Appeal No. UKEAT/0267/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 & 8 June 2018
Judgment handed down on 12 July 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

MR P M HUNTER

MR P L C PAGLIARI

MS J MARLOW — APPELLANT

AIG ASSET MANAGEMENT (EUROPE) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL TATTON-BROWN (One of Her Majesty's Counsel) Instructed by: Kingsley Napley LLP Knights Quarter 14 St John's Lane Clerkenwell London EC1M 4AJ
For the Respondent	MR DANIEL STILITZ (One of Her Majesty's Counsel) Instructed by: Travers Smith LLP 10 Snow Hill London EC1A 2AL

SUMMARY

SEX DISCRIMINATION - Inferring discrimination

SEX DISCRIMINATION - Burden of proof

SEX DISCRIMINATION - Pregnancy and discrimination

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Tribunal was entitled to reach reasoned conclusions on identified issues without having to specify and reach conclusions on each item of evidence relied upon in respect of such issues. The majority of the EAT concluded the Tribunal reached clear conclusions as to the reason for the treatment complained of which were unconnected with discrimination. The Tribunal's conclusion, namely that the Claimant's maternity or maternity absence had no material influence on the Respondent's decisions, was reached without error of law. In particular, there was no error of law in the Tribunal's approach to the burden of proof or as to causation. The minority view, however, was that the Tribunal had erred in its application of the burden of proof provisions and that this vitiated its conclusion as to the reason for the treatment complained of.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The Claimant (now the Appellant) in this case was employed by the Respondent as a derivatives trader on its London Global Capital Markets ("GCM") desk. She was absent on maternity leave from June 2015 until June 2016. During that absence the Respondent undertook a major restructuring exercise resulting in many redundancies. The Claimant was selected for redundancy. She complained that her selection was because of maternity and/or her maternity absence. That complaint was dismissed by the Central London Employment Tribunal ("the Tribunal"). This appeal is to determine whether the Tribunal erred in law in doing so.

Factual Background

2. The Respondent is part of the AIG group of companies. The group has offices in various countries including the UK and has its headquarters in the USA. GCM was one division of the group's asset management function. It operated, until 2016, from both London and from Wilton, Connecticut.

3. The Claimant commenced employment with Banque AIG, a group company, in 2005, and transferred to the Respondent in 2011. She was a very able and highly regarded performer. On 26 October 2012, the Claimant commenced her first period of maternity leave. She returned on 13 September 2013 on a four-day working week basis. The Claimant commenced her second period of maternity leave on 8 June 2015. She had requested to work a three-day working week prior to her leave, but her request could not be accommodated.

4. In October 2015, whilst she was still on her maternity leave, the Claimant's manager raised the possibility of the Claimant returning to work under a job share arrangement with a colleague, Ms Lauren Evans. Both the Claimant and Ms Evans were attracted by this proposal and the arrangement was agreed in December 2015.

5. However, around the same time in late 2015, the Respondent commenced a major restructuring exercise. This was known as "*Simplifying AIG*". The central features of the exercise were the reduction of management costs and simplification of the organisational structure. One immediate consequence of the announcement of Simplifying AIG was the dismissal on the grounds of redundancy of a number of senior figures in GCM, including the then head of division, Mr Liebergall, and two senior traders based in the USA.

6. The GCM division in London was headed by Mr O'Grady, who became the Claimant's line manager in January 2016. Mr O'Grady reported to Mr Prister, who had replaced Mr Liebergall as Head of GCM based in the USA. Mr Cornell, Deputy Chief Investment Officer, also based in the USA, sought to implement the programme of reform by identifying ways of reorganising the business and identifying candidates for redundancy. One proposal that emerged was to transfer the entire London GCM function to Wilton.

7. There were various discussions and emails between Mr Prister and Mr Cornell about potential redundancies. Two communications, in particular, assumed considerable importance in the Claimant's claim. The Tribunal dealt with these communications in paragraphs 40 to 46 of its Judgment:

> **"40. On replacing Mr Liebergall, Mr Prister became one of Mr Cornell's 'reports'. Before us much attention has focused on an email conversation between Mr Prister and Mr Cornell which began on 5 February and ended on 8 February 2016. It appears from a message of 10:39 on 5 February that Mr Cornell had had a useful conversation with someone senior to him which he interpreted as giving him a certain freedom to make important decisions. The next important message came from Mr Prister on 6 February at 09:46. He said this:**

> ***My thinking was long-term GCM. If we were able to rif the 2 women in London as part of it I think we could manage things for the time being but longer term would look to replace them with a AVP [Assistant Vice President] type Trader/Structurer. So, the hard part would be to permanently lose them but shorter term I think we can manage things. It also gives us flexibility in the future.***
>
> **We were told that RIF is an acronym for 'Reduction in Force', and is common parlance in US military circles.**
>
> **41. Mr Prister told us, and we find, that the fact that the Wilton team had managed the London trading work without any adverse consequence was a material factor in the thinking which underlay his proposal.**
>
> **42. It is apparent that Mr Cornell was working against a deadline (whether self-imposed or otherwise) of 12 February. On that date he issued a revised version of the table sent on 1 February, containing a substantially increased list of proposed candidates for redundancy and a correspondingly increased estimate of possible cost savings. Among additions to the list were the Claimant and Ms Evans. Against their names, in a column headed "Rationale", we read this:**
>
> ***Have been on maternity leave and position no longer needed***
>
> **Under "Other" is entered:**
>
> ***Currently on maternity leave in London***
>
> **43. It was common ground that not all those named on either schedule ultimately suffered dismissal. In particular, Ms Kerry O'Brien, a US-based Portfolio Manager paid almost $750,000 per annum appeared on both schedules but survived the redundancy round and is still within the organisation. It is, however, also right to point out that Ms O'Brien was identified on the schedule as "high risk" whereas the Claimant and Ms Evans were classified as "low risk".**
>
> **44. On 2 March 2016 Ms Evans returned to work following her maternity leave, on a three-day week pattern.**
>
> **45. In early March Mr O'Grady was informed of the proposal to transfer the London GCM trading function permanently to the Wilton desk.**
>
> **46. On 16 March the Claimant and Ms Evans were informed of that proposal."**

8. The Claimant was therefore informed on 16 March 2016 that she had been selected for redundancy. There followed a series of consultation meetings with the Claimant on 23 March, 8 and 22 April 2016. The Claimant put forward suggested alternatives to redundancy. However, the Respondent considered that none of these alternatives were appropriate.

9. The Claimant's second period of maternity leave ended on 7 June 2016. She was given notice of dismissal on 10 June 2016. The Tribunal found that the dismissal was decided upon jointly by Mr Prister and Mr O'Grady. Ms Evans, who had also been on maternity leave, was also made redundant.

10. The Claimant's appeal against her dismissal was considered by a Ms Monaghan, Managing Director, Global Real Estate. The appeal was dismissed, although it is fair to note that Ms Monaghan's handling of the appeal was criticised by the Tribunal as being unimpressive.

The Tribunal's Decision

11. The Tribunal understood the Claimant's discrimination claim under section 18 of the **Equality Act 2010** ("the 2010 Act") as being put in two alternative ways. One was described as the *"broad claim*". This was that the Claimant was subject to detriments and dismissal as a result of conscious or subconscious bias based upon her maternity and/or her absences on maternity leave. The other way in which the claim was put was described as the "*narrow claim*". This was that the Claimant's redundancy was discriminatory because the ability of the Wilton GCM desk to cope with all of London's trading activity whilst the Claimant and Ms Evans were on maternity leave had contributed to the decision that the London desk should permanently be transferred to Wilton, and therefore to the decision to make them redundant

12. In relation to the broad claim, the Tribunal analysed the factors which to its mind might point towards or against a conclusion that the Respondent's decisions were tainted by conscious or subconscious bias against those on maternity leave. It said:

> **"66. As to the broad claim, we have had regard to all of the many points marshalled before us by Mr Tatton-Brown on behalf of the Claimant. For our part, we think that four points stand out. First, it was not shown conclusively that it was *necessary* to recruit Mr Chan permanently to GCM. We were shown no hard evidence demonstrating that he was not prepared to move on a temporary basis. Secondly, we heard no satisfactory explanation for the fact that Ms Evans was not, at the very least, given the opportunity to be considered for the STI work once the decision had been taken to move the trading to Wilton. It is true that the Respondents strongly maintained that the STI role needed to be performed full-time, but even if that was their view, why was Ms Evans not given the chance to challenge it or, failing that, to be considered for full-time STI duties (either in direct substitution for Mr Chan or as his competitor in a pool of two)? Given our primary findings above, we remain puzzled by the Respondents' approach of treating Ms Evans as if she were a specialist trader when she was not. Thirdly, there is force in Mr Tatton-Brown's submission that the language used in some of the documents can be seen as pointing to a degree of prejudice based on maternity and/or maternity absences. The gratuitous reference to the gender of the Claimant and Ms Evans in Mr Prister's email of 6 February and Mr Cornell's reference to maternity leave in the**

