Neutral Citation Number: [2022] EAT 25

Case No: EA-2019-000858-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12th October 2021

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY, PRESIDENT

- -

Between:

MR C TCHAPDEU	**Appellant**
- and -	
UNIPART GROUP LTD	**Respondent**

- -
- -

Dr R Ibakakombo (Representative) for the **Appellant**
Ms C McCann (instructed by Make UK) for the **Respondent**

Hearing date: 12th October 2021

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JUDGMENT

SUMMARY

Race Discrimination

The Claimant alleged that he was discriminated against on the grounds of race and his wife's disability after being refused flexible working arrangements following a transfer from one of the Respondent's sites to another. The ET dismissed his claims finding that none of the employees who transferred were offered flexible working. The claimant appealed, largely on grounds relating to the adequacy of the ET's reasons.

Held, dismissing the appeal, that the ET had not erred in law. The ET had correctly concluded that the circumstances of the Claimant's chosen comparators were different (in that they had not transferred) and they were not, therefore, appropriate comparators. That finding was adequately explained. The ET was also entitled to accept that the Respondent's witnesses were more credible than the Claimant and to conclude that the grievance investigation was thorough. Once again, both conclusions were adequately explained as were the remaining conclusions reached. There was no error of law.

THE HONOURABLE MR JUSTICE CHOUDHURY, PRESIDENT:

Introduction

1. I shall refer to the parties as the Claimant and the Respondent as they were below. The Claimant appeals against the Judgment of the Leicester Employment Tribunal ("the Tribunal"), Employment Judge Hutchinson ("the Judge") presiding, dismissing the Claimant's claims of direct and indirect discrimination, victimisation and associative disability discrimination.

Factual Background

2. The background to this matter may be briefly stated as follows. The Claimant worked for the Respondent's logistics division as an operations colleague from October 2009. He was initially based on a site in Nuneaton. In November 2014, the Claimant applied for flexible working. The reason given was that he had three children under the age of 16 and his wife's health meant that she needed some relief from childcare. It was not until October 2015 that the request was finally approved, the Claimant having raised a number of grievances about the process in the meantime. One of those grievances was partially successful.

3. In June 2016, one of the Respondent's clients moved its operations to an alternative provider. This meant that there was no longer sufficient work for the Claimant and his colleagues at the Nuneaton site. The Claimant was offered a new role with the Respondent, based at its Magna Park site. The Tribunal found that the Respondent was finding it difficult to keep pace with the demand for its services at Magna Park and that, as such, those from Nuneaton moving to Magna Park were only able to do so if they were able to work full-time. As the Tribunal also found, this did not mean that there were no part-time workers already in Magna Park, it was just that business needs required any displaced staff to work full-time.

4. The Claimant had meetings with a Ms Gill of HR who explained that, because of those operational issues, the Claimant would have to work full-time at Magna Park and that his flexible working arrangement could not be accommodated at that site. The Tribunal found that the Claimant was not happy about this, that he reluctantly accepted the position and signed a letter to that effect. He commenced working at Magna Park on a full-time basis on 25 July 2016. On 29 July 2016, the Claimant made a request for flexible working on the basis that that is what his current terms provided for. The Tribunal found at para. 67 that the Claimant had written his letter:

> "in the full knowledge that he had agreed to work on a full-time basis in the new position and had understood why his transfer had been on that basis."

5. The Claimant raised the matter with his team leader, a Mr Fragona, who did not have the authority to vary the Claimant's hours. Mr Fragona referred the matter to HR. The Tribunal found that Mr Fragona had been "misled" by the Claimant, in that he had indicated to Mr Fragona that his flexible working arrangement had already been agreed with HR as part of the relocation process, when it had not.

6. At a meeting on 3 August 2016, it was made clear to the Claimant that his request for flexible working could not be accommodated and that he would be required to work the hours to which he had agreed. This did not satisfy the Claimant and he made a further request for flexible working on 4 August 2016. The Claimant raised a grievance against Ms Gill on 8^{h} August 2016, complaining of less favourable treatment on the grounds of race, national origin and because of his support for a Mr Onuoha in another tribunal claim against the Respondent. The Claimant made various allegations against Ms Gill, all of which the Tribunal rejected as being "untrue".

7. The grievance was heard by a Ms Ringer, a manager based in Burton-on-Trent, who had had no previous dealings with the Claimant. After an investigation, during which Ms Ringer interviewed

Ms Gill, Mr Fragona and Mr Kyle Newell, another manager, Ms Ringer rejected the grievance. The Claimant was informed of the outcome by a letter dated 22 September 2016. On 3 October 2016 the Claimant went off sick and did not return to work thereafter.

