Appeal No. UKEAT/0074/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS,7 ROLLS BUILDING, FETTER LANE, EC41 1NL

At the Tribunal
On 6 June 2019

Before

HEATHER WILLIAMS QC (DEPUTY JUDGE OF THE HIGH COURT)

(SITTING ALONE)

MR S RAJ — APPELLANT

1) CAPITA BUSINESS SERVICES LIMITED
2) MS G WARD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBIN ROBISON (Representative) Free Representation Unit 5th Floor Kingsbourne House 229-231 High Holborn London WC1V 7DA
For the Respondents	MR DAVID MAXWELL (of Counsel) Instructed by: Irwin Mitchell LLP Solicitors 2 Wellington Place Leeds LS1 4BZ

SUMMARY

HARASSMENT - Burden of proof

The Employment Tribunal found the Claimant had been subjected to unwanted physical contact by his team leader (the Second Respondent), namely massaging his shoulders on two or three occasions in the open plan office where he worked; and this had the effect specified in section 26(1)(b)(ii) of the Equality Act 2010. However, the Employment Tribunal dismissed the harassment claim on the basis that the conduct was not related to the Claimant's sex.

The Employment Tribunal's Reasons made no express references to the shifting burden of proof provisions contained in section 136 of the Equality Act 2010.

However, on careful analysis, the Employment Tribunal had asked the correct "Stage One" question, namely whether there were facts from which the Tribunal could conclude that the unwanted conduct related to the Claimant's sex; and had lawfully determined that there were not. A *prima facie* case was not established simply by the Claimant satisfying the other ingredients of the cause of action; or from the Tribunal's rejection of part of the Second Respondent's account. **Birmingham City Council v Millwood** [2012] UKEAT/0564/11/DM did not lay down a rule of law that the burden of proof would always shift where a Tribunal rejected aspects of a Respondent's evidence as to what occurred.

In any event, the Tribunal found the Respondents had proved the reason for the unwanted contact was misguided encouragement on the part of the Second Respondent and thus had been satisfied they had shown the conduct in question was unrelated to the Claimant's sex.

Accordingly, the Employment Tribunal had not erred in law and the appeal was dismissed.

HEATHER WILLIAMS QC (DEPUTY JUDGE OF THE HIGH COURT).

1. This is an appeal by Mr Raj who was the Claimant below. Capita Business Services Ltd and Ms G Ward, the Respondents to this appeal, were, respectively the First and Second Respondents to the claim. For clarity, I will continue to refer to the parties as they were known below.

2. The appeal is from the decision of the Leeds Employment Tribunal comprising Employment Judge Jennifer Wade and members Miss V M Griggs and Mr G Corbett ("the ET"). Written Reasons were sent to the parties on 14 June 2018. The ET dismissed the Claimant's complaint of harassment related to sex. By an Order sealed on 14 March 2019 following the Rule 3(10) Hearing, Her Honour Judge Eady QC directed that this appeal proceed to a Full Hearing on a single, amended ground of appeal, as follows:

> **"The Employment Tribunal erred in law in this case in failing, in relation to the Appellant's claim of harassment on the grounds of sex, to apply the shifting burden of proof provisions to the determination of whether unlawful harassment relating to sex occurred."**

The Respondents contest the appeal.

3. There is an agreed bundle of documents and skeleton arguments from the parties. At the hearing before me, the Claimant was represented by Mr Robison, a Free Representation Unit volunteer and the Respondents by Mr Maxwell of Counsel, both of whom made very clear and helpful submissions.

The ET's Decision

4. By a claim form presented to the Leeds Employment Tribunal on 1 November 2017, the Claimant brought proceedings arising from his employment with the First Respondent. The Second Respondent to the proceedings was his team leader. By the time of the Full Merits

Hearing before the ET, the allegations pursued by the Claimant were as follows: disability discrimination in relation to a failure to make reasonable adjustments; breach of contract in requiring him to work evening hours, when he was contractually bound to work from 9.00am to 5.30pm; racial harassment and/or racial discrimination in relation to a racist remark; and sexual harassment and/or harassment related to sex in relation to the actions of his team leader, the Second Respondent. This appeal is only concerned with the latter of those claims.

5. The ET found the Claimant was not disabled; that the alleged racist remark was not made; and it upheld the breach of contract claim. I will return to the findings made in relation to the harassment allegation after outlining the claim in a little more detail.