> **'Rationale' column of the schedule of 12 February are striking examples. Fourthly, Ms Monaghan's extraordinary remark that the Claimant's allegations of discrimination were "not strictly relevant" to the appeal and the perfunctory way in which those allegations were dispatched do not inspire confidence that the organisation regarded the avoidance of discrimination as a priority.**
>
> **67. On the other hand, there are telling factors arguing in the contrary direction. First, it was not suggested that there was any history of the Respondents having subjected mothers to discrimination based on their maternity or their exercise of the right to take maternity leave. The 'background' evidence did not suggest to us an organisation hostile to working mothers, maternity leave, flexible working practices and the like. Secondly, Mr Stilitz was entitled to draw support from the fact that the idea of a job share between the Claimant and Ms Evans received strong backing from Mr O'Grady and Mr Liebergall. It is significant that, whether or not the germ of the idea originated from Ms Evans (see her witness statement, paragraph 19), it was senior executives of the Respondents who took the initiative in seeking to develop the proposal and take it forward. That is not, on its face, conduct which one would expect of a company disposed to penalise women for taking maternity leave or to think negatively of them for having done so. Thirdly, it is plain and beyond question that the 'Simplifying AIG' reorganisation was genuine and substantial and produced, as it was intended to do, huge cost savings across the organisation. In that context, it is not possible to detect a pattern of unfavourable treatment towards women, mothers, or those who had taken, or planned to take, maternity leave. Fourthly, the Respondents' responses to the Claimant's proposals for means of avoiding redundancy were entirely rational. In short, she advanced no suggestion which was compatible with their priorities of rationalising the trading function and achieving significant cost savings.**
>
> **68. One factor strongly urged upon us by Mr Tatton-Brown as supportive of the broad claim was the timing of the proposal to close down the London trading operation and dismiss the Claimant and Ms Evans as redundant. We cannot agree with this submission. It seems to us that the timing of key events was consistent with the Respondents' case. Mr Cornell invited the seven executives who reported to him to review their business areas and come up with proposals for reform. Mr Prister duly did so on 6 February 2016. His suggestion was examined and Mr Cornell was persuaded. So it was that, by 12 February, the Claimant and Ms Evans been added to the draft schedule. So had other names, no doubt as a result of input from one or more of the other individuals reporting to Mr Cornell. In our judgment the timing of these events is unexceptionable and lends no support to the theory of conscious or subconscious discrimination." (Original emphasis)**

13. The Tribunal proceeded in paragraphs 69 through to 76 to conclude that the weight of the evidence leaned against the inference of unlawful discrimination and it identified eight factors supporting its conclusion:

> **"69. Having weighed up the evidence and arguments with care, we conclude that the considerations which lean against the inference of unlawful discrimination for the purposes of the broad claim are stronger than those which lean in favour. In the first place, Mr Chan's appointment, although regarded with suspicion by the Claimant, occasioned no disadvantage to her. He was brought in to do work which she was not employed to perform and which, for good reason, the Respondents never envisaged her performing. His appointment occasioned no detriment to her and, we think, cannot possibly have been intended (consciously or unconsciously) to put her at any disadvantage. Moreover, it is not, we think, realistic to regard Mr Chan's appointment as evidence of a strategy to engineer the redundancy of Ms Evans during or immediately after her maternity leave. Although Ms Evans had not made the transition from STI work to trading, it is clear to us that all concerned saw her career as moving in that direction. Hence her query in the email of 22 October 2015 as to whether "we" (she and the Claimant) would be working on FX "only" under the job-share arrangement. And although the evidence could have been better, it seems to us highly probable that (as witnesses for the Respondents told us) Mr Chan did express unwillingness to move from a secure post into a temporary maternity cover role which was liable to become redundant within the year. All in all, we find in the appointment of Mr Chan no support for the theory of maternity-based discrimination against the Claimant.**

70. Second, although it has given us pause, in the end we think it more likely than not that the treatment of Ms Evans (about which, we have no doubt, she was justifiably aggrieved) is innocently explained. Our thinking here develops the reasoning in the preceding paragraph concerning the appointment of Mr Chan. Although Ms Evans had not made the transition to dedicated trader, we accept that Mr O'Grady in particular was already seeing her in that way by the time she commenced maternity leave. Mr Chan successfully filled the STI role and brought some additional work to it. We strongly doubt whether it even crossed the minds of Mr Prister or Mr O'Grady to consider offering Ms Evans the STI job, or the chance to compete with Mr Chan for it. We think that the installation of Mr Chan and the shift (partly effected, partly anticipated) in Ms Evans's career direction explain the oversight in failing to give proper consideration to Ms Evans's situation in light of the planned reorganisation.

71. Third, the treatment of Ms Evans is in any event at best a matter of tangential relevance to the Claimant's case. Unlike Ms Evans, the Claimant was not in a good position to raise strong arguments for preserving her employment. She was not prepared to take any cut in her rate of pay or to consider moving to the US. And the suggestion that, alone or in a job-share with Ms Evans, she should replace Mr Chan in the STI role was quite unrealistic. That was patently not suitable alternative employment for her and the proposal would have entailed the Respondents paying massively over the odds to retain her services at the expense of one or two individuals equipped with the necessary skills and commanding relatively modest salaries appropriate to the work involved. In these circumstances, once the decision was taken to move the trading function to the US, the Claimant's fate was sealed.

72. Fourth, it follows that the Claimant's case necessarily hangs on a theory that the Respondents designed and implemented the reorganisation of the trading function with the purpose (conscious or subconscious) of punishing her (and, no doubt, Ms Evans) for having become a mother and/or taking maternity leave and/or requesting flexible working arrangements. A theory of such devious and malign scheming is, we think, inherently implausible.

73. Fifth, that theory becomes all the more improbable when examined against the simple explanation offered by the Respondents. Mr Prister was asked to find substantial savings and to redesign his area of business as if it was being set up from scratch. There was no objective reason why trading *needed* to operate from Wilton *and* London and recent experience had demonstrated that running it solely from Wilton could be done without adding to the headcount there. Deleting the London trading function would deliver a very substantial cost saving. That explanation of Mr Prister's thinking, adopted by Mr Cornell, is, we think, inherently plausible.

74. Sixth, the wider contextual facts tend to support the Respondents' explanation. The absence of any background history pointing to a tendency to discriminate on grounds of maternity or pregnancy and the proactive pursuit by Mr O'Grady and Mr Liebergall of the job share proposal in October 2015, which attracted the endorsement of Mr Cornell are, to our minds, telling considerations which argue against the theory of discrimination. There are certainly points which lean the other way (the unguarded use of language in emails and other documents and the way in which the appeal was dealt with, to name two), but overall we regard the contextual and 'background' facts as more helpful to the Respondents' case than the Claimant's.

75. Seventh, Mr Tatton-Brown urged us to be mindful that the Claimant's case does not require a finding that *the* reason for the matters complained of was a discriminatory reason: if discrimination plays a material part, that is enough. He is, of course, right, but we do not accept that there was a subsidiary, discriminatory motivation behind the acts complained of. In our judgment, the Respondents' explanation for their conduct is true and accurate and fully accounts for their treatment of the Claimant.

76. Eighth, the individual detriment claims, in addition to that based on the dismissal (list of issues, para 2(a)-(f)), are not made out. As to (a), we have already explained why we take the view that the appointment of Mr Chan was no detriment to the Claimant. And even if a detriment was made out, we hold, for reasons already stated, that it was not done wholly or in material part because of the Claimant's pregnancy or maternity or because of any consequence of those conditions. As to (b) and (c), it may have been a detriment to be identified as potentially redundant, but that was the natural result of the reorganisation proposed by Mr Prister and, for reasons already stated, we are satisfied that his proposal was not tainted by discrimination. There is nothing in (d). It was for the Respondents' senior management to formulate their plans for the business and, in so far as those plans involved possible redundancies, to consult affected employees on them. That is what was done. There

was no detriment and, in any event, no discrimination. As to (e), the Claimant did have FX trading responsibilities removed from her without her consent. That was the effect of the reorganisation which brought about her redundancy. There was no discrimination. We find no substance in (f). The alternatives to dismissal put forward by the Claimant were considered. As we have stated, those proposals were unrealistic and their rejection by the Respondents did not entail discrimination." (Original emphasis)

14. At paragraph 77, it summarised the position as follows:

"77. For these reasons we reject the broad claim. The facts [sic] that the Claimant and/or Ms Evans were mothers and/or were taking maternity leave was not the reason for, or a material factor in, any of the matters about which she complaints [sic]."

