Appeal No. UKEAT/0189/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 December 2018
Judgment handed down on 30 January 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR A OLALEKAN — APPELLANT

SERCO LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ESTHER GODWINS (Employment Consultant) Equip Law Ltd Tottenham Green Enterprise Centre Town Hall Approach Road London N15 4RX
For the Respondent	MS LOUISE CHUDLEIGH (of Counsel) Instructed by: Carter Leydon Millard 68 Milton Park Abingdon OX14 4RX

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Comparison

The Claimant was employed as a Prison Custody Officer (PCO). He was dismissed following an assault on a prisoner committed whilst the prisoner was being restrained. The Claimant alleged that the dismissal was unfair and discriminatory on the grounds of race as other white PCOs had not been dismissed for similar assaults on prisoners. The Employment Tribunal (ET) dismissed his claims.

The principal ground of appeal was that the ET should have constructed a hypothetical comparator based on the information as to the other white PCOs. That ground was not upheld as the ET's approach to the hypothetical comparator disclosed no error of law. The Claimant had not sought to challenge the Respondent's evidence that the circumstances in which the white PCOs were dismissed were materially different from those of the Claimant. As such, the ET could not be criticised for not constructing a comparator in the manner suggested. The ET did consider whether the Respondent would also have dismissed a white PCO who had committed the same offence as the Claimant, and found that it would. That hypothetical comparator was adequate in the circumstances, and the conclusion that that person would also have been dismissed was supported by evidence.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The Appellant, to whom I shall refer as the Claimant, was employed by the Respondent as a prison custody officer ("**PCO**") at HMP Thameside.

2. On 15 July 2016, the Claimant was involved in an incident at the prison during which a prisoner had to be restrained by several PCOs including the Claimant. The Claimant was alleged to have delivered three blows to the prisoner's head whilst the prisoner was restrained and prone on the floor. The matter proceeded to a disciplinary hearing. On 26 September 2016, the Claimant was dismissed for assaulting a prisoner. The Claimant's appeal against that dismissal was not upheld.

3. The Claimant brought a complaint to the Employment Tribunal ("**the Tribunal**") alleging that his dismissal was both unfair and discriminatory on the grounds of race. The grounds of complaint referred to five white PCOs who had not been dismissed following the use of force against prisoners and to three black officers who had been. The Tribunal rejected the claims of unfair dismissal and discrimination. The Claimant appeals against that decision, placing particular reliance on the Tribunal's approach to the issue of comparators.

Factual Background

4. The Respondent has a number of standard operating procedures ("**SOPs**"), one of which deals specifically with the use of force. The use of force was only permitted when "*absolutely*

necessary, and when Control and Restraint ["**C&R**"] *is used, only authorised C&R will be used".* The SOP went on to state that "*use of force must be regarded as a last resort and may only be used when persuasion or other means, which do not entail the use of force, have been explored or are unlikely to succeed*", and "*Staff must not employ C&R techniques when it is unnecessary to do so in a manner which entails the use of more force than is necessary*."

5. The incident that led to dismissal occurred on 15 July 2016. After an earlier altercation, a prisoner become aggressive and threatened to assault the Claimant. The prisoner was told to calm down, but this was ignored, and he refused to go back to his cell when asked to do so. At this point, C&R was initiated and other PCOs came to the Claimant's assistance. The use of C&R techniques resulted in the prisoner being brought under control and held prone on the floor. The Tribunal found that whilst the prisoner was under control and presenting no further threat, the Claimant struck the prisoner's head three times with his hand. The incident was captured on CCTV.

6. The disciplinary hearing took place on 26 September 2016 before Mr Chambers, Assistant Director Head of Security and Operations, a position that he has held since November 2011. The Claimant was represented at the hearing by his union representative. Mr Chambers heard evidence from the Claimant and various witnesses and viewed the CCTV footage. The Claimant had sought to suggest that the prisoner was trying to bite him and that the Claimant had reacted "emotionally". Mr Chambers concluded that the Claimant's conduct amounted to gross misconduct and warranted summary dismissal. He concluded that the prisoner had been restrained and staff had been in full control. Nevertheless, the Claimant used force which was excessive and unnecessary in that he struck the prisoner three times with the palm of his hand with intent.

