Neutral Citation Number: [2023] EAT 82

Case No: EA-2021-001174-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 June 2023

Before :

THE HONOURABLE MR JUSTICE LINDEN
MS RACHAEL WHEELDON
MS EMMA LENEHAN

- -

Between :

Ms K KOHLI **Appellant**

- and –

DEPARTMENT FOR INTERNATIONAL TRADE **Respondent**

- -
- -

Diya Sen Gupta KC (instructed by **Thompsons Solicitors**) **for the Appellant**
Robert Moretto (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 18 May 2023

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JUDGMENT

SUMMARY

The Claimant's claims of race and disability discrimination were dismissed by the Employment Tribunal. She was given permission to challenge the rejection of her claims for direct race discrimination. Her principal argument was that the Tribunal failed to consider, expressly and/or separately, the question of subconscious discrimination.

Held: There was no suggestion that the Respondent had acted on the basis of stereotyping or assumptions based on the Claimant's Indian origins. Tribunal considered what the true reasons for the matters complained of were. Although it did not refer to subconscious discrimination in its Reasons or consider this as a separate matter, its findings effectively precluded findings that the Claimant's Indian origins subconsciously influenced the decisions of the Respondent. The Tribunal also permissibly found that there were no facts from which it could draw an inference that this had happened.

Appeal dismissed.

THE HONOURABLE MR JUSTICE LINDEN:

INTRODUCTION

1. This is an appeal against a decision of an employment tribunal (Employment Judge Davidson, Mr Hearn and Mr Ferry) sitting at London Central on 11-14 October 2021 ("the ET"). In a Judgment and Reasons which were sent to the parties on 27 October 2021, the ET dismissed various complaints of race discrimination and disability discrimination which had been brought by the Claimant. She had also alleged that the matters which she said were direct disability and/or race discrimination were acts of direct sex and/or religious discrimination, but at the beginning of the ET hearing she confirmed that these complaints were not pursued.

2. Permission to appeal was refused on the papers by His Honour Judge Auerbach on 15 February 2022. At a hearing on 3 November 2022, however, His Honour Judge Tayler gave permission to appeal on Ground 3 of the Notice of Appeal. This Ground contends that the ET's dismissal of the Claimant's complaints of direct race discrimination was the result of errors of law on the part of the ET.

BACKGROUND

3. We take our account of the facts from the findings of the ET unless the contrary is indicated. Given that the appeal is limited to a challenge to the ET's rejection of the Claimant's complaints of direct race discrimination, we will focus on the findings which are most relevant to these complaints and therefore will not set out the findings which are relevant to the Claimant's complaints of disability of discrimination. These can be read in the ET's Judgment and Reasons, which is a public document.

4. The Claimant identifies herself as Indian for the purposes of her race discrimination claims.

5. She joined the Respondent on 10 July 2019 and worked in the Global Strategy Directorate ("GSD") as a Grade 7 civil servant. Initially she had a dual role as Head of Latin America and the Caribbean ("LATAC"), which was a geographic role, and in Global Britain, which was a thematic role. In October 2019, however, there were changes within the GSD as a result of which she was offered a choice between a geographic role in LATAC or a thematic role in Global Britain. She chose the former.

6. In November 2019, Mr Jonathan Hanna became the Claimant's manager. Her countersigning manager at all material times was Ms Becks Buckingham.

7. On 18 May 2020, the Claimant began a temporary voluntary deployment known as surge. In this role she was working as part of a team which was dealing with delivery of COVID test kits. The ET found that whilst she was on this assignment Mr Hanna and Ms Buckingham had conversations with her in which they kept her informed of the fact that there was little going on for the GSD in the LATAC region and that her current role in relation to that region therefore was not viable.

8. On 2 June 2020, Ms Buckingham asked the Bilateral Trade Relations ("BTR") department to take over the LATAC work while the Claimant was on surge, albeit on a temporary basis. At the handover to the BTR department Mr Hanna identified that two of the three areas of the Claimant's LATAC work were in abeyance.

9. On 30 June 2020, the Claimant was offered and accepted a temporary promotion to Joint Deputy Head of GSSEP Strategic Communications and Briefing Unit. This was a one of two Grade 6 roles in the department which had been advertised, and it was to be for six months. However, as a result of budget constraints following the reorganisation of the COVID response teams in July 2020, it was decided that there would, instead, be a Grade 6 and a Grade 7 role in that department. The Claimant decided not to apply for the Grade 6 role. She was offered the Grade 7 role and initially accepted it, but then changed her mind and decided to return to the GSD.

10. On 31 July 2020, Mr Hanna was notified that the Claimant was returning to the GSD on 3 August 2020. He was taken by surprise by this. By now the LATAC work was being dealt with by the BTR department and it was not sufficient for a full time role for the Claimant in any event. There was therefore a period of weeks during which he and the Claimant discussed the other opportunities that there were.