15. As to the narrow claim, the Claimant's submission before the Tribunal was that, although the fact that the move to Wilton had been successfully trialled during the Claimant's absence was on its face a gender-neutral reason, it arose only because of the Claimant's absence on maternity leave. As the trial was a material factor in her selection for redundancy, that selection had arisen because she had exercised her right to take maternity leave. The Tribunal rejected that submission and said as follows:

"85. In our view, Mr Tatton-Brown's submissions are wrong. They posit a 'but for' causation test which, as high authority has repeatedly told us, is inapplicable. Unfortunately, as can be seen in some of the extracts cited above, the language of causation, which can lead to error, continues to be used routinely in discrimination cases before us and in the higher courts. Addressing the 'reason-why' question, and focusing on the mental processes of the decision-makers, we are clear that the fact that the Claimant took maternity leave was part of the material background but was not the *reason* for the matters complained of. Had she and Ms Evans not been absent on maternity leave, the trading function would not have been temporarily transferred to Wilton and the successful 'trial' would not have occurred. The absence and the temporary transfer of the work are part of the relevant context and can be seen as *causes* which contributed to the Claimant losing her job. But they are not *reasons* for the decisions and actions under challenge.

86. Mr Tatton-Brown urged us to find that, even if the Claimant's pregnancy (or absence on maternity leave) was not *the* reason for the treatment complained of, it was at least *a* significant contributing factor. We cannot accept that submission, which seems to us to be contrary to principle. It ignores the need to focus on the mental process of the person(s) responsible for the act impugned as discriminatory. We see no logic in the contention that if a 'but for' cause cannot be *the* reason, it can nonetheless be *a* reason. We are in any event satisfied that the fact that the Claimant had taken maternity leave did not of itself influence to any material extent the decision-making of Mr Prister and Mr O'Grady.

87. We are not able to reconcile *Rees* with the high authority to which we have referred and feel constrained to treat it as a decision on its own special facts. It seems to us that *Keohane*, a case on facts quite different from ours, presents no difficulty. The *treatment* complained of (removal of the dog) was, manifestly, 'because of' the claimant's pregnancy. That fact is not gainsaid by the detail (irrelevant for our purposes) that the *detriment* for which the claimant was entitled to be compensated (risk of career damage) was a consequence of the treatment rather than the treatment itself. *Charlesworth* illustrates the important distinction between a context and a reason (something which operates to a material extent on the mind of the decision-maker). And the observations at para 18 of the judgment (cited above) do not, in our view, significantly assist the Claimant's case as Mr Tatton-Brown submitted. It must be borne

> **in mind that the s15 test sets a different, and much lower, standard than s18. Under the latter, the pregnancy, maternity, maternity leave etc must be the reason, or at least a material reason, for the treatment under challenge. Under the former, all that is needed is treatment because of "something arising from", or caused by - here the language of causation is certainly appropriate - the disability. The question whether something arises from the relevant disability is an objective one. It does not turn on the mental processes of the decision-maker. So a 'but for' test is appropriate and a 'but for' cause, if not too tenuous, is all that is required. But the 'because of' element is a quite different matter.**
>
> **88. Finally, in case we are wrong in any part of our reasoning on the narrow claim, we should add that, in our judgment, the fact that the move of the trading function to Wilton had been "successfully trialed", while a contributing ground in Mr Prister's analysis, was not determinative of the decision to dismiss the Claimant. It is certainly right that, had she and Ms Evans not been away on maternity leave, the 'trial' would not have happened, but we are satisfied that Mr Prister would have put forward the same proposal to Mr Cornell in any event, and that the proposal would have been accepted. Mr Prister had been called upon to come forward with cost-cutting measures and rationalising the trading function was an obvious option. The fact that the work of the Claimant and Ms Evans had been managed by Wilton with no ill-effects gave him added confidence that his proposal was sound, but it was not the decisive factor in his thinking or that of Mr Cornell. Accordingly, had the narrow claim been upheld, it would not have attracted substantial compensation." (Original emphasis)**

16. The Tribunal also concluded that there was no unlawful conduct extending over a period such that the claims were out of time, although it did indicate that had it found that the claims were made out, it would have been sympathetic to an application to extend time.

The Grounds of Appeal

17. The Claimant was given permission to proceed with four grounds of appeal. These are as follows:

a. Ground 1 - There are two parts to this ground. First, it is said that the Tribunal erred in law in dismissing the broad claim in that it failed to make relevant findings of fact and failed to consider important evidential matters. The second is that the Tribunal erred in its approach to the application of the burden of proof requirements under section 136 of the **2010 Act**.

b. Ground 2 - The Tribunal erred in law in dismissing the narrow claim in that it failed to conclude that the maternity absence was a cause that contributed to her losing her job.

c. Ground 3 - The Tribunal erred in finding at paragraph 88 of the Judgment that it was satisfied that Mr Prister would have put the same proposal, namely to transfer the GCM function to Wilton, to Mr Cornell in any event, even if the Claimant had not been on maternity leave.

d. Ground 4 - If the Tribunal's decision on discrimination falls to be set aside, then so too should its finding that such claims were out of time.

Relevant Statutory Provisions

18. Section 18 of the **2010 Act**, so far as relevant, provides:

> **"18.** ***Pregnancy and maternity discrimination: work cases***
>
> **(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably -**
>
> **(a) because of the pregnancy, or**
>
> **(b) because of illness suffered by her as a result of it.**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**
>
> **…"**

19. Section 136 of the **2010 Act**, so far as relevant, provides:

> **"136.** ***Burden of proof***
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **…"**

A

Ground 1 - The Broad Claim

Submissions

20. The Claimant was represented, as below, by Mr Tatton-Brown QC. He submitted that the Tribunal's Judgment cannot be defended simply by saying that the Tribunal made findings of fact based on the evidence. There were particular requirements in relation to the approach to a fact-finding exercise in discrimination claims which were not met in this case. Reliance is placed upon the judgment of the Court of Appeal in the well-known case of **Anya v University of Oxford** [2001] ICR 847. The following passages, amongst others, from that judgment were highlighted:

> **"14. Such a conclusion was without doubt open to it, but only provided it was arrived at after proper consideration of the indicators which Dr Anya relied on as pointing to an opposite conclusion. His case was that the evidence showed two critical things. One was a preconceived hostility to him: this depended on matters of fact which it was for the industrial tribunal to ascertain or refute on the evidence placed before them. The other was a racial bias against him evinced by such hostility: this was a matter of inference for the industrial tribunal if and in so far as it found the hostility established. Experience shows that the relationship between the two may be subtle. For example, a tribunal of fact may be readier to infer a racial motive for hostility which has been denied but which it finds established than for hostility which has been admitted but acceptably explained. The industrial tribunal in paragraph 5 of its reasons directed itself correctly in law about this, with one arguable exception: it concluded the paragraph with this remark:**
>
> > **"If an employer behaves unreasonably towards a black employee it is not to be inferred, without more, that the reason for this is attributable to the employee's colour; the employer might very well behave in a similarly unreasonable fashion to a white employee."**
>
> **As Neill LJ pointed out in *King v Great Britain-China Centre* [1992] ICR 516, such hostility *may* justify an inference of racial bias if there is nothing else to explain it: whether there is such an explanation as the industrial tribunal posit here will depend not on a theoretical possibility that the employer behaves equally badly to employees of all races but on evidence that he does.**
>
> **15. In the present case the industrial tribunal embarked in exemplary fashion on the methodical approach which this court has said is essential. In paragraph 16 they tabulated five prior events put in evidence by Dr Anya as evidence of hostility on the part of Dr Roberts and denied or explained, as in each case the industrial tribunal records, by Dr Roberts himself and by other witnesses. They were, in brief, that Dr Roberts had not given Dr Anya adequate research guidance; had not given him the opportunity he gave others to co-propose research projects; had discouraged or blocked him from publishing research papers; had not given him the opportunity to present his work at scientific conferences; and had allocated him no research students in contrast to other post-doctoral research assistants. These allegations were followed, in paragraph 17(b), by another which had emerged on disclosure of documents: that in the unsuccessful funding application to the Engineering and Physical Sciences Research Council Dr Lawrence had been named as the intended research assistant. Even more directly related to the material job application is the other allegation set out in paragraph 17: that Dr Anya was notified by Mr Briant, the eventual panel chairman, of the coming opportunity in terms markedly less encouraging than those in which Dr Lawrence was notified of it. On none of these issues, from first to last, did the industrial tribunal record any conclusion as to where the truth lay and what, if anything, it indicated in terms of racial bias.**
>
> **…**

