Appeal No. UKEAT/0208/20/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 29 April 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MR JANUSZ MEDRYSA — APPELLANT

THE LONDON BOROUGH OF TOWER HAMLETS — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	In Person
For the Respondent	Ms Robin Moira White (Of Counsel) Instructed by: London Borough of Tower Hamlets Mulberry Place 5 Clove Crescent E14 2BG

SUMMARY

RACE DISCRIMINATION

The employment tribunal properly considered the evidence, applied the law, and determined that the claims of race discrimination were not made out. The employment tribunal did not err in law. The appeal is dismissed.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of the employment tribunal, Employment Judge Burgher with lay members, sitting at the East London Hearing Centre on 13, 14, 15, 20 and 21 March 2019, with 22 March 2019 in Chambers.

2. The claimant brought a race discrimination complaint for the purposes of which he described his race as white Polish.

3. The claimant commenced employment with the respondent on 4 July 2011. The Tribunal described the respondent as one of the most ethnically diverse local authorities in the country. The claimant worked pursuant to a job description as a Debt Recovery Officer. The claimant considered that he had not been graded sufficiently highly by application of the respondent's job evaluation procedure. By the time of the employment tribunal hearing his complaints about the job evaluation process had been held to be out of time and the issues had been reduced to five set out at paragraph 2 of the judgment, of which, for the purposes of this appeal, only three are relevant:

(1) failure to progress an Individual Right to Review (IRR) procedure in respect of the claimant's job duties (Issue 2)

(2) refusal of special leave (Issue 4)

(3) failing to follow the Combating Harassment and Discrimination (CHAD) procedure (Issue 5)

4. The claimant failed in all of his claims. The Tribunal held that where the claimant was able to establish a difference in treatment between himself and a person of another race, or where a hypothetical comparator was relied upon, there was no evidence to suggest that the claimant's race had had any effect on his treatment. The Tribunal concluded that where there were individuals of another race who had been more favourably treated than him, the claimant had established no more than that there was a difference of race and a difference of treatment and had not establish facts from which the tribunal could conclude, in the absence of an adequate explanation, that he had been subject to discrimination.

5. The appeal was first considered pursuant to the sift by HHJ Martin Barklem, who in a decision with seal date 6 January 2020, concluded that there were no reasonable grounds for bringing the appeal. The claimant challenged that decision pursuant to rule 3(10) of the EAT Rules. A hearing before HHJ Shanks took place on 18 September 2020. By an order, with seal date 13 October 2020, HHJ Shanks permitted the appeal to proceed, unusually, on the basis that the claimant's skeleton argument for the rule 3(10) hearing would be substituted for his grounds of appeal. HHJ Shanks noted that the claimant had a very detailed understanding of the documentation and stated that he had been persuaded (just) that it was reasonably arguable that certain of the findings of fact of the employment tribunal might have been perverse or unsupported by the evidence.

6. For the purposes of today's hearing the claimant provided a further skeleton argument that slightly revised that provided at the rule 3(10) hearing. As the revised skeleton argument referred to the page numbers of the documents in the EAT bundle it has formed the basis of my analysis.

7. The claimant is a litigant in person. It is clear that he has spent many hours developing an exceptionally detailed understanding of the paperwork. He has sought to comply with the employment tribunal and EAT procedures. He produced his skeleton argument believing that it would be helpful to order his arguments by focusing first on what he thought were his best points. That had the consequence that appeal points relating to each issue are not dealt with together. I explained to the claimant how I had linked the grounds of appeal to the issues identified by the employment tribunal. The claimant was happy to address his arguments using that structure.

8. I will start with Issue 5. This is the issue that the claimant considers is the most significant. It concerns the manner in which his CHAD complaint was dealt with. Next, I will consider Issue 4, the manner in which his application for special leave was dealt with. Finally, I will consider Issue 2, the way in which the IRR procedure was dealt with.