7. The Claimant did not suggest that any comparators should be considered by Mr Chambers. The Claimant appealed. The appeal was considered by Mr Thomson, Director of the Prison, a position that he had held since the end of April 2016.

8. The Claimant's grounds of appeal included an allegation that the dismissal was racially discriminatory as white officers committing assault had been treated more favourably. The Claimant was represented at the appeal by a different trade union representative, Mr Van Zandt. The Claimant handed Mr Thomson a handwritten note of comparator prison officers who he said had not faced disciplinary action or were not dismissed after using excessive force. He also identified three black officers who he said had been dismissed after similar offences. Mr Thomson agreed that he would investigate the names provided on the Claimant's list although he stated that his investigation would be limited to the time when he was in office. That meant that his investigation would not include any cases that occurred prior to his appointment in April 2016, notwithstanding the fact that some of the Claimant's comparators were involved in incidents dating back to 2013. This course was apparently agreed by Mr Van Zandt.

9. Mr Thomson found that the comparators that he investigated were involved in situations that were materially different to the one before him. The appeal was dismissed.

The Tribunal's Decision

10. The Tribunal noted that the Claimant's recollection of the events was somewhat inconsistent with what was in his statement and considered that his evidence lacked credibility. In relation to the issue of whether the Claimant was treated less favourably on the grounds of race, the Tribunal held as follows:

> **"77. We will first deal with the issue of whether the Claimant was treated less favourably because of race. In the agreed issues above at paragraph 3(a) and (b) the Claimant alleges that his dismissal was less favourable treatment because of race. The Tribunal have noted in the closing submissions of the Claimant that it is now accepted that the comparators referred to in his evidence are not the same and are materially different. It was also noted that the Claimant's case now alleges that it is not the dismissal that is discriminatory (as stated in his ET1), it is now that 'white officers' explanations would have been accepted as to mitigation and what was on the CCTV', this was not the Claimant's pleaded case. There was no evidence before the Tribunal to suggest that the Claimant was treated less favourably when the Respondent considered his evidence as to mitigation.**
>
> **78. There was also no evidence that the Claimant had been treated less favourably than comparable white officers who had used excessive and unnecessary force against a prisoner who had been restrained; we conclude from the consistent evidence from the Respondent that any prison officer who had committed a similar offence would have been dismissed. We refer to our findings of fact above where Mr Chambers was clear that he would have dismissed a white officer for the same offence (see above at paragraph 29). Having considered all the evidence the Tribunal conclude that there is no evidence from which we can conclude that the Claimant has been treated less favourably because of race. There was no evidence to suggest that mitigation offered by White Officers "would have been accepted" whereas mitigation offered by Black Officers would not. We conclude that the reason for dismissal was conduct and a comparable White Officer who had committed the same offence would also have been summarily dismissed."**

11. There was initially an issue between the parties as to whether there was any such concession that the comparators relied upon were "*not the same and are materially different*" as referred to by the Tribunal in paragraph 77. However, it became clear in the course of oral submissions that the Claimant was not seeking to suggest that the circumstances of the comparators relied upon were not materially different, so as to make them suitable as comparators within the meaning of s.23 of the *Equality Act 2010*. Instead, the Claimant was submitting that notwithstanding any material differences, the circumstances of the comparators ought to have been used to construct a hypothetical comparator. I shall return to this issue when dealing with Ground 1 of the Claimant's appeal below.

12. As to the claim of unfair dismissal, the Tribunal accepted that the Respondent had established a potentially fair reason for dismissal, namely misconduct, and that the Respondent

had reasonable grounds for believing that misconduct had occurred. The Tribunal rejected a number of allegations of unfair procedure raised by the Claimant. As to the appeal, the Tribunal said as follows:

> **"87. The Tribunal noted that Mr Thomson conducted an investigation into the points that the Claimant raised in his appeal, he carried out some investigation into the comparators that the Claimant maintained had been treated more favourably in respect of the sanction awarded and concluded that the cases he raised were not similar to the incident before him. The Tribunal noted that Mr Thomson instructed Ms Chambers to carry out this investigation, although the closing submissions made on behalf of the Claimant refers to this, there has been no suggestion that her involvement was detrimental to the Claimant's case. Mr Thomson concluded that all appeals are dealt with on their own merits and did not find any evidence to suggest that others had received a lesser sanction, this ground of appeal was rejected. He also asked Mr Chambers whether he had told the Claimant that he had made his mind up before and is written response was that he had clearly said he had not made up his mind, this matter was therefore investigated and the answer he received was accepted.**
>
> **88. The decision letter covered all the points that Claimant raised in his appeal but it was concluded on the evidence that the Claimant had used excessive force by striking the prisoner three times and the only option open to them was dismissal. Therefore, the decision was upheld. The Tribunal conclude therefore that the appeal was thorough and dealt with all points but concluded on all the evidence that the decision to dismiss was reasonable. The Tribunal conclude therefore that the disciplinary process in its entirety was fair. The Claimant's claim for unfair dismissal is therefore dismissed."**

13. The Tribunal dismissed the Claimant's claims.

The Grounds of Appeal

14. There are four Grounds of Appeal:

a. Ground 1 - The Tribunal failed to make findings of fact in relation to the comparators relied upon by the Claimant and in failing to do so had failed to form a hypothetical comparator from which inferences of direct discrimination could have been drawn;

b. Ground 2 - The Tribunal's conclusion that the appeal was "*thorough and dealt with all points*" (paragraph 88) was perverse, in particular, having regard to the limited nature of Mr Thomson's investigations;

c. Ground 3 - The Tribunal erred in concluding that Mr Thomson had conducted a reasonable appeal given his failure to carry out a full investigation into comparable cases of black and white officers;

d. Ground 4 - The Tribunal's failure to make findings on comparable cases rendered the dismissal unfair.

15. I shall deal with each ground in turn.

Ground 1 – Failure to make findings in respect of comparators

Ground 1 - Submissions

16. Ms Godwins' principal contention here is that the Tribunal erred in law in failing to consider the evidence of comparable cases and reach conclusions thereon. This, in turn, led to a failure to give proper consideration to the question of the hypothetical comparator. Reliance is placed upon the case of *Shamoon v Chief Constable of the RUC* [2003] UKHL 11, where Lord Scott said as follows:

> **"109. But, secondly, comparators have a quite separate evidential role to play. Article 7 has nothing to do with this role. It is neither prescribing nor limiting the evidential comparators that may be adduced by either party. The victim who complains of discrimination must satisfy the fact-finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground e.g. sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, e.g. under Article 7, by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was treated less favourably than she would have been treated if she had been the Article 7 comparator.**
>
> **110. In summary, the comparator required for the purposes of statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. <u>But the</u>**

> **comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim." (Emphasis added).**

17. These passages, and in particular the words underlined, are relied upon for the proposition that, even if the actual comparators relied upon were in a materially different position to that of the Claimant, they nevertheless had some evidential value in that the Tribunal could and ought to have considered whether those comparators, in conjunction with other evidence, could lead the Tribunal to draw the inference that the Claimant had been treated less favourably than a white PCO would have been treated. A similar point was made by the EAT in *Chief Constable of West Yorkshire v Vento (No.1)* [2001] IRLR 124:

> **"15. The second main head of argument in the Notice of Appeal is headed "Misuse of comparators". The Notice of Appeal refers to the four actual comparators as to whose cases evidence was given. It proceeded to say that "None was a true comparator and the tribunal accordingly erred in law in relying on them". But the Tribunal did not treat any of the four cases, as we see it, as being a relevant actual comparator. That is why the Tribunal turned, as it had to, to a hypothetical male officer in the same circumstances. The Tribunal used the four actual cases as if building blocks in the construction of the neighbourhood in which the hypothetical male officer was to be found. For the Tribunal to have relied on the four actual comparator cases in that way was not only not an error of law, it was, as it seems to us, the only proper way for it to proceed on the evidence put before it." (Original emphasis)**

18. The Claimant also drew my attention to paragraph 34 of *Igen v Wong* [2005] EWCA Civ 142 where Lord Justice Peter Gibson said as follows:

> **"34. We also heard argument on the need for there to be a comparator in the ingredient of less favourable treatment which the complainant must prove for there to be sexual or racial discrimination. However, there was no real dispute before us on this point. That a comparison must be made is explicit in the language of the definition of discrimination. In s. 1(1)(a) of the SDA one finds "he treats her less favourably than he treats or would treat a man". In s. 1(1)(a) of the RRA one finds "he treats that other less favourably than he treats or would treat other persons". The comparison must be such that the relevant circumstances of the complainant must be the same as or not materially different from those of the comparator. It is trite law that the complainant need not point to an actual comparator. A hypothetical one with the relevant attributes may do. Our attention was drawn to what was said by Elias J., giving the judgment of the EAT in *The Law Society v Bahl* [2003] IRLR 640 at paras. 162 and 163. There it was held that it is not obligatory for ETs formally to construct a hypothetical comparator, though it was pointed out that it might be prudent to do so and that the ET might more readily avoid errors in its reasoning if it did so. Similarly, when *Bahl* went to appeal, this court ([2004] IRLR 799 at para. 156) said that it was not an error of law for an ET to fail to identify a hypothetical comparator where no actual comparator can be found. However, this court also said that not to identify the characteristics of the comparator might cause the ET not to focus**

> **correctly on what Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 at para. 7 called "the less favourable treatment issue" (viz. whether the complainant received less favourable treatment than the appropriate comparator) and "the reason why issue" (viz. whether the less favourable treatment was on the relevant proscribed ground). The importance of a failure to identify a comparator or the characteristics of the comparator may vary from case to case, and may be thought to be of particular relevance to the appeal in *Emokpae v Chamberlin Solicitors* [2004] UKEAT 0989_03_1506."**

19. Finally, I was taken to *Balamoody v Nursing and Midwifery Council* [2002] ICR 646, in which the Court of Appeal said as follows:

> **"54. The task set by section 3(4) is broadly to compare like with like. It is the same under section 5(3) of the Sex Discrimination Act 1975 . If the applicant can point to an actual person whose circumstances are the same or not materially different from his own, then so much the better. Frequently, however, there may be no actual comparator whom it can be shown has been treated more favourably than the applicant. In those circumstances it is necessary to construct a hypothetical comparator to show how a person of the other racial group would have been treated. The concept of the hypothetical comparator can often be crucial to the operation of the Act. That does not appear to be in dispute. The chairman of the employment tribunal correctly stated that "a comparison can be made with either an actual or hypothetical comparator". The appeal tribunal referred to that without dissenting from it. Mr Sutton, counsel for the respondent council, for whose submissions I am indebted, accepts in his skeleton argument that Mr Balamoody does not have to show that an individual has actually been treated more favourably; a comparison can be made with a hypothetical comparator. If one is seeking to find a minutely exact comparator, it is possible to define that comparator, whether actual or hypothetical, as a white nurse, whether male or female, who had been removed from the register for conduct of a kind similar to, or not materially different from, the misconduct found against Mr Balamoody, who had applied for the second time to be restored to the register. In my judgment at the bare minimum the hypothetical comparator in this case is a person of another racial group from Mr Balamoody, a white nurse, who had been removed from the register for misconduct and was seeking to be restored thereto."**

20. Ms Godwins submits that in the present case, the comparators formed the crux of the Claimant's case on discrimination: they had been named during the internal appeal, had been referred to in his grounds of complaint and the Tribunal had been provided with a schedule summarising the position of each of the comparators. Given that there were several instances of white PCOs not being dismissed in circumstances involving assaults on prisoners, it was necessary, submits Ms Godwins, to examine these other cases in order to construct a hypothetical comparator. Ms Godwins submits that the failure to do so meant that it was impossible for the Tribunal to identify whether the Claimant had indeed been treated less favourably than he would have been treated had he been white.

21. The Claimant further submits that the Tribunal's reliance on Mr Chambers' evidence, which was that he would have dismissed a white PCO in similar circumstances, should not have been accepted at face value. The Claimant reminds me that it will be a rare case where a witness would admit to acting on a racially discriminatory basis and submits that a mere assertion by a witness that he would not have done so is evidentially of limited value.