23. Mr Underhill seeks to meet this objection by submitting that none of the historic issues set out by the industrial tribunal in paragraphs 16 and 17 of its reasons was capable, even if resolved factually in Dr Anya's favour, of founding an inference of racial bias. They were simply, he argues, the kind of thing which can occur in any academic relationship of this kind. By not making explicit findings on them the industrial tribunal was, he says, taking an understandably emollient approach in what was a fraught case. Both these things may be true, but they do not answer the problem. It is precisely because a witness who by himself comes across as essentially truthful may be shown by documentary evidence or by inconsistency to be less reliable than he seems that the totality of the evidence in a case like this must be evaluated; and there was in this case no useful way of approaching the totality except through its parts. If, to take one instance from the foregoing, the industrial tribunal had accepted to any significant extent Dr Anya's evidence that Dr Roberts had not given him the academic and professional support that he was entitled to expect between 1994 and 1996, it would have had to ask why this was so. In answering that question it might or might not have derived help from the conversations that Dr Roberts had had with Mr Briant about Dr Anya and the differing terms in which Mr Briant wrote about the new post to Dr Anya and Dr Lawrence respectively. They might then have needed to consider whether these were isolated events or part of a pattern; if part of a pattern, whether academic differences sufficiently explained it; if they did not, whether it was justifiable to infer the presence of a racial element. To the extent that Dr Czernuska had been the first to express his preference for Dr Lawrence, the industrial tribunal might have been concerned to establish what had been said in discussion before he did so. To the extent that Dr Roberts's own evidence was crucial, it will have needed to test the good impression he made against any contra-indications in the evidence. No appellate court can now do this job in place of the tribunal of fact; and no tribunal of fact could properly come to a conclusion without dealing with these issues.

…

25. To assert this is not to demand, as Mr Underhill sought to suggest it did, an infinite combing by the industrial tribunal through endless asserted facts or an over-nice appraisal of them. It is simply that it is the job of the tribunal of first instance not simply to set out the relevant evidential issues, as this industrial tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose; and if they do become otiose, the tribunal needs to say why. But the single finding of the industrial tribunal in this case on Dr Roberts's honesty as a witness, while important, does not make the other issues otiose: on the contrary, it begs all the questions they pose. Mr Underhill's reliance on it as effectively dispositive overlooks what Robert Goff LJ said in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 57:

> **"It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence … reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."**

The industrial tribunal has not given any ground, and none is evident, for departing from this classic mode of reasoning in a case where every one of the ingredients mentioned by Robert Goff LJ was present. The citation from *Armagas Ltd v Mundogas SA* in fact features in the transcript of this court's decision in *Heffer v Tiffin Green* The Times, December 1998; Court of Appeal (Civil Division) Transcript No 2084 of 1998, where Henry LJ concluded, relevantly to the present case, at p 18:

> **"Nor were the crucial contemporary documents given proper, detailed and dispassionate consideration. In my judgment they cannot be explained away … by an uncritical belief in Mr Heffer's credibility …"**

Credibility, in other words, is not necessarily the end of the road: a witness may be credible, honest and mistaken, and never more so than when his evidence concerns things of which he himself may not be conscious." (Original emphasis)

21. Mr Tatton-Brown submits that the Tribunal in this case reached a conclusion adverse to the Claimant's claim without proper consideration of the factors relied upon by her supporting

it and, in particular, without proper consideration of the important documentary evidence pointing to discrimination. Particular reliance was also placed upon the dicta of Leggatt J in **Gestmin SGPS SA v Credit Suisse (UK) Ltd** [2013] EWHC 3560 (Comm) as to the importance of contemporaneous documentation in assessing a witness's oral evidence in recalling past beliefs. That guidance was as follows:

> **"17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).**
>
> **18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.**
>
> **19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.**
>
> **20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.**
>
> **21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.**
>
> **22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of**

what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose - though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

22. Mr Tatton-Brown identified several key documents which he says the Tribunal did not properly address:

a. On 1 February 2016, Mr Cornell sent an email attaching his proposals to reorganise several different business areas. He included a table identifying a number of senior individuals as candidates for redundancy. The only employee from within GCM included in that table was Mr Ed Lieber, who is based in the USA. The inference to be drawn from the Claimant's absence in this list, says Mr Tatton-Brown, is that there could have been no decision at that stage to close or transfer the London GCM desk.

b. The rif email from Mr Prister dated 6 February 2016. This is referred to in the extract from the Judgment set out at paragraph 7 above. Mr Tatton-Brown submits that the reference to the "*2 women in London*" indicates that Mr Prister's thinking was related to the fact that the women were on maternity leave at the time. Furthermore, he submits that the Tribunal was invited to consider that the content of the email contemplates replacing the two women in London, which would be contrary to the suggestion that the desk was being transferred to Wilton.

c. An email dated 8 February 2016, in which there is reference to the Claimant and Ms Evans as the "*2 women in London who will be going to 3 days a week once they return from maternity leave*". This shows, submits Mr Tatton-Brown, that once again the focus of the discussion was the fact that the two women were on maternity

leave and that there was nothing about their function being transferred. The Tribunal does not refer expressly to this email.

d. The schedule produced on 12 February 2016, which is also referred to above, in which the rationale for proposing the Claimant and Ms Evans for redundancy was stated to be, "*Have been on maternity leave and position no longer needed*". Mr Tatton-Brown submits that this was direct evidence of discrimination which called for an explanation from the Respondent. The explanation given in evidence by Mr Cornell was that the reference to maternity leave was "sloppy" and "misleading" and was a result of the document being produced in haste. Mr Tatton-Brown submits that that was implausible and the Tribunal simply did not address that evidence or make any clear findings as to whether or not it accepted the Respondent's explanation. Whilst the Claimant accepts that the document was considered by the Tribunal, it is submitted that its analysis was inadequate and did not satisfy the requirements established by **Anya**.

e. On 9 March 2016, there was an email between two HR officers which refers to "*2 of the … employees whose positions are being eliminated in this wave are from the capital markets team: Lauren Evans and Jennifer Marlow*". It had been submitted to the Tribunal that this email undermined the Respondent's evidence that no decisions as to dismissal had been made by mid-March. The Tribunal did not refer expressly to this email in its Judgment.

f. Finally, there is a note of the second consultation meeting with the Claimant at which Mr O'Grady, who became involved in the process in mid-March, said as follows in response to the Claimant's question about the timeline of the decision to potentially eliminate FX and IR trading in London:

> **"… The drill down to understand how to best … take the Global Capital Markets group forward flowed on from this and again various options were considered. This continued in early 2016 and considerations remained fluid up until early March.**

> **Included in this was the decision to potentially eliminate FX and IR trading in London being finally proposed in early March. Consequently, there was still no clarity on the way forward at the time when your return to work was discussed and the FWA agreement put in place." (Emphasis added)**

Mr Tatton-Brown submits that the underlined words clearly indicate that at the time Mr Cornell proposed the Claimant and Ms Evans for redundancy on 12 February 2016, there had been no decision to close the London desk. Accordingly, the closure of the desk could not have been the reason for the dismissal and the other documentation, including the 12 February schedule, would suggest that the rationale was in fact that they had been on maternity leave. This document is also not expressly referred to by the Tribunal.

23. The upshot is, submits Mr Tatton-Brown, that the failure to consider these documents invalidates the Tribunal's ultimate conclusions. That error is compounded by Tribunal's failure to approach the burden of proof provisions properly. The documents highlighted above establish a *prima facie* case which demanded an explanation from the Respondent and required the Tribunal to examine that explanation. It is not enough, submits the Claimant, for the Tribunal simply to analyse the background factors to reach a conclusion that there was no discrimination.

24. Mr Stilitz, for the Respondent, submits that this is a Judgment which plainly satisfies the requirements in **Meek v City of Birmingham District Council** [1987] IRLR 250 to give reasons, and that the Claimant's submissions effectively amount to a criticism of the Tribunal that it did not address every argument or deal with each piece of evidence relied upon; that was not something that the Tribunal was required to do. He relies upon another well-known case, **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409 at paragraph 17. In **Anya**, numerous background facts asserted by the claimant in support of his complaint were not

addressed by the Tribunal at all. That is not what occurred here. In any case, says Mr Stilitz, the Tribunal did expressly take account of several of the key documents highlighted by the Claimant and accepted that, to an extent, the language contained therein could be seen as pointing to a degree of prejudice based on maternity and/or maternity absences. Insofar as that amounted to a *prima facie* case that the Claimant had been discriminated against, the Tribunal proceeded to make clear findings of fact as to the explanations given by the Respondent for acting as they did and accepted those reasons. The Respondent highlights, in particular, the sentences at the end of paragraph 75: "*In our judgment, the Respondents' explanation for their conduct is true and accurate and fully accounts for their treatment of the Claimant*"; and in paragraph 77: "*The facts [sic] that the Claimant and/or Ms Evans were mothers and/or had taken maternity leave was not the reason for, or a material factor in, any of the matters about which she complaints [sic]*".