11. In the meantime, one of the Claimant's Grade 7 colleagues in Mr Hanna's team had returned from surge in May/June. His previous job as Head of Middle East was no longer available. The Head of Africa role was vacant and it was offered to him. This meant that when the Claimant returned to the GSD unexpectedly on 3 August 2020 the Head of Africa role was occupied.

12. On 18 August 2020, following completion of assurance processes to which we will return, the Claimant was informed that her appraisal grading was 3C. On 9 September 2020, the Claimant

appealed against this grading but did not suggest that the grading was affected by race or, indeed, disability discrimination. The appeal was unsuccessful.

13. On 14 September 2020 she lodged a grievance in which she complained about not being able to continue in the LATAC role and alleged that this was the result of sex, race and/or disability discrimination by Mr Hanna. Her grievance was not upheld.

14. On 25 September 2020, the Claimant was instructed to take the LATAC role with a focus on the Caribbean, and to carry out a Wellness role in addition as there was nothing else available at her grade and she had been without a role for eight weeks.

15. In September 2020, the Head of Africa in the GSD accepted a foreign posting which would take effect in December, at which point the position would become vacant. By now the Development Team had been disbanded and there was a number of employees who needed to be redeployed. A request for expressions of interest ("EOI") was put out in October/November 2020. At paragraph 54 the ET found as follows:

> "When the claimant became aware of the EOI for the Head of Africa role, she queried why the role had not been offered to her. Jonathan Hanna explained to us that there was no vacancy for the Africa job at the time the claimant was looking for roles and he did not want her to be without a role for a further 3 months, which was the period until the job became vacant. It is also apparent from the evidence that Becks Buckingham had reservations about the claimant's ability to do the job. We find that this assessment is based on Becks Buckingham's knowledge of the claimant and of the scope of the Head of Africa job, which is larger than Head of LATAC and involves line managing stuff, which the LATAC role does not. We do not find that Becks Buckingham's view of the claimant is because of the 3C appraisal grade. It is more likely that the 3C appraisal grade is a reflection of her view of the claimant."

16. Although she was aware of the EOI, the Claimant did not apply. The role was given to a male colleague of Afro-Caribbean origin.

17. Proceedings were issued on 23 November 2020 and the hearing took place by CVP over 4 days in October 2021 as we have said. The Claimant represented herself and Mr Moretto appeared for the Respondent. There was then an application for reconsideration of the Judgment on 9 November 2021 which was refused on 25 November 2021.

18. The appeal to the Employment Appeal Tribunal was lodged on 7 December 2021.

THE ET'S REASONS

19. The ET began by identifying what was, and what was no longer, in issue. Having then identified the witness and documentary evidence which it had received, it proceeded to set out a chronological series of findings of primary fact which were relevant to all of the Claimant's claims. These included findings as to the conditions and impairments on which she relied for her claims of disability discrimination which we have not repeated here.

20. Under the heading "Law" the ET then proceeded to set out what it described as "The relevant law". The directions of law were brief and the ET did not explicitly refer to authority. For the most part, what it set out was a summary of the relevant statutory provisions although it is clear that it had case law in mind given that its summary included principles drawn from the case law and it is apparent from other parts of its Reasons that it had the case law in mind.

21. As far as direct discrimination is concerned the ET directed itself as follows at [62]-[64]:

> "62. Section 13 Equality Act provides: *"(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."*
>
> 63. The claimant must establish facts from which a tribunal could properly find that the treatment was because of her protected characteristics and the mere fact of a difference in status and a difference in treatment without, more, will not be sufficient for a tribunal to be able to conclude that the respondent had discriminated.
>
> 64. If the claimant shows facts from which it could be inferred that the respondent has treated her less favourably because of a protected characteristic, the burden of proof shifts to the respondent who must show that the treatment was in no sense on the grounds of the claimant's protected characteristic."

22. The ET then went on to set out what is described as its "Determination of the Issues". In relation to the allegations of direct race and/or disability discrimination it began by finding, at [73], that the Claimant was subjected to four acts or omissions of which she complained. These were:

> "73.1. she was not given her previous role of Head of LATAC on her return from surge;
> 73.2. she was not offered the Head of Africa role;
> 73.3. she was required to take the role of Head of LATAC (with focus on the Caribbean) and Wellness;
> 73.4. she was given a performance grade of 3C."

23. The ET noted that, as far as the appraisal score issue was concerned, the Claimant based her allegation of race discrimination on a comparison with a white colleague who received a performance grade of 3B.