8. The Claimant's appeal against the grievance outcome was heard by a Mr Harper. Mr Harper was satisfied that Ms Ringer was entitled to make the findings that she did and rejected the appeal. His decision is set out in a letter dated 18 November 2016.

9. The Claimant presented his claim of discrimination to the Tribunal on 15 February 2017. However, he continued to make further requests to work part-time. These requests were rejected for the same reasons as before. The Claimant continued to make requests for flexible working and lodged various grievances against those dealing with him. By a letter dated 31 May 2017, the Respondent informed the Claimant that it would not hear further grievances relating to matters which had already been dealt with, those matters being, by then, the subject of ongoing tribunal proceedings. That decision had to be re-stated on two further occasions because of the Claimant's continuing complaints and his "repetitious grievances".

The Tribunal's Judgment

10. The claim has a long procedural history which need not be repeated here, suffice it to say that there were three other preliminary hearings before three other employment judges, all of whom had, in various ways, indicated that the claims made by the Claimant were very weak. The Claimant was, for example, ordered to pay a deposit as a condition of being able to proceed with his claims. Undeterred, the Claimant continued to the full hearing, which came before the Tribunal in April 2019. The Claimant was represented then, as he is today, by Dr Ibakakombo, who is a lay representative.

11. The Tribunal commenced its conclusions with the following general remarks:

> "116. We agree generally with Mr Willey's submission that this case is "remarkable for the almost complete lack of any supporting evidence for the Claimant's claims". Whilst Mr Tchapdeu and even more so Dr Ibakakombo are firmly of the view that the Claimant has suffered the discrimination alleged, there is in our view no evidence to support that contention. None of the facts have been presented to us point to the reasons for any treatment that he has received being because of his race or because of his wife's disability or because he had undertaken protected acts.
> 117. We are satisfied that allegations numbered 6 to 15 are all out of time and that the Tribunal does not have jurisdiction to deal with these claims. The Claimant notified ACAS of his claims on 19 December 2016 so on the face of it any claims made before 20 September 2016 are out of time. Dr Ibakakombo on behalf of the Claimant accepted at the commencement of the hearing that these were out of time and we are satisfied that they are and no reason has been put forward why there should be an extension of time on a just and equitable basis.
> 118. The allegations which are in time and which could form part of a continuing act relate to his request for flexible working and grievances he has raised in respect of them."

12. As to the claims of direct and indirect discrimination on the grounds of race, the Tribunal held as follows:

> "Direct race discrimination
> 119. The Claimant says that all matters that he complains of amount to direct race discrimination i.e. because he is Black African Cameroonian. The alleged less favourable treatment is set out in the schedule.
> 120. We are satisfied that his request for flexible working was rejected not because of his race but because of issues at Magna Park which led to a decision being made that those transferring from Nuneaton would have to transfer to Magna Park on a full-time basis. We are satisfied that this provision applied to all employees and that the Claimant was not singled out in any way or suffered any different treatment. We have heard the Respondent's explanation as to why they made their decision and accept that this was the reason for them doing so, namely issues over the facilities at Magna Park.
> 121. Allison Ringer's rejection of his grievances was because there were no grounds for his grievance. She knew nothing of the Claimant prior to being appointed to consider his grievances and her rejection of those grievances was perfectly proper and not motivated by his race at all.
> 122. David Harper was also someone who knew nothing about the Claimant and nothing about his involvement in other cases. He rejected the Claimant's appeal not because of the Claimant's race but because there were no grounds for it.
> 123. After the Claimant presented his claim to the Tribunal the company took a strategic decision to not consider any further claims but for these matters to be dealt with by the Tribunal. Again, this was a business decision and not motivated by race.
> Indirect Race Discrimination
> 124. The provision, criterion or practice relied on in this case is rejecting claims and grievances. We are satisfied that there was no provision, criterion or practice to reject his grievances. There was no lack of a proper examination of complaints and grievances. All matters were looked into carefully by those responsible, i.e. Allison Ringer and David Harper. The Claimant has not established any basis for any such complaint."

13. Whilst the Tribunal accepted that the Claimant had done various protected acts (including appearing as a witness in Mr Onuoha's tribunal proceedings), it rejected the Claimant's contention that any of the treatment complained of was because of those protected acts:

> "128. We are satisfied that none of the acts complained of were because of these protected acts. Allison Ringer, David Harper and Jose Fragona, we are satisfied, were not aware of his involvement in the Tribunal claims until he told them about it. They were not involved in the claims. None of the people who he complains of were motivated in any way by the protected acts complained of."