9. Having heard the claimant's submissions and sought to ascertain from him what are the key arguments in the appeal, I consider that there are two basic contentions. Firstly, as identified by HHJ Shanks, the claimant considers that there are a number of respects in which the judgment was erroneous, where evidence has been missed that has resulted in incorrect factual findings. The claimant sees this as something very sinister that demonstrates that the Tribunal was, in his words, perfidious. Secondly, the claimant considers that the Tribunal erred in law in analysing his claims. This is not a matter that was picked out by HHJ Shanks but was clear when the claimant was making his submissions. The claimant's understanding was that if he could establish a difference in treatment between himself and a person of a different race it was then for the Tribunal to question how that could have come about, if necessary, requiring the respondent to provide further evidence. Essentially, the claimant considers that, irrespective of the circumstances, if he can point to a difference of treatment between himself and one other person

of a different race that necessarily shifts the burden of proof. He raised similar points in respect of all three of the key issues.

10. The claimant contended that he proved he had been less favourably treated in the CHAD complaint in comparison to Black and Asian colleagues because their complaints had been treated appropriately under the policy whereas his had not. The claimant considers that as a result the Tribunal was required to investigate. I asked the claimant whether he thought it was likely that there were other white people who had raised CHAD complaints that were dealt with appropriately. He said that there probably were. His position is that irrespective of whether other people of his race were, like his comparators, treated more favourably than him, the difference of treatment between himself and the comparators he identified was sufficient to require the tribunal to investigate why the difference of treatment had occurred.

11. The claimant considered that because two Black employees were treated more favourably than him in respect of special leave that should have prompted the tribunal to ask why there was a difference of treatment and call upon the respondent to establish that it was not his race.

12. The claimant alleged that Mr Willie had failed to follow advice given to him by human resources about the IRR procedure. The claimant stated that Tribunal had to follow up on why Mr Willie did not follow the advice he had been given.

13. When given a brief opportunity to respond to the submissions made on behalf of the respondent, the claimant put it this way; “I provided the employment tribunal with prima facie evidence showing that I was treated in a less favourable way than others and there was no explanation why.”

14. The employment tribunal set out the law at paragraphs 60 to 69:

> **Law**
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> **62. Section 13 of the Equality Act 2010 states:**
>
> **Direct discrimination**
>
> > **(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.**
> >
> > **(2) – (4)…**
> >
> > **(5) If the protected characteristic is race, less favourable treatment includes segregating B from others**
>
> **63. Section 9 of the Equality Act 2010 states:**
>
> **"Race**
>
> **(1) Race includes –**
>
> > **(a) colour;**
> > **(b) nationality;**
> > **(c) ethnic or national origins.**
>
> **(2) In relation to the protected characteristic of race –**
>
> > **(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;**
> >
> > **(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.**
>
> **(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.**
>
> **(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group."**
>
> **64. When considering discrimination based on inferences the case law states that the Tribunal should ask itself the following questions:**
>
> > **(a) Whether the Claimant can establish facts from which Tribunal could infer, in the absence of any explanation, the Respondent discriminated against him on the grounds of disability or age (a prima facie case of discrimination); if so**
> >
> > **(b) Whether the Respondent can establish a non-discriminatory explanation for the treatment (Igen Ltd v Wong [2005] EWCA Civ. 142).**
>
> **65. The burden of proof provisions are found at section 136 of the Equality Act 2010.This states:**
>
> > **"136 Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

66. The burden is on the Claimant to prove, on a balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ. 33, at paragraph 56. The court in Igen v Wong 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). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

67. Even if the Tribunal believes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the Claimant's colour or race. In B and C v A [2010] IRLR 400, EAT at paragraph 22:

"The crucial question is on what evidence or primary findings the tribunal based its conclusion that C would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based: no such situation had ever occurred, and the tribunal refers to no admissions by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular it is second nature to executives to follow appropriate procedures, and the explanation offered by C for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, or the surrounding circumstances, to give rise to that supposition)."