6. The Claimant was employed from Autumn 2016 by the First Respondent as a Customer Service agent at its Harlington premises, providing support services on behalf of the National Health Service. At the relevant time, he worked on the ophthalmic team processing ophthalmic forms. From 8 May 2017, the Second Respondent was his team leader. His employment was terminated on 8 August 2017 under the probation process, following a number of meetings at which his performance was considered.

7. The Claimant alleged that on several occasions when he was sitting at his desk, the Second Respondent had stood behind him and given him a massage, feeling his shoulders, neck and back. He said that this was unwanted conduct either of a sexual nature or unwanted conduct relating to his sex, both within the meaning of section 26 of the **Equality Act 2010**. The allegation was denied by the Respondents. The ET's consideration of this part of the claim appears at paragraphs 66 - 103 of their Written Reasons.

8. After describing the allegation and the Respondents' defence, which was that Ms Ward had done no more than tap the Claimant's shoulders on one occasion, the ET considered whether the Claimant had proved that the physical conduct he alleged had taken place: see paragraphs 69 - 92 of the Written Reasons. In this regard, at paragraph 92, the ET concluded:

> **"92. We consider the claimant has proven physical contact, a brief massage type contact, unlikely in that open plan office to have listed for two or three minutes, but long enough to make the claimant uncomfortable, and to seek advice from Ms U and to tell Ms Ward to stop on the next occasion."**

9. The ET had already indicated (in paragraph 88) they concluded there was conduct of this nature on at least two, possibly three, occasions. In finding that the Claimant had proved this physical contact, the ET indicated they relied on the fact that a number of the Claimant's colleagues had provided accounts (either to the Tribunal or to the First Respondent's earlier investigation) confirming they saw something akin to the conduct described by the Claimant: see in particular the ET's reference to the accounts of Ms U (paragraph 80); Mr Y and Ms I (paragraphs 82 to 83); and the account of Ms Gooden-Payton (paragraphs 84 to 85).

10. In so finding, the ET make clear that they rejected Second Respondent's description of simply tapping the Claimant's shoulders on one occasion, noting it was "Inconsistent with the weight of the other evidence, and inherently unlikely in her elaboration of it," (paragraph 89).

11. Relying on the supporting witness evidence of Ms U (paragraph 80) and Ms Gooden-Payton (paragraph 85), the ET concluded that the massages were long enough to make the Claimant feel uncomfortable, see paragraph 92. The ET then went on to say, in the last sentence of paragraph 92, "It is also the balance of the evidence that Ms Ward's purpose in the contact was encouragement." I return to the significance or otherwise of that finding when I come to discuss the submissions and my conclusions.

12. Before leaving this part of the Written Reasons, I note that in paragraph 90, the ET observed in relation to the various witnesses: "We consider no recollections are likely to be wholly reliable".

13. The next section of the Written Reasons, comprising paragraphs 93 - 103 was headed, "Applying the Law to the Facts". Firstly, the ET set out section 26 of the **Equality Act**. They did not set out or refer explicitly to section 136 of the **Equality Act**, the shifting burden of proof provisions which are the subject of this appeal.

14. In paragraph 94, the ET addressed and rejected the allegation that the unwanted massaging of the Claimant's shoulder areas was "Conduct of a sexual nature" within the meaning of section 26(2)(a). Mr Robison accepts that the ground on which this appeal was permitted to proceed does not include a challenge to this finding. The Tribunal said:

> **"…We consider that the context and behaviour we have found (open plan office, said in a jokey way, accompanied by "well done" or praise" and so on) are not consistent with sexual behaviour, and we reject this characterisation of the conduct. We consider it inconceivable that if this had been reported as "sexual" conduct to Mr M at the time, the latter would have been clear and said so in his statement. We have rejected the elaboration of the conduct as running hands up and down the Claimant's back, which could be sexual conduct on any view, but consider the contact was limited in the way we describe it. For these Reasons, on the balance of the evidence, we have concluded that two or three occasions of massage type contact with the Claimant's shoulders was not conduct of a sexual nature such as to satisfy 26 (2) (a)."**

15. The reference to Mr M was a reference to the Claimant's union representative at the time. The Tribunal had already described the nature of the open plan office and the desk arrangement at which the Claimant worked in relatively close proximity to other colleagues, at paragraphs 67 - 68 of the Written Reasons.