14. In the course of proceedings, Dr Ibakakombo had made generalised allegations of institutional racism against the Respondent. The Tribunal was scathing about these allegations and dismissed them as follows:

> "Institutional Racism
> 128. In this case in an almost desperate attempt to make some sort of claim Dr Ibakakombo accuses the Respondent of institutionalised racism. Saying that the Respondents by not hearing his new grievances and complaints were motivated by widespread racism which permeates the business. He cannot accept what we accept that this was simply a business decision undertaken by the business.
> 129. Allison Ringer and David Harper had carried out thorough investigations into the allegations that the Claimant has made and came to entirely appropriate conclusions that he had not been discriminated on grounds of his race.
> 130. We are satisfied that there were no misdeeds with regards to the witness statements. The amendments made were simply to address the new race discrimination claim that the Claimant had been discriminated against because he was Black African Cameroonian. There is no evidence in this case at all that the Claimant has suffered any type of discrimination.
> 131. We are satisfied that he has been treated fairly and properly by his employers' and the allegations of discrimination against them are entirely without foundation."

Accordingly, the Claimant's claims were all dismissed.

The Grounds of Appeal

15. The Claimant raised 17 Grounds of Appeal. These were all rejected on the sift by HHJ Barklem. However, upon renewal at the Rule 3(10) Hearing, Judge Keith permitted six separate grounds to proceed. These were formulated as follows:

i) Grounds 2 and 3 – the Tribunal arguably erred in failing to explain why the three comparators identified by the Claimant did not discharge the burden of proving a prima facie

case of discrimination on grounds of race and disability;

ii) Grounds 4 and 5.1 – the Tribunal arguably erred in failing to explain why the Appellant's amendments of his claims damaged his consistency, credibility, or reliability; and why the Respondent's witnesses were seen as more credible;

iii) Grounds 6 and 17 - the Tribunal arguably failed to explain why it regarded the grievance investigators as having carried out thorough investigations and having reached entirely appropriate conclusions, given that its conclusions at para. 129 of the Judgment arguably failed to follow on from the facts found in relation to the investigations, those facts merely reciting the nature of the investigations;

iv) Grounds 12 and 13 - the Tribunal failed adequately to explain why the detriments complained of were not because of the acknowledged protected acts and it is at least arguable that some of the reasons were insufficient, in particular the "good business reasons" relied upon by the Respondent for not responding to the Claimant's grievances in 2017;

v) Ground 14 – the Tribunal arguably failed to consider that the allegations relating to Ms Gill related to flexible working and, as such, amounted to conduct extending over time;

vi) Finally, Grounds 15 and 16 - the Tribunal erred in failing sufficiently to explain why there was no provision, criterion or practice ("PCP") when the Tribunal referred to the refusal to deal with grievances during 2017.

16. It will be clear from those grounds that they are principally, if not entirely, concerned with the adequacy of reasoning on the part of the Tribunal. Rule 62(5) of the Employment Tribunal (Constitution Rules and Procedure) Regulations 2013 provides:

> "(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. ..."

17. In the well-known case of **Meek v City of Birmingham District Council** [1987] IRLR 250, the Court of Appeal gave the following guidance as to the tribunal's task in setting out its reasons:

> "8. It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."

The essential question in relation to each of the grounds, therefore, is whether the Tribunal's reasons, on a fair and proper reading, demonstrate to the Claimant why his claim did not succeed. If that task has been achieved, then the basis for many, if not all, of the grounds of appeal will fall away.

Burns-Barke Order

18. The Respondent suggested, following the Rule 3(10) Hearing that, given the nature of the permitted grounds of appeal, it would assist the EAT if the Tribunal were given the opportunity via the Burns-Barke procedure to answer some specific questions about its reasons for some of its conclusions. Judge Keith agreed with that suggestion and a set of questions was sent to the Tribunal for its consideration. By an e-mail dated 3rd February 2021, the Tribunal, through the judge, set out its responses to the questions ("the Burns-Barke Response"). It is appropriate to refer to the Burns-Barke Response alongside the Judgment in determining whether any error of law is established.

19. Before dealing with the Grounds specifically, I should mention that Dr Ibakakombo relied upon a written Skeleton Argument and extensive written submissions which were received yesterday. These were supplemented by extensive oral submissions which took up all of this morning's hearing. Although I am grateful to Dr Ibakakombo for his industry and diligence, the written submissions served yesterday tended to stray from the questions to be considered under each of the grounds into

territory which is more aptly described as an attempt to re-argue the facts and/or to contend that the Tribunal's conclusions were perverse. Neither of those courses is permitted, given the narrow scope of the permitted Grounds of Appeal.

