Case Number: 2300036/2017

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr L Welling		**Hallmark Catering Equipment Hire**

Held at London South
On 20 & 21 February 2018

BEFORE: Employment Judge J Nash

Members: Mrs A Williams
Mr E Thompson

Representation

For the Claimant: Mr A McKenzie, Law Centre Representation
For the Respondent: Mrs R Towill, Consultant

JUDGMENT

The Judgment of the Employment Tribunal is: -

1. The Respondent did not discriminate against the Claimant because of his sex.

2. The claim for breach of contract is dismissed upon withdrawal.

3. The claim for annual leave is dismissed upon withdrawal.

REASONS

1. The Claimant presented a claim to the Employment Tribunal on 5 January 2017. The ET3 was presented on 6 February 2017. There was a case management hearing on which clarified the issues and made case management orders.

The Hearing

2. In respect of witnesses, the Tribunal heard from the Claimant on his own behalf. From the Respondent it heard from Mr Greg Hall its Managing Director, Mr Damien Fox its the Operations Manager, and from Ms Charmian Scott an employee. The Tribunal did not take into account the written statements of Miss Scott's mother, and two other employees, Ms Paige Towers and Ms Danielle Whitehead as these statements did not go to the agreed issues.

3. The Tribunal had sight of a joint bundle prepared by the Respondent to 102 pages. All references are to this bundle unless otherwise stated.

The Claims

4. The Claimant's claim was for direct discrimination because of his sex under section 13 Equality Act 2010. All references are to this Act unless otherwise stated.

5. The Claimant had originally brought two further claims - one for holiday pay and one for breach of contract. These two claims were dismissed upon withdrawal after discussion between the parties at the hearing as follows.

6. The Claimant had been ordered at paragraph 5.1 of the case management order to provide further particulars of his breach of contract claim and of any comparator for his equality claim before 17 March 2017. The claimant provided details as to comparator but not as to his breach of contract claim. Accordingly, the Tribunal understood that the contract claim was no longer pursued. However, before the Tribunal the Claimant stated that this failure was an oversight and that he wished to pursue his contract claim. The Respondent objected to the continuation of the breach of contract claim on the basis that the Claimant had failed to comply with the order whilst he was represented; further, the breach of contract claim would significantly increase the length of the hearing, as the Tribunal would need to make a further finding of fact.

7. The Claimant had provided a schedule of loss on 17 March 2016 according to which he claimed compensation for breach of contract - being wages to the end of his fixed

term contract in January 2017; however, he also stated that he was entitled to one week's notice.

8. The Tribunal advised both parties to consider their position with regard to proportionality of the breach of contract and annual leave claims. The liability issue in both claims was whether or not the claimant was in fundamental breach of his contract of employment, thereby permitting the respondent to dismiss him summarily and without payment of his accrued but untaken holiday pay. The Tribunal advised the parties that, on a preliminary reading of the Claimant's written contract, it was of the view that any damages for breach of contract were likely to be limited to one week. With the parties, it was agreed that the quantum of the annual leave claim would amount to between three and five days wages.

9. The breach of contract and annual leave claims would require the Tribunal to consider whether the Claimant committed the gross misconduct of which he was accused. This issue did not fall to be considered in the discrimination claim and, it was agreed, would require a further three witnesses. In that case, there was a significant risk that the case would go part heard. The Tribunal reminded the parties in terms that the Claimant had the right to bring these claims.

10. After consideration, the Claimant said he withdrew the breach of contract and annual leave claims.

The Issues

11. The issues were set at the preliminary hearing. The issues for the sex discrimination complaint were as follows:

    a. whether the Respondent had subjected the Claimant to the following treatment:
        i. the failure to investigate the complaints against him properly or at all; and
        ii. dismissal.

    b. Had the Claimant been treated less favourably than the comparator? The Claimant relied on Ms Scott as an actual comparator and in the alternative a hypothetical comparator.

    c. Had the Claimant proved primary facts from which the Tribunal could conclude that the treatment was because of the protected characteristic of sex and if so, had the Respondent provided a satisfactory explanation?

d. Whether there should be any amendment to any award to the Claimant pursuant to any failure to comply with the ACAS Code.