22. Mr Chambers was not specifically cross-examined on the Respondent's treatment of the comparators, despite the fact that extensive evidence was set out in his statement explaining why the circumstances of the comparators were different. Ms Godwins' submission is that the absence of cross-examination does not mean that the issue of comparators ceased to be live or that the Tribunal was thereby relieved of its obligation to construct a hypothetical comparator. Reliance is placed upon the decision of the EAT in *King v Royal Bank of Canada Europe Ltd* UKEAT/0333/10/DM where HHJ Richardson said:

> **"74.The Tribunal's task was certainly made more difficult because the Claimant did not put her case to Mr Fleming by questioning him on the matter. But we do not think that a dispute necessarily ceases to be an issue in the case because a party – particularly a litigant-in-person – omits to cross-examine about it."**

23. The EAT went on to consider that, on the facts of that case, where the Claimant was a litigant-in-person, the failure to cross-examine did not mean that the issue ceased to be live.

24. In my judgment, in the present case, the absence of cross-examination meant that the Tribunal was left with unchallenged evidence from a witness, who was otherwise found to be credible, that these comparators' circumstances were materially different. The Tribunal's conclusion that the comparators were in a materially different position therefore has a sound evidential basis and the Claimant is not able to contend that the Tribunal erred in so concluding. The decision in *King* does not assist the Claimant for two reasons:

a. First, the approach taken in *King* was adopted in the case where a litigant-in-person had failed to cross-examine a witness. It is readily apparent that a less generous approach will be taken where a professional representative opts not to cross-examine a witness on a relevant issue;

b. Second, the absence of cross-examination was significant in this case. The Claimant's case was that there were sufficient similarities with the comparator cases for them to have some evidential value or for them to be used to provide the building blocks to construct a hypothetical comparator. However, those alleged similarities were not put to the Respondent's witnesses. It seems to me that where the Claimant's case is based on alleged similarities with the comparator cases, it was incumbent upon him to put that case to Mr Chambers, who was asserting that the cases were dissimilar.

25. It seems to me that the Claimant's submissions under this Ground make the following four key points:

a. Notwithstanding the differences between the comparators and the Claimant, the Tribunal should have made express findings of fact in respect of each of the comparators situations as this remained a live issue in dispute. Having done so the Tribunal would have noted the similarities between the comparators and the Claimant in terms of the use of force by PCOs against a prisoner and would have noted the difference in treatment whereby the Claimant was dismissed, and they were not;

b. These similarities ought to have been considered in constructing a hypothetical comparator for the purposes of assessing whether the treatment was on the grounds of race; and

c. The Tribunal should have examined the approach taken by the Respondent to the mitigation offered by the comparators and the effect of such mitigation on sanction, and compared that to the similar mitigation offered by the Claimant which did not have the effect of reducing his sanction.

d. On the basis of that material, the Tribunal would have been in a position to draw the inference that the less favourable treatment of the Claimant, namely his dismissal, was on the grounds of his race.

Ground 1 – Conclusions

26. The Claimant's first contention under this ground is that the Tribunal should have made express findings of fact in relation to each of the comparators relied upon and/or should have, at the very least, noted the similarities with the comparators in order to construct a hypothetical comparator.

27. In my judgment, the Tribunal was not bound to make express findings in respect of each of the comparators in circumstances where: (a) the Claimant had not challenged the Respondent's evidence that these comparators were in a materially different position to that of the Claimant; and (b) the Claimant was not seeking to rely upon the comparators as statutory comparators in any event. As to the submission that the Tribunal should have noted the similarities between the Claimant and the comparators in order to construct a hypothetical comparator, I accept that that is a course that the Tribunal could have taken. The decision of Lord Scott in *Shamoon* (see above) makes it clear that a comparator who does not satisfy the requirement that there be no material difference between his position and that of the Claimant such that he cannot be statutory comparator, can nonetheless be of some evidential value. However, as Lord Scott noted, that evidential value will be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the Claimant: see *Shamoon* at [110]. In the present case, there was clear and unchallenged evidence from Mr Chambers that there were material differences between the comparators and the Claimant. In those circumstances, it seems to me that the evidential value of these comparators is severely limited. Not only did they not

satisfy the statutory threshold to be a comparator, but their circumstances were, on the face of it, sufficiently different to render them of limited assistance in the Tribunal's analysis.