16. The ET then turned to address the second way that the Claimant put his case on harassment, namely that the unwanted conduct was related to his gender. In paragraph 95 the

ET said, "We are also clear that Ms Ward's purpose was one of those prohibited by section 26 (1)(b)(i) or (ii)". After we considered the matter during the hearing, both representatives agreed with my suggestion that the only way to make sense of this sentence in the context of the rest of the Tribunal's Written Reasons is to read it as involving a typographical error, namely a missing negative. If the ET intended to indicate that they had found the Second Respondent's purpose to be one of those giving rise to liability under section 26(1)(b), as opposed to saying that they had *not* so found that, they would inevitably have gone on to identify which of the prohibited purposes they had found. Further, it would have been unnecessary for the ET to then proceed to consider the *effect* of the unwanted conduct on the Claimant, because that is an alternative route to liability under the statutory provision. There is no other passage in the Written Reasons that suggests the ET concluded that the Second Respondent acted with one or more of the purposes set out in section 26(1)(b); and such a proposition would stand in contradiction to the finding in the last sentence of paragraph 92, which I have already referred to and the finding in paragraph 102, which I will come onto.

17. At paragraph 96, the ET reiterated the finding that the conduct was unwanted and indicated they rejected the Second Respondent's evidence that the Claimant had encouraged her in that behaviour. At paragraph 97, the Tribunal said, in deciding whether the conduct had the effect of creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant, they had taken into account the matters specified in section 26(4), including the Claimant's discomfort at the time. The ET concluded they were satisfied that the conduct did have that effect.

18. It is then necessary to set out in some detail the paragraphs that follow because they lie at the heart of this appeal. At paragraph 98, the ET said:

> **"In order to succeed with this complaint however, there have to be facts from which the Tribunal could conclude that the unwanted conduct related to the Claimant's gender. The evidence base for that is limited. The context includes the whole chronology of attendance and latterly performance difficulties, the raising of the back issue, the need to encourage performance, and indeed baseless allegations of race discrimination, indicative of a Claimant who would see things that are not there."**

At paragraph 100, the Tribunal observed that there was no evidence of the Second Respondent behaving in a similar way to anyone else, male or female, and indicated they considered this was isolated conduct towards the Claimant.

19. In paragraph 101, the Tribunal noted that the Second Respondent had not suggested in her evidence that her conduct was related to the Claimant's reported back pain (a condition which had been considered in relation to the rejected disability claim).

20. The ET then said at paragraph 102:

> **"We have found the purpose of the conduct was misguided encouragement; the context is a standing manager over a sitting team member; the contact was with a "gender neutral" part of the body in an open plan office.**

And at paragraph 103:

> **"Some physical contact at work is obviously harassment; other contact is more subtly so; and some is very difficult to assess. This case falls into the latter category, which is why our deliberations have taken us longer than they might otherwise have done. On balance, the evidence from which to conclude the conduct related to gender does not take us to that conclusion in these circumstances. For that reason, unwise and uncomfortable as the conduct was, the complaint fails."**

The Law

21. Section 26 of the **Equality Act 2010**, provides (as relevant):

> **"(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **"(2) A also harasses B if—**
>
> **(a) A engages in unwanted conduct of a sexual nature, and**

(b)the conduct has the purpose or effect referred to in subsection (1)(b)."

…

"(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

Subsection five indicates that one of the relevant protected characteristics for the purposes of this section is sex.

22. Section 136 of the **Equality Act** provides (as relevant):

"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."

23. In **Igen v Wong** [2005] ICR 931 (which was concerned with the earlier burden of proof provision in section 63A of the **Sex Discrimination Act 1975)**, the Court of Appeal explained the two stage process involved in the application of the burden of proof provision. Peter Gibson LJ, giving the judgment of the Court explained it as follows at paragraph 17:

"The statutory amendments clearly require the employment tribunal to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."

24. In **Igen**, the court considered and approved, with minor revisions, the guidance earlier provided by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] ICR 1205. The guidance, as revised, was set out in an annex to the

Court of Appeal's judgment in 13 paragraphs. I need not set it out because it is very well known, but see in particular, paragraphs 1 – 6 and 9 – 13.