25. Given the commercial backdrop to this redundancy, whereby the vast majority of the Respondent's derivatives business, in which the Claimant worked, had been wound down, it would have been surprising if the Claimant had not been made redundant, particularly given her high salary and consequential cost to the business. In the context of this case, the burden of proof is said not to make any difference. This was a **Hewage**-type case (**Hewage v Grampian Health Board** [2012] ICR 1054) where there was clear evidence on which the Tribunal could reach conclusions as to the reasons for the treatment complained of.

Discussion - Ground 1

26. In our judgment, the guidance of the Court of Appeal in **Anya**, important as it is, does not mean that a Tribunal is required to set out every argument and every piece of evidence relied upon in support of such arguments.

27. At paragraph 25 of **Anya**, Sedley LJ said that:

> **"25. … it is the job of the tribunal of first instance not simply to set out the relevant evidential issues, as this industrial tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose; and if they do become otiose, the tribunal needs to say why. …"**

28. Thus, the obligation is to reach a reasoned conclusion in respect of relevant *evidential issues*; it is patently not to set out and to state whether it accepts or rejects every item of *evidence* in support of or against such issues.

29. The principal issue of fact to be determined here was, what was the reason for the Claimant's selection for redundancy and her dismissal. In determining that issue, the Tribunal, correctly in our view, analysed both the background factors and the specific allegations of fact made by the Claimant to support her case. One evidential issue (to use the language in **Anya**) which the Claimant contended supported her claim, was that the documents demonstrated direct evidence of discrimination. As to that issue, the Tribunal expressly referred to three out of the six items of correspondence relied upon by Mr Tatton-Brown (see paragraphs 39 to 42). It also referred to the fact that there had been notes taken of each of the three consultation meetings (see paragraph 47), thus suggesting that these too were taken into account. This would account for the final item of correspondence upon which the Claimant relies.

30. The question then is whether, in accordance with **Anya**, the Tribunal reached a reasoned conclusion on that evidential issue, namely whether the documents demonstrated discrimination. The Tribunal, having noted that it had had regard to "*all of the many points marshalled before us by Mr Tatton-Brown on behalf of the Claimant*" (see paragraph 66), proceeded to highlight four points which, in the Tribunal's view, stood out. One of these was that the Tribunal agreed that there was force in the Claimant's submission that the "*language*

used in some of the documents can be seen as pointing to a degree of prejudice based on maternity and/or maternity absences. The gratuitous reference to the gender of the Claimant and Ms Evans in Mr Prister's email of 6 February and Mr Cornell's reference to maternity leave in the 'Rationale' column of the schedule of 12 February are striking examples". Furthermore, at paragraph 74, it stated that, "*There are certainly points which lean the other way (the unguarded use of language in emails and other documents and the way in which the appeal was dealt with, to name two) ...*". Those references, it seems to us, amount to a conclusion in favour of the Claimant that these documents could give rise to an inference of discrimination. In other words, the Tribunal reached a concluded view in respect of this evidential issue.

31. Mr Tatton-Brown contends that the Tribunal's analysis is inadequate because, for example, it did not state expressly whether it accepted or rejected Mr Cornell's explanation - namely that he had been "sloppy" in putting the spreadsheet together - as to why he had included the reference to being on maternity leave in the rationale section of the 12 February spreadsheet. However, this contention confuses evidentiary issues (i.e. matters which could support an inference of discrimination) with evidence. As we have said, the Tribunal is not required to set out every item of evidence which it takes into account in reaching a conclusion on the relevant issues. The conclusion reached was that the documents could point towards a degree of prejudice against those on maternity leave. The fact that the Tribunal may not have referred to every document in the sequence of correspondence relied upon, and/or did not go through each document line-by-line or word-by-word in addressing the Claimant's arguments relating to them, does not, in our judgment, undermine that conclusion. Had the Tribunal failed to refer to any of these documents at all, either expressly or implicitly, and/or had it not reached any conclusion in relation to their effect, then it might be said that the requirements of **Anya**

had not been met. But for the reasons set out we do not consider that the Tribunal did fail in its task.

32. Having addressed the factors leaning in favour of the Claimant's case, the Tribunal proceeded to reach clear conclusions as to reasons for the treatment complained of. Taking account of the totality of the primary facts, including those which favoured the Respondent, the Tribunal rejected the broad claim of conscious or unconscious bias. We do not see any error of law in its approach.

33. The Claimant also relied upon the **Gestmin** guidance. In **Gestmin**, the context was the reliability of witnesses' memories of what was said or believed several years earlier. In that context, the "best approach" was to place little if any reliance on witnesses' recollections. However, Leggatt J emphasised that this did not mean that oral testimony had no value at all:

> **"22. … This does not mean that oral testimony serves no useful purpose - though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. …" (Emphasis added)**

34. Thus, oral evidence may be valuable in discerning motivation. That was precisely what the Tribunal had to discern in this case, and what Tribunals have to do in dealing with any discrimination claim. Discrimination cases are somewhat unusual in that it has been deemed necessary to explore the mental processes of the relevant decision maker; that is undoubtedly a very difficult exercise. That exercise would be rendered near impossible, in our view, if Tribunals had to disregard direct oral testimony from witnesses as to their thought processes. The question for the Tribunal in a discrimination case is, what was the reason operating on the

Respondent's mind for taking the steps that it did, i.e. what was the motivation[1]. The Claimant could not know what was in the Respondent's mind and could not give any evidence as to that one way or the other. Only the Respondent could give evidence about that. The Respondent did give extensive evidence about that in this case. It is clear that the Tribunal accepted that evidence. To the extent that the Tribunal considered and accepted the Respondent's witnesses' oral evidence in that regard - and it is important to note that the Tribunal's view that Mr Prister's reason was inherently plausible was only one of several factors in support of its conclusion that there was no discrimination - there is nothing in the **Gestmin** guidance to suggest that that was impermissible.

35. In any case, it seems to us, looking at the matter again at this stage, that the conclusions reached by the Tribunal were not inconsistent with the documentary evidence. The high point of the Claimant's case on the documents is the schedule produced on 12 February 2016, which refers to the rationale for selection as follows: "*Have been on maternity leave and position no longer needed*". It seems to us that this rationale is just as supportive of the Respondent's case as it is of the Claimant's. The Respondent's case was that the GCM function in London was to be moved to Wilton. The reference to the Claimant's position being "*no longer needed*" is consistent with that. We accept, of course, that the further reference to the Claimant being on maternity leave might suggest that that was a factor in the rationale for proposing her redundancy. The Tribunal accepted as much in its comments in paragraph 66. However, as we have said, its clear conclusion, based on the totality of the evidence, including the background factors and the explanations given by the Respondent's witnesses, was unequivocally that maternity leave was *not* the reason for or a material factor in the relevant decisions.

[1] We use the term "motivation" here in contradistinction to the term "motive". The important distinction between these two terms in the context of discrimination claims is fully analysed by Underhill J (as he then was) in **Martin v Devonshires Solicitors** [2011] ICR 352 at paragraphs 35 to 36.

36. Much was made in submissions both at the hearing below and before the EAT as to the significance of the timing of the proposal to close the London trading operation and the dismissal of the Claimant and Ms Evans as redundant. This was a matter expressly considered by the Tribunal: see paragraph 68. The Tribunal's conclusion was that the timing of key events was consistent with the Respondent's case. It gave reasons as to why it came to that conclusion. These included the fact that Mr Cornell had invited his reports to review the business areas and come up with proposals for reform. Mr Prister had done so on 6 February 2016, which is when he made his first list of proposed redundancies. The position then developed further so that by 12 February the Claimant's and Ms Evans's name had been added to the draft schedule, as had other names. The Tribunal regarded the timing of these events as unexceptionable. The Tribunal also found that, "*once the decision was taken to move the trading function to the US, the Claimant's fate was sealed*" (paragraph 71), and that although, "*it may have been a detriment to be identified as potentially redundant, … that was the natural result of the reorganisation proposed by Mr Prister*" (paragraph 76). Those findings suggest that the chronology was that the proposal to move the trading function preceded the proposal to make the Claimant redundant. These were findings that the Tribunal was fully entitled to reach on the evidence. They can hardly be said to be perverse; indeed, perversity was not alleged. Once again, the fact that the Tribunal may not have referred to every item of evidence relevant to the timing issue and/or to every nuanced argument raised in support of it does not undermine its conclusion.