68. It is not sufficient, to shift the burden of proof onto the Respondent, that the conduct is simply be unfair or unreasonable if it is unconnected to a protected characteristic. In St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ. 921 at paragraph 44:

> **"The Respondent's bad treatment of the Claimant fully justified the finding of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the Respondent's similar treatment of the Claimant in the other instances in which the Claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Haywood the Respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the Claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the Respondent to prove that it had not committed an act of race discrimination."**

69. The Claimant referred to the case of Nagarajan v London Regional Transport [2000] 1 A.C. 501 where Lord Nicholls stated at 512-513:

> **"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."**

15. The Tribunal set out the test for direct discrimination. The Tribunal quoted section 136 EqA 2010 and considered the circumstances in which the burden of proof may shift to the respondent to establish that discrimination has not occurred. The tribunal noted that a mere difference of treatment and difference of protected characteristic is not of itself sufficient to shift the burden of proof, there must be something more. The law is well established that a wide variety of material might provide the "something more". The Tribunal focused its analysis on section 136 EqA 2010. The dual stage test is not always easy to apply in practice. It is always open to a tribunal as a starting point to consider the totality of the evidence, including the respondent's explanation for the claimant's treatment, and decide whether an inference of discrimination should be drawn without the need to rely on section 136 by application of the principles in **King v the Great Britain China Centre** [1992] ICR 516, the leading authority before the statutory

shift in the burden of proof was introduced. I consider a King analysis can still be a helpful starting point, particularly as it can avoid getting unnecessarily tangled up in convoluted burden of proof analysis. If an inference cannot be drawn on **King** grounds it may be necessary to consider whether application of section 136 could assist the claimant. The Tribunal can in an appropriate case move straight to the reason why question at stage two of the section 136 analysis, provided that to defeat the claim the respondent must have established that any adverse treatment was not materially influenced to any extent by the claimant's race. I do not consider that a **King** analysis could have affected the outcome in this case.

16. Whichever analysis is adopted, it is always important for a tribunal to stand back and look at the evidence as a whole to consider whether there are facts from which it might be appropriate to draw an inference of discrimination or that, disregarding any exculpatory explanation given by the employer for them, there are facts that could result in a finding of discrimination, so as to shift the burden of proof. There may be cases in which a consideration of the totality of evidence strongly suggests that discrimination has not occurred.

17. Where a claimant complains of treatment by different people, in different circumstances, it will often be necessary to consider why it is contended that they have all discriminated against the claimant. Where a comparator has been dealt with by someone different to the person who is alleged to have discriminated against the claimant that provides much less compelling evidence than where the comparator was treated more favourably by the alleged perpetrator of discrimination against the claimant. Indeed, the former type of evidence may not assist the employment tribunal at all.

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18. The Tribunal clearly did take an overview of the evidence. They made a general observation at paragraph 12:

> **There was no direct evidence of the Claimant's actual nationality or colour being a factor in this claim. The Claimant was not asserting that any alleged discriminators had a propensity to disfavour Polish people or white people. The Claimant sought to rely on inferences from the treatment of alleged comparators.**

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19. It is, perhaps, not particularly significant that there was no direct evidence of the claimant's nationality or colour being a factor in his treatment as there rarely is direct evidence

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of discrimination. More significantly, the Tribunal noted that the claimant was not asserting that any of the alleged discriminators had a propensity to disfavour white people or Polish people. The claimant did not contend there was a general pattern of discrimination against people of his

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race who worked for the respondent. That was consistent with what the claimant told me; that he thought that there probably were white employees who had been treated as favourably as the comparators he chose, although he did not have a view either way whether it was likely that there were Polish people who were treated in a similar manner to his comparators.

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20. The Tribunal noted that the claimant considered that if, in respect of any treatment, he could identify a person of a different race who was treated more favourably, that was sufficient

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to found an inference of discrimination, or to shift the burden of proof. That would be the case even if there were others of the same race as the claimant who were treated equally favourably as the proposed comparators were.

G

21. In its conclusion, the Tribunal noted:

> **We agree with the submission of Ms White that the Claimant sought to alleged race discrimination in respect of any matter that he was unhappy with. However, there was nothing to suggest that any treatment he was unhappy with was due to his colour or race.**

H

22. I will deal first with the CHAD complaint. At paragraph 2.5 the Tribunal set out the complaint, whom it was made against, and the comparators relied upon:

> **Failing to follow its own procedure adequately or at all in the handling of the Claimants Combating Harassment and Discrimination (CHAD) complaint that he made against Mr Ormsby. This allegation is against Ms Johura Begum, Human Resources Business Partner, Ms Karen David's HR Manager, Mr Aman Dalvi, Corporate Director. Following evidence, it seems that this allegation extended to Will Tuckley CEO, Zena Cooke, Corporate Director and Denise Radley, Corporate Director. The Claimant relies on Hasina Begam (Asian), Francis Avornyoste (black African), Terry Roque Black and Ms Lolita Sutherland (black) as comparators (Issue 5).**

23. The tribunal considered the comparators at paragraphs 24 to 28:

> **24. Ms Hasina Begam, who is Asian, submitted allegations against Ms L Mohammed in respect of incidents on 28 April 2014 and 22 July 2014. A CHAD investigation was instituted on 20 October 2014 and statements distributed to witness on 3 March 2015. This timescale was not compliant with the timescale or in accordance with the Respondent's CHAD processes and is consistent with the Respondent's HR's failure to monitor and enforce compliance with its procedures.**
>
> **25. Ms Lolita Sutherland, who is black, submitted a CHAD complaint in 2017. We have no details of how this CHAD was dealt with, if at all.**
>
> **26. Mr Francis Avornyoste is black African. We have no evidence of him submitting a CHAD but there were emails demonstrating him submitting a complaint in May 2016 which he stated he gave up when her realised it 'was a complete waste of time'. The Claimant's evidence was that Mr Avornyoste was not informed by HR about their final decision and Mr Avornyoste left work under distress and frustration at the time.**

24. The Tribunal reached its conclusions at paragraphs 90 to 98:

> **90. The Claimant claims race discrimination arising from the Respondent failing to follow its own procedure adequately or at all in handling of his CHAD complaint against Mr Ormsby.**
>
> **91. The CHAD process specifies types of claims to be considered. There is a sifting process. Mr Begum took the view that the Claimant's PDR and grading concerns were outside the scope of CHAD procedure. However, it was still processed. Ms Zena Cooke addressed the PDR part of the Claimant's CHAD on 18 June 2017 and made it clear that she would not take it further.**
>
> **92. The remaining parts of the Claimant's CHAD was eventually subject to a meeting with Denise Radley on 5 December 2017. However, no outcome has been provided to the Claimant. The failure to provide a response to this at all is a further substantial shortcoming in the administration and communication within the Respondent. We have not heard from Ms Radley in respect of her failure to respond and have no contextual information relating to her efficiency of response to CHAD complaints with other races or colour.**
>
> **93. We considered whether this substantial shortcoming could form a basis from which the Tribunal could infer race discrimination. In doing so we considered the evidence provided of the comparators.**

94. Hasina Begam, Asian, made allegations against Mr Mohammed. The incidents occurred on 28 April 2014 and 22 July 2014. A CHAD investigation was held on 20 October 2014 and statements distributed on 3 March 2015. We did not have evidence of the outcome of the CHAD or when the date this was provided. This was not compliant with timescales provided within the Respondent's CHAD processes and is consistent with the poor management of processes within the Respondent.

95. Lolita Sutherland, black, submitted a CHAD complaint in 2017. We have no evidence of how it was dealt with, if at all.

96. Francis Avornyoste, black African, did not submit a CHAD but made a complaint and stated it was a waste of time, he did not pursue and gave up. The Claimant's evidence was that Mr Avornyoste was not informed by HR about their final decision. This is consistent with the poor management of processes within the Respondent.

97. Mr Terry Roque Black made a grievance, not a CHAD complaint, although the Claimant contended that Mr Willie prevented Mr Roque from pursuing a CHAD. Mr Roque stated that nothing ever came of the complaint and he was fobbed of with mediation. He stated that he has formal complaint against Mr Willie on 13 December 2017 which was investigated on 20 June 2018 and he still has not been provided with an outcome.

98. We considered whether if a CHAD complaint had been submitted by a black or Asian person it would have been treated any differently and progressed. On the evidence we have we cannot conclude that it would have been. The Claimant's comparators have evidenced a discontent with the dilatory progression of complaints and the lack of actions of the Respondent in accordance with due process and stated procedures. Whilst we have not heard from Ms Radley we have no evidence at all to infer that her failure to respond to the Claimant following the meeting on 1 December 2017 could be on grounds of the Claimant's 'culture', colour or race. There are consistent failures of HR to case manage and hold managers to account in compliance with its policies and procedures within relevant timescales. It is evident that there is a very poor standard of communication that seems to be endemic within the Respondent. We conclude that there is incompetence within the Respondent concerning the management and administration of grievance and CHAD procedures. These failures apply to all staff regardless of race. Therefore, we do not infer race discrimination from this.

