Neutral Citation Number: [2023] EAT 58

Case No: EA-2020-000334-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 April 2023

Before :

THE HONOURABLE MR JUSTICE LINDEN
MR DESMOND SMITH
DR GILLIAN SMITH MBE

- -

Between :

MR DANIEL MATOVU **Appellant**
- and -
(1) 2 TEMPLE GARDENS CHAMBERS
(2) Mr NEIL MOODY KC
(3) LEE TYLER **Respondents**

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- -

The Appellant in person
Mr Richard Leiper KC (instructed by Farrer & Co) for the **Respondents**

Hearing date: 21 – 23 March 2023

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JUDGMENT

SUMMARY

Practice and Procedure, Race Discrimination, Victimisation, Harassment

The Appellant is a barrister who brought claims of direct and indirect race discrimination, harassment related to race and victimisation against his chambers, the then head of chambers and the Senior Clerk. The claims were all dismissed by an Employment Tribunal sitting at London Central. He appealed on four main grounds: (a) procedural unfairness which he said vitiated the decision; (b) apparent bias; (c) errors of law/approach and/or inadequate reasons in relation to the findings on direct race discrimination; and (d) errors of law/approach and/or inadequate reasons in relation to victimisation.

Held: appeal dismissed for the reasons set out in the judgment of Employment Appeal Tribunal.

THE HONOURABLE MR JUSTICE LINDEN:

INTRODUCTION

1. This is an appeal from a decision of an Employment Tribunal (Employment Judge Snelson, Mr Simon and Ms Moreton) sitting at London Central ("the ET"). In a decision which was sent to the parties on 11 February 2020, the ET dismissed the Appellant's claims of direct and indirect race discrimination, harassment related to race and victimisation on their merits, but also on the grounds that, save for three of his complaints, his claims were out of time. We will refer to the Appellant by his name given that he is also an advocate in the appeal.

2. There are four main Grounds of Appeal although they include a number of sub-grounds and arguments:

    a. First, it is contended that the ET failed to conduct a fair hearing ("Ground 1");

    b. Second, relying on the criticisms of the ET made under Ground 1 and a number of additional criticisms of the ET's conduct of the proceedings, as well as criticisms of some of the findings against him made under Grounds 3 and 4, Mr Matovu alleges apparent bias ("Ground 2");

    c. Third, it is contended that the ET's approach to certain of Mr Matovu's complaints of direct race discrimination was erroneous and/or that the ET failed to give adequate reasons for its decisions in relation to these complaints ("Ground 3");

    d. Fourth, Mr Matovu argues that the ET's approach to certain of his complaints of victimisation was erroneous and/or that the ET failed to give adequate reasons for its decisions in relation to these complaints ("Ground 4").

3. Permission to appeal in respect of what are now Grounds 3 and 4 was given by Mrs Justice Stacey after a hearing on 26 November 2020 under Rule 3(10) of the Employment Appeal Tribunal Rules 1993. She also directed that permission in relation to the proposed Grounds relating to fair hearing/apparent bias would be considered when the Mr Matovu had submitted an affidavit in support, and the Respondents and the ET had had an opportunity to comment, pursuant to the procedure set out in [12] of Practice Direction (Employment Appeal Tribunal Procedure) 2018.

4. Mr Matovu duly provided an affidavit dated 22 December 2020. This was responded to by Ms Sarah Vaughan Jones KC on behalf of the Respondents in an affidavit dated 18 January 2021, and by the members of the ET in comments received by the Employment Appeal Tribunal on 12 May 2021. In the light of these materials, at an oral hearing on 18 January 2022, Mr Clive Sheldon KC, sitting as a Deputy High Court Judge, gave permission to appeal on what have become Grounds 1 and 2. He also directed that the Grounds of Appeal be amended so that they were limited to the Grounds which he and Stacey J had permitted to go forward – permission had been refused in respect of some of Mr Matovu's arguments - and, by Order dated 11 February 2022, Mr Sheldon then gave permission to amend in the terms of draft Amended Grounds of Appeal dated 4 February 2022.

OUTLINE OF THE PROCEEDINGS IN THE EMPLOYMENT TRIBUNAL

Introduction

5. Before turning to the detail of the Amended Grounds of Appeal, is necessary to give an outline of the dispute, of some of the procedural history of the matter, and of the ET's decision.

The dispute

6. Mr Matovu describes himself as a black African and Ugandan citizen. He has lived in the United Kingdom since he was six years of age. He was educated at Eton College and Oxford University and was called to the Bar in 1985. He was taken on by a set of chambers in the Inner Temple in 1987 and he practised from there for 16 years. Over time, his practice came to be focused largely on employment and discrimination law work and, in 2001, he moved to 2 Temple Garden Chambers ("2TGC"). He practised from there until 29 October 2019, when he was expelled.

7. On 26 February 2019, Mr Matovu presented his first claim (case no 2200700/2019) which was against 2TGC and Mr Neil Moody KC, who was the Head of 2TGC from July 2015 to July 2019. In it, he alleged direct and indirect race discrimination, harassment related to race and victimisation contrary to sections 13, 19, 26 and 27 Equality Act 2010 read with section 47. The definitions of these categories of prohibited conduct will be very familiar but, for ease of reference, sections 13, 19, 26 and 27 are set out in Annex 1 to this Judgment. In summary, section 47 prohibits discrimination, harassment and victimisation by barristers and barristers' clerks in relation to the terms on which tenancy is offered to a barrister, the provision of opportunities to gain experience, the provision of any other benefit, facility of service or *"by subjecting [them] to any other detriment"*.

8. On 30 May 2019, Mr Matovu presented a second claim (case no 2202310/2019) in which he made allegations of direct race discrimination, harassment related to race and victimisation against Mr Lee Tyler, the senior clerk at 2TGC. His complaints against 2TGC and Mr Moody in the first claim to a large extent encompassed his complaints against Mr Tyler.

9. At this stage, it is sufficient to note that there were the following main strands to the two claims, which were in due course consolidated:

    a. In the context of Mr Matovu falling behind with the payment of his monthly chambers bills, he had complained about the fact that 2TGC did not differentiate between direct access work and work carried out pursuant to instructions from solicitors in terms of its charges to barristers for services and facilities. He objected to this because he considered that direct access work was "self-generated" rather than generated by chambers staff including its clerks. The position of 2TGC was that direct access cases required work by clerks and other members of staff and made use of chambers premises and facilities. It was therefore right that contributions were paid by barristers on their receipts from this type of work. This became Mr Matovu's indirect discrimination claim to the ET which was put on the basis that the *"provision, criterion or practice"* of charging the same in respect of work coming from these two different sources placed or would place black members of chambers at a *"particular disadvantage"* when compared with members who were not black, and that this practice was not *"a proportionate means of achieving a legitimate aim"*: see section 19 of the 2010 Act.

    b. Another of Mr Matovu's claims was that when he had asked about the approach to charging barristers for different types of fee income at a meeting with Mr Moody on 16 January 2016, he had effectively been told that if he did not like it, he should consider leaving chambers. He alleged that this was *"harassment"* as defined by section 26 of the 2010 Act, and that the harassment was *"related to"* race.

    c. The chambers contributions issue was discussed in writing and at meetings over the course of 2016. Mr Matovu complained that he had agreed to attend one of these meetings, on 15 November 2016, without a supporter or companion on the basis that the meeting would be tape-recorded. But, when he attended, it became apparent that the arrangements had been withdrawn. He claimed that there had been an argument about this, and Mr Moody had walked out. This was alleged to be harassment related

to race and/or victimisation for raising issues of discrimination contrary to section 27 of the 2010 Act.

d. There was also a meeting of the management board of 2TGC ("the Board") on 19 December 2016 to which Mr Matovu was invited so as to put forward his views on the chambers contributions issue. His complaint about this meeting was that he had requested, in advance, sight of all of the materials which would be before the Board at the meeting in relation to this issue, but this had been refused. This was said to be direct race discrimination contrary to section 13 of the 2010 Act, and/or harassment related to race.

e. There was a complaint that, on or about 21 June 2017, Mr Tyler had failed to put Mr Matovu forward as the only candidate for a speaking opportunity at a seminar which was being organised by a member of chambers, Ms Helen Wolstenholme, when one of the speakers had dropped out. Mr Matovu alleged that Mr Tyler had knowingly put forward, in addition to him, a member of chambers (Ms Jennifer Gray) who was not suitable. This was alleged to be an act of direct race discrimination.

f. On 12 July 2017, Mr Matovu made a written complaint to Mr Moody that putting forward Ms Gray was a "clear cut act of discrimination" and "should plainly be viewed as an act of as gross misconduct". Ms Rehana Azib (now KC) was appointed to investigate his complaint. On 26 September 2017, she produced a report which rejected his complaint. She found that Mr Tyler had done nothing to disadvantage Mr Matovu and had no intention to disadvantage him. There was also nothing to support the allegation that this was connected to Mr Matovu's race, and Ms Azib questioned whether the allegation of race discrimination was made in good faith. Mr Matovu's claims about this report were that:

    i. Ms Azib had failed "to adopt a fair, objective or even-handed approach to conducting the fact finding investigation" of his complaint against Mr Tyler. This was said to be an act of victimisation.

    ii. He had not been provided with Ms Azib's final report or permitted to comment on it or be heard before the outcome of his complaint about Mr Tyler was determined on 29 September 2017. This was alleged to be an act of harassment related to race and/or victimisation.

g. There was a complaint that the full clerking services of Mr Tyler had then been withdrawn from Mr Matovu without due process with effect from 4 October 2017. This was said to be an act of harassment related to race and/or victimisation.

h. Continuing to require Mr Matovu to pay full contributions on all of his earnings, including his direct access receipts, whilst depriving him of the full benefit of Mr Tyler's services was also alleged to be race related harassment.

i. There were complaints about a mediation process which took place in December 2017 to try to resolve the differences between Mr Matovu and Mr Tyler and 2TGC. We need not set out the detail of these complaints as they are not relevant to this appeal, and they raised matters which the ET held were protected by without prejudice privilege.

j. There was a complaint that, at an AGM on 27 November 2018, Mr Moody and the Board had allowed Mr Matovu to be subjected to heckling by another member of chambers when he was addressing the meeting. The failure to protect him from this outburst was said to be an act of harassment related to race.

k. There was a complaint that, on 1 May 2019, Mr Moody and the Board had initiated an investigation of a grievance against Mr Matovu brought by Mr Tyler whilst disregarding Mr Matovu's complaints and failing to investigate them. This was alleged to be an act of victimisation.

10. These claims were denied by the Respondents in their entirety. It was also part of their defence to the claims of victimisation made by Mr Matovu that the allegation of discrimination which he made against Mr Tyler on 14 July 2017, and the subsequent allegations of discrimination against the Respondents on which he relied as his *"protected act(s)"* for the purposes of section 27(2) of the 2010 Act, were *"false"* and *"made in bad faith"* for the purposes of section 27(3).

11. The Respondents also contended that a number of the claims were out of time.

Relevant procedural history

12. The hearing of Mr Matovu's claims was listed for 10 days, from 12-25 November 2019. There were, however, various applications and cross applications made by the parties which complicated preparations for trial. Before us, each side accused the other of being obstructive

and acting other than in accordance with the overriding objective in the pre-trial stages. We are not in a position fairly to reach a firm view about all of the procedural history. As we told the parties, it is not necessary for us to do so for the purposes of determining the appeal and, in any event, we could only go off the materials which were before us.

13. At a Preliminary Hearing before Acting Regional Employment Judge Wade on 11 July 2019 the listing of the full hearing was confirmed and the parties were told that the Tribunal had no capacity to extend the hearing beyond 10 days. A two-day Preliminary Hearing was listed for 24 and 25 October 2019 to consider a number of issues which had been raised by the parties, including whether material relating to the December 2017 mediation should be excluded from the evidence on the grounds that it was privileged, and directions were given.

14. The Preliminary Hearing took place on 24-25 October 2019 before Employment Judge Hodgson. The question of the admissibility of the evidence about the mediation was not determined but a number of case management orders were made. It is not necessary to set all of these out, but it is of relevance to note that:

    a. Mr Matovu made an application to postpone the hearing on 12-25 November 2019 which was refused. The basis for this application was that a chambers meeting was to be held on 29 October 2019 at which his expulsion from 2TGC was to be considered and there was the likelihood that there would be further proceedings if this was the outcome. It was argued that the first two claims should be consolidated with the third claim, assuming it was made, and the three claims heard together. The hearing should be postponed for this purpose.

    b. Mr Matovu was made subject to an Unless Order to serve his witness statement by 4pm on 4 November 2019 having failed to comply with a direction to exchange witness statements by 22 October 2019. He had previously been made the subject of an Unless Order by REJ Wade on 27 September 2019 which required him to provide his disclosure by 3 October 2019.

    c. Mr Matovu was encouraged to clarify the issues for determination at the full hearing, particularly in respect of the question of *"particular disadvantage"* in relation to his indirect discrimination claim, and the parties were encouraged to agree a list of issues.

d. At the Preliminary Hearing, Mr Matovu asked for a direction that "a racially diverse panel be appointed for the full hearing" and EJ Hodgson directed that any such application should be made to the Regional Employment Judge.

e. Mr Matovu also asked EJ Hodgson for permission to hire a stenographer for the hearing. The EJ directed that any such application be made in writing.

15. On 28 October 2019, Mr Matovu wrote to REJ Wade making various complaints about EJ Hodgson's conduct of the Preliminary Hearing and requesting directions that the full hearing should not be assigned to him and that a racially diverse panel be appointed "in the light of these matters". He also raised the issue of permission for a stenographer, stating that although he had not ascertained whether this was something he could afford it was important for him to have an accurate record of exactly what was said during the course of the hearing.

16. A third claim (case no 2204797/2019) was then presented by Mr Matovu on 7 November 2019. This alleges harassment related to race, and victimisation, against 2TGC and 19 named barristers arising out of his expulsion on 29 October 2019. He also made a further application for the full hearing to be postponed, and complained that he had not had a response to his letter of 28 October. His 7 November letter was followed up by him on 8 and 11 November 2019.

17. On 11 November 2019, Mr Matovu was notified that his 7 November application to postpone the full hearing had been refused by REJ Wade. She also sought clarification as to what response Mr Matovu was seeking to his 28 October letter.

18. In Reasons for the refusal of the postponement given by her on 12 November 2019, REJ Wade said:

> *"**1. Consolidation with the new claim***
>
> *The claimant made a thorough application to EJ Hodgson to postpone the hearing on the basis that this claim should be consolidated with a new claim to be brought concerning the claimant's expulsion from Chambers. The claimant said in his re-application of 7 November that the circumstances had changed as he has now actually issued his new claim and that therefore it was in the interests of justice to postpone and consolidate. I am satisfied that there has been no material change in circumstances and that the Hodgson tribunal was fully aware of the pending new claim when the decision was made not to postpone, I spoke to EJ Hodgson who confirmed this.*

> *Not only is it not appropriate for me to overturn EJ Hodgson's decision, I support it. This claim was filed in February 2019 and is overdue for resolution, it is a substantial piece of litigation in its own right and the outcome will assist the tribunal deciding the second claim and shorten the process. Further, much preparation work has been done for this hearing, including case management by the tribunal and a judge has been made available, so it is not in anyone's interests for there to be a postponement in these circumstances and at this late stage."*

19. We observe that REJ Wade's decision was unsurprising for the reasons which she gave. It was also a case management decision and the reasoning was unimpeachable. The prospects of successfully challenging it on appeal or persuading an Employment Tribunal to reverse this decision were therefore extremely remote.

20. REJ Wade also explained why the ET was not racially diverse as follows:

> *"**Request for a racially diverse panel***
> *The claimant also requests reasons for why a racially diverse panel was not provided. As he probably knows, the panel is provided based on the availability of members to sit on a particular day and the tribunal usually has little or no choice as to who that might be. All members of the panel have been trained on discrimination issues and are able to participate in the adjudication of race discrimination claims. It is also of course important that a panel is not hand-picked to suit the requirements of a particular party."*

21. The full hearing then began on Tuesday 12 November 2019. Mr Matovu represented himself, and the Respondents were represented by Mr Richard Leiper KC. There was a series of applications by Mr Matovu. The detail of some of these will be returned to because they are the subject of grounds of appeal but, in summary:

    a. Mr Matovu purported to apply to consolidate the third claim with the first two claims. In its Reasons the ET described this as a "re-packaged" version of his previous two applications to postpone the hearing. His application was refused on the grounds that there had been no material change of circumstances since the refusal of his earlier applications to postpone, and there was no prejudice to him in proceeding given that he would be permitted to give evidence about events which post-dated the second claim and, indeed, had done so in his witness statement. When EJ Snelson said that

the issue had been determined by REJ Wade, Mr Matovu said that he wished to appeal REJ Wade's decision but needed her Reasons in order to do so. The ET adjourned, EJ Snelson spoke to REJ Wade and it was confirmed that she would provide reasons that day, which she did. These are the reasons provided on 12 November 2019 to which we have referred at [18], above.

b. Mr Matovu asked, again, for a racially diverse panel, by which he explained that he meant "visibly racially diverse". This application, which would also have resulted in the hearing being postponed, was refused on the grounds that there was no power to grant such an application. The ET noted that there was a duty to recuse in appropriate circumstances, but the members could not do so, effectively "en bloc", simply because they did not appear to Mr Matovu to be racially diverse. The composition of the panel was an administrative matter and Mr Matovu's application to the Regional Employment Judge had been refused. The ET could not do otherwise.

c. The ET refused Mr Matovu's request for permission to install recording equipment in the hearing room. This is a point to which we will return, as it is raised as an issue in the Amended Grounds of Appeal.

22. We note that the hearing of the claims proceeded on the basis of a List of Issues which had been drafted by Mr Matovu. He had rejected amendments to his draft which had been proposed by the Respondents and they had decided to accept his draft. The List of Issues was appended to the ET's Reasons.

23. Once the preliminary matters had been determined, at lunchtime on 12 November 2019 the ET adjourned until 2pm on 13 November 2019 to read the witness statements on the basis that they would then be "taken as read" in the usual way. When the hearing resumed on Day 2 Mr Matovu sought, again, to postpone the hearing. During the adjournment he had lodged an urgent appeal at the Employment Appeal Tribunal which, the ET found, challenged the decision of EJ Hodgson to refuse a postponement. He produced a document prepared by His Honour Judge Shanks in which the Judge said that he was in no position to intervene but suggested that Mr Matovu be permitted to renew his application for a postponement when the hearing before the ET resumed. At [18] of its Reasons the ET said:

"It eventually emerged, but only after we were forced to press Mr Matovu for clarity on the matter, that he had not made the EAT aware in his communication(s) sent to it

on day one following the adjournment that he had made the application to us that day and received an adjudication upon it. We found this troubling."