12. The Tribunal reminded the parties that the issue for the Tribunal was not whether the claimant had committed the harassment of which he was accused, but what was the operative reason in the alleged discriminators' minds. It was agreed that the alleged discriminators were Mr Fox and Mr Hall as they had been the ones who - whether jointly or individually - had made the decision to dismiss and in respect of any investigation (or failure to investigate).

The Facts

13. The Respondent's business is the hiring out of commercial kitchen equipment. It is a small business and employs about eight people. The Claimant started work on 8 April 2016 as a driver on a full time fixed term contract expiring on 31 October 2016. His predecessor driver had been dismissed on the spot on performance grounds by Mr Fox the operations manager shortly before.

14. According to the Claimant, shortly after he started work, he struck up a friendship with a fellow worker Ms Scott, which he hoped might lead to a relationship. Ms Scott had a boyfriend Mr Chalmers who also worked for the Respondent. The Claimant and Ms Scott sent a large number of texts to each other.

15. The number and contents of the texts were not in dispute as the Tribunal had sight of the texts in the bundle. Most of the texts were friendly but among the later texts were a number from the Claimant to Ms Scott, which were very abusive. However, the witnesses differed markedly in their accounts of who said what, to whom, and when in respect of these texts.

16. In June, according to Mr Hall, Ms Scott complained to him about the Claimant's texting and harassing her; however, she said that the situation was under control and she did not want any action taken. Ms Scott, in her account, did not say that she had spoken to Mr Hall at this time.

17. Mr Fox's account was that Ms Scott had shown him, as the Claimant's line manager, texts from the Claimant, which she described as unwanted. Ms Scott told Mr Fox that she did not want a complaint made but for Mr Fox to have a quiet word with the Claimant. Ms Scott did not say in terms that she had had this conversation with Mr Fox. However, according to her witness statement she had spoken to a male colleague

about the texts and had shown him the texts; this colleague had told her that he had had a word with the Claimant and the situation was resolved.

18. Mr Fox's account was that, following the conversation with Ms Scott, he had told the Claimant that his behaviour was not appropriate and that it was upsetting; the Claimant agreed to stop. The Claimant in his oral evidence gave a very different account of this conversation with Mr Fox. He said that he had approached Mr Fox on or around the 17 June 2016 and told him that he (the Claimant) had received texts from Ms Scott. This was the only time that he had any conversation about the texts prior to dismissal. He said that Mr Fox had not told him to stop sending texts to Ms Scott; Mr Fox advised him not to text Ms Scott but to phone her because texts would give Ms Scott power over him; Mr Fox had advised him to "steer clear" of Ms Scott as she "was trouble" in that she had caused difficulties for other employees in the past. This conversation was dated to July in the Claimant's witness statement.

19. It was not in dispute that that around the time of the European Football Championships (July 2016) there was an office sweepstake, which was the subject of much discussion in the workplace. The Claimant and Ms Scott exchanged many texts on the subject. Mr Fox said that at this time, he spoke to the Claimant again about texting Ms Scott (who still did not wish to make an official complaint). Mr Fox's evidence was that he thought that the Claimant had misinterpreted Ms Scott's discussion about going out for a drink, as indicating that she was interested in a relationship with the Claimant. He told the Claimant to stop texting her and in effect, stop bothering her.

20. Ms Scott said that in July she spoke to Mr Hall asking him to monitor the situation, but she had not shown him any texts. She did not mention speaking to Mr Fox in July.

21. Mr Hall's account was that he had been told nothing about the Claimant/ Ms Scott situation after his conversation with her in June.

22. The Tribunal considered all these accounts. The Tribunal found that Ms Scott spoke to Mr Hall in June or July about the Claimant texting her. The reasons for this finding are that both Ms Scott and Mr Hall agreed that there had been a conversation on the subject, even if they could not agree on the date. They wrote their witness statements in January or February 2017, which was 8 months after the event so the Tribunal did not consider the relatively small inconsistency as to date to be material. The Tribunal had sight of a text sent by Ms Scott to the Claimant on 16 July 2016 in which she told the Claimant that she was going to report everything to Mr Hall. Therefore, on the balance of probabilities the Tribunal found that the conversation between the

Claimant and Mr Hall occurred in July, and that Mr Hall had simply misremembered the date.