20. I turn now to deal with the six Grounds of Appeal in turn:

Grounds 2 and 3 - failure to explain why the three comparators identified by the Claimant did not discharge the burden of proving a prima facie case

Submissions

21. Dr Ibakakombo, somewhat straying from the point, submitted that the Tribunal failed to acknowledge that the Claimant had been misled by Ms Gill as to the working arrangements at Magna Park, in that she had informed him that Magna Park did not offer part-time work at all. He further submits that, as the Claimant had in fact identified three appropriate comparators (Ms Underhill, Mr Hassan and Ms Wolczynska) it was incumbent upon the Tribunal to consider their circumstances and compare them with those of the Claimant rather than, as the Tribunal did, move straight to the 'reason why' question. The latter is only appropriate, submits Dr Ibakakombo, where no or no clear comparators are or could be identified. Reliance is placed on the cases of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 and **Laing v Manchester City Council** [2006] ICR 1519. In any case, he submits that the Tribunal erred in concluding (as set out in the Burns-Barke Response) that the comparators were not appropriate and/or that the issue of comparators was effectively irrelevant.

22. Dr Ibakakombo also suggested that the Tribunal failed to consider the complaint of institutional racism, although I was not able to discern how this related to his complaint about the comparators.

23. Ms McCann, of Counsel who appears for the Respondent, but did not appear below, submits that the Tribunal in this case focussed on the 'reason why' issue, as it was permitted to do, and came to the permissible conclusion that the Claimant's request for flexible working was rejected for reasons unconnected with race or his wife's disability. Those non-discriminatory reasons applied to all staff transferring from Nuneaton. In those circumstances, a comparison with three comparators who did not fall into that cohort of employees transferring from Nuneaton was of no assistance.

Discussion

24. Section 23 of the **Equality Act 2010** provides that where a comparator is relied upon, the circumstances of that comparator must not be materially different from those of the Claimant. The Claimant relied upon three comparators, all of whose circumstances were materially different in at least one vital respect: they were not part of the cohort of employees transferring from Nuneaton to Magna Park. Furthermore, as the Tribunal notes in the Burns-Barke Response, the Claimant gave no explanation as to why the circumstances of the comparators were similar to his own. Before me Dr Ibakakombo accepted that Ms Underhill was in a different position because she was not in the cohort of transferred employees, and he also accepted that Mr Hassan and Ms Wolczynska were already at Magna Park. The suggestion, therefore, that there is any similarity in the Claimant's circumstances and those of his identified comparators, is one without foundation. The Tribunal's conclusion that the issue of comparators was effectively irrelevant was, in terms of the identified comparators in this case, unassailable.

25. As for the contention that the Tribunal ought to have considered the position of comparators, whether hypothetical or actual, before seeking to determine the 'reason why' question, I consider that to be based on an incorrect reading of the case law. Whilst it is correct that in **Shamoon** and **Laing** the identification of a comparator was not straightforward, there was nothing to suggest that a Tribunal can only proceed to the 'reason why' question directly when that is the case. The guidance

of the House of Lords in **Shamoon** was clear: the two issues of less favourable treatment and the reason for the treatment are intertwined and the tribunal is entitled to focus primarily on the reason for the treatment without necessarily having to identify and draw comparison with the treatment of the comparator. The matter was succinctly addressed by former EAT President, Langstaff J, in the case of **Cordell v Foreign and Commonwealth Office** [2012] ICR 280, in which he stated as follows:

> "18. The drafting of section 3A (5), in common with the provisions proscribing direct discrimination elsewhere in the anti-discrimination legislation, appears to require the tribunal to consider two questions – (a) whether the claimant has been treated less favourably than an actual or hypothetical comparator with the same characteristics (other than his or her disability) was or would have been treated ("the less favourable treatment question"), and (b) whether that treatment was on the grounds of that disability ("the reason why question"). However, as was pointed out by Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, and as has been repeatedly emphasised since, both in this Tribunal and in the Court of Appeal – though still too often too little heeded by tribunals – those two questions are two sides of the same coin, and the answer to the one should in most cases give the answer to the other. To spell it out: if A, who is deaf, has been treated differently from B, who is not, and that is indeed the only difference between their cases, the irresistible inference will be that the reason for the different treatment is A's deafness; and likewise if A is subjected to a detriment on the grounds of his deafness it logically follows (at least if that disability is the principal ground) that a person who was not deaf would not have been so treated. As between the two questions, it is the reason why question that is in truth fundamental. Where there is an actual comparator, asking the less favourable treatment question may be the most direct route to the answer to both questions; but where there is none it will usually be better to focus on the reason why question than to get bogged down in the often arid and confusing task of "constructing a hypothetical comparator"."