24. The ET rejected Mr Matovu's application: "*The (further) renewed application added nothing. We rejected it, relying on the reasons already given."* Mr Matovu then applied for the proceedings to be halted whilst he appealed to the Employment Appeal Tribunal against this ruling. This application was refused on the grounds that there had already been an attempted appeal against the refusal of a postponement, and the ET could see no arguable challenge to its decision on this issue.

25. The hearing then proceeded with Mr Matovu's evidence starting "well after 3pm on day two" i.e. the Wednesday. Mr Matovu argues, as part of Grounds 1 and 2, that the ET was unfairly indulgent in relation to Mr Leiper's cross examination of him, as compared with its approach to Mr Matovu's cross examination of Mr Moody, which the ET guillotined. He complains that the ET dealt unfairly with his re-examination of himself, and he raises issues about the admissibility of certain evidence. We will return to the detail of these arguments below.

26. The evidence concluded at lunchtime on Day 9, which was Friday 22 November 2019, and the hearing was adjourned on the basis that written submissions would be filed and served on Monday 25 November 2019. There would then be oral submissions starting at 2pm that day. In the event, written submissions were exchanged a matter of minutes before the hearing resumed because Mr Matovu was apparently not in a position to exchange until this point. At the end of the oral submissions, Mr Matovu applied for permission to submit further written submissions, in response to Mr Leiper's submissions. This was opposed and his application was refused. In this appeal he complains that he was not given a fair opportunity to respond to Mr Leiper's written submissions and we will return to the detail of this Ground.

27. On 18 December 2019, Mr Matovu wrote to the London Central Employment Tribunal asking for a 33 page "Claimant's Response to Respondent's Closing" to be considered by the ET. This was objected to by the Respondents and the ET declined to read the additional submissions. Again, we will return to this in our consideration of the fair hearing/apparent bias grounds of appeal.

28. The ET met on 13-14 January 2020 to deliberate, and the Judgment and Reasons were promulgated on 11 February 2020, as we have said.

The ET's Judgment and Reasons

Overview

29. The ET's Judgment and Reasons are a matter of public record and the issues in the appeal mean that it is only necessary to focus on the detail in relation to certain specific aspects of it. However, in outline, at [13]-[21] of its Reasons the ET explained Mr Matovu's procedural applications, its decisions on them and its case management of the hearing. We will come back to what it said, so far as relevant, below.

30. The ET then set out the relevant law in a way which was not criticised by Mr Matovu in this appeal, before making its findings of primary fact. These findings traced, chronologically, the relevant sequence of events and they painted a picture of an escalating conflict between Mr Matovu and 2TGC with a corresponding breakdown in trust between the parties which had led, as the ET described it, to *"this bitter and destructive litigation"*.

31. As far as the credibility of the witnesses and the basis for its findings of primary fact are concerned, at [110] the ET explained:

> *"The witnesses who gave evidence on the Respondents' side were, to our minds, careful and conspicuously frank. Moreover, their evidence, which struck us as plausible and rational, was to a very large extent corroborated by, or at least consistent with, contemporary communications. By contrast, we did not find Mr Matovu in all respects a satisfactory witness, but since the Tribunal's primary focus is necessarily upon the actions and thought processes of the Respondents we do not think it necessary to pass further comment on his evidence."*

32. The ET then dealt with the claims, setting out *"Secondary Findings and Conclusions"* in relation to each of the factual and legal issues which it had been asked to determine. All of Mr Matovu's claims were dismissed.

The indirect discrimination claim

33. The indirect race discrimination claim failed on the grounds that Mr Matovu had not provided any evidence that charging contributions on direct access work put or would put black members of 2TGC at a particular disadvantage as compared with members who were not black. This decision has not been challenged on appeal.

The 16 January 2016 meeting

34. The ET found that the conversation between Mr Matovu and Mr Moody on 16 January 2016 did not amount to harassment and nor was Mr Moody's approach at the meeting related to Mr

Matovu's race in any event. It had been a frank discussion in the context of a private conversation about Mr Moody's concerns about Mr Matovu's failure to pay his chambers bills and Mr Matovu's unhappiness with his practice, the service provided to him by chambers and having to pay contributions on his receipts for direct access work.

Recording the 15 November 2016 meeting

35. The ET found that there had been a misunderstanding. Mr Moody had not agreed to the meeting being recorded and did not consider that this was appropriate for an informal meeting between colleagues. But when Mr Matovu reacted angrily at the meeting, and said that he had been *"ambushed",* Ms Vaughan Jones had proposed, more than once, that the meeting be recorded on a mobile phone. This had been a perfectly reasonable suggestion which would have resolved the matter but, instead of accepting this suggestion, *"Mr Matovu persisted in a fierce and entirely unreasonable tirade against Mr Moody which resulted in the meeting being aborted".* He had not suffered any *"detriment"* for the purposes of his victimisation claim. Nor had he been harassed and nor was what occurred *"because of"* Mr Matovu raising issues of discrimination or *"related to"* race as required by the relevant statutory provisions.

Materials for the 19 December 2016 meeting

36. The ET found that Mr Matovu had had to be chased for a reply to an email from Ms Vaughan Jones on 29 November 2016, inviting him to submit any further written observations which he wished to make on the contributions issue and to attend and address the meeting if he wished. He had replied on Friday 16 December 2016 saying that he would be prepared to speak at the meeting but wanted to be provided with all of the information which would be taken into account by the Board. He added that he did not know whether any enquiries had been made about the balance of the work provided to others, nor about what types of income had not attracted contributions in the past. She replied, saying that the Board had information about his earnings and the earnings of other members from direct access work, although this was confidential. It had not sought information about the balance of work provided to others as it did not see this as relevant, but the Board was prepared to listen to what he had to say on this point.

37. Ms Vaughan Jones discussed the matter with Mr Moody and they agreed that Mr Moody would review the materials before making a decision on this, given that they included confidential information. However, Mr Moody was unable to do this until the day of the meeting.

38. The meeting went ahead on 19 December 2016 and Mr Matovu attended and addressed it. The ET found that he was not disadvantaged by not having all of the materials at that stage: on the contrary, the Board decided to commission Mr Michael de Navarro KC, a senior practitioner who had never been a member of the Board, to look into Mr Matovu's complaint and produce a report. This was a favourable outcome from Mr Matovu's point of view. At the meeting it was also decided that the materials which had been considered by the Board would be provided to Mr Matovu (save for a legal opinion on the indirect discrimination issue) and this happened the next day, 20 December 2016. Mr Matovu then put forward his views and arguments to Mr de Navarro for the purposes of his report dated 15 January 2017. He had not been subjected to a *"detriment"* for the purposes of his direct race discrimination claim, or harassed, and nothing that happened was *"because of"* or *"related to"* race in any event.

The speaking opportunity in June 2017

39. As far as the complaint about Mr Tyler putting forward Ms Gray for the speaking opportunity is concerned, the ET found that Mr Matovu was not disadvantaged by Ms Gray being put forward as well as him. This did not amount to subjecting him to "*detriment"*. Nor were Mr Tyler's actions *"because of"* race, so the direct race discrimination claim failed in any event.

40. The seminar, entitled "What Personal Injury Lawyers Need to Know about Employment Law", was being organised by the practitioners in the 2TGC Common Law Group with a view to attracting work from solicitors practising in personal injury and/or employment law. It was scheduled for 28 June in London, and 5 July 2017 in Leeds. A speaker had dropped out at short notice as a result of a bereavement. On 21 June 2017 Mr Tyler had been asked, by Ms Wolstenholme, who might be available to stand in and he had said that Ms Nina Unthank was available on both dates and Mr Matovu and Ms Gray were available on 28 June 2017. Mr Tyler was not seeking to disadvantage Mr Matovu and suggesting Ms Gray's name "had nothing to do with race".

41. The ET noted that there was no dispute that Ms Unthank was a suitable candidate. Ms Gray had not practised personal injury law since her return from a career break in 2013 and she was not a member of the Common Law Group. The main elements of her practice were immigration law and employment law.

42. Ms Unthank told Ms Wolstenholme that she could do the 5 July seminar but not the 28 June one. Ms Wolstenholme then approached Ms Gray about the 28 June seminar and Ms Gray declined on the grounds that she was not available and she did not practise personal injury law.

43. Ms Wolstenholme had not approached Mr Matovu, and she did not do so when Ms Gray declined, because her experience of Mr Matovu was that he tended to be underprepared on these occasions and was poor at keeping to his allocated time. Instead, she decided to fill the gap herself.

44. When Mr Matovu became aware, on 26 or 27 June, that the speaking opportunity had arisen, he was aggrieved. Ms Wolstenholme then offered it to him on 27 June but he declined on the grounds that the offer was made too late.

45. The ET noted that no claim was made by Mr Matovu against Ms Wolstenholme although it was her decision-making which deprived him of the opportunity to speak at the seminar on 28 June.

Ms Azib's September 2017 report

46. As far as the complaints about Ms Azib's report are concerned:

    a. The ET was highly complimentary about Ms Azib's report, with which it fully agreed. She had expertise in discrimination law, she had never been a member of the Board and she had always been on good terms with Mr Matovu. Her report was enormously careful and conscientious, and it examined the seminar opportunity issue in exhaustive detail. *"It was the result of a fair, objective, comprehensive and even-handed investigation."* There was no "*detriment"* to Mr Matovu in the process, and he did not suggest that there was any detriment in the outcome; nor could he have. She took particular care in carrying out her task, precisely because Mr Matovu had made a complaint of discrimination, rather than treating him less favourably for this reason. So he had not been victimised by her *"because of"* his complaint of race discrimination or at all.

    b. Mr Matovu's complaint had been fully investigated by Ms Azib and he had been interviewed as part of that investigation. He had no right to comment on the final report before a decision was made about Mr Tyler in the light of Ms Azib's findings. The committee which had been formed to deal with Mr Matovu's complaint had met on 29 September 2017. Ms Azib had concluded that there was no case to answer and the committee had rightly and properly accepted that conclusion and communicated its decision to Mr Tyler and Mr Matovu. The report had been served on each of them on

3 October 2017 i.e. at the same time. There was no *"detriment"* to Mr Matovu in taking this course and nor had he been harassed. In any event, the approach had not been related to race or influenced by the fact that the complaint in question was one of race discrimination. There had therefore been no victimisation in this regard either.

Interim clerking arrangements: 4 October 2017

47. As far as the issue about the withdrawal of aspects of Mr Tyler's services is concerned, Ms Azib's report had expressed doubts about whether *"any form of working relationship could exist between [them] in the future"*. The ET found that, in the light of the breakdown in trust between Mr Matovu and Mr Tyler, the Board took the only practical course which was open to it which was to engineer a temporary interruption in face to face dealings between them. Mr Tyler continued to clerk Mr Matovu but face to face dealings were between Mr Matovu and Mr Cray, the clerk assigned to the employment law group. There was no *"detriment"* to Mr Matovu in this regard and nor was there any harassment of him. If anything, the decision reduced the risk of harassment of Mr Matovu. In any event, the treatment of Mr Matovu was not related to race and nor was it influenced by the fact that he had made a complaint of race discrimination. The decision was taken because of the *"ruptured bond"* of trust between them rather than because he had raised issues of discrimination.

The continuing requirement to pay full chambers contributions

48. The complaint about requiring Mr Matovu to pay the full contributions due under the 2TGC constitution was also dismissed. From October 2017 Mr Matovu had unilaterally withheld half of the chambers contributions which were due, purportedly on the grounds that he was being denied full clerking services, and he was £19,000 in arrears by 1 August 2019. 2TGC had continued to bill him for the full amount. Requiring him to comply with his obligations under the constitution was not harassment and nor was this related to race.

The issues in relation to the December 2017 mediation

49. The complaints relating to the mediation in December 2017 were dismissed but it is unnecessary to set out the findings on these issues for the reasons which we have explained.

Heckling at the November 2018 AGM

50. As far as the AGM on 27 November 2018 is concerned, Mr Roger Harris, a member of chambers had told Mr Matovu to "get on with it" when he was addressing the meeting, and had complained that he had been listening to Mr Matovu for eight years and was sick of it. Mr Moody and Ms Vaughan Jones had, however, suppressed the interruption by word and/or gesture and had given the floor back to Mr Matovu who continued to make his points. On the following day, Mr Moody had also sent an email to Mr Harris reminding him of the need for

respectful and courteous behaviour between colleagues. Mr Matovu had not chosen to make a complaint of harassment against Mr Harris and there was no sense in which Mr Moody or the Board had allowed Mr Harris to behave as he did or had harassed Mr Matovu. Nor was their response to the heckling related to race.

The investigation of Mr Tyler's 17 April 2019 grievance

51. As for the complaint that Mr Tyler's grievance had been investigated, on 5 April 2019 Mr Matovu had written in the 2TGC staff appraisal form that Mr Tyler was continuing to victimise him by not serving him and that the Board was *"happy to condone this unlawful and appalling discriminatory conduct"*. On 17 April 2019, Mr Tyler made a complaint about this under the 2TGC grievance procedure. The Board took legal advice and decided that it was necessary to appoint an independent investigator. Ms Rachel Crasnow KC was appointed. She conducted an investigation to which Mr Matovu refused to contribute, describing it as, amongst other things, a *"farce"*, a *"charade"* and a device to *"pull the wool over the [employment tribunal's] eyes*".

52. Ms Crasnow found no substance in Mr Matovu's allegations against Mr Tyler.

53. The ET found that the Board had taken the only course open to it and would have been in breach of its obligations to Mr Tyler had it refused to investigate his grievance. There was no *"detriment"* to Mr Matovu in so doing. Moreover, the Board's approach had not been influenced by the fact that Mr Matovu was making allegations of discrimination so there was no victimisation of him in any event.

Bad faith

54. The ET said that, as it had dismissed all of Mr Matovu's claims on the bases summarised above, it decided that it was not necessary to determine the plea of bad faith.

Limitation

55. The ET concluded with a finding that, in the light of its findings on the claims made by Mr Matovu, there could be no question of unlawful *"conduct extending over a period"* within the meaning of s123(3)(a) of the 2010 Act. The bulk of Mr Matovu's claims were therefore out of time. Nor would it be appropriate to extend time as a matter of discretion given that there was no merit in the underlying claims. All of the claims with which this appeal is concerned, save for the complaint about the investigation of Mr Tyler's grievance, therefore also failed for want of jurisdiction.

OUR APPROACH TO THE GROUNDS OF APPEAL

56. As noted above, the Amended Grounds of Appeal fall under four headings. There is a series of criticisms of the ET's conduct of the hearing. Mr Matovu also challenges its substantive decisions on some of his claims and he argues that the ET did not give adequate reasons for its decisions on these claims. At Ground 2(5)(i) he relies on three of his substantive challenges as supporting his case on apparent bias. We have considered the merits of each of his criticisms in the order and the way in which they are pleaded in the Amended Grounds. But, in relation to the apparent bias point, we have also stepped back to consider the cumulative effect of the totality of his pleaded criticisms of the ET.

57. Secondly, as far as the evidence of what occurred at the ET hearing is concerned, there were variations and/or differences in emphasis between the accounts which were given pursuant to the paragraph 12 procedure ordered by Stacey J. Mr Matovu's position was that where this is the case we should prefer his account. He was also very critical of EJ Snelson's response which, he said, failed to address the detail of his affidavit on the basis of a misreading by the EJ of the decision of the Employment Appeal Tribunal in *City of London Corporation v McDonnell* [2019] ICR 1175 EAT; and he praised Mr Simon for, as he put it, "having the guts to tell the truth".

58. We will deal with the detail of the accounts below but at this stage we make the following points. First, we did not accept Mr Matovu's criticisms of the EJ Snelson's response, or that it was based on a misreading of *McDonnell*. The key passages in what the EJ said were:

> *"The Affidavit makes numerous complaints about the Tribunal's handling of the hearing. In the reasons accompanying the judgment (paras 13-21) I went to some trouble to record the unusual profusion of procedural applications and issues that arose during the hearing, our decisions upon them and the grounds on which we arrived at those decisions. The Order does not identify any particular point or topic on which clarification or further comment is sought, but I will, of course, respond to any specific inquiry that may be directed to me."*
>
> …..
>
> *"I will not be drawn into inappropriate advocacy in support of the Tribunal's decision (of City of London Corporation v McDonnell UKEAT/0196/17/JOJ, 28 February 2019) save to say I do not accept that the Tribunal was biased against the Claimant or that there was any procedural impropriety or irregularity."*

59. In *McDonnell*, as part of an appeal based on procedural unfairness, the Employment Judge was "asked for his comments" on a schedule of procedural criticisms which had been made of him and on the affidavits of the parties in support of that schedule. In response, he produced a detailed defence of his judgment and his reasoning. At [37] Choudhury P said:

> *"We consider it highly undesirable that a judge should be required to make comments on anything other than very specific allegations as to the conduct of part or parts of the hearing. Such allegations (best set out as questions requiring the judge to confirm whether or not something occurred at the hearing as alleged) should generally be highly focused and capable of being responded to in brief terms. It would only be in the most exceptional circumstances that a judge should be requested or expected to provide comments that amount to a defence of the judgment and/or reasoning; indeed, it seems to use that such circumstances will rarely, if ever, arise."*

60. Similarly, Stacey J's Order in the present case required that the Respondents and the members of the ET be "asked for their comments". As we read it, the EJ's response was to say that his account was as per [13]-[21] of the ET's Reasons. If there were specific points which required clarification or further comment, he would be happy to address them. Indeed, he went on to deal with a point which was not covered in the Reasons and which we consider below. Some of the points relied on by Mr Matovu in his affidavit in relation to apparent bias were challenges to the ET's rejection of some of his claims, rather than evidence about what happened at the hearing, and, on any view, it would not have been right for the EJ to seek to improve on the Reasons which had been promulgated. Nor would it have been right for the EJ to advance arguments as to why the ET was not biased and had dealt with the case in a procedurally fair manner.