25. At paragraph 3 of the skeleton argument, the claimant contends that the Tribunal was wrong to record at paragraph 25 of its judgment that the Tribunal had no details of how Ms Sutherland's CHAD complaint was dealt with in 2017. The claimant relies on paragraph 30 of the witness statement he submitted to the employment tribunal in which he referred to an investigation into Ms Sutherland's CHAD complaint led by Safia Boot. The claimant also points to documents that were in the employment tribunal bundle that show that there was an investigation. The claimant was interviewed as part of that process. However, I do not know the

A outcome of the investigation or, indeed, whether it was completed. It appears that the Tribunal was wrong to state that there was no evidence about what happened in Ms Sutherland's CHAD complaint. However, that does not alter the fact that the tribunal already had another comparator of a different race whose CHAD complaint had been progressed, whereas the claimant's had not. The Tribunal concluded that the claimant was not able to establish anything that suggested that the reason for the difference in treatment was his race. Most notably, the person who had been principally involved in the failure to progress the claimant's CHAD complaint, Ms Radley, was not found to have been involved in the CHAD complaints of the comparators. Ms Radley was not called to give evidence, but that was not fatal to the defence: See **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 (and subsequent to my giving the oral judgment the Supreme Court in **Royal Mail Group Ltd v Efobi** [2021] UKSC 33). The simple fact was that the tribunal concluded that although the claimant could show a difference of treatment in respect of his CHAD complaint, he had not established any evidence to suggest that the difference of treatment was because of his race. The misunderstanding on the part of the claimant is that he considers that a difference of treatment and a difference of race between him and a potential comparator with nothing more establishes unlawful discrimination, or at least shifts the burden of proof. That is not correct as a matter of law. The something more that is needed to shift the burden of proof may not be a great deal and could include elements of the respondent's purported explanation for adverse treatment if it could support a finding of discrimination (such as an explanation that could be discriminatory because, for example, it involves stereotyping on racial grounds - which could itself constitute a part of the facts from which an employment tribunal could infer discrimination). Where the case is analysed by application of section 136 EqA 2010, it is the respondent's exculpatory explanations for any facts from which the Tribunal could infer discrimination that are to be ignored at stage one, rather than the totality of the respondent's

A evidence. Factual evidence given by the respondent could be relevant either to establishing that the burden has shifted or could show it has not.

B 26. At paragraph 12 of his skeleton argument, the claimant refers to paragraph 57 of the tribunal's decision where it is stated:

> **Ms Cooke dealt with the PDR part of the Claimant's CHAD and notified the Claimant that she would not take it further on 18 June 2016.**

C 27. It is clear that this is a typographical error, and the year should have been 2017 rather than 2016. The claimant took me to documents that he suggested clearly showed that **Ms Cooke** was dealing with a grievance complaint rather than his CHAD complaint, although he accepts that his

D PDR was one of a number of matters raised in his CHAD complaint. I spent some time with the claimant seeking to understand why he thought this factual error was of such significance. As far as I could follow the argument, the claimant considers that this evidence demonstrated that rather than there being a failure to deal with <u>most</u> of his CHAD complaint there was a failure to deal

E with <u>all</u> of it. The point is of no real significance. The real issue was whether there was some evidence to suggest that the claimant's treatment was because of his race. The tribunal found there was not. That conclusion is not undermined even if the tribunal was mistaken, and Ms

F Cooke considered the PDR issue as a grievance rather than as part of the CHAD complaint.