26. In the present case, the comparators identified by the Claimant took the matter no further because they were not, for reasons already discussed, appropriate comparators. Moreover, the evidence was such in this case that the Tribunal was able to make clear and unequivocal findings as to the reason for the treatment; namely, the unavailability for business reasons for part-time or flexible work for transferring employees at Magna Park. Those reasons had nothing to do with the Claimant's race or his wife's disability.

27. Turning to the actual Ground of Appeal for which permission was granted; namely, that there

was *no explanation* for why the identification of the three comparators did not discharge the burden of proof on the Claimant, the answer is that the mere identification of the comparators alone (especially when those comparators are not appropriate as comparators) is not enough to discharge that burden. In any case, as already mentioned above, there was ample explanation for why the tribunal reached the conclusion that there had been no discrimination.

28. In the course of his submissions, Dr Ibakakombo relied upon various matters which clearly amounted to perversity challenges in respect of the Tribunal's judgment. As permission was not granted for such challenges, it would not be appropriate to deal with them now. In any event, I consider these challenges to be wholly without substance, given the extensive evidence before the Tribunal to support its conclusions. For these reasons, this Ground of Appeal fails and is dismissed.

Grounds 4 and 5.1 - failure to explain why the amendments to the Claimant's claims damaged his credibility and why the Respondent's witnesses were seen as more credible

29. Dr Ibakakombo's submission, if I understood it properly, was that it was not open to the Tribunal to conclude that the Respondent's witnesses were more credible when consistency of their evidence was based on a comparison with "untested contemporaneous documentation", and the Claimant's credibility was based on his cross-examination. This submission is without merit; the Tribunal was fully entitled to assess the consistency of the Respondent's witnesses' evidence with contemporaneous documentation. Indeed, that is one of the key measures by which credibility may be assessed, given the operative assumption that, unless established otherwise, a contemporaneous document is more likely to contain an accurate account of events at the time. I am told that the Claimant did not put the veracity of any key documents in issue at the Tribunal below. The fact that he did not do so suggests that there was no credible basis on which he could have done so.

30. As for the Claimant's own evidence, several reasons were given by the Tribunal for doubting its reliability. First, there were the matters set out in para. 38 of the Judgment. These included the fact that the Claimant had persistently changed his case, including changing the protected characteristic upon which he relied. Dr Ibakakombo questions how such a change can have any bearing on credibility. On its own, such a matter probably would not have any bearing; it is for a claimant to identify the protected characteristic or characteristics upon which he relies. However, viewed in light of the way that this case appears to have developed, it is clear that the change has some relevance. The Claimant initially only relied upon the fact that he is Black African, presumably because he believed at that time that his comparators were of a different race. However, when it became apparent (in the course of subsequent correspondence) that one of his comparators was also Black African, a change of tack was required, since it would be damaging to a claim of discriminatory treatment that a person with the same protected characteristic was not treated less favourably. It was at that point that the Claimant changed his protected characteristic to being Black African Cameroonian. It was submitted that the Claimant did so because Mr Onuoha was of the same origins and had also been discriminated against, thereby making two people within the organisation of the same origin having suffered detrimental treatment. However, there is no evidence that Mr Onuoha's origins ever featured in the discussions below and the more likely explanation for the change in tack is (as observed by the Tribunal in its Burns-Barke Response), the Claimant's late realisation as to the origins of one of his chosen comparators.

31. At the Preliminary Hearing before EJ Clarke on 6 April 2018, the Claimant was warned of the difficulties of fixing upon such a narrowly defined protected characteristic; the underlying premise of relying on the protected characteristic of being Black African Cameroonian being that the Claimant is concerned that the Respondent was treating black people with origins in another part of Africa more favourably than him and that the reason for doing so is that he is from Cameroon. There is not a shred of evidence to support that premise. The change in tack was clearly opportunistic and exposed

a serious flaw in the Claimant's case. The Tribunal was entitled to take that into account in determining whether there was any substance to the Claimant's case.

32. The Tribunal also relied upon the fact that the Claimant had tried to build claims out of simple events that clearly had nothing to do with his race or his wife's disability. This is merely another way of stating that the Claimant's claims lack any merit at all, a point made clear by the Tribunal in its comments at para. 116. The Claimant was also found to have made allegations against Ms Gill that were "untrue" and found to have "misled" Mr Fragona as to the basis on which he had transferred to Magna Park, i.e. by suggesting that there was an arrangement in place for him to work flexibly, when he had, in fact, agreed (albeit reluctantly) to transfer on a full-time basis.