61. We therefore reject Mr Matovu's criticism of EJ Snelson's response to the request for comments. We also note that no application was subsequently made for the EJ to address specific points in Mr Matovu's affidavit although nearly two years have elapsed since the response. The question of permission to proceed to a full hearing on Grounds 1 and 2 was before Mr Sheldon KC on 20 January 2022 and an application could have been considered then if Mr Matovu had made one.

62. Secondly, in the light of the differences in the accounts of what happened at the hearing before the ET, we asked for assistance on the approach which we should adopt, and to be referred to authority. We were told that there is no authority directly on point. However, we accept Mr

Leiper's submission that the starting point in determining what happened must be the ET's Reasons based, as they are, on the EJ's notes of the hearing. This is consistent with the long-standing principle that where there is a difference between a party's note of the evidence and the EJ's note, absent agreement between the parties the latter prevails: *Dexine Rubber Co Ltd v Alker* [1977] ICR 434, 439A-C. More generally, it is well established that the starting point for the determination of any appeal is the ET's Reasons: *Beardmore v Westinghouse Brake and Signal Co Ltd* [1976] ICR 49, 52E-F and *Ogidi-Olu v Guy's Hospital Board of Governors* [1973] ICR 645, 648C. We also agreed with Mr Leiper that where there are gaps in the evidence and/or it is necessary for us to decide for ourselves which account we prefer, we should give greater weight to evidence which is clearly drawn from contemporaneous notes, as opposed to recollections of a hearing which took place a more than a year earlier.

63. Thirdly, we commend Mr Simon's independence in giving his response to Mr Matovu's affidavit and have taken into account what he says in his brief comments. But it is fair to say that what he said in his response was a combination of disagreeing *"in retrospect"* with one or two of the decisions to which he had been party, giving a small amount of evidence based on his recollection of the case and criticising certain passages in the Reasons. We have to say that we found the evidence of the other member of the ET, Ms Moreton, and Ms Vaughan Jones a great deal more helpful in coming to a decision on the appeal in that they set out what their notes of the hearing said about what had happened.

64. Finally, Mr Matovu's affidavit did not make any express reference to notes made at the material time or exhibit any notes. There were also respects in which what he said materially departed from the notes of others. This suggested that in some respects his evidence may not be accurate, perhaps because he was attempting to recall events which took place a year earlier. We also note that he did not challenge a good deal of what Ms Moreton or Ms Vaughan Jones said, or put in a second affidavit with passages from his own notes. Indeed, he adopted parts of their evidence which he considered were supportive of his case.

GROUND 1: FAIR HEARING

Overview

65. There are two complaints under this heading. The first (Ground 1(a)) relates to the guillotining of Mr Matovu's cross examination of Mr Moody. The second (Grounds 1(b)-(d)) relates to how arrangements for closing submissions were dealt with by the ET. Mr Matovu also relied on these points as being indicative of bias (Ground 2(a)).

Preliminary observations

66. Mr Matovu placed emphasis on his description of himself as a "litigant in person". He referred us to a number of passages from the Equal Treatment Bench Book which highlight the difficulties which a litigant in person may encounter during the litigation process, and the role of the judge in ensuring that they have every reasonable opportunity to present their case. These passages included paragraph 17 of Chapter 1 – *"Litigants in Person and Lay Representatives"* – which makes the points that litigants in person commonly feel at a disadvantage, and that the aim of the judge should be to ensure that the parties leave with the sense that they have been listened to and have had a fair hearing, whatever the outcome. He told us that he did not feel that he had been listened to.

67. Mr Matovu also referred us to passages from the Equal Treatment Bench Book on the importance of diversity including paragraph 8 on page 27, which refers to the importance of judicial diversity in holding the confidence of the public and court users. He criticised REJ Wade's response to his request for a racially diverse panel, which we have set out at [20] above, as being "a retort" which was inconsistent with these passages. We have to say that we did not read it that way.

68. Mr Matovu told us at the beginning of the appeal that the ET was clearly against him from the outset and that it was no exaggeration to say that he was subjected to a "court lynching". He said that he used these words advisedly.

69. Conversely, for the purposes of his assertions about what is normal practice in employment tribunal litigation, Mr Matovu also relied on the fact that he is a barrister with more than 35 years' experience, who specialises in employment and discrimination law. For example, in his affidavit prepared for the purposes of this appeal he said:

> *"I have always practised in the employment law field…..For the past 19 years at least the vast majority of my practice at the Bar has been in employment. For several years I have regularly assisted to represent litigants in person under the ELAAS scheme before the EAT. I have appeared before the EAT in numerous cases and have, also, conducted several cases in the Court of Appeal on my own account. In short, I have considerable experience as an advocate of conducting cases within the jurisdiction of the employment tribunal, and so I am completely familiar with the way in which*

> *proceedings in the employment tribunal are generally conducted…"* (highlighting added)

70. We have approached the fair trial issues in this appeal on the basis that Mr Matovu is a very well educated and highly experienced employment tribunal practitioner who evidently has a great deal of confidence in his own abilities. We have no doubt at all that he will have encountered race discrimination in the course of his career at the Bar, and we do not discount the pressures that he was under in presenting his own case. But his attempts to equate his position with that of the typical black litigant in person who appears in the Employment Tribunal were unconvincing. As Mr Leiper pointed out, paragraph 15 of Chapter 1 of the Equal Treatment Bench Book gives an indication of the sort of litigant which the Chapter has in mind. It states that *"The difficulties faced by LIPs stem from their lack of knowledge of the law and court or tribunal procedure"*. There is then a list of aspects of the legal process which, as a consequence, they may find challenging, such as having no knowledge of procedure or how to present or challenge evidence. With the exception of *"Lack of objectivity and emotional distance from their case"*, none of these challenges was even potentially applicable in the case of Mr Matovu.

71. We allowed Mr Matovu to adopt a disparaging and sarcastic tone in relation to certain Employment Judges and Mr Leiper, and effectively to make a number of allegations of bad faith because, we felt, he should not be prevented from putting his case in the way that he wished to, even if his allegations of bad faith appeared groundless. But ultimately, as would be expected, we based our decision on the evidence about what actually happened.

72. The same is true of Mr Matovu's assertions that the ET was against him from the beginning, and that he was subjected to a "court lynching". Insofar as he was referring to his applications in the first two days of the hearing, the true position is that those applications were rightly rejected on their merits. Indeed, his attempts to get the hearing postponed and his application for a different tribunal were hopeless, as he knew or ought to have known. For reasons which we explain below, we found nothing in the evidence about what happened at the hearing which was capable of justifying Mr Matovu's comparison with a lynching.

Legal framework

The duty to act fairly

73. As is very well known, under paragraph 41 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules 2013") an Employment Tribunal has a broad discretion as to how it conducts the proceedings before it:

> *"The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective……".*

74. Paragraph 2 of Schedule 1 states that:

> *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

75. We note that the parties and their representatives have an obligation to assist the Tribunal to further the overriding objective.

76. It was common ground that the exercise of the Tribunal's powers is also required to be in accordance with the right to a fair hearing under Article 6 of the European Convention on Human Rights (ECHR).

77. Mr Matovu relied on dicta in *Serafin v Malkiewicz* in the Court of Appeal ([2019] EWCA Civ 852, [2019] EMLR 21 at [108] and [121]) and the Supreme Court ([2020] UKSC 23, [2020] 1 WLR 2455 at [49]) to make the points that a judgment which results from an unfair trial is in effect a nullity and cannot be rescued by its ostensible quality or by the fact that the court or tribunal accepts some of one party's arguments and rejects others; that it is a fundamental tenet of the administration of the law that all those who appear before the court are treated fairly and that judges act and are seen to act fairly and impartially throughout the trial; and that judges should be especially conscious of this when dealing with litigants in person and should make due allowance for language or other difficulties which they may experience in the litigation process. None of this was controversial before us.

The issue in relation to closing submissions

78. As far as the issue in relation to closing submissions is concerned, Mr Matovu relied on the guidance which was given by the Employment Appeal Tribunal in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763 where, at [2.3] Mr Justice Burton said that:

> *"After a lengthy hearing like this, where written submissions are then sensibly ordered by the tribunal, we are quite clear that this should only take place on the following basis:*
>
> *(i) The timescale for preparation of the submissions must be a sensible one….*
>
> *(ii) It is essential that the timescale should provide for the submissions to be provided to the other party in sufficient time before the oral submissions for the other party to be able to assimilate them, and thus comment upon them. … oral submissions are of very much less, possibly no, value if the written submissions have not been read in advance by the other party, so that that party can, in his or her oral submissions, comment upon, address and seek to answer them……problems can inevitably arise otherwise. Points are made which have never been made before, and yet the other side does not have the opportunity either to answer them or to seek to object to their being made. Incorrect submissions or incorrect references to the evidence may be made in good faith which are never corrected. A new case may be put forward which is not answered. A good point is made which could have been countered but had not been anticipated when the other side's written submissions were prepared. It is only thus that the oral submissions can be well and sensibly used in a combination of emphasis of the original points and countering of the*

points made in the other party's written submissions, together with the making of any objections or of any fresh arguments as necessary.

(iii) It is equally, if not more, essential that the tribunal has had the opportunity to read the submissions, which again was not the case here. Points that are taken by the parties will not be tested and may be misunderstood. New points which do not arise out of the evidence or are incorrectly made but never corrected by the other party may be accepted by the tribunal. Points that are not made in the closing submissions (possibly for good reasons) but which appeal to the tribunal will never be canvassed with the parties. In this regard too, some of the problems in this appeal can be ascribed to this course of being taken."

79. Mr Matovu also relied on two decisions of the European Court of Human Rights, *Van Orshoven v Belgium* (1998) 26 EHRR 55 at [41]-42] in particular and *Vermeulen v Belgium* (2001) 32 EHRR 15 at [33]-[34] in particular and submitted that the right to adversarial proceedings under Article 6 ECHR:

> *"means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed…with a view to influencing the Court's decision"*

80. His contention was that he had not been given this opportunity and that therefore, inevitably, the decision of the ET should be set aside.

Apparent bias

81. The test in relation to apparent bias is well known. In *Porter v McGill* [2002] AC 357 at [103] Lord Hope said:

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

82. In *Serafin*, Lord Wilson was prepared to assume, without deciding, that the definition of "bias" given by Leggatt LJ (as he then was) in *Bubbles & Wine Ltd v Lusha* [2018] 341 at 17 is correct - *"Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case"* - albeit Lord Wilson described this definition as "*quite narrow"* (see [38/39] *Serafin*). He went on to note that it was far from clear that the first instance judge in *Serafin* would have been held to have evinced apparent bias, as any prejudice on his part

against the claimant appeared to have resulted from his view that the claim was hopeless and a disgraceful waste of judicial resources i.e. it was for reasons connected with, rather than unconnected with, the legal or factual merits of the case: see [38].

The duty to give reasons

83. Finally, given that some of the apparent bias arguments are based on alleged failures to give reasons, we remind ourselves of the extent of the ET's duty *"to give reasons for its decision on any disputed issue"* under paragraph 62 of Schedule 1 of the ET Rules 2013. As is well known, in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2003] IRLR 710 Lord Phillips MR (as he then was) said this at [19]:

> *"if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision…."*

84. In *Meek v City of Birmingham District Council* [1987] IRLR 250 CA at Lord Bingham MR (as he then was) said at [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; …."*

85. In relation to Grounds 2(5)(ii) and 3(2), Mr Matovu referred us to the decision of the Court of Appeal in *Anya v University of Oxford* [2001] EWCA Civ 405; [2001] ICR 337. Dr Anya was turned down for a research post by an interview panel of three which included his supervisor. His case was that there were defects in the appointment process in that the University's equal

opportunities and recruitment policies had not been followed correctly, and he gave evidence that his supervisor had evinced hostility towards him over the preceding 2 years which he attributed to racial bias. On this basis, he contended, the Employment Tribunal could and should draw an inference that race played a part in his rejection for the research post. In dismissing his claim, the Tribunal set out the relevant factual issues but did not reach reasoned conclusions on them or analyse the documentary evidence in the case, merely stating that it found the supervisor to be essentially truthful and therefore accepted his evidence that he had not discriminated. Given that discrimination may be subconscious, as Sedley LJ said at [25]:

> *"Credibility…is not necessarily the end of the road: a witness may be credible, honest and mistaken, and never more so than when his evidence concerns things of which he himself may not be conscious".*

86. The principal flaw in the Tribunal's decision was therefore a defect in its reasoning which was apparent from its reasons, although the reasons were also inadequate in that they failed to reach reasoned conclusions on the key evidence in the case: see e.g. [12]. The Court of Appeal said that Tribunals should look for indicators from events before or after the act complained of which might demonstrate that the act or decision was or was not influenced race. They should not simply set out the relevant evidential issues but should follow them through to a reasoned conclusion.

87. Mr Matovu took us to well-known passages from the judgment of the Employment Appeal Tribunal (Mummery J, as he then was) in *Qureshi v Victoria University of Manchester* [2001] ICR 863 from which Sedley LJ quoted at length at [9] of his judgment in *Anya*. Mr Matovu drew particular attention to the extract from *Qureshi* at 854C-E of the report of *Anya* which emphasises the importance of setting out the primary facts from which an inference of discrimination has been drawn so that the validity of the inference can be examined. And he took us to the extract at 854F-H which states, in summary, that the function of the tribunal is to find the primary facts from which they will be asked to draw inferences and then look at the totality of those facts, including the respondent's explanations, to see whether it is legitimate to draw an inference of discrimination.

88. Dr Qureshi had alleged that over a period of 6 years there had been a number of incidents of discrimination and victimisation against him. The Tribunal's error was that it had looked at each of these allegations in turn and asked whether there had been race discrimination or

victimisation against Dr Qureshi in each particular instance, but had not looked at the whole picture revealed by the incidents. There was therefore an error of reasoning or approach. As Mummery J said:

> *"The fragmented approach adopted by the tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds"*

89. We accept, as Mr Matovu submits at paragraph 92 of his skeleton argument, that *Anya* illustrates the long established point that circumstantial or background evidence may be relied on by a claimant to support their case that an inference of discrimination or victimisation should be drawn. But we do not accept, insofar as this was his argument, that the duty to give reasons is different in discrimination cases or, as he appeared to argue, that the duty requires that in a discrimination case all of the claimant's circumstantial or background evidence must be set out in the tribunal's reasons and/or all disputes in relation to this evidence must be resolved by the tribunal. The true position is that, in a discrimination case, the duty to set out the findings which were critical to the tribunal's decision, and to explain to the parties why they won or lost, requires the reader to be able to understand why the tribunal did or did not draw the inferences contended for by the claimant. That may mean that the tribunal's reasons are more detailed in a discrimination case, particularly where a number of claims are made, but this is a function of the application of the same general duty in the particular context of discrimination law. We return to *Anya* below.

Grounds 1(a) and 2(a): alleged unfair approach to cross examination

90. The fair trial complaint under this heading is that the ET guillotined Mr Matovu's cross examination of Mr Moody, who was the Respondents' principal witness. The bias point is essentially that this is said to be in contrast to the ET's treatment of Mr Leiper who was permitted to exceed his estimate for the length of his cross examination of Mr Matovu. Mr Leiper had said that he would need around 1.5 days to cross examine Mr Matovu but had been allowed around 2 days without there being any difficulty about this, and had concluded his cross examination. Mr Matovu had been guillotined before he had completed his cross examination of Mr Moody. In his affidavit he says that he was "shocked, and immediately protested to the Judge" at the unfairness of this approach in contrast to the treatment of Mr Leiper (paragraph 21). There was no need to do so as adjustments could have been made to the timetable to allow him to cover "the whole narrative" as Mr Leiper had. Mr Matovu might

have had to be shorter with other witnesses, or provision might have been made for Mr Moody to be recalled if time allowed, but "The Judge …did not allow the matter to be discussed at all" or "even bother to inquire how much longer I had or to explore whether that could be accommodated so intent was he on cutting me short." (paragraph 22).

91. Mr Matovu also argued that, in any event, fairness and justice should have taken priority over the timetable. Mr Simon said that many of the cases on which he sat exceeded their allocated time. This was also Mr Matovu's experience of cases in which he had been involved. It was quite normal to arrange extra sitting days where this happens.

92. At [18] of its Reasons the ET explained what had happened in this way:

> *"It was necessary for us to manage time carefully to ensure that the evidence and closing submissions were completed within the 10-day allocation. Mr Matovu's evidence took longer than we had hoped. Mr Leiper needed to cover the entire narrative and unfortunately Mr Matovu's answers tended to be long and frequently did not address the questions posed. Cross-examination of him ended on the afternoon of day four. It was agreed throughout that the Respondents' evidence must be completed on day nine at the latest, leaving day 10 (a Monday) for submissions. There were 10 witnesses on the Respondents' side and it was not until the morning of day nine that Mr Matovu announced that he did not intend to cross-examine two of them. We reminded Mr Matovu at several points of the need to keep up to speed. We agreed a timetable with both counsel and adjusted it from time to time. Ultimately, we were constrained to limit time for cross-examination of one witness, Mr Moody. His evidence began at 11.45 a.m. on day five and ended just after 3.00 p.m. on day six. Cross-examination lasted rather more than seven-and-a-half hours. At lunchtime on day six it was agreed and noted that completion of the evidence of Mr Moody and Ms Helen Wolstenholme (for whom an hour would be needed) would occupy that afternoon, two further substantial witnesses would fill day seven, four briefer witnesses (all of whom were expected at that stage to be called and cross-examined) would account for day eight and a final, substantial witness would give evidence on day nine. Mr Matovu was told that there was now no room for further slippage. He was subsequently given 30-minute and 15-minute warnings and, at 3.05 p.m. the cross examination of Mr Moody was stopped. We were reluctant to impose the guillotine but felt it necessary to do so as we had ceased to have confidence that, without our intervention, the hearing would be completed in the ample time allotted."*

93. The evidence of Ms Vaughan Jones and Ms Moreton is entirely consistent with this account and we accept it.

94. One of the reasons why we approached Mr Matovu's evidence on this point with caution is that the impression gained by the reader of his affidavit is that the guillotine had come "out of the blue" rather than the issue of timetabling being raised with him beforehand. He also complains that he could have shortened his cross examination of other witnesses, and that no provision was made to recall Mr Moody if time allowed, when it is clear that he had the opportunity to raise these possibilities but did not do so.