28. In any case, a *Shamoon*-style comparator is only one means of constructing a hypothetical comparator, and the Tribunal was not bound to adopt that means in place of all others. That is all the more so where the Claimant has, in effect, opted not to challenge the Respondent's evidence that these comparators were in a very different position from that of the Claimant. The Tribunal's failure to construct a *Shamoon*-style comparator does not, in my judgment, give rise to any error of law.

29. The Tribunal did make findings in respect of one of the comparators, Mr Valiatis. Its finding was that in that case there was a difference in the perceived level of threat in that the prisoner was not being restrained at the time of the assault. (It will be recalled that the prisoner dealt with by the Claimant was on the floor and prone at the time). That was a finding of fact that was open to the Tribunal based on the evidence before it. The conclusion that Mr Valiatis could not, therefore, be an appropriate comparator discloses no error of law. However, the Tribunal's analysis did not end there; it went on, as considered below, to construct a hypothetical comparator that had the relevant attributes for the purposes of making a comparison.

30. Before going on to consider that hypothetical comparator, I should address a submission made by Miss Chudleigh that another relevant difference between the Claimant's case and that of the comparators is that none of the comparators' cases was decided upon by the decision-maker in this case, Mr Chambers. She submits that, as it is the mental processes of the decision-maker that should be the focus of scrutiny in a direct discrimination claim, there is limited evidential value to be gleaned from considering how other situations were treated by different

decision-makers. She relies upon the following passage in *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010.

> **"36. In my view the composite approach is unacceptable in principle. I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way the Regulations work, rendering E liable would make X liable too: see the analysis at para. 13 above. To spell it out:**
>
> **(a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and – assuming we are applying the composite approach – that act was influenced by Y's discriminatorily-motivated report.**
>
> **(b) X would be an employee for whose discriminatory act E was liable under regulation 25 and would accordingly be deemed by regulation 26 (2) to have aided the doing of that act and would be personally liable.**
>
> **It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation."**

31. Insofar as the submission is that the existence of a different decision-maker would necessarily amount to a material difference for the purposes of identifying a comparator, then I would reject it. The decision in *Reynolds* does not suggest that a person who is otherwise a suitable comparator is rendered unsuitable merely because a different decision-maker is involved. The scheme of the legislation is that an employer may be liable for the acts of an employee or agent. The employer could therefore be liable for discriminatory treatment meted out to different employees in similar circumstances even though different decision-makers were involved. An employee alleging discrimination ought, in principle, to be permitted to compare his treatment with that meted out to another in similar circumstances, notwithstanding the fact that a different decision-maker in the same employment was involved. There may well be cases where the difference in decision-maker amounts to a material difference: this could arise, for example, where one decision-maker was operating under a different policy from the other, or where one decision-maker is operating at a significantly different level from the other. However, if the only

difference is the identity of the decision-maker that would, in my view, be unlikely to amount to a material difference because the employer would be liable for the actions and decisions of both decision-makers (subject, of course, to any defence under s.109(4) of the *Equality Act 2010*). This approach is not inconsistent with that in *Reynolds*. The focus would still be on the mental processes of the decision-maker who dealt with the claimant; and there is no suggestion that the decision-maker (and the employer) would be liable as a result of the discriminatory motivation of another.

32. As to the Tribunal's approach to the hypothetical comparator, it is clear from paragraph 78 that the Tribunal did have in mind such a comparator. It found that "*a comparable White Officer who had committed the same offence would also have been summarily dismissed*". That hypothetical comparator is, as Ms Chudleigh submits, *Balamoody*-compliant, in that it satisfies the 'bare minimum' for what is required of a comparator: see *Balamoody* at [54]. At the bare minimum, the hypothetical comparator would be a white PCO who had committed the same offence. That is precisely the comparator identified by the Tribunal.

33. The Tribunal's finding that such a comparator would also have been summarily dismissed was not unsupported by evidence. The Tribunal accepted the clear evidence of Mr Chambers that he would have dismissed a white officer for the same offence. That assertion on the part of Mr Chambers was also not unsupported; there was unchallenged evidence from Mr Chambers that he had dismissed three officers, two of whom were white, and one of those in circumstances where a white officer had racially abused a black officer. This evidence provides some material upon which the Tribunal could conclude that Mr Chambers' mental processes in this particular case were not, consciously or otherwise, tainted by considerations of race.