23. We found that Ms Scott and Mr Fox had at least one conversation about the texts during June and July. Our reason for this finding was that their evidence was consistent. Although Ms Scott did not name Mr Fox, it appeared very likely that she and Mr Fox were referring to the same conversation. It was also credible that Ms Scott would speak to a senior colleague about this matter and ask him to intervene on her behalf.

24. We found that there was at least one conversation between the Claimant and Mr Fox about the texts in June or July. We preferred Mr Fox's account, that he told the Claimant to, in effect, stop bothering Ms Scott. We did not find the Claimant's account that Mr Fox told him that Ms Scott might, in effect, wish to entrap him, to be credible. We noted that this allegation was not put to Mr Fox. We also found it difficult to follow the logic of why Ms Scott would want to entrap the Claimant, as there was no suggestion of any identifiable benefit to her in doing so.

25. We now turn to the events leading up to the dismissal. In late October Mr Fox and Mr Hall noticed that a sign had been placed on the door to the office where Ms Scott, and others, worked. (There was no dispute that the sign had gone up at this time.) The sign asked people to knock before entering. Both Ms Scott and the Claimant agreed that on or around 20 October there was a confrontation between them in the office; both were rude to the other. The Tribunal found that Ms Scott, possibly with her colleagues, had put up the sign as a result of her confrontation with the Claimant in the office.

26. Ms Scott's account was that she then told Mr Hall and Mr Fox that the Claimant was continuing to text and bother her, which is what had led to their confrontation in the office. Mr Hall did not recall this conversation; he said he knew nothing about the situation between the Claimant and Ms Scott until later. Mr Fox in contrast said that he had spoken to Mr Hall about the matter several times in October. On the balance of probabilities, we found that Mr Fox had not mentioned the matter to Mr Hall, or at least not in a way that had lodged in Mr Hall's mind. The reason for this is that Mr Hall chose to extend the Claimant's contract shortly afterwards.

27. Mr Welling's fixed term contract was due to expire on 31 October. Both he and Mr Fox agreed that they discussed extending the contract. They both agreed that Mr Fox told the Claimant that he was not to insult Ms Scott and - at the Claimant's prompting – would tell Ms Scott that she was not to insult the Claimant. However, Mr Fox's account was that he also told the Claimant to stop texting and bothering Ms Scott

again, and that he would terminate the Claimant's employment if he did not comply; the Claimant denied that Mr Fox said this.

28. We considered these accounts and made the following findings. We found that Mr Fox told the Claimant not to text and bother Ms Scott during this conversation, because this was consistent with his previous conduct and his approach of dealing with the matter informally. We also found Mr Fox credible because he readily agreed that that he had been prompted by the Claimant to speak to Ms Scott about shortcomings in her own conduct. However, we did not accept that Mr Fox warned the Claimant of dismissal because this was inconsistent with the Respondent's decision to extend the Claimant's contract at this time. We were of the view that this element was added in afterwards, in light of the later decision to dismiss.

29. It was Mr Hall's decision whether to extend the Claimant's contract. At this point, according Mr Hall's account, he had been told about the texts in June but understood that this was now resolved. As he had no issues about the Claimant's conduct or performance otherwise, he agreed to extend the Claimant's contract. This was duly extended to 31 January 2017 by a letter of 21 October 2016.