25. The Court of Appeal has confirmed in **Ayodele v Citylink Ltd & Anor** [2017] EWCA Civ 1913 that the guidance is equally applicable to section 136 of the **Equality Act 2010** and that such changes to the statutory wording as have been made do not materially affect the content of that guidance.

26. In **Madarassy v Nomura International** [2007] ICR 867, the Court of Appeal provided further assistance on the working of the shifting burden of proof provision. Mummery LJ gave the leading judgment with which other members of the Court agreed. Having indicated that the **Igen** guidance was sound and did not require amendment (paragraphs 5 and 12), Mummery LJ stressed that if a Tribunal omitted to refer to the **Igen** guidance, this was not, of itself, an error of law. He said at paragraph 10:

> **"Omitting to refer to guidance or to apply it may increase the risk of errors of law in a decision, but such an omission is not in itself an error of law on which to find a successful appeal."**

27. Mummery LJ had already stressed that the judicial guidance was not a substitute for the application of the statutory wording (paragraph 9).

28. Because these passages have featured in the submissions to me, it is necessary to refer to paragraphs 54 - 56 of the judgment. Therein, Mummery LJ addressed a submission made by the Claimant that the burden of proof shifted to the Respondent, "Simply on [the Claimant] establishing the facts of a difference in status and a difference in the treatment of her" (paragraph 54).

29. Mummery LJ rejected the submission, observing that it was not supported by the guidance provided in **Igen.** He continued in paragraph 56:

> **"The court in Igen v Wong [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. 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."**

Mummery LJ then addressed the evidence that a Tribunal should consider at the first stage. He said (paragraph 57):

> **"Could … conclude" in section 63A(2) must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."**

He continued at paragraph 58:

> **"The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."**

30. Mummery LJ returned to the question of the evidence the Tribunal should take into account at the first stage of the process in paragraphs 66 - 72 of his judgment. He observed that in **Laing v Manchester City Council** [2006] ICR 1519, Elias J (President) (as he then was), had rightly rejected a submission that the only material the ET could consider at the first stage was evidence adduced by the Claimant together with any evidence from the Respondent that assisted the Tribunal in reaching the conclusion that a *prima facie* case had been made out (paragraph 69):

> **"The Employment Appeal Tribunal (Elias J (President) presiding) in *Laing* rightly rejected the complainant's submission. It accepted the respondent's submission that, at the first stage, the tribunal should have regard to all the evidence, whether it was given on behalf of the complainant or on behalf of the respondent, in order to see what inferences "could" properly be drawn from the evidence. The treatment (or mistreatment) of others by the alleged discriminator was plainly a highly material fact. All the evidence has to be considered in deciding whether "a *prima facie* case exists sufficient to require an explanation": para 59. The only factor which section 63A(2) stipulates shall not form part of the material from which inferences may be drawn at the first stage is "the absence of an adequate explanation" from the respondent."**

31. Mummery LJ continued in paragraphs 71 as follows:

> **"Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy."**

And at paragraph 72:

> **"Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground."**

32. Mummery LJ also indicated that, in certain circumstances, a Tribunal could go straight to the second stage of the enquiry. He referred to the "valuable discussion of cases in which it might be sensible for a Tribunal to go straight to the second stage" by Elias J in **Laing** (paragraph 81). Mummery LJ concluded his observation on this point by saying:

> **"While it would often be desirable for a tribunal to go through the two stages suggested in *Igen Ltd v Wong* [2005] ICR 931, it would not necessarily be an error of law to fail to do so acting on the assumption that the burden may have shifted to the respondent and then considering the explanation put forward by the respondent."**

33. As regards the distinction between the aspects of Respondent's evidence which the Tribunal may consider at the first stage; and the Respondent's explanation for the treatment in question, which only arises at the second stage if the burden of proof shifts, the discussion by Elias J in his judgment in **Laing** is also illuminating.