95. Ms Moreton says this:

> *"14. There were issues with the pace of the cross examination of Mr Moody in particular. At the start of day 5 Mr Matovu has proposed a timetable which would allow for the completion of the evidence by day 9 to which the panel agreed. EJ Snelson checked with Mr Matovu on the progress several times, each time being assured that Mr Matovu was an experienced Barrister well able to manage within his own timetable.*
> *15. Cross examination of Mr Moody began at 11.30 on day 5 and was ended at 15.00 on day 6 to ensure that Mr Matovu's timetable could be met. EJ Snelson checked with Mr Matovu that he was on course to end as proposed at the close of day 5 and at the lunchtime adjournment on day 6; both times being assured that Mr Matovu was on track. EJ Snelson reminded Mr Matovu of his timetable and reminded him of the time at 14.30 and 14.45.*
> *16. Mr Matovu states at his paragraph 22 that there was no discussion of the need to limit time. As can be seen from the above this is not correct. The timetable had been, and continued to be, the subject of discussion on every day of the hearing. It was clear from the outset that the timetable would be tight. Mr Matovu was adamant at every turn that as an experienced barrister he was able to keep to the timetable he had set himself.*
> *17. Mr Matovu further states that EJ Snelson did not enquire as to how much longer he would be with Mr Moody before ending the cross examination. This is not entirely in accordance with my notes. The subject of time constraint was very much live, canvassed with the parties frequently throughout. Mr Matovu can have been in no doubt about the constraints on the timetable he had himself proposed. When EJ*

> *Snelson ended the cross examination, Mr Matovu did not say that he was going to need only a brief further time or make any other suggestions as to how the timetable might reasonably be amended. Mr Matovu also complains that no arrangements were made to recall the witness. He made no application to do so either at the time the guillotine was applied or later.*
>
> *18. At the start of day 8, Mr Matovu stated that he did not now propose to cross examine two of the Respondent's witnesses; stating that their evidence was inadmissible, self serving and irrelevant. He made no application to strike out or for the tribunal to otherwise disregard their evidence. It was clear that the statements would be taken as read. Had the Tribunal been made aware of this at an earlier stage the decision to limit cross examination on day 6 would have been avoided. This decision also led to day 8 ending short at 15.05."*

96. These passages provide a complete answer to Mr Matovu's points but they also indicate that Mr Matovu's affidavit is not entirely accurate, at least on this point.

97. Ms Vaughan Jones' evidence also makes clear that, consistently with [18] of the ET's Reasons, at 2pm on the afternoon of the guillotine there was a discussion of the timetable with Mr Matovu and he mapped out the likely timetable which meant that the evidence would conclude at the end of the week. He told the ET that he was aiming to complete his cross examination of Mr Moody and then Ms Wolstenholme that afternoon and that her cross examination would last "Maybe an hour?". By implication he would therefore finish Mr Moody not long after 3pm and would have had very little left at 3.05pm when the guillotine was applied. Mr Matovu told us that, when the guillotine was applied, he actually had about an hour to go. Given that he was given a 30 minute and a 15 minute warning, we were perplexed by how it came to pass that this was the position and yet he had not told the ET.

98. As for the contrast with the approach to Mr Leiper's cross examination, there were delays owing to the procedural issues raised by Mr Matovu at the start of the case. Mr Matovu was also 25 minutes late on the morning of Thursday 14 November and then raised issues about his appeal to the Employment Appeal Tribunal. On the Friday afternoon Mr Matovu also objected to the evidence about the December 2017 mediation process – which the Respondents contended was privileged - being dealt with in a private hearing. This was an objection which the ET found difficult to follow given that it would defeat the purpose of the Respondents' application if the evidence was dealt with in public and given that, if the evidence was held not to be privileged, the findings would be set out in the ET's published Reasons. But before us

Mr Leiper accepted that he overran by around half a day. Although he was asked on the Friday of the first week how long he would be, he was permitted to complete his questioning of Mr Matovu.

99. As the ET explained at [18] of its Reasons and Ms Moreton also says at [11] of her comments:

> *"My notes show that Mr Matovu's cross examination did take longer than timetabled. Partly because of time taken with administrative applications, both at the start of the case and during cross examination; and partly because of the manner in which Mr Matovu chose to answer the points put to him. EJ Snelson made clear to Mr Matovu on several occasions that the manner of answering was consuming time that the tribunal did not have and that the best assistance he could offer to the tribunal was to answer concisely."*

100. Although, before us, Mr Matovu refuted the suggestion that his answers were long and frequently did not address the question which had been put to him, this was the finding of the ET and we saw nothing in the course of the appeal which would suggest that we should doubt it, still less go behind it. We therefore do not accept that the ET dealt with Mr Matovu unfairly in this regard or that the difference in the treatment of his cross examination of Mr Moody compared with the treatment of Mr Leiper's cross examination is indicative of bias.

101. It is clear that the ET was concerned to ensure that the case was concluded in the 10 days allocated, which was a proportionate allocation of time for the case, and was right to timetable the matter particularly given that time was tight. Its concerns about time increased as the hearing went on and it based its approach to the timetabling of Mr Matovu's cross examination of the Respondents' witnesses on what he himself told them. The ET was entitled to expect the parties to assist it in completing the hearing within the allocated time, pursuant to their duty to the court to assist in achieving the overriding objective. This included agreeing a sensible timetable, keeping the ET accurately informed as to progress and adjusting their approach in order to keep to what had been agreed. If Mr Matovu needed a little more time it was incumbent on him to say so. If it was the case that the ET need not be concerned about time because he had decided not to cross examine two of the Respondents' witnesses, he should have told the ET. If he wanted Mr Moody to be recalled when it became apparent that the evidence would finish early on Day 9, he should have made an application. None of this was or is too much to expect of a person with his experience of tribunal litigation.

102. Mr Simon's comments about allocating additional days were made "in hindsight". With respect, we regard Mr Matovu's suggestion that the case could simply have been allowed to run on, and additional days then be booked to finish it, as very surprising. A substantial share of the resources available to the public in the form of the employment tribunal system was allocated to this case. The issue was and is not "justice *or* additional time". Justice includes justice for other litigants in the tribunal system and the allocation of an appropriate and proportionate period of time to each case having regard to the issues in the case. It was entirely reasonable for the ET to expect the case to be completed in 10 days and the parties to assist it to achieve this, and there is no sense in which it was unjust to limit Mr Matovu to 7.5 hours' cross examination of Mr Moody in the present case.

Grounds 1(b)-(d) and 2(a): alleged unfair approach to written submissions

103. At [20] and [21], the ET explained what had happened as follows:

> *"20. There was also a procedural disagreement at the end of the hearing. The evidence was completed in the middle of Friday, 22 November (day 9). It was agreed that the parties would present written submissions on Monday, 25 November and supplement them with oral argument. In the usual way, counsel would exchange their submissions and deliver copies to the Tribunal. Mr Leiper proposed delivery and exchange of submissions by 10.00 and Mr Matovu voiced no dissent. We made no formal order as there seemed no need to do so. The agreement was that oral submissions would follow at 2.00 p.m., with up to an hour being allowed on each side. Mr Leiper duly delivered his submissions (46 pages, double-spaced, small font) to the Tribunal at 10.00a.m. on Monday, 25 November but unfortunately Mr Matovu was not in a position to do likewise. His submissions (11 pages, single-spaced, small font) were sent to the Tribunal at 1.38 p.m., and no doubt counsel exchanged their documents at or about that time. The result of Mr Matovu's tardiness was that neither advocate could devote more than the briefest attention to the written submissions of the other. Both focussed overwhelmingly on emphasising and developing their main contentions. At the end of oral argument, Mr Matovu applied for permission to supplement his submissions in order to address Mr Leiper's points. Mr Leiper opposed the application and we agreed with him. Appropriate arrangements had been made for the presentation of closing argument. Ample time had been allowed for the work to be done. To grant the application would extend the process and inflate the Respondents' costs. There was some factual detail to master but the case was not complex, factually or legally. There was no reason to depart from the (standard) procedure which had been agreed and*

> *doing so would be contrary to the overriding objective. Accordingly, the application was refused.*
>
> *21. After the end of the hearing, and despite our clear ruling on day ten, correspondence followed from Mr Matovu together with what appeared to be lengthy supplementary closing submissions. The Tribunal had refused permission for these and they remain, unread, on the file."*

104. In his Amended Grounds of Appeal, Mr Matovu says that he had no more than 10 minutes to consider Mr Leiper's written submissions. He has "since discovered" that Mr Leiper had emailed his submissions to the ET at 9.32am but without copying him in. He criticises the ET for assuming that the parties had exchanged at 1:38pm when they had been told that it was not until shortly before 2pm, suggesting in his skeleton argument that the ET were being "untruthful" in this regard. He also criticises the ET for refusing to permit him extra time to consider Mr Leiper's written submissions and respond in writing, and for refusing to consider the supplementary closing submissions which he filed on 18 December 2019 "addressing points made by the Respondents". All of this, he submits, was contrary to his right to a fair hearing and Article 6 ECHR, and in particular his right to adversarial proceedings as expressed in the *Van Orshoven* and *Vermeulen* cases (see paragraph [70] above), particularly when the ET were not due to meet to deliberate until 13 January 2020 and were prepared to extend time for the Respondents to file their response to the third claim to 12 February 2020.

105. These arguments were developed in Mr Matovu's skeleton argument and orally. He emphasised that on Day 9 he indicated that he may not be able to complete his written submissions by 2pm on Day 10. He submitted that none of the *Sinclair Roche & Temperley* guidance on timetabling written submissions was followed and that it is no answer to the *Vermeulen* principle to say that *both* parties were denied the opportunity to comment on each other's written submissions. He also relied on Mr Simon's comment that *"Dealing with the case expeditiously [pursuant to the overriding objective] should not have taken priority over giving the claimant every opportunity to put forward his case"* and he accuses the EJ of avoiding addressing the complaint about how written submissions were dealt with at all in his response to Mr Matovu's affidavit despite requesting 28 days to respond.

106. As we have noted, this last point is a false one given that the EJ relied on the account at [20] and [21] of the ET's Reasons, to which there is not a great deal which we wish to add. It appears from the Reasons that the question of written submissions was raised at an earlier point in the hearing. Mr Matovu tentatively suggested that closing submissions be put off to an unspecified

date after the hearing to give him more time to prepare but the ET signalled that it was not attracted by this idea, and it was not pressed by him.

107. The evidence is that, at the beginning of Day 9 - the Friday - the approach to closing submission was discussed between the ET and Counsel. The consensus was that, as is commonly the approach, written submissions would be put in and there would then be oral submissions, with the parties allocated one hour each. The proposal was that the written submissions would be exchanged and filed on the Monday morning, and the ET and Counsel would then have an opportunity to read them in advance of the oral submissions at 2pm. Mr Matovu did not dissent from this approach, for example by saying that he would prefer to proceed by oral submissions only, but in his affidavit he says that he did indicate that he would not be ready to exchange by 9.30am, the time Mr Leiper had suggested, and that he would struggle to be complete his submissions long before 2pm. He says that it was left that he would "make best endeavours to complete my written submissions if possible by 9.30am or so soon after as I could and the parties would seek to deliver and exchange written submissions as early as possible. It was also left open that I could apply for more time on Monday if I felt it was necessary" (paragraph 23).

108. Ms Vaughan Jones' note is that Mr Matovu said "I may not be able to get you written submissions before 2pm. I'll see what I can do". Ms Moreton says:

> *"At the start of day 9 EJ Snelson canvassed views from the parties on timetabling for submissions. It was proposed that if parties wanted to rely on written submissions these should be handed up at the start of the day for the tribunal to read; with 1 hour each allotted for verbal submissions at 14.00. Mr Matovu did indicate at the point that he may not be able to complete written submissions in that time. There was no pressure on him to do so. He made no application for additional time. In the event Mr Matovu finished with the one remaining witness at 13.08 and the day ended short."*

109. In accordance with the model which had been agreed, at 9:32am on Monday 25 November 2019 Mr Leiper emailed his submissions to London Central Employment Tribunal and stated that hard copies would be delivered at 10am, which they were. Mr Matovu was highly critical of Mr Leiper's failure to copy him into his email to the Tribunal on the basis that "it is absolutely standard practice in all tribunals for communications sent to the Tribunal to be copied to all other parties" (paragraph 29 of his affidavit), but his criticism was unfounded for at least three reasons:

a. The agreement had been for exchange of written submissions. Having emailed his submissions to the Tribunal, at 9:33am Mr Leiper immediately sent Mr Matovu an email which said, "Please could you let me know when you have completed your written submissions so that we can exchange them". We cannot see anything improper in Mr Leiper's approach. Unfortunately, Mr Matovu did not respond to this email, subsequently telling the ET that he did not see it because he was "busily trying to get my submissions done".

b. When Mr Matovu himself sent his submissions to the Tribunal at 1:38pm he did not copy in Mr Leiper despite what he says is the "absolutely standard practice".

c. If, indeed, Mr Matovu was so busy preparing his closing submissions that he did not see Mr Leiper's email before he filed his own submissions, it seems unlikely that he would have had time to read them in any event.

110. The upshot was that exchange did not take place until 1:55pm, when Mr Leiper and Mr Matovu exchanged hard copies at the Tribunal. The hearing then began at 2:12pm. Ms Moreton says that Mr Matovu told the ET that he had only just seen Mr Leiper's submissions. Contrary to Mr Matovu's statement in his Amended Grounds of Appeal that he has "since discovered" that Mr Leiper had sent his written submissions through to the Tribunal at 9:32am, Ms Moreton says that in Mr Matovu's presence Mr Leiper told the ET that, at the same time as he had sent his submissions to the Tribunal, he had emailed Mr Matovu to offer to exchange but had not heard back. It was at this point that Mr Matovu said that he had not seen the email. Ms Vaughan Jones says, and we accept, that EJ also told the parties that the ET had read Mr Leiper's submissions "which we got this morning and we've read hastily, Mr Matovu, the submissions you have also provided this lunchtime. Obviously, we'll read them closely when we come to deliberate".

111. Mr Leiper's note records, and we accept, that Mr Matovu raised the possibility of an opportunity to respond in writing which he said they might come back to after the oral submissions. The oral submissions then proceeded, with Mr Leiper going first for around 35 minutes and Mr Matovu making his submissions for about an hour. Although Mr Matovu accuses Mr Leiper of seeking to press home his advantage by not taking the ET through his written submissions, we see no reason to go behind the EJ's statement, at [20] of the ET's Reasons, that *"Both focussed overwhelmingly on emphasising and developing their main*

contentions". As the ET records, Mr Matovu then made an application to supplement his written submissions *"in order to address Mr Leiper's points"*. This was opposed and Mr Matovu's application was refused for the reasons given at [20] of the Reasons.

112. Mr Leiper's submission to us was that, on the facts, both sides before the ET had a fair opportunity to respond to the submissions of the other and what happened in relation to the closing submissions did not render the hearing unfair. Mr Matovu had the opportunity to exchange written submissions from 9:33am on the Monday, just under 4.5 hours before oral submissions, albeit this required him to complete his own written submissions. Even if he could not be ready for 9.30am he had the opportunity to exchange before 1.55pm. He also had an opportunity to read Mr Leiper's written submissions when they did exchange, albeit shortly before the hearing resumed, and whilst Mr Leiper was making his oral submissions. Mr Leiper submitted that it was not unusual for Counsel to be listening to an opponent's oral submissions whilst skimming their written submissions to see whether there is anything new or unexpected. Mr Matovu also went second and therefore had an opportunity to reply to Mr Leiper. Unlike the position in *Van Orshoven* and *Vermeulen*, then, this was not a case in which under the generally applicable approach adopted by Employment Tribunals, or in this particular case, Mr Matovu had no opportunity to respond to his written submissions.

113. Mr Matovu's position was that the *Vermeulen* principle is "not about hypotheticals": he submitted that we had to look at what actually happened in practice, and in practice he was not able to reply to Mr Leiper's written submissions. It was consistent with this position that he relied on Mr Simon's view that he should have been given *"<u>every</u> opportunity to put forward his case"* (emphasis added) and that this should have trumped dealing with the case expeditiously.

114. Again, we do not agree that the issue is a binary one. The question is whether Mr Matovu had a *fair* opportunity to put his case to the ET, including to respond to Mr Leiper's arguments. A party which is given a fair opportunity to respond to the submissions made to a court or tribunal but does not take it cannot then insist on another opportunity, whereas the logic of Mr Matovu's position appeared to be that there is an absolute right to respond when and in the manner of a party's choosing. Our view is not based on "hypotheticals"; it is a position based on consideration of the reality or otherwise of the opportunity which was actually made available to Mr Matovu if he chose to take it and the effect of what happened on the fairness of the hearing before the ET.

115. Turning to that question, we understand why Mr Matovu presented the issue as being the narrow one of whether there was an opportunity to respond to Mr Leiper's written submissions after they had been exchanged, but it seemed to us that this was not the only issue here. The reality is that Mr Matovu's written submissions to the ET did not cover all of the issues in the case and it appears that, at some point after he had put them in, he decided that he wished to supplement them in writing as well as orally. This is apparent from reading Mr Matovu's first set of written submissions to the ET. This document opens with 10 paragraphs of criticism of 2TGC's record in relation to equality and diversity. It contains a good deal about the law; it spends 8 paragraphs on submissions about the admissibility of aspects of the evidence; it deals with the allegation of direct discrimination against Mr Tyler in detail and then briefly with the allegations of subsequent victimisation. But it does not make submissions on the facts in relation to some of Mr Matovu's claims. He himself says in his affidavit that his written submissions were "far from complete".

116. Paragraph 80 of Mr Matovu's first set of written submissions says under the heading "Further submissions" that:

> "The Claimant proposes to supplement the above submissions which do not cover all of the issues to be determined by oral submissions"

117. So at this point Mr Matovu was, in effect, saying that he would fill in any gaps in his written submissions by oral submissions as he confirmed to us when we asked him. There was no suggestion in his written submissions that he wished to apply to put in further written submissions, whether to complete the first set, or in reply, or otherwise.

118. Consistently with this approach, Mr Matovu therefore did not apply for the oral submissions to be postponed, or for more time to complete his written submissions, or say to the ET that there was a problem because he had not had time to complete his written submissions. Instead, he presented the issue as being about having more time to respond to Mr Leiper's written submissions. Even then, he did not simply ask for more time to read Mr Leiper's written submissions. He applied to respond in writing at a later date.