30. Shortly after the extension of his contract, the Claimant went on a week's annual leave returning on 1 November 2016. Mr Hall's account was that it was only when the Claimant was on leave that he learnt that Ms Scott was concerned that the Claimant was continuing to bother her. In contrast, Mr Fox said he had kept Mr Hall up do date with the issue at all times. Again, we prefer Mr Hall's account on the balance of probabilities for the same reasons as before; had Mr Hall known that the texting issue was ongoing, he would not have extended the Claimant's contract or not without further thought

31. We now turn to the day of dismissal, 1 November 2016, which was the Claimant's first day back from annual leave. According to the Claimant, Ms Scott's boyfriend approached the Claimant in an aggressive manner at work. It was not in dispute that the Claimant then texted Ms Scott at 9.23 that day, as follows:

> "so what happened there Charm (Ms Scott)? How on earth has that happened? Seems like you are getting me to lose my job or something? Have you to broke up or something? If this goes tits, I'm not losing my job, ill just him all the texts iv got from you!" (sic)

32. The Respondent's evidence as to what happened between 9.23am and the dismissal was confused and inconsistent. Mr Hall's account was that, as a result of this 9.23 text, he investigated that day by speaking to Ms Scott and Mr Fox. At this point he had not

seen the texts sent to Ms Scott by the Claimant, but he was informed that a number of them were highly abusive including one where the Claimant called Ms Scott a, "fucking ugly bent tooth pikey". (This text was sent on 13 August by the Claimant to Ms Scott.)

33. Mr Hall's account that was he discovered, contrary to what he had previous been led to believe by Mr Fox and Ms Scott, that the texting issue was far from resolved and was still a live problem. He was displeased that he had not been kept informed, particularly in in light of his recent decision to extend the Claimant's contract. As the Claimant had been repeatedly and recently instructed not to text Ms Scott, and yet had done so that morning, Mr Hall took the decision to dismiss the Claimant in the late morning or early afternoon. However, there was some modification to this plan because the Claimant's van happened to break down en route that day.

34. Mr Fox's account of 1 November was somewhat different. He stated, under questioning, that the 9.23am text led to him and Mr Hall together deciding to give the Claimant a final written warning. The Claimant then sent a second text to Ms Scott. However, before the Tribunal he resiled from this (although the witness statement in which it was contained had been made about two months after this dismissal). Then the Claimant had sent one or more texts to Mr Chalmers, Ms Scott's boyfriend. The decision then changed to dismissal.

35. Ms Scott stated in her witness statement and in oral evidence that the Claimant texted her boyfriend that day to say that she wanted them to fight and for them both to lose their jobs. Mr Hall never made mention of any texts to Mr Chalmers.

36. The Claimant's account was that he had not sent any texts to Mr Chalmers on 1 November and there were no such texts in the bundle.

37. The Claimant did not deny sending any texts to Mr Chalmers on 1 November in either his supplementary statement or in oral evidence. However, this allegation was not put to him in cross-examination. The texts to Mr Chalmers were, on the account of one of the respondent's witnesses, the operating catalyst for the decision to dismiss. However, the other witness, Mr Hall, did not mention them. If texts to Mr Chalmers were formed part of the reason for dismissal, it would be expected that the existence of the texts would be put to the Claimant. Accordingly, the Tribunal did not take these alleged texts to Mr Chalmers into account when deciding on the respondent's reason for dismissal. The Tribunal was bolstered in this finding by the fact that these alleged texts to Mr Chalmers were mentioned at all in the letter of dismissal, which concentrated on harassment of female members of staff. Further, no such texts were

in the bundle as would have been expected had they existed and been material to the decision-making.

38. To sum up the respondent's case as to the reason for dismissal. Mr Hall said the catalyst was just the 9.23 text, whereas Mr Fox said what changed the formal written warning into a dismissal was the texts to Mr Chalmers.

39. Mr Hall also said that prior to dismissal, Ms Scott told him that the Claimant had been physically harassing her as well. Ms Scott said that this in fact had only come out after the dismissal. As Ms Scott's evidence was more detailed and clearer, the Tribunal accepted her evidence on this point and found that Mr Hall had no knowledge of any allegations of physical harassment at the time of dismissal. Mr Hall had become confused as to what he knew before and after the decision to dismiss.