34. As to the Tribunal's approach to the question of mitigation, it is right to note that this was not expressly relied upon as a factor in the Claimant's pleaded case. The Claimant's case was put on the basis that the comparators were in a similar position because of the nature of the offence and not because the mitigation put forward was of a similar character. Paragraph 14 of the ET1 does refer to the Claimant having a good record and not having had any warnings in the past. However, the list of comparators at paragraph 22 of the ET1 makes no reference to the past record of the individuals or to any other pleas in mitigation. I accept that the comparison schedule submitted by the Claimant at the hearing refers to the comparators' "previous conduct history / mitigation / explanation". However, that does appear to be a new factor that was not previously mentioned.

35. In those circumstances, it is my judgment that the Tribunal did not err in saying what it did about the Claimant's case on mitigation at paragraph 77 of the judgment. But in any event, the Tribunal did go on to consider whether the mitigation offered by white officers would have been accepted in circumstances where mitigation offered by black officers would not. The Tribunal came to a clear conclusion, at paragraph 78, that there was no evidence before them to suggest that mitigation would have been approached differently in the case of a white PCO as alleged. The main mitigation advanced by the Claimant was that he was suffering from flashbacks as a result of an assault suffered previously and that the prisoner in this case was trying to bite him. However, the Tribunal held (albeit in relation to unfair dismissal) that the relevant medical evidence in support of any psychological problems had been produced 10 months before the incident in question, that "*there was no consistent evidence before the Respondent that he was suffering from mental impairment or that his health impacted upon his judgment at the time of the incident*.", and that the Claimant had not raised health as an issue prior to the incident: see paragraphs 84 and 85. In those circumstances, where there were clear reasons for the Respondent

to reject the Claimant's mitigation and no suggestion put to the Respondent's witnesses that similarly inadequate mitigation was accepted in the case of white comparators, the Tribunal was entitled to conclude that there was no evidence of less favourable treatment in this regard.

36. The allegation that the Claimant acted as he did because of the prisoner's attempt to bite him cannot be regarded as a point in mitigation. The Tribunal found that the employer was entitled to conclude that the striking of the prisoner "*amounted to an assault on a compliant and restrained prisoner*": see para 29. That finding was made having heard the evidence and having viewed CCTV footage of the incident. Moreover, the Tribunal referred to evidence given by the Claimant to Mr Chambers at the disciplinary hearing that he had "*lost it*" and had "*hit him 3 times with an open palm*…" The allegation of biting is, in those circumstances, more an attempt to go behind the factual conclusions which the Tribunal found the employer was clearly entitled to reach.

37. For these reasons, it is my judgment that the Tribunal did not err in dismissing the Claimant's claim of race discrimination or in its approach to the construction of the hypothetical comparator. The Tribunal's reasoning at paragraphs 77 and 78 was certainly terse. However, when read with the findings appearing elsewhere in the judgment, it is clear that the Tribunal did engage with the Claimant's case on hypothetical comparators to a sufficient extent.

Ground 2 - Perversity

38. The allegation here is that it was perverse of the Tribunal to conclude that the appeal was "*thorough and dealt with all points*" given that Mr Thomson operated under a self-imposed restriction as to the scope of his investigation.

39. This is not so much a perversity point as a contention that the Tribunal erred in concluding that the investigation conducted by the Respondent fell within the band of reasonable responses.