24. Under the heading "The claimant's job role" it then found as follows:

> "75. We find that in relation to the LATAC role, the scope of the role was insufficiently demanding for a full-time G7 position. We note that the claimant's role was not originally a single role and only became a single role due to a reorganisation among geographical and thematic roles. During the course of April onwards, the reduction in the workload of the LATAC role was partly due to a change in prioritisation at ministerial level away from Latin America towards IndoPacific, Europe and Africa. As a result of these changes, the claimant's former role no longer existed in the way that it had previously and the claimant was not able to return to her former job on return from surge. Jonathan Hanna did not follow a formal redeployment procedure on advice from HR although there is contradictory HR advice in the bundle. We accept Jonathan Hanna's explanation for his decision as being based on the HR advice he received.
> 76. We do not find any discrimination in relation to the Head of Africa role. At the time the role was first vacant, the claimant was not free to take it up and it had been offered to one of her colleagues who was, at that time, without a role. When the claimant was looking for a role, the Head of Africa role was not vacant as it had been filled. By the time it would be vacant again, the claimant would have been without a role for a number of months and the respondent took the decision that it was not appropriate to keep her out of a role simply to give her the Head of Africa when it became vacant. We accept the respondent's evidence that, in any event, it could not just be given to the claimant. By that time, there were several other G7s looking for roles because their department had been disbanded. We also note that Becks

> Buckingham had reservations about the claimant's suitability for the role as she considered her skillset was better suited to an operational delivery role rather than strategy role. We note that the role was ultimately given to an Afro-Caribbean candidate. We accept the respondent's explanation and find it non-discriminatory.
>
> 77. As regards being forced to take the LATAC and Wellness role, we accept the respondent's explanation that she had been without a role for a number of weeks and the roles she was prepared to accept did not exist. The LATAC role was not big enough in itself but she was offered it together with another role in Wellness. We find nothing in this discriminatory."

25. Under the heading "The claimant's performance appraisal" the ET found as follows:

> "78. We find that the claimant was disappointed with her appraisal grade but we do not agree that it signified an assessment of poor performance or that this grade impacted on her job roles. She had a misconception regarding the value of a 3C grade and incorrectly regarded it as a criticism of her performance.
>
> 79. We find that the claimant had an unrealistic view of her achievements and that the 3C grade reflected that she had met expectations against objectives. An adjustment had been made so that only the last part of the working year would be considered due to the absence of objectives and the claimant's ill-health in the earlier part of the year. It cannot therefore be said that the medical issues (even if they were disability related) which affected the claimant in the earlier part of the year resulted in the 3C grading, as that period was not taken into account. We do not find that the claimant has shown facts from which we could infer that disability was the reason for any of the treatment she complains about.
>
> 80. We accept that the 3C grade was Jonathan Hanna's honest assessment of the claimant's performance. We do not find that the slightly higher grade given to CA is tainted by discrimination. This was also Jonathan Hanna's honest assessment of a different employee with different objectives. From the claimant's evidence, she would have been unhappy if she had received the same as her comparator (3B) as she thought she should have received a 2B. The claimant has not shown any facts from which we could conclude that the decision was discriminatory other than a small difference in

> grade and a difference in race. The BAME assurance exercise that was undertaken illustrated that BAME employees were not disadvantaged as a group in their grading within the GSD department.
>
> 81. We accept the respondent's evidence that appraisal grades are not taken into account in job applications. We find that the 3C grading had no adverse impact on the claimant's job opportunities or career development."

26. The ET concluded as follows at [95]:

> "The claimant is highly intelligent and articulate and presented her case thoroughly and competently. We accept that she feels genuinely aggrieved at a number of issues, not all of which were issues before us. However, we are satisfied that none of the issues we considered were tainted by race or disability discrimination. For the reasons set out above the claimant's claims fail and are dismissed."

27. The complaints of direct race discrimination and direct disability discrimination were therefore dismissed.

THE APPEAL

28. Ground 3 is broken down to five alleged flaws in the ET's reasoning.

29. Ground 3.1 alleges that the ET: *"Failed to direct itself as to subconscious discrimination (whether at paragraphs 62- 64, where it seeks to set out the law on direct discrimination, or at all)."*

30. Under this Ground, Ms Sen Gupta KC submitted that the ET's summary of the law at [62]-[64] of its Reasons was entirely inadequate and that the absence of any specific reference to the authorities is striking. The lack of any reference in the Reasons to the concept of subconscious discrimination was a notable omission. She reminded us of the following well known passage from the speech of Lord Nicholls in *Nagarajan v London Regional Transport* [1999] ICR 877 at 885E-G:

> *"I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are*

> *unable, or unwilling, to admit event to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."*

31. Ms Sen Gupta referred to *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] where Lord Nicholls said that the key issue in direct discrimination claims was *"what, consciously or unconsciously, was the [alleged discriminator's] reason?"* for the act complained of. She submitted, by reference to *Geller v Yeshurun Hebrew Congregation* [2016] ICR 1028 at [48]-53] and 57, that the Tribunal must bear in mind that a discriminatory motive may be sub- or unconscious. Consideration of the possibility of subconscious discrimination is therefore an essential ingredient/feature of the determination of a claim of direct discrimination.