40. The Tribunal found that the decision to dismiss was made hurriedly and with little care on 1 November by Mr Hall and Mr Fox and this is why their accounts differ. On the balance of probabilities the Tribunal found that Mr Hall found out from Mr Fox about the Claimant's sending Ms Scott's texts, the rude and abusive nature of some of the texts, the fact that Mr Fox had tried and failed to resolve the situation and that Mr Chalmers had now in some way become involved. The decision was made in the middle of the day to dismiss the Claimant and the Tribunal found that it was unlikely that a final written warning was proposed as the respondent showed little sign of considering the use of its disciplinary policy.

41. Mr Fox then went to see the Claimant, whose van had broken down out on the road. He dismissed the Claimant on the spot and did not let him return to the Respondent's premises. In effect, he left the Claimant at a garage on the side of the road.

42. The Claimant then rang up the Respondent. We found that the Claimant was very angry during this call. There was evidence before the Tribunal in the form of earlier angry texts from the Claimant, that the Claimant could lose his temper. It was very plausible that the Claimant would lose him temper over being dismissed, especially in they way it was carried out.

43. The Respondent did not provide a letter of dismissal until requested and did not offer the Claimant an appeal, contrary to its dismissal procedure. The dismissal letter dated 3 November 2016 stated that :

> "You asked a female member of staff out on a date which she said no to… over a period of some months you continued to send texts to this lady … on several occasions even though she said that she was not interested… Your actions also

included approaching her when she was leaving work which caused a lot of distress….your actions have been intimidating and frightening to this lady and this amounts to harassment which cannot be tolerated. You were warned on several occasions by your line manger to stop contacting the lady … or you would be dismissed but immediately upon return from a holiday the texts started again which is why you were dismissed."

Applicable Law

44. The applicable law is found at Section 13 of the Equality Act 2010 as follows,

> (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> …
>
> (8)This section is subject to sections 17(6) and 18(7).

45. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee by, amongst other things, subjecting them to a detriment.

46. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Submissions

47. Both parties made oral submission.

Applying the Facts to the Law

48. The first issue for the Tribunal was whether the acts relied upon as discriminatory actually occurred. There was no dispute that the Claimant was dismissed. The Tribunal considered whether there had been a failure to investigate the complaints against the Claimant properly, or at all. The Tribunal found that there was an investigation, but it was manifestly inadequate for the following reasons. It was against natural justice and good industrial relations to dismiss an employee without giving them a chance to put their side of the case and, in the case of Mr Hall, looking at the evidence on which

decision was based, that is the texts. This was a particularly egregious example because, as is often the case with harassment, the facts were disputed.

49. Accordingly, the next issue for the Tribunal was whether this treatment was because of the Claimant's sex.

50. If the act is not inherently discriminatory, (as per James v Eastleigh Borough Council [1990] IRLR 572) the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator(s) acted as they did. Although their motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

51. The Tribunal directed itself in line with the guidance of the Court of Appeal in Igen Ltd v Wong and Others CA [2005] IRLR 258. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

52. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

53. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal

could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

54. If the Claimant does not prove such facts, his claim will fail.

55. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed.

56. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, among other things, that:

> "No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'

57. Turning to the facts of this case, the Claimant firstly put his case on the basis of there being an actual comparator - Ms Scott. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different.

58. The Tribunal considered if Ms Scott was an appropriate actual comparator. The Tribunal accordingly considered the position of Mr Fox and Mr Hall in respect of the Claimant and Ms Scott; they had dismissed the Claimant – it was not in dispute – as a

result of Ms Scott's complaints against him. How had they reacted to any comparable complaints by the Claimant against Ms Scott? The Claimant's case as to his complaining to them about Ms Scott was inconsistent. In his written statement he said he had complained several times to Mr Fox but in his oral evidence he said had complained only once, in June. The Tribunal considered how much Mr Fox and Mr Hall knew about the Claimant's allegations against Ms Scott.

59. Taking the Claimant's case at its highest, he had told Mr Fox that Ms Scott had (according to paragraph 14 of his main statement) been texting him and invited him out for a drink. On this basis, we did not find that Ms Scott was a valid comparator as the facts were different. Ms Scott had mentioned going out for a drink with the Claimant, whereas the Claimant had sent Ms Scott a number of abusive and foul-mouthed texts to which Ms Scott had objected, over a considerable period. Although Mr Hall had not, when he took the decision seen these texts, his oral evidence showed that he was aware of the abusive nature of the texts.