119. Similarly, that is how he presented his further written submissions in his email to the Tribunal dated 18 December 2019, and the 33 page document was entitled "Claimant's Response to Respondent's Written Closing". But when we asked him about this document he appeared to accept that it did not contain anything material which could not have been in the first set of

submissions and was genuinely responsive to Mr Leiper's written submissions. It made very little reference to Mr Leiper's written submissions. It expanded on the "General Background". It developed his case on indirect discrimination over the space of 32 paragraphs, having devoted 2 paragraphs to this subject in the original submissions, and it expanded on the issue of limitation. It went on to make submissions, in a number of instances for the first time, on the issue of protected acts for the purpose of his victimisation claims, Ms Azib's report, interim clerking arrangements, the meetings of 14 January, 15 November and 19 December 2016, the AGM on 27 November 2018 and the investigation of Mr Tyler's grievance. These were largely, if not entirely, submissions which Mr Matovu could have made "first time round".

120. Mr Matovu's second set of written submissions therefore do not support the suggestion that there were material points in response to Mr Leiper's written submissions which he wished to make and which, contrary to *Van Orshoven* and *Vermeulen,* he was denied the opportunity to make. Nor does this document suggest that the sorts of problems anticipated by Burton J in *Sinclair, Roche and Temperley* -new points being taken in Mr Leiper's written submissions, unanticipated points, false points, mis-recording of the evidence etc – had occurred as a result of the late exchange. The document suggests that Mr Matovu now wished to supplement his first set of written submissions.

121. Notwithstanding the way in which Mr Matovu presented his concern to the ET and to us, given that his first set of written submissions did not cover all issues; and given that that part of Mr Leiper's argument is that Mr Matovu had the opportunity to read his written submissions by exchanging longer before 2pm than he did; we gave careful consideration to whether the arrangements for exchange were fair having regard to what was said in *Sinclair Roche & Temperley* about a sensible timescale for preparation being allowed, albeit in the context of a significantly longer case. We have noted that Mr Matovu did indicate to the ET that he might not be able to get his written submissions to them much before 2pm. Mr Matovu's affidavit does not suggest that he put forward any particular reason for this. He points out that he had been cross examining in the week before but, other than this, does not say why 2.5 to three days were insufficient to complete his written submissions.

122. In fairness, and conscious of Article 6 ECHR, we felt that we should give Mr Matovu an opportunity to comment on this point. He told us that he started writing on the Saturday. He was totally exhausted. He had had to endure what he said was the most unfair hearing that he had ever experienced. He did not have a legal back up team and the timetable was "absolutely ridiculous". He had worked on the submissions until 1.38pm on the Monday when he sent

them through to the Tribunal and he could not have done more than he did. He went on to refer to various challenges including dealing with a personal family matter involving a close relative (though he did not go into the detail of this), the fact that he had been under EJ Hodgson's Unless Order to produce his witness statement, the fact that he had been expelled from 2TGC on 29 October 2019, an Employment Appeal Tribunal hearing in another case which he had on 30 and 31 October 2019, being cut off from the 2TGC network and there being a 2000 page bundle which took considerable time to master. He said that he was under constant pressure and had no time to start his written submissions before or during the trial.

123. Having considered what he said, we concluded that we should not go behind the ET's finding, at [20], that there was *"ample time"* for the work to be done. The ET was in the best position to judge this having presided over the hearing but we agree that the case was not factually or legally complex. Mr Matovu was inevitably very familiar with the evidence and the issues given that it was his claim. But, in addition to this, the pleadings were detailed, Mr Matovu drafted the issues, and witness statements were exchanged more than a week before the hearing. There had been 6-6.5 days of oral evidence but the battle lines were clearly drawn before the hearing started. We also note that Mr Matovu's two sets of written submissions make barely any reference to the oral evidence: virtually all, if not all, of the references are to the written evidence. Mr Matovu is a very experienced practitioner. The fact that closing submissions were a combination of written and oral argument is a routine feature of ET litigation involving Counsel and must have been anticipated by him. This approach was, in any event, raised earlier in the trial and he did not argue against it. We therefore remain surprised that Mr Matovu did not make progress on the written submissions before and during the trial but, even if he could not be expected to, these points support the conclusion that 2.5-3 days was ample time for Mr Matovu to prepare his written submissions.

124. We accept, as we have said, that there was additional pressure on Mr Matovu in presenting his own case, particularly given the nature of his dispute with 2TGC. But the evidence does not bear him out in relation to his claims about the fairness of the treatment which he received from the Tribunal. Insofar as this was a reference to his being subjected to Unless Orders, the rejection of his procedural applications at the beginning of the hearing and the fair trial and apparent bias issues which he raises in this appeal, some of these decisions are not challenged before us and, as will be seen, we reject the challenges which he has made in this appeal. It was Mr Matovu's choice to expend time and energy on procedural battles which he lost and, insofar as we are able to judge, rightly and in many cases inevitably lost.

125. It would have been consistent with the approach indicated in paragraph 80 of Mr Matovu's first set of written submissions for him to exchange an hour or so earlier than he did on the basis that his plan was to supplement the document orally in any event. But if Mr Matovu had needed more time, or had good reason for not covering all of the issues in his written submissions but wished to do so, he had an opportunity to set out his position to the ET and apply for a different approach to be taken, or for more time.

126. Instead, on the Friday Mr Matovu did not object to the overall approach, when he could have said that his position was that submissions should be made orally, or that it would be impossible for him to get written submissions to the ET by 2pm and a different approach would therefore have to be adopted. He left the ET and the Respondents with the impression that he would get his written submissions in before the hearing resumed. When Mr Leiper offered to exchange on the Monday morning, Mr Matovu did not indicate that he would not be able to do so and at no point on the Monday morning did he indicate to Mr Leiper that he needed more time, or apply to the ET for more time. When he filed his written submissions, he did not indicate that he needed further time to complete them and explain why. Instead, paragraph 80 indicates, in effect, that he remained content to make a combination of written and oral submissions.

127. When the hearing resumed, Mr Matovu did not apply for more time to complete his written submissions either. His position was, in effect, that he was content to proceed on the basis of what had been put in but wanted the opportunity to respond to Mr Leiper's submissions at a later date. That application was dealt with on its merits in a way with which we are not prepared to interfere given that it was a case management decision which the ET was plainly entitled to make and for the reasons which it gave.

128. If Mr Matovu had made an application for submissions to be made orally or asked for more time to complete his written submissions, his reasons and any objections on the part of the Respondents could have been explored by the ET, findings made, and a decision taken. That decision could then have been considered on appeal if it went against Mr Matovu. We did not consider that we were in a position to hold that insufficient time had been given to prepare written submissions on the basis of what Mr Matovu told us in the course of his oral submissions, nor that the appeal had been pleaded or prepared in such a way as to make it appropriate for us to do so. Moreover, as we have said, we see no reason to doubt the ET's view on this issue, still less to find that the amount of time permitted for preparation of written submissions was such as to render the hearing unfair or to lead us to conclude that it was unfair because Mr Matovu had had no or no fair opportunity to respond to Mr Leiper's submissions.

129. We also reject the submission, under Ground 2(a) that the ET's approach in this regard was indicative of bias. Here the fact that the parties were treated in essentially the same way in respect of closing submissions is important. Mr Matovu relies on the Respondents being given an extension of time to file their Response to the third claim but, as Ms Moreton says at [24] of her comments on this point:

> *"I can only observe that every application is determined on its merits. This inevitably means that some applications are granted, and some refused. The application for an extension of time to file the ET3 had no impact on the timetable for this case, nor indeed for the case management hearing for that claim. It had no cost implication for either side. Had the application been refused the Respondents indicated that they would simply file a skeleton response with a later application to amend which would have made no difference to the management of the latter case but would have caused additional administrative work for the tribunal."*

Conclusion on Grounds 1(a)-(d) and 2(a)

130. We therefore accepted Mr Leiper's submissions on this issue. We concluded that the true analysis of what happened in this case is that the ET did comply with the *Sinclair Roche & Temperley* statement of good practice in the arrangements which it made in relation to written submissions at the end of the case. A fair opportunity to put his case and to respond to the Respondent's case was presented to Mr Matovu. The problem lay with his approach to that opportunity which led to written submissions being exchanged later than was ideal, albeit he had had sight of Mr Leiper's written submissions when he made his oral submissions.

131. It follows that we reject Mr Matovu's argument based on *Van Orshoven* and *Vermeulen*. But, more generally, we are satisfied that the hearing before the ET was fair for the reasons which we have given, and that it would not be fair to set aside the ET's decision because of the way in which cross examination and closing submissions were dealt with. We also reject the contention that the ET's management of these matters is indicative of bias.

GROUND 2: APPARENT BIAS

Overview

132. Mr Matovu relies on his fair hearing points and, in addition to this, a number of additional criticisms of the ET.

Ground 2(b): the re-examination point

133. The allegation here is that the ET "sought to cut short [Mr Matovu's] re-examination". At [18] of his affidavit Mr Matovu says:

> "Having not curtailed the cross-examination of me at all, the Judge then sought to cut short my re-examination. This is contrary to standard practice. He proposed that I could simply write down some bullet points and that would suffice. I actually had to argue to be allowed to re-examine myself in the normal way…."

134. Leaving to one side the question whether there is "standard practice" or such a thing as a witness re-examining themself "in the normal way", at [12] and [13] of her comments Ms Moreton says, and we accept, that:

> *"12. Mr Matovu states at his paragraph 18 that he had to argue to be allowed to re-examine himself. My note does not reflect this. At the close of cross examination on day 4, which was a Friday, EJ Snelson asked Mr Matovu in the normal way if there was anything in re-examination. Mr Matovu replied that there was but that he was unable to do this immediately because cross examination had been so long. There was no issue with this. EJ Snelson did suggest that Mr Matovu could, if he wanted, put additional material in writing. This was an offer only and not a requirement; made only to enable Mr Matovu to put over all the points he wished whilst still maintaining the required timetable. No limit of the time he might taken in re-examination was suggested.*
>
> *13. On day 5, Monday 18th November, Mr Matovu told the court that he had not been able to make any preparation over the weekend for re-examination. He did not have a list or any other prompt. However, in the event he spoke for only about 15 minutes before commencing his cross examination of the Respondent's witnesses."*

135. [25]-[27] of Ms Vaughan Jones' affidavit is consistent with this account. Mr Matovu emphasised to us that she had noted that, when suggesting that Mr Matovu could put something in writing which drew attention to the key documents of which he wished to remind the ET, EJ Snelson had said that this would shorten his re-examination and that "We cannot have extensive re-examination after all of that evidence". However, it is clear that the EJ did so in the context of expressing a concern about the timetable after the cross examination of Mr Matovu had lasted longer than expected for the reasons discussed above.

136. We therefore do not accept Mr Matovu's presentation of what the EJ said and did in relation to this Ground. The EJ was simply suggesting a practical way in which Mr Matovu could cover a lot of ground in re-examination in a short space of (court) time i.e. by preparing a note and setting the ET some reading. Mr Matovu did not take up this suggestion and, in the event, he spoke for around 15 minutes on the Monday without interruption.

137. We are satisfied that there was nothing which the EJ did in this regard which was indicative of bias.

Ground 2(c): refusal of Mr Matovu's application for a " stenographer"

138. The ET dealt with this point at [15] of its Reasons:

> *"Mr Matovu also sought permission on day one to install recording equipment in the hearing room. We refused the application. The case was not out of the ordinary. It was not said that there was any obstacle to either side attending with a note-taker. Maintaining the status quo would not entail any disadvantage to Mr Matovu. No disability or other special need calling for a special adjustment was asserted."*

139. Mr Matovu submitted that two decisions of EJ Snelson under this heading were indicative of bias: first, the EJ's refusal to deal with this application before he dealt with the other preliminary matters which Mr Matovu raised "thereby depriving [him] of any transcript in relation to" those applications; and, second, the refusal of the application itself given that he was acting in person without any legal or clerical support, given that he had a number of witnesses to cross examine, given that he had incurred expense (c£192) to secure the stenographer's (Ubiqus) attendance on 12 November 2019 and given that the Respondents were neutral on this application.

140. The difficulty with these complaints is that they are not borne out by the ET's Reasons or the comments and evidence of Ms Moreton and Ms Vaughan Jones. They say, in summary, that it was simply not the case that the EJ insisted on dealing with all of Mr Matovu's applications together. The issue of the "stenographer" was dealt with first and EJ Snelson then asked whether there was anything else which Mr Matovu wished to say before they considered his application. Without objection, Mr Matovu then raised his other preliminary issues. When he had said what he wanted to say, the ET retired to consider his applications. The EJ therefore did not "insist" on dealing with all procedural applications together.

141. Second, Ms Moreton and Ms Vaughan Jones both say that in fact Mr Matovu's proposal was that equipment would be installed to record the hearing and it would be "later transcribed". Ms Moreton says that Mr Matovu explained that this was a cheaper method than having a stenographer present throughout. He explained the difficulty with taking notes himself and said that he had chosen not to bring a friend or other assistance because of cost and because he wished to have a fully accurate record.

142. When we asked Mr Matovu about what the proposal was, he was surprisingly vague. It was clear that he wanted the proceedings to be recorded but whether he was intending that a transcript would be made during the course of the hearing and, if so when, was less clear. He had not reached any agreement with Ubiqus as to when the recording would be transcribed or as to how much this would cost. He told us he was aware that it would be more expensive to have it transcribed overnight and that there was the possibility of asking for a transcript every three days. He confirmed that he had not discussed this with Mr Leiper, nor the question whether any transcript would be shared with the Respondents or the ET and, if so, at what stage in the proceedings. He also confirmed that in the event he had had the assistance of friends who took a note in the course of the hearing.

143. We are aware that other courts and tribunals routinely record hearings, although they do this so that there is then an official record of the proceedings for future reference rather than as a substitute for the parties taking their own notes. Recording court proceedings without leave is a contempt of court: see section 9(1)(a) Contempt of Court Act 1981. A court or tribunal may permit the parties to commission the preparation of their own daily transcript at their own cost, but typically this is where an agreed proposal is put to the court or, at least, a specific one which goes beyond a simple proposal to record the hearing. Indeed, a simple application to make a recording would likely be refused absent good reason. We are therefore unsurprised by the ET's refusal of Mr Matovu's application notwithstanding that Mr Simon *"now believe[s]"* that this refusal was wrong.

144. We remind ourselves that the issue for us is whether the ET's decision on this application is indicative of apparent bias, rather than whether we would have granted Mr Matovu's application. We cannot see that it is. The ET simply applied the standard approach in employment tribunal proceedings in circumstances where there was no compelling reason to depart from it. As we have said, we are unsurprised that the ET declined to permit Mr Matovu to record the proceedings insofar as he simply wished to have his own recording. Insofar as he wished to have the recording transcribed later, and to use the transcript as his note of the

evidence, he did not put a clear proposal to the ET and, in the event, he was able to make use of a note taker.

Ground 2(d): the admissibility of evidence point

145. The complaint under this heading is that the ET failed to address Mr Matovu's objection to the admissibility of evidence adduced by the Respondents which spanned his 18 years as a member of 2TGC. The ET noted that he had said that he considered the witness statements made by Mr Howard Palmer KC and Ms Caroline Harrison KC to be *"irrelevant and even inadmissible"* but nevertheless admitted them without giving reasons. Mr Matovu confirmed that he was not asking us to hold that the ET was wrong to admit this evidence, not least because we were not shown the evidence which he said was inadmissible. His complaint was that the ET should have given reasons for doing so, that its failure to do so was a "flagrant breach" of paragraph 62 of Schedule 1 to the ET Rules 2013, and that this was indicative of bias.

146. There is nothing in this point. If Mr Matovu had wanted to exclude the witness statements of Mr Palmer and Ms Harrison, the obvious thing to do was to apply for them to be excluded before the witness statements were read by the ET on Days 1 and 2 and became part of the evidence. He apparently did refer in passing to inadmissible material on Day 1, but he did not make any application to exclude evidence. Until Day 8, the hearing proceeded on the basis that the evidence of Mr Palmer and Ms Harrison had been admitted and Mr Matovu intended to cross examine them, and it was timetabled accordingly. It was only in explaining why he no longer wished to do so that Mr Matovu said that their evidence was inadmissible, self-serving and irrelevant. But he did not then apply for it to be excluded or disregarded.

147. Mr Matovu showed us passages from his first set of written submissions in which he argued that a lot of material had been put before the ET for its prejudicial effect rather than its probative value and referred specifically to the witness statements of Mr Palmer, Ms Harrison and Ms Vaughan Jones. Although he did so under the heading "Inadmissible Evidence" he did not formally apply for it to be excluded or disregarded and, realistically, it would have been rather late in the day for him to do so.

148. The question is whether the way in which the ET dealt with Mr Matovu's position on admissibility is indicative of bias. At [40] of its Reasons the ET noted what Mr Matovu had said about the evidence of Mr Palmer and Ms Harrison on Day 8. At [109] it referred to Ms Harrison's evidence in a section entitled *"Miscellaneous and 'background' matters"*. It noted,

amongst other things, her evidence about the 2TGC Equality and Diversity Working Group, of which she had been the Chair until 2017 and about the negative and disruptive contribution of Mr Matovu to that Group, which it clearly regarded as relevant, albeit not of central relevance. The ET did not appear to place reliance on Mr Palmer's evidence.

149. The central answer to Mr Matovu's point under this Ground is that the ET was not formally asked to determine an application to exclude or disregard any particular evidence. It referred to evidence which it regarded as sufficiently relevant in giving its Reasons, and those Reasons make clear why it regarded that evidence as relevant. It is entirely understandable that the issue of admissibility did not occupy a prominent place in its Reasons. Whether or not the ET should have given explicit, or more, reasons for taking into account the evidence of Ms Harrison, we cannot see that its handling of this point was indicative of bias.

Ground 2(e)(ii): failure to set out 'background' evidence

150. Ground 2(e)(i) pleads that Mr Matovu relies on two points under Grounds 3 and 4 as evidence of apparent bias, namely part of Grounds 3(1)(a) and (b) and Ground 4(8). We deal with these points below.

151. Ground 2(e)(ii) complains that the ET "failed (i) fully and seriously to engage with key elements of [Mr Matovu's] case, considering the full relevant narrative and all the available evidence…" and/or (ii) "to give adequate reasons for all of its conclusions". It is also alleged that the ET "failed to make any findings or to set out" what are said to be "significant parts of the relevant narrative forming an important and material part of [Mr Matovu's] case". In summary, these were his evidence about:

    a. His efforts to highlight the underrepresentation of black pupils/clerks in 2007/2008 and what is said to be 2TGC's failure to act on advice from Ms Clare Cozens, "Public and Equality Consultant and Government adviser" in 2007 and a report provided by Mr Matovu in 2008;

    b. Failure by 2TGC to improve diversity amongst clerks since 2007 when Mr Tyler became Senior Clerk;

    c. Alleged failures on the part of the Equality and Diversity Working Group set up in 2015;

d. Not being offered a speaking opportunity at a Common Law Group Seminar since March 2015, his wish be offered speaking opportunities and Mr Tyler's awareness of this wish through practice review meetings in October 2016 and 30 May 2017.