32. She argued that it is not sufficient, for us to be satisfied that the ET had the possibility of subconscious discrimination in mind, that this basis for a finding of direct discrimination is well established and understood by employment tribunals or *"elementary"* as I described it in *Gould v St John's Downshire Hill* [2021] ICR 1 at [151]. Nor is it sufficient that the relevant authorities were referred to the ET by the parties and these included, at least in the Respondent's submissions, a reference to subconscious discrimination.

33. Ground 3.2 alleges that the ET *"Failed to consider whether the reason why "Becks Buckingham had reservations about the Claimant's ability to do the job" (paragraph 54) and "Becks Buckingham had reservations about the claimant's suitability for the role as she considered her skillset was better suited to an operational delivery role rather than strategy role" (paragraph 76) was impacted by the Claimant's race, whether consciously or subconsciously."*

34. Under this Ground, Ms Sen Gupta argued that Ms Buckingham's reservations about the Claimant's ability to do the Head of Africa job were part of the reason why it was not offered to her. The ET was therefore bound to consider why Ms Buckingham held these views about the Claimant. Her views were entirely subjective and they may, consciously or subconsciously, have been influenced by the Claimant's Indian origins.

35. Ground 3.3 pleads that: *"In referring to the Claimant's line manager Jonathan Hanna's "honest assessment of the Claimant's performance" and Jonathan Hanna's "honest assessment of a different employee with different objectives" (paragraph 80) the ET failed to recognise that an "honest assessment" can be negatively impacted by subconscious discrimination."*

36. Under this Ground, Ms Sen Gupta argued that the ET made the same error as the employment tribunal had made in *Anya v University of Oxford* [2001] EWCA Civ 405, [2001] ICR 847 at [25] and she reminded us of what I said in *Gould* at [76]

> *"Given that a prohibited characteristic may subconsciously influence a decision-maker, this does not necessarily mean that the court or tribunal is merely deciding whether the evidence of the decision-maker is truthful. As Lord Nicholls noted in the passages from Nagarajan which we have cited, the alleged discriminator may be mistaken in their denial that they acted on prohibited grounds because they have not appreciated that they were influenced by the protected characteristics or step. The honesty of a witness who denies that they acted on prohibited grounds is therefore relevant but it cannot, of itself, be decisive. This point was emphasised in Anya v University of Oxford [2001] ICR 847, where the employment tribunal had set out the relevant factual issues but had not reached reasoned conclusions on these issues or analysed the documentary evidence in the case, merely stating that it found the respondent's main witness to be essentially truthful and therefore accepted his evidence that he had not discriminated. Sedley LJ said, at para 25:*
>
> > *"Credibility, in other words, 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."*

37. Here, she submitted, as a result of its failure to have the concept of subconscious discrimination in mind the ET based its decision, that the appraisal grade awarded to the Claimant was not the result of direct discrimination, on its finding that Mr Hanna had made an honest assessment of her performance and that of her comparator. That, submitted Ms Sen Gupta, did not exclude the possibility that in making that assessment he was subconsciously influenced by her Indian origins. This is a further fundamental flaw in the ET's reasoning.

38. Ground 3.4 alleges that: *"In stating "the Claimant has not shown any facts from which we could conclude that the decision was discriminatory other than a small difference in grade and a difference in race" (paragraph 80),the ET failed to have due regard to a report by the Department's Executive Committee dated 10 July 2020 which stated the Department's Executive Committee 'were disappointed to see that discrepancies remain in the diversity of the outcomes. Colleagues self-reporting as disabled or minority ethnics are still less likely to receive the higher performance ratings and are slightly more likely to receive lower ratings'.*

39. The report in question, which we will refer to as the 10 July assurance process, went on to say "These inconsistencies are likely to be reflecting of wider cultural and behavioural patterns or unconscious biases in the performance management process, and indeed are similar to trends we have seen across the Civil Service for a number of years."

40. This, argued Ms Sen Gupta, was documentary evidence of discrimination in the awarding of appraisal scores which the ET ignored when it found that there were no facts from which it could infer that the Claimant's score was influenced by her Indian origins. This document was plainly a sufficient basis for an inference of race discrimination to be drawn and, indeed, such an inference should have been drawn on the basis of it.

41. Ground 3.5 alleges that the ET: *"Failed to give any adequate consideration to the Claimant's case that the Respondent's conduct towards her was not limited to isolated incidents but demonstrated a series of acts amounting to a pattern of discriminatory behaviour towards her in which she was refused development opportunities".*

42. Under this Ground, Ms Sen Gupta submitted that the ET failed to take a holistic approach to the claims being made by the Claimant. In particular, it considered each of the alleged detriments separately but without stepping back to consider the pattern of discriminatory behaviour which the Claimant alleged in relation to the refusal to provide her with development opportunities. In this regard she relied on *Qureshi v Victoria University of Manchester* [2001] ICR 863, which was cited with approval by the Court of Appeal in *Anya*, and on *Fearon v Chief Constable of Derbyshire* UKEAT/00455, [2004] 1 WLUK 242 at [91].