37. Having examined the documents to which we were taken in relation to timing, we would comment that the Tribunal's conclusion seemed, in our view, to be perfectly consistent with them. For example, the email between HR officers referring to two employees "*whose positions are being eliminated in this wave*" is consistent with the Respondent's case that the

proposal was to move the GCM function to Wilton; it does not mean, contrary to Mr Tatton-Brown's submissions, that this was a definitive statement that the Claimant's dismissal had been determined as of 9 March 2016. A further document upon which great reliance is placed is the note of the consultation meeting held on 7 April 2016 (this is set out above). Reading the whole of the response given by Mr O'Grady to the query about the timeline of decision making, it is clear that he was merely saying that the matter remained fluid, and that various proposals were made over a period of time culminating ultimately in "*the decision to potentially eliminate FX and IR trading in London being finally proposed in early March*". Mr Stilitz submits that the word "*finally*" is significant because it suggests that this was not the first occasion on which this proposal was raised. We agree that that could be a reasonable interpretation of that document. It is implicit in the Tribunal's conclusion that the timing of the decisions was unexceptionable that the Tribunal did not perceive anything in these documents that was inconsistent with the Respondent's case.

38. The above detailed analysis of the factual findings of the Tribunal has been necessitated by the nature of the argument. However, the result is that the EAT is being asked to consider merits arguments as to factual conclusions which are the domain of the Tribunal. We see no basis for interfering with those conclusions.

Ground 1 - Burden of Proof

Submissions

39. There is no dispute that the Tribunal directed itself correctly in law as to the burden of proof provisions. The criticism made by Mr Tatton-Brown is that the Tribunal ought to have concluded that there was a *prima facie* case of discrimination, as demonstrated by the documents, and that it should then have turned to the Respondent to consider whether it had

provided a non-discriminatory explanation for the treatment. Moreover, it is said that it was not logically probative to rely upon background factors, such as Ms Monaghan's approach to the appeal or the fact that the managers had been supportive of a job share previously, to determine what was in the decision maker's mind.

40. The Respondent submits that this is a **Hewage**-type case whereby the Tribunal was able to make positive findings of fact thereby diminishing the significance of the burden of proof provisions. The relevant comments in **Hewage** were made by Lord Hope of Craighead:

> **"32. … Furthermore, as Underhill J (President) pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is *room for doubt* as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. …" (Emphasis added)**

Discussion - Burden of Proof

41. The EAT was divided on this issue. We set out first the view of the majority (Choudhury J and Mr Pagliari) before setting out the view of the minority (Mr Hunter).

Majority View

42. In order to better understand the "*room for doubt*" comment in **Hewage** above, it is helpful to consider the judgment of Underhill J (as he then was) in **Martin v Devonshires Solicitors** [2011] ICR 352, to which Lord Hope refers:

> **"38. The Tribunal does not in the passage which we have set out at para. 18 above, or anywhere else in the Reasons, refer explicitly to either section 63A of the 1975 Act or section 17A (1C) of the 1995 Act, which provide, in terms too well-known to require setting out here, for the so-called "reverse burden of proof", or to the decision of the Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931, which gives guidance on the effect of those provisions. Mr Stephenson submitted that that showed that the Tribunal had "failed to deal properly with the burden of proof" and had "failed to have due regard to the guidance in *Igen Ltd v Wong*".**
>
> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination - generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head - "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings**

> **on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law. In the present case, once the Tribunal had found that the reasons given by Mr Hudson and Mr Buckland in their letters reflected their genuine motivation, the issue was indeed how that was to be characterised and the burden of proof did not come into the equation. (Cf. our observations in *Hartlepool Borough Council v Llewellyn* [2009] ICR 1426, at para. 55 (p.1448C).)"**

43. Unlike the position in **Martin**, the Tribunal in this case did set out the burden of proof provisions. The criticism is that no reference was made to them thereafter, thereby suggesting that they had not been applied. However, in the majority's view, on a fair reading of the Judgment, it is apparent that the Tribunal considered there to be no real doubt as to the facts about the Respondent's motivation for acting as it did. The Tribunal was in a position to make positive findings on the evidence that that motivation had nothing to do with maternity and everything to do with the ongoing restructuring. Thus, although not expressly stated to be such, it can, in the view of the majority, be inferred that the Tribunal considered that this was a **Hewage**-type case.

44. Mr Stilitz conceded before us that the Claimant had discharged the burden of establishing a *prima facie* case. The question then is whether the Respondent has discharged the burden placed upon it to provide an explanation for acting as it did. There can be no doubt, in the majority's judgment, that the Tribunal clearly did have regard to the Respondent's explanation, which was that the Claimant's redundancy arose out of the proposal to move the job function to Wilton, and that the Tribunal fully accepted that explanation as being "*true and accurate and fully accounts for their treatment of the Claimant*" (see paragraph 75). The fact that the Tribunal did not expressly state that the *prima facie* case had been made out and/or that, having so concluded, it was then moving to the second stage of the burden of proof provisions does not undermine its judgment. It is unnecessary to require such a formulaic approach to the burden of proof to be set out in every judgment: see **Laing v Manchester City Council** [2006]

ICR 1519 at paragraph 76. That is all the more so where, as in this case, the evidence was such that the Tribunal was able to reach clear conclusions of fact.

45. Mr Tatton-Brown submits that in discharging the burden on it, the Respondent could be expected to adduce cogent evidence in support of its explanation, but that the Respondent's oral evidence here was vague and inconsistent with the documents. However, it seems to the majority that these criticisms really amount to an attack on the weight attached to aspects of the evidence, which is a matter for the Tribunal. The cogency of the evidence will depend on the totality of the matters relied upon by the Respondent in explaining its actions; the evidence will not lack cogency overall just because some aspects are not as cogent as others.

46. Furthermore, submits Mr Tatton-Brown, the Tribunal erred in taking account of an irrelevant consideration in that it described the Claimant's case as "*necessarily [hanging] on a theory that the Respondents designed and implemented the reorganisation of the trading function with the purpose (conscious or subconscious) of punishing her (and, no doubt, Ms Evans) for having become a mother and/or taking maternity leave and/or requesting flexible working arrangements*" (paragraph 72). Whilst it is right to say that it was not part of the Claimant's case that the Respondent sought to "*punish*" her, it was not irrelevant, in the majority's view, to consider that the Claimant's case that she had been discriminated against could imply that the Respondent had engineered the decision to move the trading function to Wilton in order to achieve a discriminatory outcome. Indeed, the Claimant had submitted below that the Respondent's case was "*simply not credible*" and that the documents were "*disastrous*" for that case. Against that backdrop of strong allegations as to credibility, it is perhaps unsurprising that the Tribunal commented in the colourful terms that it did. But none of that establishes that this was an irrelevant consideration. It is also relevant to note, in view of

the minority view expressed below, that the majority did not consider that paragraph 72 of the Judgment suggested that the Tribunal was seeking to impose any burden of proof on the Claimant, and nor was it argued by the Claimant that it did. In the majority's view, the Tribunal was doing no more in paragraph 72 than commenting on what would be the necessary corollary of its findings that the reorganisation lay behind the Respondent's actions. If, as the Tribunal found, the reorganisation was the reason for making the Claimant redundant and that "*once the decision was taken to move the trading function to the US, the Claimant's fate was sealed*", then the Respondent could only be acting discriminatorily if that reorganisation or decision was itself a sham intended to produce a discriminatory outcome. Unsurprisingly, the Tribunal considered that to be implausible.

47. For all of those reasons, the majority view is that ground 1 of the appeal should be dismissed.

Minority View

48. Whilst Mr Hunter does not dissent from the analysis in paragraphs 26 to 38 above, he does not agree that there was no error of law in the Tribunal's application of the burden of proof provisions. He considers that whilst **Hewage** may qualify the need to apply the guidance in **Igen Ltd v Wong** [2005] ICR 931 in an appropriate case, nothing in the judgment of the Supreme Court alters the meaning of the statutory provisions. In the present case, the Tribunal did not expressly address the question of whether the first stage of the burden of proof had been discharged or whether the burden had shifted to the Respondent. In Mr Hunter's view, the Claimant was entitled to know, quite unambiguously, whether the burden of proof rested with her or with the Respondent. The Tribunal's failures in this regard led it into error.

49. Mr Hunter considers that paragraph 72 of the Judgment offers an insight into the Tribunal's reasoning. In particular, the Tribunal's use of the phrase, "*it follows that the Claimant's case necessarily hangs on a theory ...*", which is the language of onus, suggests that the Tribunal was in fact imposing a burden on the Claimant to establish that her theory was correct by showing that the Respondent had acted with a desire to punish her or with a sinister motive.