34. In paragraphs 61 - 62, Elias J discussed the following scenario:

> **"To take an example discussed in the course of argument. Assume that an employer withholds pay from a group of workers, one of whom is black, for working to rule but they do not do this to similarly placed workers not working to rule. On [Counsel for the Claimant's] analysis the black worker could allege that he had money withheld because he was black, and no doubt he could point to white colleagues (not working to Rule) who were being treated differently. Taking his evidence in isolation, the tribunal would have to conclude that he had been treated differently and to his detriment in circumstances which could point to race. Accordingly, at that stage- unless he accepted in cross examination that other white workers had been similarly treated- the onus would switch to the employer.**
>
> **"The case could of course be rebutted by the employer adducing in evidence the fact that many white workers had been treated the same way. But that evidence could not, in our view, properly be described as an explanation for the treatment. Rather it is merely factual evidence presenting a fuller picture of the material facts and putting the facts adduced by the employee in context, and thereby demonstrating that there is nothing about the circumstances to justify an inference of race discrimination, whatever the reason for withholding the money may be. The explanation for the treatment, if that were to become material, would be that the money was withheld because the worker was working to rule."**

35. Mr Robison, on behalf of the Claimant, places reliance upon the Employment Appeal Tribunal's analysis in **Birmingham City Council & Anor v Millwood** [2012] UKEAT/0564/11/DM (Langstaff J, President), where the something "more" Mummery LJ referred to in paragraph 56 in **Madarassy** was discussed further. The EAT held that the something "more" could arise from the Tribunal's rejection of aspects of the Respondent's account or from a finding that an earlier, untrue account had been given. In that case the Claimant, who was black, complained that she had been treated disadvantageously in comparison with an Asian employee who was in similar circumstances. The Tribunal found that, without more, this would not satisfy stage one of the process. It was not entirely clear to the EAT what the "more" was that the Tribunal had relied on in finding that the first stage had been satisfied, shifting the burden of proof. The EAT allowed the appeal and remitted the case to the same Tribunal to make further findings, giving some guidance as to what could be capable of constituting the something "more" in the circumstances.

36. Mr Robison relies on what was said by the EAT in paragraphs 25 and 26:

> **"….We have to ask whether the Tribunal by asking for "something more" identified that which Mr Swanson submits they did: that there had here been a number of rejected explanations put forward for consideration. We approach this question by remembering that the purpose of the provisions is to identify a proper claim of discrimination, recognising that it is highly unlikely in the real world that there will be any clear evidence that that has occurred. The inference will have to be drawn if a claim for discrimination is to succeed at all. Though a difference in race and a difference in treatment to the disadvantage of the complainant is insufficient and something more is required, Mr Beever was prepared to accept that where as part of the history that the Tribunal was examining an employer had at the time of the alleged discriminatory treatment given an explanation for it which a Tribunal was later to conclude was a lie, that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof. We agree.**
>
> **"What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof."**

I return to this passage when I address the submissions that have been made.

37. In **Martin v Devonshires Solicitors** [2011] ICR 352, the EAT upheld the Tribunal's dismissal of the Claimant's case of victimisation on the basis that the treatment she complained of was not the protected act that she identified. One of the grounds of appeal concerned the Tribunal's lack of explicit reference to the burden of proof provisions or the related appellate case law.

38. Underhill J (President) (as he then was), addressed that submission as follows, at paragraph 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 …. 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."**

39. In the present appeal, both representatives have sought to derive some support from that passage. In addition, my attention was drawn to the words of Lord Hope of Craighead in **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054 at paragraph 32,

wherein he referred to the observations made by Underhill J in paragraph 39 of **Martin**, saying that it was important not to make too much of the role of the burden of proof provisions. He added:

> **"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."**

Again, both representatives seek to derive support from that passage, Mr Robison, from the first sentence I have quoted; and Mr Maxwell from the second sentence.

The Parties' Submissions

40. The Claimant's submissions can be summarised as follows:

41. Firstly, the ET made no express reference to section 136 or the related case law concerning the burden of proof provisions and did not structure their reasoning and findings in a way that was consistent with the operation of that provision.

42. Secondly, the ET rejected the Second Respondent's explanation that she had simply tapped the Claimant on the shoulder and rejected her account that he had encouraged her to do so, finding specifically that he had told the Second Respondent to stop (see paragraphs 88 – 89). These findings went to the Second Respondent's credibility and, coupled with the Tribunal's conclusion that the massaging had taken place; that it was was unwanted by the Claimant; and that it had caused him one or more of the prohibited effects specified in section 26(1)(b)(ii) was sufficient to conclude that the burden of proof had shifted to the Respondents to show the conduct was not related to sex, and the ET should have so found.