28. At paragraph 4 of his skeleton argument, the claimant contends that the tribunal

G perversely focused on general failings of human resources as an explanation why his CHAD complaint had not been dealt with, without focusing on the fact that he could point to one Black person and one Asian person whose complaints had been progressed. It is correct that the tribunal held that the respondent had generally applied its procedures poorly and that there were multiple

H failings in the way in which the respondent dealt with complaints made by a number of its employees. At paragraph 13 of his skeleton argument, the claimant notes that the Tribunal

considered that the failure to respond to his CHAD complaint was a further example of the shortcomings in administration and communications within the respondent. Having considered the totality of the evidence the Tribunal concluded that there was insufficient evidence to establish that the claimant's race could have been a reason for his treatment.

29. At paragraph 5 of the skeleton argument, the claimant contends that the Tribunal were not entitled to conclude that if the CHAD complaint had been submitted by a Black or Asian person, it would not have been treated any differently. The claimant contends that he had pointed to complaints by a Black person and an Asian person that had been dealt with differently, although he accepted that there may well be white people who had been treated equally favourably to them. The Tribunal in this section was, I consider, referring to a CHAD complaint made in the same circumstances of the claimant's, being dealt with by the same individuals. The Tribunal was considering a hypothetical comparator. The Tribunal concluded that the claimant had not put forward evidence from which it could reasonably conclude that the reason that his CHAD complaint was not progress was his race. That was a decision that was open to the tribunal on the evidence.

30. At paragraph 6 of the skeleton argument, the claimant complains about the way in which the bundle was produced by the respondent. The claimant contends that the respondent failed to include all the documents he wanted, including some about Ms Sutherland's CHAD complaint. By the time of the employment tribunal hearing all the documents that the claimant wanted to have in the bundle had been added. I can see no reason to criticise the approach of the tribunal in this regard.

31. The Tribunal described the complaint about refusal of special leave at paragraph 2.5:

> **2.4 Mr Stephen Willie refusing the Claimant's requests for special leave on 22 May 2017 and 20/21 July 2017. The Claimant relies on Francis Avornyoste, black African, and Fitzroy Andrew, black Caribbean, as comparators (Issue 4).**

32. The Tribunal considered the comparators from paragraph 21:

> **21. In 2014, Francis Avornyoste, who is black, applied for annual cover for 2 weeks absence for his sick wife. Mr Willie had not long been employed by the Respondent suggested that Mr Avornyoste apply for special paid leave. This was authorised but the application was subsequently revoked by Human Resources. Consequently, Mr Willie gained a better understanding of the operation of the special leave policy within the Respondent.**
>
> **22. On 3 November 2014, Mr Fitzroy Andrew, who is black, applied for flexi leave. His then manager, Mr Darren Houston informed him that he had been granted paid special leave. Mr Willie had no involvement in this process.**
>
> **23. Mr Fitzroy Andrew also applied for and was granted paid special leave for 17 and 18 November 2016 in view of his wife's serious illness. Mr Willie sanctioned this in accordance with the Respondent's special leave policy.**

33. The Tribunal set out its conclusions from paragraph 86:

> **86. In respect of special leave, the issue was not, as the Claimant contended whether he was able to take the time off in accordance with 'UK employment law', but whether he should have been paid special leave payment for taking the time off. It is not in dispute that the Claimant did in fact take time off for his family emergencies at the relevant times. His complaint is therefore that he was not paid special leave for the emergencies and that he was required to take flexi leave or annual leave in accordance with the policies**
>
> **87. Mr Willie refused the Claimant's requests for paid special leave on 22 May 2017 and 20/21 of July 2017. The Respondent's special leave policy entitled him to do so. We find that the comparators relied on by the Claimant are not in the same or similar circumstances given the reasons given for their leave, the amount of paid special leave take and annual leave and flexi leave he had outstanding. The policy allows for a margin of management discretion. Further, the Claimant was, following review, able to be paid an extra day special leave which took him over the 5 days paid special leave provided for in the Respondent's special leave policy for the year.**
>
> **88. Therefore, the Claimant has not established that he was subject to less favourable treatment. Further, and in any event, the Claimant has not established that race played any part in Mr Willie's refusal to sanction paid special leave.**

34. The claimant criticises the tribunal for suggesting that Mr Willie may not have understood the special leave procedure properly in the first year of his employment with the respondent. The claimant contends that Mr Willie had an extensive history of working for local

authorities. I see nothing in the determination of the tribunal in respect of Mr Willie's knowledge of the procedure that was impermissible. He may have had considerable local authority experience. Local authorities generally have a myriad of policies and procedures. Employees of local authorities sometimes are not fully familiar with each and every policy. The Tribunal reached a finding of fact that was open to it on the evidence. It was open to the tribunal to conclude that the circumstances of the claimant were different to those of his comparators, in particular because he was seeking special paid leave when there were a number of other potential ways in which he could take paid leave. It was not a question of the claimant not being permitted to take the leave; the issue was how he could obtain pay for it.