50. Insofar as the Tribunal approached this as a **Hewage**-type case, it was incumbent upon it to explain why it concluded that the quality of the evidence was such that there was no room for doubt and that the burden of proof had therefore assumed less importance. In Mr Hunter's view, the Tribunal, having concluded that some of the language used by the Respondent pointed to a degree of prejudice, erred in not applying the approach set out in **Igen**. The failure to apply that approach, and, in particular, the Tribunal's search for a conspiracy theory, meant that the Tribunal had not properly assessed the evidence as to the reason why the Respondent acted as it did. The Tribunal's findings as to the timing of events could be said to be similarly tainted by that search. For those reasons, concludes Mr Hunter, ground 1 of the appeal should be upheld.

Ground 2 - The Narrow Claim

Submissions

51. The Claimant submits that the Tribunal fell into error here by not focusing on the question of causation. Moreover, it is said that the Tribunal misunderstood the Claimant's submissions in that she did not posit a "but for" test but did say that an identified cause for the allegedly discriminatory act could be a reason for the Respondent acting as it did. The identified cause in this case is said to be that which emerges from the finding set out at paragraph 41 of the Judgment:

> **"41. Mr Prister told us, and we find, that the fact that the Wilton team had managed the London trading work without any adverse consequence was a material factor in the thinking which underlay his proposal."**

52. The reference to the Wilton team managing was in the context of the Claimant and Ms Evans being absent on maternity leave. Thus, says the Claimant, this amounted to a cause, related to maternity leave, of the decision to terminate her employment. As such, the dismissal was **because of** her maternity leave. The absence on maternity leave provided the employer with the opportunity to compare the situation with and without the Claimant present. This has been described by Mr Tatton-Brown as the "maternity leave comparison". Where the maternity leave comparison is a cause of the act complained of then that act is done because of maternity leave and the discrimination claim is made out.

53. It is further submitted that the Tribunal erred in focusing solely on the reason for the act and in eschewing the clear causative factor of her maternity absence. Reliance is placed upon the judgment of Lady Hale in **R(E) v Governing Body of JFS** [2010] 2 AC 728 at paragraphs 61 to 64:

> **"61. Despite this difference of opinion, the decisions in the *Birmingham* case [1989] AC 1155 and the *James* case [1990] 2 AC 751 have been applied time and time again. They were affirmed by the House of Lords in the victimisation case of *Nagarajan v London Regional Transport* [2000] 1 AC 501. As Lord Nicholls of Birkenhead said, at p 511:**
>
> > **"Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign."**
>
> **62. However, Lord Nicholls had earlier pointed out that there are in truth two different sorts of "why" question, one relevant and one irrelevant. The irrelevant one is the discriminator's motive, intention, reason or purpose. The relevant one is what caused him to act as he did. In some cases, this is absolutely plain. The facts are not in dispute. The girls in the *Birmingham* case [1989] AC 1155 were denied grammar school places, when the boys with the same marks got them, simply because they were girls. The husband in the *James* case [1990] 2 AC 751 was charged admission to the pool, when his wife was not, simply because he was a man. This is what Lord Goff was referring to as "the application of a gender-based criterion".**
>
> **63. But, as Lord Goff pointed out, there are also cases where a choice has been made because of the applicant's sex or race. As Lord Nicholls put it in the *Nagarajan* case [2000] 1 AC 501, 510-511:**
>
> > **"in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some**

> **other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."**
>
> **In the *James* case, Lord Bridge was**
>
> > **"not to be taken as saying that the discriminator's state of mind is irrelevant when answering the crucial, anterior question: why did the complainant receive less favourable treatment?": [2000] 1 AC 501, 511.**
>
> **64. The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of "anterior" inquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke JJSC. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else - usually, in job applications, that elusive quality known as "merit". But nevertheless, the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in the *Nagarajan* case [2000] 1 AC 501, 512:**
>
> > **"An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did … Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(a)." "**

54. There is a difference between a factor which may be regarded as merely providing the context for a subsequent act and one which is an effective cause of that act. We were referred in that regard to the case of **Rees v Apollo Watch Repairs plc** [1996] ICR 466 at page 470A-F:

> **"… It is therefore distinguishable from *Webb v Emo Air Cargo (UK) Ltd* on its facts. However, Mr Saini submits that by extension where the background to her dismissal is her unavailability for work through pregnancy which leads to the appointment of a replacement whom the employer finds to be more efficient and acceptable than the applicant [Miss Rees] and for this reason she is dismissed, that constitutes direct sex discrimination, since but for her pregnancy Mrs Turner would not have been engaged, the comparison between their respective performances would not have been made and the applicant would not have been dismissed.**
>
> **Such an argument was advanced before the industrial tribunal and rejected. However, the tribunal did so by reference to the wrong test, namely, whether the employer would have treated a man differently were he in the same position as the applicant. Following the decision of the Court of Justice [1994] ICR 770 and the House of Lords in *Webb v Emo Air Cargo (UK) Ltd (No. 2)* [1995] ICR 1021, no such comparison may properly be made. It follows, in our judgment, that the effective cause of the applicant's dismissal was her absence on maternity leave and that is discrimination on the grounds of her sex.**
>
> **In reaching that conclusion we reject the submission of Mr Giffin that there has been a break in the chain of causation. The *immediate* cause of her dismissal, as the tribunal found, was that Mr Pollock found Mrs Turner more efficient and acceptable than the applicant. That is a "gender neutral" reason in much the same way as the need to find a replacement for an employee herself absent on maternity leave, as in *Webb v Emo Air Cargo (UK) Ltd*. However, the underlying reason is the applicant's absence on maternity leave. Since no comparison may properly be made with a hypothetical male we conclude that this industrial tribunal erred in directing itself, quite properly at the time, in accordance with the Court of Appeal decision in *Webb* [1992] ICR 445.**

> **Finally, we are fortified in reaching our conclusion in this case by the policy behind the legislation. The protection afforded to women on maternity leave would be drastically curtailed if an employer was able to defeat a complaint of direct discrimination by a woman who, during such absence, discovers that the employer prefers her replacement, a state of affairs which has arisen solely as a result of her pregnancy and therefore of her sex." (Original emphasis)**

55. Mr Tatton-Brown submits that the Tribunal erred in not applying the approach in **Rees**.

56. Mr Stilitz submits that the Tribunal clearly did show an understanding of the difference between context and cause, but that, in any event, the findings of fact were fatal to the narrow claim.

Discussion - Ground 2

57. We were referred to numerous other authorities dealing with the difficult question of causation in the context of discrimination claims. We remind ourselves of the note of caution sounded by Lord Nicholls of Birkenhead in **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 at paragraph 29:

> **"29. Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [1999] ICR 877, 884-885, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."**

58. It was not in dispute that there is no difference between the formulation "*by reason that*", considered by the House of Lords, and the formulation in section 18 of the **2010 Act** of an act being done "*because of*" a protected characteristic.

59. It is well-established that the 'but for' approach to causation is not appropriate in discrimination claims where the key question is the reason why the employer acted as he did. For any given act, there is likely to be a chain of events leading up to it. Removing any link in that chain might mean that the crucial act would not have happened. However, that does not mean that that link in the chain is necessarily the reason (or a reason) for the act taking place, even though on a strict causative analysis, the link was a factor. Lord Scott alluded to this difficulty in **Khan**:

> **"77. Was the reference withheld "by reason that" Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the reference would have been given. The proceedings were a causa sine qua non. But the language used in section 2(1) is not the language of strict causation. The words "by reason that" suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified."**

60. More recently, the analysis of Underhill J (President) as he then was in **Amnesty International v Ahmed** [2009] ICR 1450 considered the difference between something forming a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, and something forming part of the ground, or reason, for that treatment:

> **"37. We turn to consider the "but for" test recommended in the second of the passages which we have quoted from Lord Goff's speech in *James v Eastleigh Borough Council*: see para 28(3) above. The passage in question forms part of the final section of the speech, and follows the section (at pp 574-575) where he has expressed his conclusion on the primary issue as regards direct discrimination. That section begins at p 575E: "Finally, I wish briefly to refer to the use, in this present context, of such words as intention, motive, reason and purpose." Thus, although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else - all that matters is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed, if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment. That point was clearly made in the judgment of this tribunal in *Martin v Lancehawk Ltd* (unreported) 15 January 2004. In that case the (male) managing director of the respondent company had dismissed a (female) fellow employee when an affair which they had been having came to an end. She claimed that the dismissal was on the ground of her sex because "but for" her being a woman the affair would never have occurred. At para 12 Rimer J referred to the tribunal's finding that the dismissal was "because of the breakdown of the relationship" and continued:**