43. The Notice of Appeal did not challenge the adequacy of the ET's Reasons as such. The complaint was as to its reasoning i.e. the argument was that it failed to consider subconscious discrimination and the other matters referred to in Ground 3 in coming to its decision and that

this was apparent from its Reasons. Even if there had been such a challenge, the Reasons were in our view adequate.

LEGAL FRAMEWORK

44. Under section 13 of the Equality Act 2010 direct discrimination is defined as follows:

> *"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"*

45. Section 23(1) provides:

> *"On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case"*

46. Sections 136(2) and (3) of the 2010 Act provide:

> *"(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"*

47. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [8] and [11] employment tribunals were encouraged by Lord Nicholls to concentrate on the so-called "reason why" question when considering a complaint of direct discrimination. This question is less legally complex than the task of identifying a comparator whose circumstances are materially the same, for the purposes of section 23, and almost invariably the answer to it will determine the claim. In *Khan* (supra) Lord Nicholls framed the reason why question as*: "why did the alleged discriminator act as he did? What, consciously or unconsciously, was the [alleged discriminator's] reason?"* and he pointed out that this is a question of fact.

48. We accept that therefore an employment tribunal which is considering a direct discrimination claim must make findings of fact about what the alleged discriminator's reasons for their actions were. But it does not follow from this that in every case an employment tribunal must

expressly refer to the possibility of subconscious discrimination in its Reasons and consider this as a separate matter.

49. First, any suggestion that failure on the part of the ET to do so in the present case indicates that it was not aware of the concept or the possibility of subconscious discrimination, and/or did not consider this question, is highly implausible. The possibility that discrimination may be subconscious is indeed an elementary feature of discrimination law. It is of very long standing and very well known to employment tribunals. As Lord Hoffmann said in *Piglowska v Pilowski* [1999] 1 WLR 1360, at 1372B-H:

> *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes…. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions, and which matters he should take into account……*

50. This approach was echoed by Griffiths J in *Oxford Saïd Business School v Heslop*, EA-2021-000268-VP, 11 November 2021, at [48] when he said:

> *"The working assumption must be that an Employment Tribunal, which has made no clear error of law, has reached no impermissible conclusion of fact. This working assumption should not easily be displaced by hypercriticism of reasoning, or lack of reasoning, or of the way in which a decision is either structured or expressed. Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an ex post facto attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error. If it passes that test, the facts (including inferences of fact, and findings of secondary fact) should remain where the independent (and, in the case of the Employment Tribunals, specialist) tribunal of fact has left them."*

51. Moreover, in the present case there were references to subconscious discrimination in the Respondent's written closing submissions although this would not be a decisive point in every case. In particular, Mr Moretto set out a passage from *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, where Elias P (as he then was) said *"If there is a genuine non-discriminatory reason, at least in the absence of clear factors justifying a finding of unconscious discrimination, that is the end of the matter"*.

52. Second, we note that the way in which Kerr J expressed his decision in *Geller* was as follows:

> *"49. [The ET] satisfied themselves that, on the evidence, conscious discrimination was excluded, but it seems to me that this was a case in which it was very much necessary to go on to consider and exclude subconscious or unconscious discrimination."* (emphasis added)

53. At [52] Kerr J also said:

> *"I do not say that it is necessary explicitly to refer to and make a finding on the issue of unconscious or subconscious discrimination in every case – it will depend on the circumstances – but I am satisfied that here, it was a misdirection not to do so."*

54. We also agree with what Cavanagh J said in *Watson v Hillary Meredith Solicitors*, UKEAT/0092/20/BA, 10 March 2021, at [61]:

> *"Mr Roberts submitted that it is incumbent upon the Tribunal to consider unconscious motivation, I do not accept that the Geller case is authority for the proposition that a Tribunal must do this in every case, still less for the proposition that an Employment Tribunal has a duty expressly to deal with the possibility of unconscious motivation in its judgment whenever it is considering the reason why a respondent did a particular act."*

55. Cavanagh J pointed out what Kerr J had said at [52] of his judgment in *Geller*. He also explained that in *Geller* there were particular features of the evidence which should have alerted the tribunal in that case to the risk of subconscious discrimination. In *Geller* a husband and wife both worked for the respondent. She was engaged on an ad hoc basis and her husband had a salaried position. The evidence raised the possibility that this reflected a stereotypical

view of men as being the bread winner of the family and the earnings of women as being of secondary importance: see [25] and [53] in particular.

56. Cavanagh J added:

> "*However, there will be other cases in which it is not necessary, in light of the evidence, for a Tribunal specifically to go on to examine whether there was an unconscious motivation."*

57. And he went to hold, at [63], that in the case which he was considering it was not necessary for the employment tribunal to have referred specifically to sub-conscious discrimination because the tribunal's findings of fact on the issue of conscious motivation did not leave any room for the possibility of the alleged victimiser in that case being unconsciously materially influenced by prohibited considerations.