40. The question, therefore, is whether it was reasonable for Mr Thomson to take the steps that he did. In my judgment, Mr Thomson's approach did fall within the range of reasonable responses for the following reasons:

a. The limitation in terms of the scope of the investigation was one that appears to have been agreed with the Claimant's representative, Mr Van Zandt. Had it been considered at the time to be necessary to investigate all of the comparators then Mr Van Zandt could have been expected not to agree with the suggestion made by Mr Thomson. It is very difficult to say that a course of action agreed with an employee's representative was unreasonable.

b. Mr Thomson's task on appeal was not to conduct a full rehearing of the matter but to review the decision taken by Mr Chambers. In those circumstances, it was not incumbent upon him to investigate matters that had not been raised below. The comparators had not been raised as an issue before Mr Chambers. This would appear to have been a conscious choice by the Claimant and his representative given that there was a considerable delay between the incident and the disciplinary hearing itself such that it cannot be suggested that the Claimant did not have sufficient time to prepare a case based on comparators. In my judgment, it is not outside the band of reasonable responses for a manager conducting an appeal (which is not by way of a full re-hearing) not to explore every new point raised by an employee that had not been raised before and to take reasonable steps to limit the scope of his investigation.

A

c. Furthermore, the limitation which Mr Thomson fixed upon, namely, to deal only with those cases which had occurred during his tenure, was not irrational, particularly as he had been in post for at least a year and some of the cases relied upon by the Claimant dated back several years. Mr Thomson appeared to rely on two reasons for focussing on his tenure: one (which emerged in cross-examination) was that previous decisions had been taken by directors adjudged to be *"fit and proper persons*" to hold that office and that they would have come to an appropriate decision (see paragraph 36); the other, which appears in his witness statement, is that he thought it appropriate for him and his subordinates to be judged by the standards he had set as Director. The first of these is not a proper reason; it is clearly not appropriate to assume that just because a person held a particular office all of their decisions were appropriate. Had that been the only basis for Mr Thomson's self-imposed limitation then it would have been perverse. The second reason, however, does provide a rational basis for the limitation, particularly as there was some evidence before the Tribunal that Mr Thomson had established a zero-tolerance approach to violence at the prison.

B

C

D

E

41. The Claimant makes the further point that the investigation did not even cover those comparators who fell within the scope of Mr Thomson's self-imposed limitation. In particular, the case of Mr Valiatis, which occurred on 3 May 2016, was not investigated by Mr Thomson. Mr Thomson appears to have accepted that he did not adjudicate on this matter (see paragraph 40 of the Tribunal's judgment). It is not clear why that is the case. The matter was, however, appropriately examined by the Tribunal. The Tribunal concluded that Mr Valiatis was not in a comparable position. It seems unlikely, therefore, that even if Mr Thomson had investigated this matter it would have changed his view.

F

G

H

42. Insofar as this is a perversity ground, there is, as Miss Chudleigh points out, a high hurdle for any appellant who alleges perversity: *Yeboah v Crofton* [2002] IRLR 634. In my judgment, the Tribunal's conclusion that the appeal was thorough and covered all points was one that was open to it based on the evidence of Mr Thomson's investigation and was not perverse.

Ground 3 - Error in concluding that the conduct of the appeal was reasonable despite failure to carry out a full investigation into comparable cases of black and white officers

43. This ground of appeal raises very similar issues to those under Ground 2, namely whether the conduct of the appeal fell within the range of reasonable responses. For similar reasons to those under Ground 2, I consider that that the Tribunal did not err in concluding that the conduct of the appeal was reasonable.

Ground 4 - Failure to make findings in comparable cases rendered the dismissal unfair

44. This is really a complaint that the Respondent's approach to the Claimant's conduct was inconsistent with its approach in other comparable cases. The difficulty with this complaint is that it is well-established that unfair dismissal claims based on disparity of treatment are only likely to succeed where the circumstances in the other cases are truly similar. Thus, we see that in *Paul v East Surrey District Health Authority* [1995] IRLR 305, Beldam LJ said as follows:

> **"34. I consider that all industrial tribunals would be wise to heed the warning of Waterhouse J, giving the judgement of the employment appeal tribunal in *Hadjioannou v Oral Casinos Ltd* where in paragraph 25 he said:**
> **'We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal maybe led away from a proper consideration of the issues raised by s.57(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of**

> **our judgement will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation.'**
>
> **35. I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. if they employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. if the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified."**

45. For reasons already discussed, it is clear that the circumstances of the comparator cases here were not truly similar to those involving the Claimant. Accordingly, this ground of appeal must fail.

Conclusion

46. For the reasons set out above, and notwithstanding Ms Godwins' helpful and concise submissions, none of the grounds of appeal is made out. Accordingly, this appeal is dismissed.