152. At [69] of his skeleton argument Mr Matovu did not develop these points in relation to Ground 2(5). He said that "These matters will be addressed more specifically below but they add to the overall picture". We will also deal with these points below but suffice it to say that, for reasons which we explain below, we did not consider that the ET's approach to what were essentially background matters, or the extent to which it set these out, was indicative of bias on its part. We therefore reject this Ground.

Ground 2(g): alleged gratuitous comment by the ET

153. Permission was refused in relation to Ground 2(f).

154. Ground 2(g) is a complaint that the ET made a gratuitous comment "prejudicially against [Mr Matovu's] interest, which was unsupported by any evidence, unconnected with the legal or factual merits of the case and wholly unjustified". This refers to [121] of the ET's Reasons where it said this in relation to the interim clerking issue:

> *"As to issue 18.4, again, the complaint falls on the primary findings set out above. The Board took the only practical course open to it, namely to engineer a temporary interruption of face-to-face dealings between Mr Matovu and Mr Tyler. It neither required, nor achieved, a cessation of Mr Tyler's clerking services on behalf of Mr Matovu. Mr Tyler continued throughout to clerk Mr Matovu, who also retained at all times his face-to-face working relationship with Mr Cray. <u>There was no detriment to Mr Matovu and it is hard to avoid the thought that, had the Board not intervened, he would have been likely to complain that requiring him to maintain direct contact with someone whom he had accused of discrimination was itself a detriment</u>."* (highlighting added)

155. Mr Matovu points out that the ET itself found that he had protested about the interim clerking arrangements – on 9 October 2017 and then in a complaint of professional misconduct to the Bar Standards Board on 27 October 2017- and that he alleged victimisation in relation to this decision. He says that the highlighted comment shows a hostile animus towards him on the part of the EJ unconnected with the legal or factual merits of the case. He also points out that Mr Simon says in his comments that: *"This comment is speculative and suggests that the*

Claimant was inclined to make unwarranted accusations. I believe this comment should not have been made by the Tribunal".

156. We accept that the ET considered that Mr Matovu would have complained whatever decision about clerking arrangements had been taken – that 2TGC would be "damned if it did and damned if it didn't", as Mr Leiper put it – but we see the force of the argument that it was not strictly necessary for the ET to make this finding in order to dismiss this claim. However, the suggestion that Mr Matovu was totally unreasonable was very much before the ET as part of the Respondents' case – they argued that he had acted in bad faith - rather than one which the ET introduced unilaterally. It is also apparent from the ET's findings that it considered that Mr Matovu's very strong objection to Ms Azib's report, which he described as a *"whitewash"*, was unreasonable. So, in the view of the ET, was the fact that he alleged victimisation in relation to the interim clerking arrangements and made a complaint of professional misconduct to the Bar Standards Board against the members of the Board. We also noted that the ET found that when, in October 2018, Mr Tyler offered to resume working in direct contact with Mr Matovu, and proposed a practice review, *"The offer was initially ignored and, after a chasing email, rejected"* [92].

157. We were therefore persuaded that the ET's comment could have been left out of its Reasons without undermining them but that it was not "gratuitous" in the relevant sense. Rather, it reflected the ET's view having heard all of the evidence and its assessment of that evidence and of Mr Matovu. The view was one which the ET was entitled to hold and we did not accept that the fact that it made this comment was indicative of bias nor that, in itself, or taken with the other points on which Mr Matovu relies, the test for apparent bias was satisfied.

Ground 2(h): delay in providing reasons for not 'consolidating'

158. The complaint under this heading is that the EJ "inordinately delayed in providing written reasons on a preliminary issue, though [he] had undertaken to provide these as a priority and completely disregarded the Claimant's further written request dated 18 December 2019, without replying to the same." The preliminary issue referred to is Mr Matovu's second application to the ET to postpone the hearing, which he made at 2pm on Day 2 after the suggestion by HHJ Shanks that he be permitted to do so, although Mr Matovu refers to this as his application to consolidate his three claims. Mr Matovu says that he immediately said that he required written reasons for this decision so that he could pursue an urgent appeal and that it is indicative of bias that, having promised to provide them as a priority, the EJ then did not do so until the full Reasons were promulgated.

159. The most obvious answer to this point is that if the EJ had been biased he would not have promised to get the written reasons to Mr Matovu as a priority. Nor would he have approached REJ Wade to ask her to give reasons for her refusal of Mr Matovu's second application to postpone as we have noted he did.

160. But, apart from this, it is far from clear that the EJ made any such promise. No one appears to have a note of it being made. The EJ does recall agreeing to approach REJ Wade to pass on Mr Matovu's request for her reasons *"as a matter of priority"* but does not recall promising to provide the ET's Reasons for the fourth refusal of a postponement as a priority. Mr Simon says he does recall the promise being made but does not suggest that he has a note and, of course, he may be remembering the promise in relation to Ms Wade's Reasons. Ms Moreton's note says:

> *"Mr Matovu states at his paragraph 14 that EJ Snelson stated he would provide the written reasons as a priority yet failed to do so. That does not accord with my record which shows that EJ Snelson actually stated, twice, that written reasons would be provided in due course. Mr Matovu continued over some minutes to press EJ Snelson for a precise timescale and asking that the matter be treated as a priority. EJ Snelson responded that whilst all efforts would be made to treat it as a priority but that it was not the only priority before the tribunal."*

161. The EJ does not recall the matter being raised again and Mr Matovu does not suggest that he did raise it again. We agree with the EJ that the question of a postponement was a *"dead letter"* by the end of Day 2. In our view it was a dead letter in the light of REJ Wade's Reasons on Day 1. There was no realistic prospect of a successful appeal against the refusal to postpone the full hearing and this may be why Mr Matovu did not press it after Day 2. Whether or not that is so, it is unsurprising that the provision of written reasons for the purposes of such an appeal was treated as a low priority. We do not accept that the ET's approach in this regard was indicative of bias.

162. Similarly, nor do we consider that the failure to provide written reasons for this decision separately, in response to Mr Matovu's email of 18 December 2019, indicates bias. Mr Matovu did not actually request separate or immediate reasons. What he asked for in this email was written reasons for six of the rulings made in the course of the hearing and these were then provided at [13]-[21] of the Reasons which were subsequently promulgated by the ET in February 2020. There was nothing inconsistent between this approach and what he asked for

on 18 December 2019. We also consider that it was perfectly appropriate to respond to Mr Matovu's request, and the Respondents' response to it, in the Reasons rather than engaging in correspondence with the parties. Even if Mr Matovu had requested immediate reasons for the refusal to postpone the hearing it would have served no sensible purpose for them to be provided separately given that the hearing had now taken place.

Overall conclusion in relation to apparent bias

163. Standing back and taking into account the criticisms of the ET which we have addressed above, as well as the additional apparent bias points which we address below, we do not accept that, individually or cumulatively, they are such that "*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"*. Quite apart from these criticisms not being well founded and/or not having the force which Mr Matovu suggested they have, such an observer would also have noted, as we have noted, that there were points at which the ET could have gone further if it were biased against Mr Matovu. It did not make findings of bad faith against him; it refrained from making detailed criticisms of his credibility as a witness; it did not make all of the findings against him on disputed issues which it might have made if it had been biased. Moreover, its findings were clearly based on its assessment of the case.

LEGAL FRAMEWORK FOR THE PURPOSES OF GROUNDS 3 AND 4

164. We confine ourselves to a brief consideration of relevant aspects of the law on direct discrimination and victimisation given that there is no challenge to the ET's rejection of Mr Matovu's allegations of harassment related to race, and the essential principles are very familiar and well established. As noted above, the relevant provisions of the Equality Act 2010 in this case are set out in an Appendix to this Judgment for ease of reference.

165. The concept of direct discrimination requires less favourable treatment of the claimant than an actual or hypothetical comparator in materially the same circumstances *"because of"* the relevant protected characteristic, in this case race: see section 13, read with 23 of the 2010 Act.

166. Under section 27(1) of the 2010 Act, the concept of victimisation involves *"A [subjecting] B to a detriment because"* B does a *"protected act"*, as defined in section 27(2), or it is believed that they have done or may do a protected act. In broad terms, a protected act entails taking steps under or in connection with the Equality Act 2010, for example by raising issues of discrimination. The giving of evidence or information or the making of an allegation of discrimination is not protected if what is said is false, and the claimant acted in bad faith in doing so: see section 27(3).

167. The question whether an alleged discriminator or victimiser acted *"because of"* a protected characteristic or act is a question about their conscious or subconscious reasons for acting as they did, and the test is therefore subjective. This point was made by Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [2000] 1 AC 501, 511C-D, and again in *Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065* where, at [29], he distinguished the nature of the "reason why" question from the determination of "causation". He pointed out that the latter is a legal exercise in which the court decides which events are causative of what happened - what was the operative or effective cause - sometimes applying the 'but for test'. The former is a question of fact. Although *Nagarajan* and *Khan* were considering direct discrimination and victimisation under the legacy enactments which the Equality Act 2010 brought together, the approach is the same under sections 13 and 27 of the 2010 Act: see *Onu v Akwiwu* [2014] ICR 571 at [19].

168. It is sufficient, that the protected characteristic or act had a *"significant influence"* on the decision to act in the manner complained of. It need not be the sole ground for the decision: per Lord Nicholls in *Nagarajan*, at 886E–F. However, the requirement that the protected characteristic or act must subjectively influence the decision-maker means that there may be cases where the "but for" test is satisfied—but for the protected characteristic or act the act complained of would not have happened—and/or where the protected characteristic or act forms an important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the characteristic or act itself did not materially impact on the thinking of the decision-maker and therefore was not a subjective reason for the treatment complained of. This point is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e g *Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372 – victimisation for whistleblowing). It is also very well established in the field of equality law. As Underhill P, as he then was, said in *Amnesty International v Ahmed* [2009] ICR 1450 at [37]:

> *"The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."*

169. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [8] and [11], Lord Nicholls also said that the question whether there has been direct discrimination is *"essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others"*. It therefore is not necessary for the court or tribunal to consider the reason why question and the issue of less favourable treatment in stages in every case. Indeed, it may be better to focus on the reason why question given that this is less complex and the answer to this question will almost invariably be decisive. See, further, Elias P (as he then was) in *Law Society v Bahl* [2003] IRLR 640 at [115].

170. In relation to victimisation, the formulation under section 27 of the 2010 Act - *"A [subjecting] B to a detriment because"* - reflects that fact that no comparison with an actual or hypothetical comparator is required. The comparison is simply with how the claimant would have been treated if they had not taken the protected step. This is what the Court of Appeal held in *Aziz v Trinity Street Taxis* [1988] ICR 534.

171. The difficulties in proving discrimination or victimisation are notorious and are sought to be mitigated under section 136 of the 2010 Act, which is the subject of Ground 3(3). Section 136 provides, so far as material

> *"(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"*

172. There are various well known authorities on the application of section 136 but for present purposes it is sufficient to note that:

    a. In *Laing v Manchester City Council* [2006] ICR 1519 EAT at [65], in a passage relied on by Mr Matovu, Elias P said that what section 136 *"envisages is that the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn. Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation)."*

b. Although section 136 envisages a two-stage approach, the first stage being whether the claimant has established a prima facie case and the second being whether the respondent is able to prove that there was no discrimination, a tribunal is not bound to adopt such an approach. It may also use, at stage one, evidence from the employer denying discrimination when deciding whether there is the statutory reversal of the burden of proof: see e.g. *Laing v Manchester City Council* at [73]-[77].

c. In *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] Lord Hope said that *"it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

173. The final point is that, having defined the types of prohibited conduct in Chapter 2, Part 2, the 2010 Act goes on to set out the discriminatory acts which are unlawful. As pointed out above the relevant provision in the present case is section 47 which, like many similar provisions in the 2010 Act renders various acts unlawful, including subjecting another to *"detriment"*. This is intended to be a low bar for the claimant. The following points were confirmed by the House of Lords in *Derbyshire v St Helens Metropolitan Council* [2007] UKHL 16; [2007] ICR 841:

a. The test is one of *"materiality"* [67];

b. The question should be looked at from the point of view of the alleged victim [66];

c. As Brightman LJ said in *Ministry of Defence v Jeremiah* [1980] ICR 13, 31 *"a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment"* [37], [67].

d. As Lord Scott of Foscote said in *Shamoon*, *"If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice."* [67]

e. However, *"an unjustified sense of grievance cannot amount to 'detriment'"* [67].

f. Whether a reasonable claimant would or might take the view that the treatment was to their detriment is a question of fact: e.g. [28].

174. In the light of part of Mr Matovu's argument on this point, we think it important to emphasise, for the avoidance of doubt, that the question is not whether the respondent acted honestly and/or reasonably. Nor is there any exception which permits honest or reasonable victimisation: *St Helens* at [64]-[67]. References to an *"unjustified"* sense of grievance are to a sense of grievance which a claimant could not reasonably hold, rather than one with which the Tribunal disagrees and, as is well known, there may be a range of reasonable views on a matter. Consideration of whether a reasonable claimant would or might take the view that the treatment complained of was to their detriment may include consideration of the reasonableness of the respondent's actions but that is not the test. Obviously, reasonable conduct by a respondent might reasonably be considered by a claimant to be to their detriment given that each views the matter from a different perspective and brings different considerations to bear in making their assessment. The assessment may include consideration of whether the alleged detriment is minor or trivial but, again, that is not the test.

175. In the run of cases the detriment threshold will be crossed by the claimant and the real issue will be whether they were treated less favourably, and/or whether the treatment was, *"because of"* a protected characteristic or act. This does not mean that the reasonableness of the respondent's actions will be irrelevant in every case where detriment is established. Depending on the evidence, the reasonableness of the respondent's actions may lend some support to an argument that the "reason why" question should be answered against the claimant given that arbitrary and irrational actions may be harder to explain in non-discriminatory ways although, again, this is not the test. If the detriment is minor and/or the employer's conduct was reasonable in all the circumstances, this may influence the question of compensation given that a tribunal may need more persuasion that significant injury to feelings has been sustained as a result of understandable actions on the part of the respondent. But none of what is said in this summary is intended to add to or depart from the well-established principles in this field.

GROUND 3: DIRECT RACE DISCRIMINATION – ALLEGED ERRORS OF LAW/APPROACH AND FAILURES TO GIVE ADEQUATE REASONS

Grounds 3(1) and 2(e)(i): speaking opportunity/further evidence of bias.

176. Mr Matovu's Amended Grounds of Appeal complains, at [3(1)], that "the ET did not properly address [his] central complaint regarding [Mr Tyler's decision] to put forward names to speak at a chambers seminar on 28 June 2017" and "failed to provide any or any adequate reasons to explain in [134] why it was satisfied that the act of suggesting Ms Gray's name had nothing to do with race".

177. The focus of Mr Matovu's argument on this point was the question of the suitability of Ms Gray. His case before the ET was that Mr Tyler knowingly put forward Ms Gray as if she was equally suitable to him when she was unsuitable and, additionally, she was not a member of the Common Law Group. She should not have been put forward at all. Her unsuitability was therefore a key component of his case on direct discrimination. His argument was that without determining whether or not she was unsuitable, the ET could not decide whether there had been less favourable treatment of him on the basis of a comparison with Ms Unthank or alternatively Ms Gray. The ET noted that it was not in dispute that Ms Unthank was suitable yet it "studiously avoided" making any specific finding as to whether or not Ms Gray was suitable, and wrongly found that he was not disadvantaged by her being put forward.

178. As we understood the apparent bias point under Ground 2(e)(i) it was that the ET appreciated that it was bound to find that Ms Gray was unsuitable and therefore avoided making a finding on this question. In this connection, Mr Matovu took us to passages from the evidence given to Ms Azib in the course of her investigation which, he said, were clear evidence of Ms Gray's unsuitability. By way of example, these included a line from the transcript of her interview of Mr Tyler where he said "also I would say that yes JG may not have been appropriate, I accept that".

179. Mr Matovu referred us to *The Gulf Agencies Ltd v Ahmed* [2016] EWCA Civ 44 at [35]-[37] as authority for the proposition that, in his words, "failure to address a central issue or to deal with an important part of the relevant evidence is an unacceptable way of deciding a case" (in fact the problem in that case was that the Judge had failed to address "the" central issue in the case). He also referred us to *R v Birmingham City Council ex parte EOC* [1989] AC 1155 for the proposition that diminishing a person's chances of obtaining a benefit may amount to less favourable treatment. In *ex parte EOC* the Council provided more grammar school places for boys than for girls. The girls in the area were therefore treated less favourably than the boys as they were given less opportunity to go to grammar school.

180. We refer to our summary of the ET's decision on this point at [39]-[45] above. Given that this was a complaint of direct race discrimination the central issue was, in fact, why Mr Tyler put Ms Gray's name forward: was it "because of" race? There was also an issue about whether he was treated less favourably given that, at least on the most obvious analysis, he had been treated the same as his actual comparators. The central issue was not whether Ms Gray was objectively suitable, or equally suitable to Mr Matovu, or a member of the Common Law Group, although Mr Tyler's beliefs on these questions were relevant to why he acted as he did. The ET's finding on this point was as follows:

> *"We are entirely satisfied that Mr Tyler's act of suggesting Ms Gray's name had nothing to do with race. He simply gave a hasty response to Ms Wolstenholme's inquiry about availability, based on a survey of the diary. The idea that he was seeking to disadvantage Mr Matovu, let alone that that purpose was motivated by or linked to race, strikes us as remarkable. To state the obvious, if he had any such aim he would surely have been careful to avoid mentioning him as a possible candidate."*

181. This was a perfectly plausible and adequately explained finding on the evidence and it was fatal to this claim. As the ET had found earlier in its Reasons, the seminar was about employment law for personal injury lawyers and a mixture of employment law and personal injury solicitors was invited. Mr Tyler was asked who was available and might be able to stand in at short notice. He put forward three barristers who had expertise in employment law and, to differing degrees, experience of personal injury work. Ms Gray declined on the grounds that she was not available and that she had not practised personal injury law since her return from a career break in 2013 but it did not follow from this that she was "unsuitable" in some objective or absolute sense. Even if it did, what mattered was what Mr Tyler understood he was being asked and why he put the three names forward. It was not impossible for Mr Tyler to have thought that Ms Gray might be willing and able to step in, as Mr Matovu appeared to be arguing.