60. Accordingly, based on the information available to Mr Fox and Mr Hall when they made the allegedly discriminatory decisions, we did find that the circumstances of Ms Scott and the Claimant were materially different.

61. However, as stated by Elias P (as he then was) in London Borough of Islington v Ladele [2009] IRLR 154, there are rarely actual comparators whose circumstances are the same or not materially different.

62. The Claimant's case was that if Ms Scott was not an actual comparator, he relied in the alternative on a hypothetical comparator. The Tribunal noted that in constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators; see, Ahsan v Watt [2007] UKHL 51.

63. The Tribunal was mindful of the judgement of the Employment Appeal Tribunal in D'Silva v NATFHE (now known as University and College Union) and others UKEAT/0384/07) and others UKEAT/0384/07), that:

> "It might reasonably have been hoped that the Frankensteinian figure of the badly-constructed hypothetical comparator would have been clumping his way rather less often into discrimination appeals since the observations of Lord Nicholls in Shamoon

…(see in particular paragraph 11 at p.289) and the decision of this tribunal, chaired by Elias J, in Law Society v Bahl [2003] IRLR 640 paragraphs 103–115… We regard it as clear…, that the tribunal made an express finding that the only reason why the (respondent) acted in the way complained of …was (a non discriminatory reason). Those findings necessarily exclude the possibility that the acts complained of were done, even in part, on (protected characteristic) grounds."

64. The House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, stated that it may be more appropriate to simply ask: did the claimant, because of the protected characteristic, receive less favourable treatment than others? Therefore, this issue might be approached by asking a simple question - What was the reason in the alleged discriminator(s)' mind(s) when making decision not to invest properly or omitting to invest properly and dismissing?

65. In this case we were of the view that considering how the respondent would have treated a hypothetical comparator would be of assistance in analysing the reason why the respondent acted as it did. Such a comparator would be a relatively new female employee on a recently extended fixed term contract who had been accused, over a period, of harassment by an established employee. Would be the Respondent have investigated so poorly and dismissed so easily?

66. The relevant enquiry is into the thought processes of the relevant decision-maker(s). It if was a joint decision, then it is the thought processes of the joint decision makers which is relevant.

67. The Tribunal reminded itself that the question before it is not one of reasonableness. In the words of Underhill P (as he then was) in RBS v Morris UKEAT/0436/10 (para 36)

> "It is trite law that the fact that a person may have acted unreasonably is not, without more, evidence that he or she was acting on a proscribed ground. In the present case the facts that the Claimant's complaints – even to the extent (which is limited) that they were complaints of racial discrimination – were incompetently investigated and that unreasonable conclusions were reached is irrelevant except to the extent that the managers responsible for those failures were significantly influenced by the fact that he was black. It is easy for tribunals to slip into thinking that the incompetent or inadequate investigation of a claim of discrimination is itself an act of discrimination; but that does not follow (cf**.** Prison Service v Johnson [2007] IRLR 951, at paras. 63-64, 69 and 121 (pp. 962-3, 964-5 and 973) and Wilcox v Birmingham CAB Services Ltd (UKEAT/0182/10), at para. 52)."

68. In this case, the Tribunal was not concerned with a failure to properly investigate a complaint of discrimination (or, more properly, harassment) brought by the alleged victim, but a complaint brought by, in effect, the alleged perpetrator.

69. The Tribunal found that, on the balance of probabilities, the respondent would have treated a recent female employee whose contract had just been extended and whom a well-established employee, had accused of harassment, would not have been treated differently by Mr Hall and Mr Fox. The Tribunal's reasons are as follows.

70. It was difficult for the Tribunal to disentangle what Mr Hall and Mr Fox knew or believed at the time when they made the allegedly discriminatory decisions and what they believed and knew at the time of the hearing. In the view of the Tribunal both witnesses had become confused as to this.