43. Thirdly, the ET did not approach matters on the basis that the burden of proof had shifted. This was shown by their approach in paragraph 102 and, in particular, paragraph 103,

which were expressed in a way which indicated they had wrongly regarded the burden of proof as remaining on the Claimant to show, on the balance of probabilities, that the conduct was related to his sex.

44. Fourthly, in consequence, the ET erred in law in concluding the Claimant had failed to make out the necessary ingredients and in dismissing his claim.

45. Fifthly, as the ET had rejected the Second Respondent's account of tapping the Claimant's shoulder and her account that he had encouraged her, the Tribunal erred in finding that the reason for the conduct was that it was done out of misguided encouragement.

46. Sixthly, as the ET had indicated that they had found the harassment claim particularly difficult to resolve (see paragraphs 2 and 103), this was the kind of case where there was room for doubt and where correct application of the burden of proof provisions was particularly important, as per the words of Lord Hope in **Hewage**.

47. The Respondents' submissions can be summarised as follows:

48. Firstly, the Tribunal did ask the right question and, quite properly, considered all of the evidence at what was, plainly, in paragraph 98, the first stage of the enquiry, namely seeing whether a *prima facie* case had been made out by the Claimant, albeit the ET did not label the exercise it was engaged in as such.

49. Secondly, having done so, the ET legitimately concluded that the Claimant had not shown facts from which it could decide, absent an adequate explanation, that there had been harassment related to the Claimant's sex.

50. Thirdly, and accordingly, the case never got to the stage where a burden of proof was placed on the Respondent to show that the massages were not related to the Claimant's sex.

51. Fourthly, the ET also proceeded on the alternative basis that, if the burden had shifted to the Respondent, they found, as a positive fact, that the conduct complained of was undertaken to give the Claimant misguided encouragement, rather than for any reason related to the Claimant's gender.

52. Fifthly, insofar as the ET did not refer in terms to section 136 or the related case law, this is not, in itself, an error of law, and a careful reading of the Written Reasons indicated that the ET did, in fact, undertake the tasks section 136 contemplates. Insofar as the ET focused on stage two, making a positive finding that the Respondent had shown the conduct was related to giving the Claimant misguided encouragement rather than to his gender, the authorities established it was not an error of law for a Tribunal to take that approach, assessing the case on an assumed basis that the burden of proof had shifted. There was no disadvantage to the Claimant from the ET taking that approach.

Discussion and Conclusions

53. As is clear from their Written Reasons, the ET accepted the Claimant had shown that the Second Respondent had engaged in unwanted conduct, namely the brief massaging on two or three occasions and that this had the effect of creating an intimidating, hostile, degrading,

humiliating, or offensive environment for him. The remaining issue was whether this conduct related to the Claimant's gender. It was in respect of this issue that section 136 of the **Equality Act** directed attention to whether the facts were such that, absent any other explanation for it, the ET could conclude that the massaging of the Claimant was related to his gender (stage one) and if so, had the Respondents shown that it was not, in fact, related to his gender (stage two). When considering whether the ET erred in law, it is important not to lose sight of the fact that this was the issue that the Tribunal had to resolve. (As I have already noted, there is no appeal against the ET's rejection of the claim brought under section 26(2) that it was conduct of a sexual nature.)

54. It is accepted that the ET did not specifically express their conclusion by reference to section 136 or the associated case law. Plainly it would have been clearer for the parties if they had done so and it would potentially have avoided this appeal. However, as my earlier citation from Mummery LJ's Judgment in **Madarassy** indicates, this is not, of itself, an error of law, if in fact, the Tribunal applied the effect of section 136 of the **Equality Act** correctly. In this instance, the opening words of paragraph 98 of the ET's Written Reasons: "In order to succeed with this complaint however, there have to be facts from which the Tribunal could conclude that the unwanted conduct related to the Claimant's gender," is a correct self-direction as to the test to be applied at stage one, as Mr Robison accepted when I raised this with him.

55. After posing the correct question at the start of paragraph 98, what did the ET then do? In my judgement, they proceeded to identify what they saw as the evidential difficulties with concluding that the threshold of showing a *prima facie* case that the treatment was related to the Claimant's sex had been reached, "The evidence base for that is limited," as they said in the same paragraph.