182. As for Mr Matovu's reliance on the evidence given to Ms Azib, there were passages which he was entitled to argue were supportive of his position but there were others which clearly were not. Ms Azib and the ET looked at the whole of the evidence and, again, it is important not to take words out of their context. By way of example, the whole of what Mr Tyler said in the passage referred to at [178] above was as follows:

> "LT – I go back to what I said before...I thought it best to give a range of people as best I could, given that a limited number of people on paper were actually available

and the fact that we were a week before the seminar and also I would say that yes JG may not have been appropriate, I accept that. If the criticism is that I put someone forward who was entirely inappropriate and that I have totally misunderstood what the seminar was about, then if that's right, then I put my hands up. But I put forward people who were available from the employment group because I thought there was likely to be a weight on employment law at that seminar and JG was someone who was potentially available. And I say potentially because they were all only potentially available even though on paper they were available. As far as I was concerned, it was a week before, it was an evening seminar and they may well have had commitments during those evenings, as you do..." (emphasis added)

183. What he "had said before" included:

"LT – … Bruce was no longer available to speak at either of the seminars and she was looking for a suitable replacement to join her and Helen Bell…. And she asked me who was available... Now I obviously knew that it was a PI seminar but that there were employment aspects to it so on that basis… Now I don't know whether Helen asked me specifically can you nominate employment barristers. I think she may have done. But I can't hand on heart say she did. But certainly that's how I interpreted the request because of the employment aspect to it. So I went through the diary.." (emphasis added)

184. Having considered all of the evidence, Ms Azib's conclusions included the following:

"f. I find as a fact that JG was not an unsuitable choice for an alternative seminar speaker. LT chose members of the employment group as alternative speakers, which would have included JG. HW did not specify to LT that speakers had to be members of the PI groups. The seminar was a cross-over of employment issues and to which employment solicitors had been invited and I therefore find that it was appropriate to nominate speakers from the employment group, including JG;

g. I find as fact that JG was not doing PI work at the time she was asked to do the seminar but that she had done PI work in the past. I further find as a fact that the proposal of JG by LT as a potential replacement speaker did not cause HW any concern at the time as to whether she was appropriate, such that HW did approach JG

> to speaker and further, that HW was equally not concerned about JG's appropriateness even after she learned that JG no longer did PI work, as she had done PI work in the past and therefore felt JG would be able to speak to the issues."

185. So even if, which it was not, the key evidence in the case was the evidence given to Ms Azib rather than the evidence given to the ET, that evidence did not establish that there was only one finding which the ET could make on the suitability of Ms Gray. Moreover, the ET did in fact make findings which went to the suitability of Ms Gray. At [73] it found that Ms Gray had declined the invitation on grounds which included that she no longer practised personal injury law. The ET found that she was not a member of the Common Law Group and that the main elements of her practice were immigration and employment law. It did not make a finding, in terms, that she was suitable or unsuitable, but this was not a binary question in the circumstances. Indeed, we note that Mr Matovu's complaint of 12 July 2017, which Ms Azib was investigating, was that "JG was an unsuitable and/or far less suitable choice than DM". As for the alleged contrast with the ET's approach in relation to the suitability of Ms Unthank, all that the ET's words pointed to by Mr Matovu did was, in effect, to note that there was no issue in relation to her being put forward.

186. Second, even assuming that Ms Gray was unsuitable, absent a finding that Mr Tyler was deliberately putting forward Ms Gray in order to reduce Mr Matovu's chances of being chosen by Ms Wolstenholme, it is hard to see that he subjected Mr Matovu to detriment, and the ET found as a fact that he was not seeking to disadvantage Mr Matovu. Based on a survey of the diary, Mr Tyler simply put forward what he saw as options for Ms Wolstenholme to choose from. If there was any detriment it was in Ms Wolstenholme approaching Ms Gray, and not Mr Matovu, in relation to the slot on 28 June. She told the ET, and it accepted, that she would not have offered the opportunity to Mr Matovu even if he had been the only name put forward as available on 28 June. Rather, she would have decided to step in herself as in fact she did when Ms Gray declined. The ET was therefore entitled to find, as it did at [117], that Mr Tyler did not subject Mr Matovu to a detriment. Ironically, his case on this point would have been stronger if Mr Tyler had put forward a barrister who was equally or more suitable than Mr Matovu so that his chances of being offered the opportunity were inevitably reduced; on his case Mr Tyler put forward an additional candidate who was unsuitable and was therefore unlikely to be selected by Ms Wolstenholme.

187. Third, the issue of less favourable treatment is therefore somewhat beside the point given that the ET chose to go straight to the "reason why" question, as suggested in *Shamoon*, and made

an unimpeachable finding on this question. Indeed, Mr Matovu's arguments on the issue of less favourable treatment tended to demonstrate why Employment Tribunals will often be well advised to deal directly with the reason why question rather than become bogged down in arguments about the relevant characteristics of an actual or hypothetical comparator. But, on the ET's findings, if the comparison was to be with Ms Unthank the less favourable treatment question was whether Ms Gray would have been put forward by Mr Tyler for the 5 July 2017 slot as well as Ms Unthank if the diary had indicated that Ms Gray was also available on this date. On the ET's findings, there is no reason to think that she would not have been.

188. We have difficulty in seeing how a comparison with the treatment of Ms Gray would lead to the conclusion that Mr Matovu was treated less favourably given that they were, on the face of it, treated the same and given that Ms Unthank was also put forward for the 28 June slot, to which Mr Matovu did not object. The argument that Mr Matovu was treated less favourably because Ms Gray was less suitable or unsuitable and yet she was also put forward is highly debateable. On analysis it raises the hypothetical questions such as whether, if the facts were the same save that Mr Matovu was white and/or she was black, Ms Gray would have been put forward as an option. On the ET's findings she would have been.

189. We cannot see anything in Mr Matovu's complaints about the ET's approach or the adequacy of its Reasons in relation to this claim. Nor is the ET's approach to this claim evidence of apparent bias. The suitability of Ms Gray was not the central issue and, in any event, it is not the case that the question could only have been answered in one way so the ET avoided finding in Mr Matovu's favour on the point. The ET did make appropriate findings about Ms Gray's suitability and, indeed, it could have found that she was suitable albeit not as suitable as Ms Unthank or Mr Matovu. We therefore reject this Ground.

Ground 3(2) alleged failure "to have any or any proper regard to all the evidence relating to potential racial discrimination, including evidence of racial inequality in recruitment"

190. This Ground is linked to Ground 2(e)(ii), above, as we have noted. At paragraph 3(2)(a) of the Amended Grounds of Appeal Mr Matovu alleges that the ET "omitted to mention…… or have any regard to" the particular responsibility of the Senior Clerk for the recruitment of clerks and/or the fact that since he had been appointed in 2007, only white clerks had been appointed. At paragraph 3(2)(b) he contends that the ET erred in its treatment of evidence relating to the consistent underrepresentation of black pupils and clerks at 2TGC despite the problem being highlighted in 2007, and in its treatment of the fact that no measures had been taken to deal with it. He refers to [133] of the ET's Reasons as indicating that the Respondents'

conduct was judged by the lowest possible standard rather than the standards set by the Bar Standards Board in its Guidelines on the Equality and Diversity provisions of the Bar Code.

191. In his written and oral submissions Mr Matovu relied on *Anya*, and submitted that the ET referred to these aspects of the evidence briefly and dismissively. Relying on the Equal Treatment Bench Book he argued that if a judge is to hold the confidence of a black litigant they should not be seen to do less than full justice to their case and should make specific findings about evidence which potentially supports the claimant's case, rather than dealing with it in a generalised way. A fair minded and informed observer would not consider that the Respondents should be exculpated on the basis of the record of the Bar as a whole and would consider that Mr Matovu's evidence should be taken seriously and that 2TGC's record on racial diversity should be judged on its own merits and according to normally accepted standards at large. The failure to make explicit findings on material parts of Mr Matovu's case, and dismissing it in the way that they did, meant that the ET was not seen to ensure that his case was equally listened to, as required by the Equal Treatment Bench Book.

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192. As we have noted in relation to *Emery*, *Meek* and *Anya* at [83]-[89] above, whilst an Employment Tribunal is obliged to base its assessment of a discrimination case on the whole of the admissible evidence, when it sets out the reasons for its decision the duty of the Tribunal is to identify and record those matters which were critical to its decision and to explain to the parties why they won or lost. It is not to set out all of the evidence of one side or the other, or both sides. Nor is it to explain what it made of every piece of evidence or to resolve every evidential dispute, however peripheral. As Mr Matovu reminded us when he took us to *Anya*, the drawing of inferences involves reaching reasoned conclusions which follow from established primary facts, rather than acting on an intuitive hunch. This point was made as long ago as the decision in *Chapman v Simon* [1994] IRLR 214 at [43] and [33(3)]. Employment Tribunals are entitled and, indeed, encouraged to adopt a proportionate approach to setting out their reasons, giving greater emphasis to the primary facts which are central to or more probative of the inferences which they are being asked to draw, one way or the other, than to background or more peripheral matters.

193. This is precisely what the ET did in the present case. At [43] of its Reasons it said this before approaching its task of setting out its findings in the way which we have summarised at [29]-[33] above:

> *"The evidence was, as we have mentioned, detailed and extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we set out below."*

194. As Mr Leiper pointed out, the ET then proceeded to leave out key aspects of the Respondents' case on the grounds that they were not critical to its decision. At [44] it said this:

> *"We use the words "facts essential to our decision" advisedly. We have consciously omitted to record findings on certain matters. In particular, given our conclusion that the victimisation claim fails in any event, we decline to address the bad faith defence and so judge it unnecessary to make findings on a number of matters relied upon by the Respondents in support of that defence."*

195. It is also important to note that Mr Matovu's presentation of the record of 2TGC on diversity was contested and the ET did not set out the whole of the Respondents' evidence on this topic either. Contrary to his argument that the ET omitted to mention or have regard to the matters on which he relied, the ET did make findings about a number of these matters at [104]-[109] of its Reasons, albeit those findings were more nuanced than his evidence had suggested. Its findings on these issues were as follows:

> *"104. Mr Matovu was the only member of Chambers who self-identified as black. Two other black practitioners had been members, and one remains a 'door tenant'. Other racial minorities were and are represented among the membership. There had long been a system of double-blind marking of applications to Chambers. There was no suggestion before us of a policy against appointing black applicants.*
>
> *105. With one exception, the clerks in Chambers during Mr Matovu's years were uniformly white. Mr Tyler told us of an unsuccessful attempt to diversify the clerking cohort by advertising outside the usual channels.*
>
> *106. There were and are two black members of the Chambers non-clerking staff. One, the Marketing Executive, joined as a typist some 30 years ago. She reports directly to Mr Tyler.*
>
> *107. Equality and diversity training is mandatory for all Chambers staff and members of the Board and the Pupillage Committee. Mr Moody invited the Bar Council's Head of Equality and Diversity to Chambers to give in-house training in January 2017 and January 2019. The aim is to repeat the exercise at similar intervals in future.*

> *108. For a number of years Chambers has had an Equality and Diversity Officer.*
> *109. It would be wrong to omit mention of Ms Harrison's illuminating and powerful witness statement. Aside from setting out her own remarkable personal story and the considerable support received from Chambers in connection with it, it covers…her role as Chair of the Equality & Diversity Working Group set up by Chambers in 2015. On the latter subject she gives detailed and heartfelt evidence of the (modest) progress made (she resigned as Chair in 2017) and what she clearly perceives as the negative and disruptive contribution to the work of the Group by Mr Matovu. The statement is unchallenged. In so far as it consists of assertions of fact, we accept it as true."* (highlighting added)

196. It is apparent from the heading of this section of the Reasons – *"Miscellaneous and 'background' matters"* – that the ET did not regard these findings as being of central importance to its decision and Mr Matovu did not persuade us that this view was wrong, still less indicative of bias. Even if Mr Matovu's account of the record of 2TGC and Mr Tyler on racial diversity had been accepted in its entirety, this evidence was not strongly probative of his case on the issues as framed by him which did not concern recruitment of pupils, barristers or staff. (For example, the two acts of direct discrimination complained of were a failure by Ms Vaughan Jones to provide certain information to Mr Matovu prior to the Board meeting of 19 December 2016 and Mr Tyler putting Ms Gray forward for the speaker opportunity on 28 June 2017). Nor was it evidence, as in *Anya* and *Qureshi*, of previous hostility towards, discrimination against or victimisation of Mr Matovu by the people he was now accusing. We can see that Mr Tyler's record on racial diversity was relevant given that he was accused of direct race discrimination, but the ET made findings about this at [105] and [106] which we have set out above.

197. As for [133], what the ET said is this:

> *"No pattern of behaviour is demonstrated pointing to race as a material influence upon the acts of omissions on which the claims hang. Certainly, the 'background' facts relied on by Mr Matovu are eloquent of the stubborn reality that the Bar is adapting to social change more slowly than many other professions. And progress towards diversity among barristers' clerks is, it seems, even slower. But we were shown no evidence of a pattern of Chambers' decisions rejecting strong black candidates for pupillages or tenancies in favour of weaker white candidates. Nor of recruitment arrangements which might be seen as disadvantaging black applicants. Nor of*

appointments in the clerks' room suggestive of racial bias. The notion, implicit in Mr Matovu's case, of some sort of Chambers 'culture' of race-based prejudice is not made out."

198. If this passage is to be read as saying that a poor record on diversity can be excused by pointing to the poor record of other comparable organisations or in a particular sector, we would entirely disagree. We also agree with Mr Matovu that the Bar should be judged by the highest and not the lowest standards in relation to diversity. But we consider that his criticism of [133] is based on a misreading of it. What the ET was saying in this passage is that the evidence about the recruitment record of 2TGC demonstrated that progress was slow, as it is across the Bar, but did not provide cogent evidence of discrimination in the particular decisions in respect of which Mr Matovu brought his claims. Mr Matovu had not established, on the evidence, patterns of decision making which were indicative of racial bias or a culture of race based prejudice which might then have supported his contention that the particular decisions of which he complained were influenced by, or related to, race.

199. These were the ET's findings on the evidence which it received. Far from ignoring this aspect of Mr Matovu's case, the ET addressed it and made findings. Importantly, it did not consider that this part of the evidence supported the inferences for which he contended. Given the issues in the case, and the facts found by the ET specifically about the incidents which were said to be acts of race discrimination and race related harassment, we were wholly unsurprised by this. As we have said, nor did we see that there was anything in the ET's approach to this aspect of the case which was indicative of bias.

Ground 3(3): the ET's position on the burden of proof provisions

200. Although Ground 3(3) is pleaded as a general complaint that the ET was wrong to decide the matter without applying section 136 of the 2010 Act and/or wrong to say that the burden of proof had not shifted and/or wrong to say that the burden had been discharged in any event, Mr Matovu indicated in his skeleton argument that this Ground is related to Ground 3(1), which we have dealt with above.

201. What the ET stated in its penultimate paragraph, [141], is this:

"For reasons stated, all claims fail and the proceedings are dismissed. We have reached our decision without applying the burden of proof provisions. Had we applied

them, we would have held that the onus had not transferred to the Respondents and that, even if we were wrong about that, they had amply discharged it."

202. We refer to [172(c)] above, and in particular what Lord Hope said in the *Hewage v Grampian Health Board* case. This was also noted by the ET at [36] where it reminded itself of the terms of section 136 and of the leading cases on this provision. The following of the two stages of the burden of proof provisions is not obligatory in every case. This was evidently a case in which the ET felt well able to determine the primary facts and then concluded that these facts plainly showed that there had been no race discrimination, harassment related to race or victimisation. We are unsurprised by this and see no error of law in the ET's approach on this point.

Ground 3(4): materials for the meeting on 19 December 2016

203. Mr Matovu contends that the "ET failed properly to address the issue of detrimental treatment of [him]" at [115] of its Reasons. He argues that the meeting of 19 December 2016 was "set up for the Board to make a final decision on the contributions issue" and that at no stage had he received any material from the Board "on which they were relying against him". The refusal to disclose the material disadvantaged him in making representations at the meeting as he could not comment on that material, and the ET was wrong to find that he was not subjected to detriment.

204. The ET's finding at [115] was as follows:

"Under issue 2.1 the detrimental treatment is said to have been (a) the refusal of Ms Vaughan Jones in her email of 16 December 2016 to supply "any information" in response to Mr Matovu's request of 15 December 2016, and (b) the failure of the Board to have regard to 'due process' prior to the meeting of 19 December 2016 in relation to the contributions issue. We find no detriment in either. Ms Vaughan Jones reasonably pointed out that Mr Matovu could be assumed to be aware of the distribution of his recent earnings as between conventional and DA Instructions and that such data relating to other members of Chambers were confidential. She did not exclude the possibility of further evidence being gathered on the conventional/DA balance across Chambers if a case for that was made out at the meeting. It is true that some documents were not supplied to Mr Matovu until 20 December, the day after the meeting, but that occasioned no disadvantage to him. He was able to put forward his points at the meeting and he secured the best outcome that he could reasonably have

hoped for, namely the decision to ask Mr de Navarro to conduct an investigation and produce a report."

205. We refer to our summary of the ET's decision on this complaint at [36]-[38] above. We see no error of law in the finding at [115], in which the matter is looked at in terms of whether Mr Matovu was materially disadvantaged. The ET was entitled to find that he was not for the reasons which it gave. This was a meeting between colleagues rather than a court hearing which required disclosure in advance. No final decision on the contributions issue was taken and Mr Matovu was able to put his views to Mr de Navarro with the benefit of the materials with which he was provided on the following day. Nor can it sensibly be said that its reasons for this conclusion were inadequate.

206. In any event, at [134] the ET found as a fact that the Respondents' actions in this regard were not influenced by or related to race. There is no flaw in this finding; indeed it is not specifically challenged. The rejection of this claim by the ET therefore stands.

GROUND 4: VICTIMISATION – ALLEGED ERRORS OF LAW/APPROACH AND FAILURES TO GIVE ADEQUATE REASONS

Ground 4(1): recording the meeting on 15 November 2016.