33. These matters, taken together, provide ample justification, in my view, for the Tribunal's preference for the Respondent's evidence over that of the Claimant. The assessment of evidence is quintessentially a matter for the tribunal as the arbiter of fact, having had the benefit, in this case over several days, of seeing and hearing from the witnesses directly. There is no basis on which this appeal tribunal could interfere with those findings, even if that had been a ground of appeal, which it is not.

34. Dr Ibakakombo also complains that the Tribunal was not able to make an assessment of the Respondent's witnesses, given that only some of them gave evidence and that others (in particular, Ms Gill), did not. This, it seems to me, is a bad point: it is quite clear that, in referring to the Respondent's witnesses, the Tribunal is referring to those from whom it had heard evidence. This is confirmed, if confirmation is necessary, from the fact that the Tribunal expressly lists the witnesses from whom evidence was heard at para. 5 of the Judgment. The Tribunal's comments about Ms Gill were based on what she said in correspondence and as noted in meetings. As already mentioned, the Claimant did not put the veracity of the relevant documents and notes in issue and it does not, therefore, behove him to question any assessment by the Tribunal of evidence arising from such material. For these reasons, this Ground of Appeal fails and is dismissed.

Grounds 6 and 17 - failure to explain why the Tribunal regarded the grievance investigations as thorough and as leading to appropriate conclusions

35. This Ground of Appeal is based, it seems to me, on a false premise; namely, that the Tribunal, instead of making findings of fact about the grievance investigations, merely recited the nature of the investigations. In fact, the Tribunal made numerous findings of fact that were directly relevant to the allegation at the core of the grievance, which was that the failure to afford him flexible working was because of his race and/or his involvement in Mr Onuoha's claim. For example, at para. 77 the Tribunal recorded that Ms Ringer had no prior knowledge of the Claimant's involvement in the other claim; and at para. 86, that neither did Mr Harper. These findings are reiterated at para. 128 and are directly relevant to the Claimant's allegations of discrimination. As it was, there was no substance to those complaints. The Tribunal also found that the grievance process was carried out professionally and without a hint of discrimination. That goes far beyond merely reciting the nature of the investigations: it amounts to an assessment, based on the evidence that it heard, of the quality and propriety of those investigations.

36. In any case, the setting out of the detailed steps in an investigation process itself underlines its thoroughness. These are all findings of fact, and references to the investigation were not couched in terms suggesting that the Tribunal was merely setting out the Respondent's case as to what occurred; rather the Tribunal is expressly accepting that these were the steps taken. As the underlying premise for this Ground of Appeal is mistaken, the contention that there was any error on the Tribunal's part must also be flawed. Dr Ibakakombo also submitted this morning that there was a failure to investigate the allegations made in the grievance process, and he referred me to certain aspects of the grievance which, he says, were not addressed. I must confess, I did not understand this aspect of Dr Ibakakombo's submissions because the passages to which he drew my attention referred to Mr Onuoha, and the grievance expressly addressed whether or not the treatment complained of

was because of the Claimant's previous involvement in Mr Onuoha's claims.

37. Dr Ibakakombo also suggested that the grievance investigation did not consider the specific allegations against Ms Gill, who was described as the "leader and conspirator" of his unjust and discriminatory treatment and that the Tribunal failed to address that matter. However, the Tribunal clearly accepted that Ms Ringer had found that Ms Gill had not done anything improper and that she had done her best to find suitable alternative work for as many people as possible (see para. 80). The Tribunal went on to note at para. 82 that:

> "none of her [Ms Gill's] actions were in any way because of the Claimant's race or because he had been involved in a Tribunal claim."

It is difficult to see what more the Tribunal could reasonably have said by way of addressing the Claimant's allegations or to demonstrate that the investigation was, in its view, adequately detailed.

38. In his written submissions, Dr Ibakakombo also complained that the Tribunal failed to bear in mind that overt discrimination is rare and that it ought to have drawn inferences based on the treatment meted out to the Claimant. Apart from the fact that this is not a permitted ground of appeal, the flaw in that submission is that is that there is nothing in the treatment from which any adverse inference can sensibly be drawn: there was a clear, non-discriminatory reason for Ms Gill's treatment; namely, the business needs of the Magna Park site. There is simply no scope, in these circumstances, for drawing an adverse inference, no matter how strongly the Claimant considers or felt he had been discriminated against.