58. In this connection we also note that, in *Anya*, Sedley LJ said that *"Credibility…is not necessarily the end of the road: a witness may be credible, honest and mistaken"* (emphasis added). He identified the particular risk that this is the case where the witness evidence concerns matters of which they may not be conscious. But he did not say that in every case it will be an error of law to dismiss a direct discrimination claim on the basis that the respondent's evidence as to the reasons for the impugned decision was accepted.

59. Third, we also accept Mr Moretto's submission that there must be evidence on which an inference of subconscious or unconscious discrimination could be based. It is well established that unreasonable conduct is not sufficient: see, for example, Elias P (as he then was) in *Bahl v Law Society* [2003] IRLR 640 at [94]. And, as Mummery LJ said in *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56], in a passage which was approved by the Supreme Court in *Efobi v Royal Mail Group* [2021] UKSC 33, [2021] 1 WLR 3863 at [46]:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

60. We also note the following passage from the judgement Elias P in *Bahl* at [127]:

> *"If, however, the tribunal accepts that the reason given for the treatment is genuine, then unless there is evidence to warrant a finding of unconscious discrimination, such that the tribunal is really finding that the alleged discriminator has concealed the true reason even from himself, there will be no basis to infer unlawful discrimination at all. Tribunals can in a proper case make a finding of unconscious discrimination, but it is a significant finding for a tribunal to hold that they can read someone's mind better than the person himself, and they are not entitled to reach that conclusion merely by way of a hunch or speculation, but only where there is clear evidence to warrant it."*

61. It is not uncommon for a witness to be convinced in their own mind of the truth and accuracy of the evidence which they give but for other evidence to show that they are mistaken. This passage appears to have been primarily directed at cases where the alleged discriminator has convinced themself that they were not influenced by the protected characteristic and that the reasons for their decision, act or omission which they gave in evidence were the true reasons, but the tribunal finds that this is not the case.

62. Of course, there may also be cases where the discrimination is subconscious or unconscious because, although the reasons for their actions are genuinely the ones which they identify, they do not appreciate that these reasons are discriminatory. This will be the case, for example, where assumptions are made based on stereotypical views of people who have the relevant protected characteristic. But it is well established that in this type of case there must also be evidence to support the inference that such assumptions were made. For example, in *Stockton on Tees Borough Council v Aylott* [2010] EWCA Civ 910, [2010] ICR 1278, at [49], Mummery LJ said:

> *"Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss."*

63. See, to the same effect, Simler J (as she then was) in *Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN at [46].

64. Fourth, we agree with what is implicit in the decision of Cavanagh J in *Watson*, namely that the extent of the risk of subconscious discrimination, and therefore the need to consider it separately and expressly, will vary according the particular circumstances of the case. There may be cases where there are objectively verifiable facts which clearly demonstrate or confirm the reasons for the act complained of and the question of subconscious discrimination does not realistically arise. On the other hand, there may be other cases where the reasons given for a decision consist of purely subjective views which are not supported by objectively verifiable facts and/or there is evidence to suggest that a recognised stereotype has been applied. None of this serves to downplay the importance of the law's recognition that direct discrimination need not be intentional and a discriminator may not appreciate that they have been influenced by a protected characteristic. But it does acknowledge that the risk or possibility of subconscious discrimination may be greater in some cases than others.

65. Fifth, unless there is agreement on the point, in all direct discrimination cases the reality is that the tribunal is being asked to consider what the true reasons of the alleged discriminator were. It may decide that they are not telling the truth as to their reasons or it may decide that their evidence is unreliable or mistaken for one reason or another, however sincere or honest they may be. But the process of deciding their true reasons addresses what operated on their mind and therefore implicitly encompasses consideration of their subconscious. For this reason, once the tribunal has found what their true reasons were there will little or no room for a finding of subconscious discrimination unless those reasons are themselves discriminatory, for example because they reflect stereotypical assumptions.

66. Sixth, as for the nature of the "Anya error", Dr Anya was turned down for a research post by an interview panel 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 on various occasions 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. The problem in *Anya* was that the tribunal had set out the relevant factual issues but had not reached reasoned conclusions on them. It had merely stated that it found the respondent's main witnesses to be *"essentially witnesses of truth"*.

67. Finally, as for *Qureshi v Victoria University of Manchester* [2001] ICR 863, Dr Qureshi had alleged that over a period of 6 years there had been a large 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"*

GROUND 3.1

68. Ultimately, Ms Sen Gupta did not seriously challenge [52] of *Geller* or what Cavanagh J said in *Watson*. She accepted that there was no rule that subconscious discrimination must be expressly and/or separately considered in every case. But she submitted that it did have to be in this case because the Claimant was a litigant in person, because there was a series of adverse decisions on which she relied and because of the 10 July assurance process to which she referred for the purposes of Ground 3.4. She added that consideration of subconscious discrimination was required because the Claimant did not limit her case to conscious discrimination.