207. The contention in the Amended Grounds of Appeal is that the ET's finding that Mr Matovu had not been victimised in relation to the recording of the meeting on 15 November 2016 "because there was no agreement about recording of the meeting was perverse and contrary to the evidence". It is then pleaded that Ms Vaughan Jones "confirmed in evidence that she understood that the meeting would be recorded" and that the ET omitted the events of 14 November 2016 from its narrative, when Mr Matovu confirmed with Ms Kelly (Chambers Manager) that it was agreed that the meeting would be recorded and that equipment had been acquired for that purpose. It also overlooked contemporaneous evidence in which Ms Kelly "rejected the suggestion by Mr Moody that she had been instructed to communicate to [Mr Matovu] in advance that the meeting would not be recorded".

208. These arguments were then developed in writing and orally by Mr Matovu who submitted that, on the evidence, there could not have been any misunderstanding – certainly not on the part of Mr Matovu – that it was agreed that the meeting was to be recorded. He had been shown the recording equipment by Ms Kelly on the previous day. Ms Vaughan Jones had said in evidence that her "impression" was that it would be recorded. To have breached that agreement and not to have warned Mr Matovu, when he had specifically checked on the day before that it would be set up, and knowing that it was so important to him, clearly amounted to subjecting him to a detriment. On previous occasions he had been accompanied. He could not be on this occasion and from his perspective he would be "outnumbered" and "opposed" by two silks and the Chambers Manager. So it was particularly important to him that the meeting was recorded.

209. We refer to our summary of the ET's decision at [35] above. The ET's finding in relation to detriment is at [118] of its Reasons:

> *"We find no detriment in issue 18.1. On our primary findings there was a misunderstanding. There was no 'agreement' about recording. Mr Matovu asked Ms Kelly to arrange for the meeting to be recorded and she gave him to understanding that that would be done. But when she spoke with Mr Moody he said that recording was not appropriate. She did not pass that back to Mr Matovu. The fact that the recording equipment was not ready might, arguably, have left Mr Matovu disadvantaged had it resulted in a state of affairs in which recording of the meeting was made impossible. But that is not what happened. Ms Vaughan Jones proposed, more than once, that the meeting be recorded by means of a mobile phone. That was a practical and perfectly reasonable suggestion, which would have resolved the procedural disagreement and allowed attention to turn to substance. There was no detriment. Regrettably, instead of accepting Ms Vaughan Jones's suggestion, Mr Matovu persisted in a fierce and entirely unreasonable tirade against Mr Moody which resulted in the meeting being aborted. If he suffered a detriment through the premature termination of the meeting, it was not one to which he was subjected by Mr Moody or Ms Vaughan Jones."*

210. Contrary to Mr Matovu's case, the reference at the beginning of this paragraph to Ms Kelly giving him to understand that the meeting would be recorded is a reference to what happened on 14 November 2016 (see, also, [61] of the ET's Reasons). Whatever Ms Vaughan Jones' "impression" was, the ET was entitled to find on the evidence that Mr Moody did not agree to

the meeting being recorded as, indeed, he had not. It was also entitled to find that there was a misunderstanding in that Mr Moody's position had not been relayed to Mr Matovu. It is apparent from [118] that the ET addressed the question of detriment from the point of view of Mr Matovu and considered whether he was disadvantaged. It determined that he was not, not least because an offer to record the meeting was immediately and repeatedly made. In our view, this was a finding which was open to the ET.

211. Again, it cannot sensibly be argued that the ET's Reasons were inadequate on this point.

212. Again, in any event the ET also found that what happened on 15 November 2016 was not *"because of"* any protected act. Its finding, at [139] was that there was no victimisation:

> *"Mr Moody directed that the tape recording equipment be not used (issue 18.1) because he regarded it as inappropriate. It had not been used before and he considered that it had no place in an informal meeting between Chambers colleagues."*

213. This was also a finding of fact which the ET was entitled to make on the evidence – it is not specifically challenged by Mr Matovu - and the ET was entitled to dismiss this claim on this basis alone. There is therefore nothing in this Ground.

Ground 4(2): alleged insufficient reasons in relation to Ms Azib's report.

214. The Amended Grounds of Appeal plead that "although Ms Azib's report was strongly disputed by the Claimant, [the] ET failed to set out any details of the disputed matters and/or properly to explain, by any careful analysis of the matters in dispute, on what basis the findings and conclusions of the report had been vindicated. In fact, the underlying evidence which emerged from Ms Azib's investigation confirmed and corroborated the factual basis of the Claimant's allegation."

215. In his written and oral arguments Mr Matovu referred us to passages from the evidence which Ms Azib considered which, he argued, showed that her findings of fact were wrong. And he submitted that the ET's Reasons were inadequate because it did not set out these passages from the evidence before her, and his criticisms of her report. He said that this showed that the ET was not engaging with his case and gave him no confidence that he was being listened to or had a fair hearing.

216. We reject this complaint. The issue for the ET as set out in Mr Matovu's List of Issues was whether he had been subjected to a detriment and victimised:

> "18.2. By Ms Rehana Azib failing to adopt a fair, objective or even-handed approach to conducting the fact-finding investigation of the Claimant's complaint against the Senior Clerk."

217. In relation to detriment, the ET found this at [119]:

> *"As to issue 18.2, the alleged detriment is entirely unsustainable. As we have stated, we are satisfied that Ms Azib produced an admirable report. It was the result of a fair, objective, comprehensive and even-handed investigation. There was no detriment in the process and, rightly, Mr Matovu does not say that he suffered a detriment in the outcome. In any event, such an allegation would be doomed to failure. The fact that he does not agree with Ms Azib's conclusions does not warrant the assertion that they entailed any detriment to him."*

218. By way of explanation for the ET's finding:

a. As noted above, the ET's approach was to make its own findings, based on the evidence which it received, as to what happened in relation to the speaker opportunity at [70]-[75] of its Reasons. It did not rely on the Azib report for this purpose.

b. It also made its findings about on the process which Ms Azib followed, and her conclusions at [79]-[82].

c. At [117], in dealing with the question of detriment for the purposes of the direct discrimination claim against Mr Tyler, it found that the matter had been examined in exhaustive detail by Ms Azib and paid tribute to her *"enormously careful and conscientious report with which we fully agree"*. However, again, its agreement was based on the evidence which it received and on its own findings.

219. At [134] the ET then found that putting Ms Gray's name forward had nothing to do with race and at [139] it found that Ms Azib had not victimised Mr Matovu. Again, these findings were based on its own assessment of the evidence, but they accorded with Ms Azib's findings.

220. It was not incumbent on the ET to set out all of Mr Matovu's criticisms of the Azib report or even all of his criticisms of her approach (as opposed to her conclusions). The question whether putting forward Ms Gray was an act of direct race discrimination was a matter for the ET to decide on the evidence which it received and that is what it did. The question whether Ms Azib's approach was even handed etc primarily involved looking at the process which she undertook, although the fact (if it had been a fact, which it is not) that her findings were inconsistent with the evidence which she received might indicate a flawed methodology. But the ET plainly did not consider that her process was flawed, nor that her conclusions indicated that it was flawed, not least because it had come to the same conclusions itself on the evidence.

221. The ET's Reasons on this issue were perfectly adequate and this Ground is rejected.

Ground 4(3): no opportunity to comment on the Azib report.

222. This Ground alleges that the "ET failed to engage properly or at all with the detriment issue ….To say that [Mr Matovu], as a full member of chambers having an interest, had no right to comment on the report or to challenge it was contrary to reason or to commonly accepted standards of fairness."

223. In his written and oral arguments Mr Matovu added that Ms Azib accepted that her report should be disclosed to him and the ET failed to explain why he had no right to see the report prior to the relevant committee considering it. At [118] of his skeleton argument he also added an unpleaded argument that the ET's approach to this point was indicative of bias.

224. The relevant allegation was of harassment and victimisation:

> "18.3. By the First Respondent and Management Board deliberately withholding Ms Azib's investigation report from the Claimant and preventing him from commenting on it before the Board hastily formed an ad hoc panel to make a final decision on the Claimant's complaint without allowing him a fair opportunity to be heard."

225. What the ET found at [120] was:

> *"Under issue 18.3, again we find no detriment. Ms Azib's report had concluded that there was no case for Mr Tyler to answer. The Board rightly and properly accepted her conclusions and released Mr Tyler from the jeopardy in which Mr Matovu's allegation had placed him. It was no possible detriment to Mr Matovu for the Board*

to take that course. He had no right to comment on the report; his right to have his complaint investigated had been fully satisfied."

226. There was some debate between Mr Matovu and Ms Azib about whether she was investigating a grievance brought by him or carrying out a disciplinary investigation into an allegation of gross misconduct against Mr Tyler. Mr Matovu's position was that it was the latter and he argued that Mr Tyler should be suspended. But when we asked the advocates about this, the precise position did not appear to have been resolved. Either way, Ms Azib carried out a fact finding investigation and concluded that Mr Matovu's allegations were unfounded. He has not pointed to any right to see the report although we accept that, in an employment case, some employers might well have invited final comments from both Mr Matovu and Mr Tyler (whose dismissal Mr Matovu was effectively seeking).

227. More importantly, the committee of three members of 2TGC met on 29 September 2017 and concluded that there was no reason to take disciplinary action against Mr Tyler. Mr Matovu and Mr Tyler were then both provided with a copy of the report on 3 October 2017. They were treated the same in this regard. Mr Matovu had an opportunity to challenge the report at this point. It is not clear whether Mr Matovu considered that fairness required that he, but not Mr Tyler, had a right to see the report in advance of the committee considering it. But, in any event, the report was final and Mr Matovu had given his evidence to Ms Azib. The ET was entitled to find that failing to give him an opportunity to challenge it before the Committee met was not subjecting him to a detriment.

228. Even if this is wrong, the ET went on to find at [135] and [139] that the acceptance of Ms Azib's report without inviting further comment was not *"related to"* race; nor was it *"because"* Mr Matovu raised issues of discrimination. These were findings of fact and they are not directly challenged by Mr Matovu. It follows that the ET was fully entitled to dismiss this claim.

229. Again, the ET's Reasons were perfectly adequate on this point. Even if it were pleaded, we see no basis on which the ET's approach to the issue of detriment under this heading is indicative of bias.

Ground 4(4): alleged general error in the ET's approach to the issue of detriment.

230. The complaint under this Ground is that the ET failed to assess the issue of detriment from the point of view of the claimant and/or according to whether his opinion that the treatment

complained of was to his detriment was a reasonable one and whether the Respondents had acted in an honest and reasonable manner.

231. We have addressed the law on this issue at [173]-[175] above, accepting some of Mr Matovu's submissions. We also note that at [34] the ET correctly directed itself that the test was as stated by Brightman LJ in *Jeremiah*: see [173](c) above. We have dealt with ET's approach to the issue of detriment in relation to each of the Grounds which complain about its finding on this issue.

Grounds 4(5) and 4(6): interim clerking arrangements

232. Ground 4(5) contends that it was perverse for the ET to find that the imposition of the interim clerking arrangements by letter dated 4 October 2017 did not subject Mr Matovu to detriment. Ground 4(6) is, in effect, a perversity challenge to the ET's finding at [139] that, in any event, the temporary clerking arrangements were "necessitated by the damage to the relationship between Mr Matovu and Mr Tyler". Mr Matovu argues that no change to the clerking arrangements had been deemed necessary before this point, despite the issues with their working relationship. He points out that Ms Azib said that, based on her interview with Mr Tyler she had concerns about whether any form of working relationship could exist between Mr Matovu and Mr Tyler "going forward" but that she said that this was a matter which would need to be explored with them.

233. In his written and oral arguments, Mr Matovu emphasised that his complaint was about the unilateral withdrawal of the full clerking services of Mr Tyler; that the matter was not explored further with him or Mr Tyler before a decision was taken; and that there was no room for dispute that the arrangement meant that there was withdrawal of aspects of the service which he could normally have expected. Indeed, this was implicit in the fact that, on 21 August 2018, Mr Tyler wrote stating that he was "prepared to let things rest and return to clerking Daniel". Mr Matovu also made submissions on what he referred to as "causation" arguing that the fact that his complaint of direct discrimination by Mr Tyler had contributed in part to the damage to their relationship was sufficient in that "the protected act had, undoubtedly, contributed materially to the outcome….since the protected act had significantly influenced it. The causal connection was therefore sufficiently established".

234. The ET's finding on detriment at [121] is set out at [154] above. It considered that the Board took the only practical course open to it and that the only aspect of the service which would

otherwise have been provided by Mr Tyler, but ceased to be provided, was face to face dealings with Mr Matovu.

235. We asked about the point that Ms Azib had said that the working relationship would need to be explored with Mr Matovu and Mr Tyler, and Mr Leiper told us that the intention had been that the clerking arrangements set out in the letter of 4 October 2017 would be truly interim in the sense that there needed to be immediate action pending discussion of the longer term arrangements. He reminded us of the ET's findings that Mr Matovu protested and alleged victimisation on 9 October 2017, and then complained to the Bar Standards Board on 27 October 2017. The ET also found that, on 31 October 2017, Ms Vaughan Jones proposed a mediation process which would include attempting to resolve the issues between Mr Matovu and Mr Tyler, and Mr Leiper showed us the correspondence in this connection. So, he said, 2TGC acted on Ms Azib's view that the issue needed to be explored with them: this was the purpose of the mediation proposal. Mr Leiper also emphasised, as the ET did, that all that was omitted was face to face dealings with Mr Tyler.

236. Nevertheless, we had doubts about the ET's finding that Mr Matovu was not subjected to any detriment in this regard. The letter of 4 October 2017 indicated that the arrangements would apply whilst the Board took legal advice about whether the working relationship between Mr Matovu and 2TGC had broken down, rather than pending a discussion with him and Mr Tyler. Whatever the original intentions, the reality was that the Board unilaterally imposed a reduced service on Mr Matovu and that this lasted for a period of nearly a year. Whilst it may have been entirely reasonable to do so in the circumstances, and the impact of the change may not have made much difference in practical terms, the ET appears in this instance to have given insufficient emphasis to Mr Matovu's perspective on the matter and whether it was one which he could reasonably hold. It is apparent from [121] that the ET considered that the Board would have been criticised by Mr Matovu whatever it had done but this was not necessarily an answer to his case on detriment on this point.

237. We do not accept Mr Matovu's challenge to the ET's rejection of his claim on this issue, however. The ET made unimpeachable findings that this was not harassment and it was not related to race, and these are not challenged by Mr Matovu. As for victimisation, Mr Matovu's argument focuses on part of what the ET said. We do not doubt that the ET was entitled to find that Mr Matovu's relationship with Mr Tyler was highly problematic and was damaged further by the outcome of the Azib investigation – for one thing Mr Matovu described her report, which vindicated Mr Tyler, as a *"whitewash"* and said in a letter of 8 October 2017 that he

"utterly rejected her analysis and interpretation of the facts" - but, in any event, as always it is important to read the context in which it was said. The full finding, at [139] was as follows:

> *"The implementation of the temporary clerking arrangements (issue 18.4) was necessitated by the damage to the relationship between Mr Matovu and Mr Tyler. No doubt that damage was attributed at least in part to the allegation of discrimination, but the reason for the Board's act was the ruptured bond, not the antecedent allegation and it would have acted in precisely the same way had the rupture resulted from any cause out with the protection of the 2010 Act, s27."*

238. In other words, and entirely in accordance with the law as summarised at [167]-[168] above, the finding was that the reason for the decision was the damaged relationship between Mr Matovu and Mr Tyler rather than the protected act itself. This was a permissible finding of fact and it meant that the victimisation claim failed. This Ground of appeal therefore also fails.

Ground 4(7): issues relating to the December 2017 mediation.

239. This Ground was not pursued although Mr Matovu also made clear that he did not concede that the ET's decision on these points was correct.

Ground 4(8) and 2(5)(i): investigating the Tyler grievance/further evidence of bias.

240. This Ground turns on the ET's interpretation of an issue which Mr Matovu framed as follows in his List of Issues. The question for the ET was whether he had been victimised:

> "18.8. By the First Respondent and Management Board, by letter dated 1 May 2019, seeking to instigate a formal grievance procedure against the Claimant based on comments which the latter had made in a feedback form that was completed on or about 5 April 2019 just repeating longstanding complaints, whilst disregarding the Claimant's complaints and not seeking to investigate those, within section 47(5)(e) of the Equality Act 2010."

241. The ET interpreted this as alleging that the detriment was the instigation of the formal grievance procedure against Mr Matovu. It found that on 17 April 2019 Mr Tyler had made a complaint against Mr Matovu under the 2TGC grievance procedure and said, at [123]:

> "
>
> *"Again, issue 18.8 discloses no arguable detriment. Mr Tyler had raised a grievance and the only proper course open to the Board was to proceed to investigate it. To do anything else would have put Chambers in breach of its obligations to Mr Tyler."*

242. At [139] it then found that there had been no victimisation in any event:

> *"As to issue 18.8, again the necessary 'because of' link is notably missing. It is plain and obvious that the fact of the protected acts had no bearing whatever upon the Board's act of accepting and processing Mr Tyler's grievance. We see no rational basis for thinking otherwise."*

243. Mr Matovu's argument was that the detriment, as drafted, included disregarding and failing to investigate his (unspecified) complaints. When we asked him which complaints he was referring to he said the 9 October 2017 challenge to the Azib report and the interim clerking arrangements amongst others.

244. Having considered the arguments and paragraphs 114-121 of the Amended Particulars of Claim we concluded that the ET was fully entitled to interpret Issue 18.8 in the way that it did. As we have pointed out, the law on victimisation does not require comparison with a comparator: see [170], above. So the ET was not required to compare the treatment of Mr Tyler's grievance with the treatment of Mr Matovu's complaints. If Mr Matovu was alleging that there was second detriment, namely failure to investigate his complaints, this should have appeared as a separate issue and the complaints in question should have been specified. They were not.

245. This criticism is also relied on as evidence of bias. Again, for the reasons we have given, we do not accept that the ET's approach evinces bias.

CONCLUSION

246. For all of these reasons, the appeal is dismissed.

ANNEX

247. Section 13(1) Equality Act 2010 provides:

> ***"13. 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."*

248. Section 19 provides, so far as material:

"19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

249. Section 26 provides, so far as material, as follows:

*"**26. Harassment***

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

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

250. Section 27 provides, so far as material as follows

"27. Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."