39. Dr Ibakakombo specifically asserted this morning that, in order for this to have been a reasonable or thorough investigation, there would have had to have been not only evidence that every single individual allegation was addressed, but also that the Respondent had interviewed all the people named in the grievances. However, the employer is entitled to adopt an approach that is proportionate

to the issue in hand. The fact that a serious allegation is made does not automatically require the employer to interview every person named in a grievance; such an approach would be disproportionate where there are many individuals named, whose involvement may be marginal or peripheral to the core allegation. In the present case it is clear that the principal allegation made in respect of Ms Gill in the 2016 grievances was investigated and that clear conclusions were reached in respect of them. For these reasons, this Ground of Appeal fails and is dismissed.

Grounds 12 and 13 - failure to explain why the detriments complained of were not because of the protected acts

40. The Tribunal agreed that there were protected acts as set out in para. 125. The question was whether any of those was the reason for the treatment of which he complained. At paras. 127 to 128, the Tribunal set out more than a dozen reasons explaining the treatment received, none of which had anything to do with the protected acts. Most significant, perhaps, is the fact that, until he mentioned it during the grievance investigations, none of Ms Ringer, Mr Harper or Mr Fragona was even aware of the Claimant's earlier involvement in Mr Onuoha's claims. Given that finding of fact, which is not challenged, and which is unchallengeable, the complaint of a conspiracy to discriminate against him and/or the protected acts being the reason for his treatment does not get off the ground.

41. Specific complaint is made about one of the Tribunal's reasons, and that is the finding that "there were good business reasons why the Respondent decided to not respond to letters of grievance during 2017". Judge Keith considered it arguable that these business reasons were not adequately explained. However, on closer analysis, it is clear that the explanation for them was more than adequate. The Claimant was prolific in his complaints and the flow of complaints did not cease, even after he had presented his case to the Tribunal. However, as the Tribunal found, these complaints and grievances related to matters that the Respondent had already dealt with. The Respondent was careful to point out that "fresh grievances" would be considered in the normal way. The Respondent's

approach in dealing with repetitious complaints was, as the Tribunal found, appropriate given the substantial resources that would be taken up by dealing with each and every one of them. That, therefore, was the reason for deciding not to respond to the Claimant's grievances in 2017; it was not the fact that he had done a protected act. This is made clear, as Ms McCann points out, by the final two sentences of para. 97 of the Judgment, which make it clear that the decision taken by the Respondent at that time was because the Claimant's continuing complaints were taking up substantial resources and was not because of the earlier protected acts. In my judgment, that was plainly a permissible approach on the part of the Tribunal and discloses no error of law. For these reasons, this Ground of Appeal fails and is dismissed.

Ground 14 –failure to consider whether allegations against Ms Gill amounted to conduct extending over time

42. This ground would only need to be considered if there had been any substance to the complaint about Ms Gill's decision not to offer any flexible working on the transfer to Magna Park. As there was, and is, no substance to that claim or to the appeal against the Tribunal's Judgment in this respect, it is academic whether the Tribunal erred in deciding that the claim was out of time and/or that it was not part of an act extending over time. However, I deal with it for completeness, nevertheless. I am clear, in any event, that the Tribunal did not err in concluding that it was not an act extending over a period. As Ms McCann pointed out, it was expressly conceded on behalf of the Claimant at the hearing that allegations 6 to 15 on the Scott Schedule, which included the allegations against Ms Gill, were out of time. Furthermore, no reason had been put forward as to why there should be an extension of time on a just and equitable basis.

43. What is now submitted is that the claim against Ms Gill related to flexible working and that was, and always has been, alleged to be an act extending over a period. However, it is not the case

that the action of every actor in a claim extending over a period itself amounts to a claim extending over a period. A particular individual's involvement may involve an isolated act in a series of events in which there is no particular link between the particular act and others in the series, other than the fact that it relates to the same subject matter. The Tribunal explained in its Burns-Barke Response that the allegation relating to Ms Gill related to a single act rather than a continuing one. That finding was open to the Tribunal, given that Ms Gill's decision was simply to convey the Respondent's position regarding the move from Nuneaton to Magna Park. The Claimant's allegation that Ms Gill was a "leader and conspirator" in the treatment meted out was clearly not one that was accepted.