69. Ms Sen Gupta confirmed that there was no suggestion in the present case that stereotypical assumptions about people of Indian origin had been applied. This, therefore, was a case in which the suggestion that there may have been subconscious discrimination was, in effect, a contention that the Respondent's witnesses were not giving truthful or reliable evidence about the reasons for the acts complained of and/or had convinced themselves that their professed reasons were their true reasons, but were mistaken. The task of the ET was therefore to decide, on the evidence, what their true reasons were.

70. We do not accept Ms Sen Gupta's suggestion that the question whether there was an obligation to consider the possibility of subconscious discrimination separately is to be answered differently according to whether the claimant is legally represented. It seems to us that, regardless of legal representation, the issues in the case will either require express and separate

consideration of this issue or they will not. We accept, however, that when asking whether a tribunal considered a matter it is relevant to ask whether or not it was raised or referred to before them.

71. As we have explained, the ET made findings as to the true reasons for the matters complained of, essentially accepting the evidence of the Respondent's witnesses. In a nutshell it found that:

    a. The Claimant was not immediately given her role as Head of LATAC back on her return from surge because it no longer existed in the way that it had prior to her being deployed away from that role;

    b. She was not offered the Head of Africa role when she returned from surge because it was not vacant at that point. In September 2020, it became known that it would become vacant in December but it was decided that she could not do no work until then and, in any event, the role could not just be given to the Claimant as there were several other Grade 7s who needed to be redeployed. The ET noted that there were also reservations about whether she was suitable for the role.

    c. She was required to carry out a combined LATAC and Wellness role because she had been without a role for a number of weeks and the roles which she was prepared to accept did not exist. The Wellness element was added because the LATAC work did not amount to a full time job.

    d. Her complaint about her appraisal grade was based on an unrealistic view of her achievements. A score of 3C was justified in that it reflected that she had met expectations against objectives but no more than this. Mr Hanna had made an honest assessment of her performance and that of her comparator who was a different person with different objectives, and there was no evidence to support the allegation of discrimination other than a small difference in grade and the difference in race which, as pointed out in *Madarassy*, is not sufficient.

72. Given that there was no suggestion of stereotyping, the effect of those findings was to exclude subconscious discrimination. But, even if they did not, the ET also found there were no facts from which it could properly be inferred that the Claimant's Indian origins played a part.

73. With these points in mind, and given that the Claimant herself had, until late in the ET proceedings, alleged that the matters complained of were accounted for by sex, race, disability and/or religion we asked Ms Sen Gupta what particular features of the case marked it out as a case of subconscious race discrimination or indeed, suggested that the Claimant's Indian origins played any role at all in the decisions about which she complains. Her answer was that there was a series of decisions which were adverse to the Claimant and that she relied on the 10 July assurance process.

74. We deal with these matters below under Grounds 3.4 and 3.5 but, in short, the ET was entitled to find that they did not provide a basis for an inference of race discrimination. That being so, failure expressly to consider whether they were evidence of *subconscious* discrimination was not an error of law.

75. We therefore dismiss Ground 3.1.

GROUND 3.2

76. Contrary to the Claimant's case, it is not clear that the views of Ms Buckingham about the suitability of the Claimant were a material reason for her not being offered the Head of Africa role in September 2020. The ET identified the reasons for this decision as being, in effect, that the Claimant could not do nothing until December and that in any event the job could not simply be offered to her given that other Grade 7s had been displaced. Given these reasons, and given that she did not respond to the EOI, the question of her suitability for the role did not arise. The way in which the views of Ms Buckingham were introduced by the ET - "It is also apparent from the evidence…" [54] and "We also note that…[76] - suggests that this was an additional feature of the evidence which the ET picked up from the evidence rather than a reason for the decision complained of. Indeed, Mr Moretto told us that this interpretation of the ET's findings is consistent with the way in which the case was defended by the Respondent.

77. Even assuming in the Claimant's favour that Ms Buckingham's views on the Claimant's suitability were a significant factor in the decision, the flaw in Ground 3.2 is that the ET clearly did consider why she had reservations about the Claimant's suitability to do the job and made findings on the subject. As is apparent from [54] of the Reasons, which we have quoted, it specifically found that Ms Buckingham's assessment was based on her knowledge of the Claimant and the scope of the Head of Africa job i.e. it was not based on assumptions about her or stereotypes of people of Indian origins. At [54] the ET also explained what was different

about the Head of Africa role which meant that she was less well suited to it i.e. it was larger role and it involved managing others.

78. Ms Buckingham's evidence to the ET was that the Claimant was a bright, able and intelligent woman who excelled in operational delivery, which was better suited to her skillset. We can see no reason why the failure to say in terms that Ms Buckingham did not subconsciously form her views about the Claimant because she is of Indian origins was an error of law. On the contrary, it appeared to us that [54] demonstrates that the ET did not simply accept the Respondent's professed reasons for the impugned decisions and then take them at face value. The ET asked what basis if any there was for Ms Buckingham's assessment and accepted that her view was both genuine and evidence based. That effectively excluded the possibility that she was deceiving the ET or herself as to her reasons and/or relying on stereotypical assumptions. In any event, as we have noted, it was not suggested that there is any relevant stereotype of people of Indian origins such as that they are less able to manage people or better suited to operational delivery rather than strategy.