35. The claimant complains that the Tribunal found that Mr Willie was not involved in the process of granting special leave to Mr Andrew. The claimant states he expected Mr Andrew to give evidence. A witness statement had been obtained from him. Mr Andrew had also sent the claimant an email that suggested Mr Andrew had a discussion with Mr Willie at the time that his special leave was approved. That evidence was not before the employment tribunal. The Tribunal cannot be criticised for not having taken it into account. The claimant sought permission to introduce this evidence on appeal. However, I considered that the evidence could with due diligence have been obtained for use at the employment tribunal hearing. The claimant was able to obtain a witness statement from Mr Andrew for the employment tribunal and it would also have been possible to have include his evidence about a discussion with Mr Willie about special leave. The document the claimant has now provided shows Mr Willie may have discussed Mr Andrew's special leave. It is not particularly surprising that he did not recall the conversation. The question of whether Mr Willie had a conversation with Mr Andrew does not really go to the core of the matter which was the Tribunal's conclusion that there was no reason to consider that

A the claimant's treatment in respect of special leave was connected to him being white or to his Polish origin.

B 36. The IRR complaint was described at paragraph 2.2:

> **Between November 2016 and February 2017, the Respondent failed to progress the Claimant's Individual Right to Review (IRR) in accordance with its procedure, in particular failing to action the Claimant's request for an appeal submitted on the 24 January 2017. The Claimant alleges that Mr Stephen Willie Parking Appeals and Permits Manager, Ms Yvonne Osedumme Human Resources Executive, and Mr Roy Ormsby, Divisional Director acted in a racist conspiracy against him in this regard. The Claimant relies on Ms Petra Burcher, who is black Caribbean and a hypothetical comparator for this allegation (Issue 2).**

C 37. The comparators were considered at paragraph 20:

> **We were informed that Ms Petra Burcher is black Caribbean. She submitted an IRR application in 2012 following being assimilated to a lower grade post. Her application was refused at Stage 1 IRR and she then appealed to a Corporate Director under IRR Stage 2 and her appeal and request was rejected. Neither Roy Ormsby nor Stephen Willie were employed by the Respondent at the time and therefore they had no involvement at all in her process.**

D 38. The Tribunal set out its conclusions from paragraph 74:

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> **74. The Claimant alleged that between November 2016 and February 2017, the Respondent failed to progress his IRR in accordance with its procedure, in particular Mr Ormsby failed to action the Claimant's request for an appeal submitted on the 24 January 2017. The Claimant made this allegation against Mr Willie and Mr Ormsby.**
>
> **75. We conclude that Mr Willie followed the advice he received from HR when he wrote the letter of 11 October 2017 that wrongly informed the Claimant to appeal to Roy Ormsby. However, Ms McTasney agreed that Mr Ormsby … was the appropriate person to appeal to at the time as he was senior to Mr Willie.**
>
> **76. Mr Ormsby was in no doubt that as Service Head and not a Corporate Director, he could only review the Claimant's stage 1 IRR that had been decided, with his approval, on 11 October 2016.**
>
> **77. In the meeting on 1 December 2016 Mr Ormsby explained why he did not believe the Claimant's role warrant a re-grading. This meeting ended with the Claimant being given another opportunity to resubmit the IRR to Mr Ormsby for reconsideration. The Claimant did this on 23 and 24 January 2016. This was a revision and resubmission of his IRR not an appeal. It was therefore a further opportunity afforded to the Claimant that was not included in the IRR procedure. The Claimant's evidence to us was disingenuous about the process he said he had to follow. An appeal against IRR stage 1 is stage 2 to a Corporate Director. The procedure does not provide an intermediate review or appeal within stage 1, but the Claimant was given this opportunity following the meeting of 1 December 2018. However, this was not an appeal to a Corporate Director and the Claimant was aware of the policy and the procedure. There was nothing**

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precluding him exercising his right of appeal to a Corporate Director, especially in view of Mr Ormsby's failure to reply.