56. The ET identified a number of features which on the authorities I have cited from were all legitimate matters for the Tribunal to take into account at the first stage and which, on the face of it, pointed away from the proposition that the massaging related to the Claimant's gender. They referred to the context of performance issues on the part of the Claimant and the Second Respondent, as his team leader, perceiving the need to encourage his performance (see paragraph 98). They made several references to the incident occurring in an open plan office with colleagues nearby. The ET had already found that the contact was accompanied by the Second Respondent saying, "Well done," or giving praise (see paragraph 94). In paragraph 98, the ET specifically observed that the Claimant had seen things that were not there, in the sense that he had made what they described as "baseless allegation of race discrimination" (a shorthand reference to their earlier findings at paragraphs 50 – 65). The ET then emphasised that there was no evidence of physical contact by the Second Respondent with other colleagues, male or female, concluding, "This was isolated conduct towards the Claimant" (paragraph 100.

57. Set against those matters then, what is it that the Claimant relies on in saying that the burden of proof did shift and the ET should have so found? Mr Robison clarified in his submissions before me that he relied on only two matters. Firstly, the ET's earlier findings that the conduct was unwanted and had an effect prohibited by section 26(1)(b). Secondly, the ET's rejection of the Second Respondent's evidence that she only tapped the Claimant on the shoulder and that he encouraged her (paragraphs 88 - 89). Mr Robison submitted that on the EAT's analysis in **Millwood** this was sufficient to shift the burden of proof (see paragraph 36 above).

58. As regards the first of these two features, satisfaction of the other statutory criteria was the necessary precondition for a successful case, but it did not in and of itself, give rise to a

prima facie case that this unwanted conduct was related to the Claimant's gender. I am doubtful that establishing unwanted conduct that had a prohibited effect could ever of itself give rise to a prima facie case that the conduct was related to a protected characteristic and in any event, I am quite satisfied that it did not do so in these circumstances.

59. I then turn to what I will call as a shorthand, Mr Robison's **Millwood** point. Whether the evidence in any particular claim establishes a *prima facie* case that, absent an adequate explanation from the Respondent, the treatment in question was because of / related to a protected characteristic, will always be fact-sensitive and context-sensitive. In my judgement, in paragraphs 25 and 26 of **Millwood**, the EAT was not seeking to lay down a rigid rule of law that the Claimant will always satisfy the stage one test and shift the burden of proof if the Tribunal finds the Respondent has given untruthful or wrong evidence about an aspect of whether the conduct happened or why it happened.

60. The question must be whether in context, the rejection of the particular part of the Respondent's account could properly enable a Tribunal to infer that the protected characteristic was the reason for / related to the conduct complained of. Firstly, it is clear that Langstaff J's own analysis contained caveats ("that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof").

61. Secondly there is a distinction between the present instance and the kind of situation that was before the EAT in **Millwood** where the Claimant had shown there was less favourable treatment by the Respondent between herself and another employee in sufficiently similar circumstances who did not have her protected characteristic; it is not difficult to see why in that context if a Tribunal also finds that a Respondent has put forward an untrue account as to what

occurred or why it occurred, it is something taken with the evidence of less favourable treatment, that may well be sufficient to satisfy stage one and shift the burden of proof.

62. In a harassment case, the Claimant may choose to, but does not need to support the claim by relying on a comparison of less favourable treatment with another employee who does not share the relevant protected characteristic and there is nothing in the ET's reasoning that indicates the Claimant did put his case in that way. As I have already noted, the Tribunal made a specific finding that this was an isolated incident and that the Second Respondent had not behaved in a comparable way to any other employees, male or female. Accordingly, in my judgement, despite Mr Robison's reliance on these passages, the Claimant was not in the kind of something "more" situation that was discussed in detail at paragraphs 54 - 56 of Mummery LJ's judgment in **Madarassy** or at paragraph 26 in **Millwood** where Langstaff J specifically set out his analysis in a context where findings of less favourable treatment and a difference in race had been made.

63. By contrast, in the instant case, although the ET made a finding of unwanted contact with the Claimant's shoulders, there was nothing identified that might suggest this related to his gender. Indeed, the obvious inference to draw from the fact that the manager in question tried to play down the incident when she gave her evidence, is that she did so because, with hindsight, she realised that it was an inappropriate way for a team leader to behave in an office, but I am unable to see why in the present context, the ET's rejection of those aspects of her evidence should be treated as a matter of logic, as affording any support for the proposition that her conduct was related to the Claimant's gender.