71. We were mindful of the difficulties with the Respondent's case in that the two alleged discriminators gave different accounts as to how they came to their decisions. We found that Mr Hall and Mr Fox made a joint decision to dismiss, albeit with input from Mr Fox. We found Mr Hall to be a credible witness when he said that he was unhappy when he discovered on 1 November that had been kept out of the loop in his own (small) company, which had resulted in his extending the Claimant's contract of employment, shortly before. We found his expression of annoyance on this very plausible. We were bolstered in this finding by the fact that Mr Fox had only relatively recently been made a manager. Further, this was a very small company and it was very plausible that Mr Hall would not delegate the dismissal of a member of staff to a subordinate. Further, it was not in dispute that it was Mr Hall who made the decision to extend the Claimant's contract, which indicated that he normally took responsibility for staffing decisions.

72. We considered what was in the mind of Mr Hall on 1 November when he did not investigate the allegations against the Claimant adequately and dismissed him summarily. We accepted his evidence that he did not have sight of the texts when he made the decisions, as there did not appear to be any reason for him to seek to mislead about this. We also accepted his evidence that he was told of at least some of the more vivid and memorable texts, such as the "pikey" text, which he mentioned in oral evidence when questioned. It was not in dispute that Mr Hall was aware of the notice on the office door instructing people to knock before entering so he had reason to believe that the situation between the Claimant and Ms Scott was having – for whatever reason - repercussions in the workplace.

73. We found that, faced with what was, in effect, a dispute between Ms Scott and the Claimant that was disrupting his business, Mr Hall chose to dismiss the Claimant. This

was the easy option. The Claimant, although there was no criticism of his performance, did not have Ms Scott's length of service; he had not had time to establish, unlike Ms Scott, the degree of trust, which an employee, especially in a small business, accrues over time. Ms Scott was a known quantity. Further, he did not have statutory employment protection as he had been employed for well under 2 years. The Claimant was relatively new in the business, and he was disrupting the business. He could, to put no finer point on it, be let go relatively easily.

74. The Claimant was a driver. The respondent gave unchallenged evidence that it treated drivers as short-term staff who were hired and fired on a somewhat casual basis. Mr Fox's account was that he had dismissed the Claimant's predecessor driver on the spot after that employee had been found increasingly troublesome. Mr Fox told this driver that he was dismissed, and the driver walked out. There was no suggestion that it occurred to Mr Fox to reach for the respondent's disciplinary procedure or carry out any investigation, or that Mr Hall was troubled by this approach. Notably, Mr Hall's evidence was that could not remember when they last dismissed someone, although it cannot have been long before taking on the Claimant. There was no suggestion that the dismissal of the Claimant's predecessor had anything to do with discrimination or attitudes to men; it was a performance and conduct issue. To sum up, the Claimant was easy to dismiss, so the Respondent did so without thinking too much about it, as was their habit in such situations.

75. The Tribunal reminded itself of the Equality and Human Rights Commission Code, the status of which is set out at paragraph 1.13 as follows

> The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

76 According to the Code at paragraph 3.15:

> Direct discrimination also includes less favourable treatment of a person based on a stereotype relating to a protected characteristic, whether or not the stereotype is accurate.

77. However, it was not the Claimant's case that the Respondent's treatment of him was influenced by a discriminatory stereotype of men being more likely to indulge in sexual harassment than women. No such argument was put before us in evidence or

submissions and the Tribunal found this telling. However, for the sake of completeness, the Tribunal would find that the Respondent's actions were not based on a stereotype. The Respondent had provided considerable evidence that the Claimant was causing Ms Scott - a valued and established employee – distress, it had evidence that he had sent her very abusive texts, he was – from their point of view - disrupting their business, he was - in their view – failing to follow direct instructions to desist. This was the reason why the respondent dismissed the Claimant, rather than a stereotype view of men.

78. The Tribunal has found that there was a non-discriminatory reason for the respondent's actions. The Claimant has not proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that he was the victim of unlawful discrimination. Accordingly, the claim of direct race discrimination must fail.

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Employment Judge Nash
Date: 22 April 2018