78. Ms Petra Burcher had her IRR stage 1 refused and exercised her right to appeal to a Corporate Director for stage 2. Her stage 2 appeal was rejected. The Claimant did not exercise a right to stage 2 appeal to a Corporate Director. As the Claimant did not request a stage 2 IRR appeal to a Corporate Director he was not comparable to Ms Burcher.

79. Mr Ormsby did not respond to the Claimant's written documents submitted for IRR review on 23 and 24 January 2017 despite indicating that he would respond to the Claimant once he had an opportunity to do so. Mr Ormsby said he overlooked the papers in his witness statement but before us stated that he reviewed the documents but did not respond. Despite the fact that Mr Ormsby was relatively new in his position and having a considerable amount of extra work it was incumbent on a person in his position to have responded to the Claimant within a reasonable time. This was a substantial failure by Mr Ormsby. However, we accept and that he was under a significant amount of extra work and conclude that the failure to respond was not on grounds of race.

39. At paragraph 11 of the skeleton argument, the claimant contends that the Tribunal was not entitled to conclude that Mr Willie had been informed an appeal in respect of the IRR process was to be made to Mr Ormsby. The Tribunal held that Mr Willie had initially been given correct advice that the appeal had to be brought to a director. There is nothing impermissible in the Tribunal concluding that approximately a month later Mr Willie was given incorrect advice. There is nothing implausible in him not recalling the original correct advice. Be that as it may, the Tribunal found that the claimant met with Mr Ormsby and was allowed to resubmit his IRR documentation for reconsideration. He did not subsequently submit an IRR appeal. There is nothing impermissible in the findings of fact that the tribunal reached

40. At paragraph 7 of the skeleton argument, the claimant contends that by holding that Mr Ormsby and Mr Willie were not employed at the time of his comparator's treatment the Tribunal failed to deal with his alternative submission that a hypothetical comparator should be constructed. The use of a hypothetical comparator involves the tribunal considering how a person in the same situation as the claimant would have been dealt with if that person was of a different race. At heart it involves considering, on all the evidence, whether race was a material factor in

A the treatment of the claimant. The tribunal expressly dealt with that question at paragraph 79 and concluded that they saw no reason to believe that the treatment of the claimant was because of his race.

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41. The proper consideration of discrimination claims is very important. It is generally best that they be dealt with at a full hearing. Tribunals should always be very careful before concluding at an interlocutory stage that there is no more than a difference of race and difference of treatment C so that the claim is bound to fail at stage one of the section 136 EqA 2010 analysis. If, having heard and carefully considered all the evidence at a final hearing, the employment tribunal stands back and concludes that the evidence does not establish any basis for drawing an inference of D discrimination it is required to dismiss the claim. Even though the claimant can point to a couple of errors in the factual determinations of the Tribunal, overall, there was very careful consideration of the evidence. The Tribunal was entitled to conclude that the claimant had not established facts from which they could conclude that the reason for his treatment was his race.

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42. The claimant has spent a great deal of time going through the documents to look for factual inconsistencies. He considers if there is even the slightest factual error in the F determination of the Tribunal that vitiates the whole decision. The Tribunal did not have the luxury of unlimited time to consider this matter. Tribunals have to deal with complaints within a relatively limited period of time. Reading the judgment overall, the Tribunal approached its task G conscientiously. The fundamental misunderstanding of the claimant, that leads to his clear and obvious distress, is his belief that if in respect of any treatment he disliked he could point to a person of a different race who was treated more favourably than himself it was then for the Tribunal to investigate and find the evidence necessary to prove his claim. The claimant finds it H hard to accept that he had to establish on the evidence that there was a real possibility that the

difference of treatment between himself and others of a different race was because of the difference of race, or to establish a real possibility that a hypothetical comparator of a different race would have been treated more favourably. He was not able to do so. I do not consider that any of the grounds of appeal are made out and, accordingly, dismiss the appeal.