64. It therefore follows that I do not accept the submission that it was an error of law for the Tribunal not to approach matters on the basis that the burden of proof had shifted. This was a situation where the ET would have been quite correct in concluding that the stage-one threshold had not been reached; and, in my reading of paragraphs 98 – 100, that is what they found, albeit it could have been expressed more clearly. In any event, as I will come on to explain, if, contrary to the conclusion I have just expressed, there was any error on the part of the ET in this respect, it was immaterial in light of the findings they went on to make concerning stage two of the enquiry.

65. I next address the Claimant's criticism that the Tribunal failed to keep the two stages of the exercise separate and wrongly took into account the view they had formed of the Respondent's explanation when they were still at stage one and in so doing, wrongly placed the burden on the Claimant to displace their finding or tentative conclusion that there was an innocent, non-discriminatory reason for the conduct.

66. I do not accept that this submission is well founded. Firstly, there is nothing in the text of paragraph 98 of the ET's Reasons which indicates that at this point in their enquiry, the Tribunal did proceed on the basis that the Respondent had provided an adequate explanation.

67. Secondly, I consider that the ET's finding in paragraph 102 that, "The purpose of the conduct was misguided encouragement" was by way of the Tribunal identifying a *further* basis for dismissing the claim. In other words, the ET was saying that, even if the burden had shifted, albeit their view was that the evidence base was limited, if the Respondents were required to prove a non-discriminatory explanation for the conduct, then they had done so, because it was misguided encouragement, rather than anything related to the Claimant's gender.

68. Thirdly, I conclude that in both this passage in paragraph 102 and in paragraph 92 where the Tribunal said; "It is also the balance of the evidence that Ms Ward's purpose in the contact was encouragement", the ET was making a positive finding that on the balance of probabilities the Respondents had shown that the massaging was done as misguided encouragement. Notably, the ET did not indicate at any juncture that it believed there was a burden on the Claimant to show that the conduct related to his gender which he had failed to discharge.

69. Fourthly, as identified by Mummery LJ in **Madarassy** at paragraph 81, the ET was entitled to dismiss the claim, given they found that the Respondents had proved an explanation for the conduct that was not related to the Claimant's sex. Accordingly, if and insofar as there is any force in the point that the ET did not fully develop their reasoning at stage one, the Tribunal was, nonetheless, quite entitled to say that the claim failed because the Respondents had satisfied them that this conduct was not related to the Claimant's gender.

70. Fifthly, determining that the massages were undertaken by way of misguided encouragement was a finding of fact that it was open to the ET to make on the evidence. Although Mr Robison suggested in his oral submissions that this conclusion was inextricably linked to the Second Respondent's account that she was tapping the Claimant's shoulder and thus it was precluded by their rejection of that part of her evidence, there is no perversity ground of appeal before me and in any event, as a matter of logic, the one would not follow from the other. It was open to the ET to regard the Second Respondent's account of the extent of the conduct that occurred as wrong or untrue but, to nonetheless accept her explanation as to why it occurred. As Mr Maxwell reminded me, this was not a case where, as Mr Robison suggested, the ET comprehensively rejected the credibility of the Second Respondent's account; indeed, there were some aspects of the case where the Tribunal preferred the Second

Respondent's account to the Claimant's, most notably in relation to the race discrimination claim. As I have already noted, the ET explained that they did not consider the recollections of any witness to be wholly reliable.

71. Lastly, the Claimant placed some reliance on paragraph 103 of the ET's Written Reasons (which I have already quoted), in particular the sentence starting, "On balance, the evidence from which to conclude the conduct related to gender does not take us to that conclusion in these circumstances." Whilst this phraseology was perhaps unfortunate, it needs to be seen in context. Paragraph 103 was the final paragraph of a relatively lengthy section of the Written Reasons addressing the harassment allegation. It appears to me that it was intended to be by way of a rather general closing observation and no more. If, as I have concluded, the ET had already correctly asked whether there were facts from which they could conclude the unwanted conduct related to the Claimant's gender and found that there were not and had, in any event, gone on to additionally find that the Respondents had positively proved the conduct was for a reason unrelated to the Claimant's sex, then this single summary sentence, appearing after that legally correct analysis does not of itself undermine what had gone before.

72. I, therefore, find that the ET did not err in law and I dismiss the appeal.