44. In the course of his submissions on this ground, Dr Ibakakombo referred me to the following authorities, none of which, in my view, advanced the Claimant's case.

a. **Arthur v London Eastern Railway Ltd** [2007] ICR 193. This is of limited assistance, as it is concerned with whether there is a series of acts under the whistle-blowing provisions of the Employment Rights Act. But, in any event, this states no more than that there must be some relevant connection between acts for them to be part of a series. It does not provide that any connection or coincidence of subject matter must inexorably lead to the conclusion that the relevant connection is established.

b. The second case was **Veolia Environmental Services Ltd v Gumbs** UKEAT 0487/12. I was taken to para. 64 in the judgment of HHJ Hand QC:

> "64. Mr Ditchburn submitted that where there is a common thread that links different allegations this kind of mathematical logic gets in the way of the fact finding role of the Employment Tribunal. The answer to this was the same answer as applied to the limitation point, to which we will come shortly; where there is a personality common to different allegations then that can lead to a shifting of the burden of proof generally both in respect of those allegations that have inherent potential for discrimination and those, which taken in isolation, do not. We agree; the whole point is that where allegations are linked by a common personality they do not stand in isolation. But this is a conclusion not necessary for the disposal of this appeal because we have found that, taken in isolation, each was correctly viewed by the Employment Tribunal as having inherent discriminatory potential."

This passage, which is, in any event, *obiter*, does not assist the Claimant for the simple reason that it is not about acts extending over time, but whether separate alleged acts can be considered together or should be viewed in isolation. It is no surprise that allegations linked by some common personality may be considered together; however, that is very different from saying that any acts linked by some common thread amount to an act extending over time for the purposes of the Equality Act 2010.

c. The final case was **Hendricks v Commissioner of Police for the Metropolis** [2003] ICR 530. This is the leading authority and was cited by the Tribunal (see para. 114). Dr Ibakakombo suggested in his written submissions that, as in **Hendricks**, all of the allegations here are connected because they are all against the same individual, Ms Gill. This is patently incorrect: it is evident from the Scott Schedule of claims that Ms Gill is but one of many targets of the Claimant's complaints and it is not clear at all how Ms Gill is said to be involved in any of the complaints which fall within the time limit provided by the 2010 Act. In these circumstances, it was open to the Tribunal to treat the complaint against Ms Gill as separate and not one of a series involving other participants.

For these reasons, this Ground of Appeal fails and is dismissed.

Grounds 15 and 16 – failure to explain why there was no PCP when the Tribunal referred (at para. 127) to the refusal to deal with further grievances in 2017

45. Dr Ibakakombo submitted that there was a continuing state of affairs amounting to a PCP, not to investigate or deal with grievances, thoroughly or at all, and that that had an adverse effect on the Claimant's position. Insofar as this submission relates to the pre-2017 grievances, it lacks substance,

given the clear finding of the Tribunal that these grievances were thoroughly investigated (see the discussion under Ground 6 above).

46. As for the grievances in 2017, the Respondent's approach to those was a specific response to the Claimant's circumstances, whereby he was subjecting the Respondent to many complaints and grievances about matters already addressed.

47. The essence of a PCP is that it is applied to all including others who do not share the claimant's protected characteristic, but which puts the claimant at a particular disadvantage. Even if the Respondent's approach to the Claimant's 2017 grievances could be described as a PCP, there was nothing to suggest that it was applied to anyone but him. Accordingly, this aspect of the indirect discrimination claim does not get off the ground and there was little need for the Tribunal to provide any further explanation than it did for not finding that there was any relevant PCP.

48. I was referred to the cases of **Ishola v Transport for London** [2020] IRLR 386 CA, **Nottingham City Transport v Harvey** [2013] All ER (D) 267 and **British Airways plc v Starmer** [2005] IRLR 862. I need only refer to Lady Justice Simler's decision in **Ishola** where she said as follows:

> "37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.
> 38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may

> be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.
> 39. In that sense, the one-off decision treated as a PCP in **Starmer** is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the **Nottingham** case in contrast to **Starmer**, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."

49. What emerges from that is, although a one-off act against an individual complainant could be evidence of a PCP if the act relied upon is one that is likely to be repeated in respect of other individuals, it is much less likely that a PCP would be established where the act is peculiar to the claimant's circumstances,. In my judgment, that is precisely the situation here. As I have said, the Respondent's actions were born of the Claimant's repeated grievances and complaints, all of which appeared to depend on matters which had, by that stage, become the subject of Tribunal proceedings. It was very unlikely that the decision not to consider grievances would be applied to any other person, and that is further confirmed by the Respondent's express confirmation at the time that, even in respect of the Claimant, fresh grievances would be considered. For these reasons, this Ground of Appeal also fails and is dismissed.

Conclusion

50. For these reasons, and notwithstanding Dr Ibakakombo's detailed submissions this morning and this afternoon, this Appeal fails and is dismissed.