79. We therefore dismiss Ground 3.2.

GROUNDS 3.3 AND 3.4

80. We can deal with these two grounds together.

81. We do not accept that the ET committed the so called "Anya error" in dismissing the complaint about the Claimant's appraisal score.

82. Firstly, we do not read the ET's Reasons as relying solely on the honesty of Mr Hanna's assessments of the Claimant and her comparator. As we read the first sentence of [79] of the Reasons, the ET found that the score of 3C was appropriate in the Claimant's case. This finding was more or less fatal to this claim, but the ET also found that Mr Hanna's scores were based on an honest assessment of the Claimant and a comparator who had different objectives. The difference between the two scores was marginal and there was no evidence that this was accounted for by the difference in race. Indeed, as the ET found at [46]:

> "Following the appraisals of all staff, there was an assurance process to check that there was consistency across the board. When the claimant's grade was being discussed, there was a suggestion that she should perhaps be given a 4 rating. Jonathan

> Hanna advocated on her behalf and persuaded the assurers that 3C was the right grade."

83. This was the 10 July assurance process on which Ms Sen Gupta relies for the purposes of Ground 3.4. Contrary to any suggestion that Mr Hanna had marked the Claimant lower than he should have because of her Indian origins, he had defended the Claimant when the assurers argued that she should be awarded a lower score.

84. Secondly, the ET was bound to make a finding as to whether the scores of the Claimant and her comparator were the result of Mr Hanna's honest assessment. It was not an error of law for it to do so and then to rely on that finding amongst others. As we have said, the error in *Anya* was to fail to reach reasoned conclusions in relation to the case which Dr Anya advanced. That is not what happened in the present case.

85. Thirdly, we note that Dr Anya provided evidence which pointed to race discrimination which the employment tribunal in that case failed to address. This brings us to Ground 3.4. It is true that the 10 July 2020 assurance process contained the passages relied on by Ms Sen Gupta but, having referred to the process at [46] the ET went on to find at [47]:

> "Due to the awareness raised by the Black Lives Matter and other movements about potential unfairness towards BAME staff, a second assurance exercise was undertaken with specific attention to whether BAME staff had suffered from discrimination. Among the GSD team, all BAME staff received Grade 3 or above and there was no evidence of any institutional discrimination on grounds of race in the appraisal scores."

86. Ms Sen Gupta accepted that this was supported by an email dated 16 July 2020 from Ms Buckingham which said:

> "Chris
> Camilla, Richard, Jon and I have discussed at length. We are content that all of the …marks are appropriate. No BAME staff in FPS received anything less than a 3C and the majority [who were then identified] scored higher than this."

87. Ms Sen Gupta described this as the alleged discriminators "marking their own homework" but, in fairness. Ms Buckingham was communicating the decision of four managers who had discussed the matter at length. And their view was based on the evidence, which was

summarised in the email and which showed that in FPS there was no pattern of ethnic minority colleagues not being awarded the higher appraisal scores. In any event, it was for the ET to reach a view on this issue, which evidently it did.

88. The ET also referred to the second assurance process at [80] of its Reasons, which we have quoted. In other words, the ET took into account both assurance processes. In the second one, the finding had been that there was no evidence of discrimination in the awarding of appraisal scores in the Claimant's particular department (albeit this was incorrectly referred to as the GSD team when in fact the ET was referring to evidence about the FPS of which she was a member).

89. We agree with Mr Moretto that even had this not been so, there was no evidence of any discriminatory decision making by Mr Hanna in particular. Moreover, the evidence related to appraisal scores but not to decisions about deployment. So the ET was fully entitled to find, as it did at [80], that there were no facts established from which it could conclude that the difference in the scores of the Claimant and her comparator were influenced by race.

90. We therefore dismiss Grounds 3.3 and 3.4.

GROUND 3.5

91. We do not accept that the ET adopted a compartmentalised approach to its decision making as in *Qureshi*. On the contrary, it made its findings of fact as one chronological narrative and it then reached its conclusions on all of the job role complaints together under one heading. It considered the performance appraisal issue under a different heading but it also considered whether the job role issues affected the appraisal score and vice versa (see the end of [54] of the Reasons). The ET then stepped back and expressed an overall view at [95].

92. We are quite satisfied that the ET had the whole picture in mind but, having considered the matter carefully, we are also clear that the whole was no greater than the sum of the parts in this case. There is nothing which we can see which supported the Claimant's allegations of direct race discrimination and we are not surprised that this was the ET's view.

93. We therefore dismiss Ground 3.5 and we dismiss the appeal.