> **"the critical issue posed by section 1(1)(a) [is] whether Mr Lovering dismissed Mrs Martin 'on the ground of her sex', an issue requiring a consideration of why he dismissed her. As we have said, we interpret the tribunal as having found that the dismissal was because of the breakdown of the relationship. That, therefore, was the reason for the dismissal, not because she was a woman. We accept that, but for her sex, there would have been no affair in the first place. It could, however, equally be said that there would have been no such affair 'but for' the facts (for example) that she was her parents' daughter, or that she had taken up the employment with Lancehawk. But it did not appear to us to follow that reasons such as those could fairly be regarded as providing the reason for her dismissal."**
>
> **See also *Seide v Gillette Industries Ltd* [1980] IRLR 427, where an employee who had been moved to a different department to escape anti-Semitic harassment fell out (for non-racial reasons) with his colleagues in his new department and was disciplined: it was held that the fact that but for the earlier harassment he would not have been in the department where the problem arose did not mean that the action of which he complained was taken on racial grounds. Lord Goff was not of course considering issues of this kind; but these examples illustrate that the ultimate question must remain whether the act complained of was done on the proscribed ground (or for the proscribed reason)."**

61. Mr Tatton-Brown sought to persuade us that that Lord Scott's analysis in **Khan** was inconsistent with other analyses in respect of causation in discrimination claims in that Lord Scott's reference to "*the real or core reason*" is synonymous with "*the principal reason*", and that that cannot be correct as there can be unlawful discrimination where the prohibited ground merely contributes to an act or decision even though it is not the sole principal reason for the act or decision: see **London Borough of Islington v Ladele** [2009] IRLR 154 at paragraph 9. We do not agree that there is any such inconsistency. We acknowledge that the language used by the higher authorities to elucidate this difficult concept has not always been consistent - as the Tribunal below also acknowledged. However, the essential point being made by Lord Scott, it seems to us, is that it is not enough for something merely to be a link in the chain of events leading up to an act for it to amount to the "*real reason*" (or as Lord Scott also puts it, the "*causa causans*") for the treatment complained of. Moreover, the reference to "*real reason*" is not to be read as synonymous with "*principal reason*"; there could be several reasons for an act, all of which are "*real*", in the sense of being an operative or effective cause of the act.

62. In the present case the Tribunal concluded that:

> **"85. … The absence and the temporary transfer of the work [to Wilton] are part of the relevant context and can be seen as *causes* which contributed to the Claimant losing her job. But they are not *reasons* for the decisions and actions under challenge." (Original emphasis)**

63. In our judgment, the Tribunal was there drawing a distinction between a matter which is part of the relevant context for, or part of the chain of events leading up to, a subsequent decision, and that which is a cause or a reason for it. The reference to *causes* in italics in the passage set out is clearly not a reference to the operative cause for the decision but merely to what might be described as a link in the chain of events leading up to it.

64. The Claimant's reliance on the finding as to Mr Prister's reasons for the redundancy proposal is misplaced. That is so for two reasons. Firstly, the finding does not state in terms that maternity absence was the operative reason for Mr Prister's proposal. The finding in paragraph 41 is more consistent with maternity absence being no more than a link in the chain of events leading to that proposal. Secondly, the finding at paragraph 41 must be read in conjunction with the further findings as to Mr Prister's thinking contained in paragraphs 86 and 88 of the Judgment. There the Tribunal said:

> **86. … We are in any event satisfied that the fact that the Claimant had taken maternity leave did not of itself influence to any material extent the decision-making of Mr Prister and Mr O'Grady.**
>
> **…**
>
> **88. … Mr Prister had been called upon to come forward with cost-cutting measures and rationalising the trading function was an obvious option. The fact that the work of the Claimant and Ms Evans had been managed by Wilton with no ill-effects gave him added confidence that his proposal was sound, but it was not the decisive factor in his thinking or that of Mr Cornell. …"**

65. Thus, the Tribunal determined that maternity leave absence was not the cause or reason for the treatment complained of, in sense of being an operative or effective cause or the real reason, but merely formed part of the context or part of the chain of events leading up to that

A treatment. That was a finding of fact which the Tribunal was entitled to make on the evidence. It was not, in our judgment, the product of an incorrect application of the authorities on causation. Mr Tatton-Brown sought to highlight the use of the phrase "*of itself*" in paragraph 86 as indicating that the Tribunal was wrongly examining whether maternity was the sole cause or reason for the act complained of, whereas it is sufficient for it to be a contributing factor. We do not agree that the Tribunal was applying a test of "*sole*" or "*principal*" reason. The Claimant's submission is inconsistent with the Tribunal's finding that maternity absence "*did not ... influence to any material extent the decision-making ...*". Implicit in that finding is an acknowledgement that, if maternity absence had influenced the decision makers to *any* material extent, the Tribunal would have concluded that there was unlawful discrimination, even if other non-discriminatory factors also influenced the decision.

66. **Rees** was correctly distinguished in our view. One can see from the judgment of His Honour Judge Peter Clark that there was a finding on the part of the Tribunal in that case that the "*immediate cause of the dismissal*" was that the employer had regarded the applicant's replacement as more efficient and acceptable than the applicant. The Tribunal's finding here was very different and closer to the circumstances in the case of **Charlesworth v Dransfield Engineering Services Ltd** UKEAT/0197/16/JOJ. In that case, the disabled employee's absence provided the employer with an opportunity to assess how the employer's business would manage without him. It decided that it could do so and dismissed him. The Tribunal found that the dismissal arose from the fact that the employer could manage without him and not from his disability. Dismissing the employee's appeal, Simler J (President) said as follows:

> **"16. In this case, the Tribunal recognised that the requirement in section 15 does not involve any comparison between the Claimant's treatment and that of others. It expressly accepted that in considering a section 15 claim it is not necessary for the Claimant's disability to be the cause of the Respondent's action, and that a cause need not be the only or main cause provided it is an effective cause (see paragraph 29.2). Notwithstanding the arguments of Mr McNerney, I can detect no error of law in that self-direction.**

17. At paragraph 29.3 the Tribunal applied the facts to that statutory test, adopting the two-stage approach identified in *Weerasinghe*. In light of my conclusions above, I do not consider that there was any error of law by the Tribunal in taking that approach. The Tribunal was entitled to ask whether the Claimant's absence, which it accepted arose in consequence of his disability, was an effective cause of the decision to dismiss him. To put that question another way, as this Tribunal did, was the Claimant's sick leave one of the effective causes of his dismissal?

18. The Tribunal accepted that there was a link between the Claimant's absence through illness and the fact that he was dismissed, the link being that his absence afforded the Respondent an opportunity to observe the way in which the work was dealt with and threw into sharp relief their ability to manage without anybody fulfilling his role of Rotherham Branch Manager. Nevertheless, the Tribunal went on to say that was not the same as saying that the Claimant was dismissed because of his absence. This is a case where on the facts found by this Tribunal it felt able to draw a distinction between the context within which the events occurred and those matters that were causative. No doubt there will be many cases where an absence is the cause of a conclusion that the employer is able to manage without a particular employee and in those circumstances is likely to be an effective cause of a decision to dismiss even if not the main cause. But that does not detract from the possibility in a particular case or on particular facts, that absence is merely part of the context and not an effective cause. Every case will depend on its own particular facts. Here, the Tribunal concluded that the Claimant's absence was not an effective or operative cause of his dismissal but was merely the occasion on which the Respondent was able to identify something it may very well have identified in other ways and in other circumstances, namely that the particular post was capable of being deleted with its responsibilities absorbed by others. That conclusion led the Tribunal to hold that what caused the Claimant's dismissal on these particular facts was the view that the Respondent could manage without him and that the absence formed part of the context only and was not an operative cause. In my judgment, that was a conclusion open to the Tribunal, applying the statutory test, and reached without error of law."

67. Whether or not absence is merely part of the context or an effective cause will depend on the facts. As set out above, the Tribunal found as a fact that maternity absence had no material influence on the redundancy decision. In the absence of any tenable suggestion that the Tribunal's finding in this regard was perverse, we find that the Tribunal has not erred in law in its approach to causation or as to the real reason why the Respondent acted as it did.

68. Our unanimous view is that ground 2 of the appeal should be dismissed.

<u>Ground 3 - Paragraph 88</u>

69. The Claimant accepts that if grounds 1 and 2 fail then ground 3 is academic. It is not therefore necessary to consider it in any detail. We would merely comment that the Tribunal's finding in this paragraph, when read fairly and in conjunction with the Tribunal's detailed

findings as to Mr Chan's employment, and as to what would have happened had the Claimant not been on maternity, is, in our view, very far from being perverse.

Ground 4 - Time

70. In view of our conclusions above, this ground does not arise.

Conclusion

71. For those reasons, and notwithstanding Mr Tatton-Brown's careful and comprehensive submissions on behalf of the Claimant, this appeal fails and is dismissed.