Neutral Citation Number: [2023] EAT 87

Case No: EA-2021-000679-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 June 2023

Before :

HIS HONOUR JUDGE AUERBACH
MR NICK AZIZ
MR ANDREW MORRIS

- -

Between :

GENERAL MEDICAL COUNCIL	**Appellant**
- and -	
MR O M A KARIM	**Respondent**

- -
- -

Ivan Hare KC (instructed by GMC Legal) for the **Appellant**
Karon Monaghan KC and **Jeffrey Jupp** (instructed by Cole Khan Solicitors LLP) for the **Respondent**

Hearing dates: 7 and 8 March 2023

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JUDGMENT

SUMMARY

Race Discrimination

The claimant in the employment tribunal is a doctor. He is black African / European and is a Muslim. A number of allegations of conduct said to affect his fitness to practise were raised with the respondent. Upon the completion of its investigation the respondent made a referral in relation to certain of those allegations to a Medical Practitioners Tribunal. Following a hearing the MPT did not find misconduct to be made out. The claimant presented a tribunal claim making complaints of direct discrimination because of race and/or religion in relation to some twenty aspects of the respondent's conduct. These included decisions to refer his case at certain points to an Interim Orders Panel, the failure to discontinue its investigation at certain stages, the overall length of time that the process took, and other decisions. The employment tribunal upheld some (but not all) of the complaints of direct race discrimination on the basis that the burden of proof had passed but not been satisfied.

The respondent's appeal to the EAT succeeded. In summary, the tribunal failed to engage with key aspects of its case, and so produced a decision which was not *Meek*-compliant; and reached some findings and conclusions at different points that were conflicting or contradictory. In particular, the tribunal did not make it clear whether certain complaints had been upheld. It failed to explain why it did not accept aspects of the respondent's case as to the particular reasons why certain conduct complained of occurred, which the respondent asserted related to features of the allegations and evidence that were also different from those relating to a white comparator relied upon by the claimant; and it made irreconcilable findings in relation to certain of those complaints. The tribunal also relied, as an essential part of its reasoning, on statistics relied upon by the claimant, relating to the over-representation of BME doctors in referrals, investigations and outcomes; but failed to explain what it made of research material relied upon by the respondent as a key part of its response to that.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. We will refer to the parties as they were in the employment tribunal, as claimant and respondent. The claimant is a consultant urological surgeon. He identifies as black African/European. He is a Muslim. He was for many years employed by what is now Frimley Health NHS Foundation Trust ("the Trust"). He is a registered medical practitioner with the respondent.

2. In a reserved decision, following a hearing at Reading, the judgment of the employment tribunal – EJ Gumbiti-Zimuto, Ms D Ballard and Ms B Osborne – was as follows: "The claimant's complaint of direct race discrimination is well founded and succeeds. The claimant's complaint of discrimination on the grounds of religion and belief is not well founded and is dismissed." This is our decision on the respondent's appeal against the judgment in respect of direct race discrimination. As before the employment tribunal Mr Hare KC appeared for the respondent before us, and Ms Monaghan KC for the claimant, now in the EAT leading Mr Jupp of counsel.

The Legislative Framework

3. Section 54 **Equality Act 2010** defines a qualifications body. Section 53, among other things, provides that a qualifications body must not discriminate against a person upon whom it has conferred a relevant qualification by subjecting them to any detriment. For these purposes discrimination includes direct discrimination as defined in section 13. Section 13(1) provides: "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." By virtue of section 4, protected characteristics include race, as defined in section 9. Section 23(1) provides: "On a comparison of cases of the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

4. Section 136 provides, in material part:

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

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

5. Under section 1(1A) **Medical Act 1983** the over-arching objective of the respondent in exercising its functions is the protection of the public. Under **The General Medical Council (Fitness to Practise) Rules 2014**, rule 2 defines "an allegation" as an allegation that the fitness to practise of a practitioner is impaired by reason of certain matters, including misconduct. By regulation 4, where the respondent's Registrar considers that an allegation meets that definition he shall refer it to Case Examiners for consideration under rule 8. Before deciding whether to make such a referral, the Registrar may carry out such investigations as are thought appropriate. Where the matter is referred to Case Examiners they have various options, including to refer the allegation for determination by a Medical Practitioners Tribunal (MPT). At any time the Registrar may also refer the matter for consideration by what was called an Interim Orders Panel (IOP) (now an Interim Orders Tribunal) which may make interim orders, such as for interim suspension or conditions upon registration.

Factual Overview

6. We take the following outline of the facts from the tribunal's decision or other factual particulars which were before the tribunal and were, and are not, disputed as such.

7. In July 2014 the Trust commissioned an external review of the Urology Department by Professor Roche. While this was taking place the claimant, and two colleagues, Mr Laniado and Mr Motiwala, were excluded by the Trust. Professor Roche's report raised a number of concerns about the conduct of the claimant and others. A copy was provided to the respondent. In November 2014 the respondent opened investigations into the fitness to practise of the claimant and of Mr Laniado.

8. At this stage the respondent's live investigation related to two relevant matters concerning the claimant. These were allegations that (a) at a meeting in the canteen in January 2014 he had threatened, abused and/or intimidated a fellow consultant, Mr Rao (the canteen-meeting allegation);

and (b) he had influenced or manipulated members of the urology multi-disciplinary team (MDT) to sign a letter stating that the case of a particular patient of Mr Motiwala had been discussed at an MDT meeting, and assessed as being of one type of cancer rather than another, when (it was alleged) it had not been discussed at such a meeting at all (the MDT-letter allegation). Mr Laniado had also been present at the canteen meeting and was accused of threatening Mr Rao. Mr Laniado was a signatory to the MDT letter, and was accused of having signed it knowing that its contents were false.

9. The cases of the claimant and Mr Laniado were each referred to the IOP, but in decisions in November and December 2014 it decided not to impose any interim restrictions on either of them.

10. Meantime, following on from the Roche report, the Trust had commissioned an external investigation by Julia Hollywood. During December 2014 she produced reports relating to the claimant and to Mr Laniado. In relation to the claimant she found evidence to support (a) the canteen-meeting allegation; (b) the MDT-letter allegation; and (c) a further allegation relating to Simon Robinson, another member of the urology team. It was alleged that in April 2014 the claimant had sought to influence Mr Robinson, who was intending to give evidence to the respondent, in connection with what was then its already-ongoing investigation of performance allegations relating to Mr Motiwala (the Robinson allegation). Following this the Trust excluded the claimant and began disciplinary proceedings. A copy of Ms Hollywood's report was provided to the respondent.

11. The respondent's usual practice is to await the outcome of any employer's or external investigation before proceeding with its own investigation. The Trust also raised with the respondent in January 2015 a further allegation, being that the claimant had inappropriately contacted a GP, Dr Hayter, asking for a copy of a letter that Mr Motiwala had written in relation to the patient who was the subject of the MDT letter (the Hayter allegation). In January 2015 the respondent's Assistant Registrar decided that the Robinson allegation and the Hayter allegation both passed the threshold tests for investigation. In February 2015 the Case Examiner decided that the Hayter allegation, and the findings in the Hollywood report, including the Robinson allegation, merited a further interim

referral to the IOP. At a hearing in March the IOP imposed conditions on the claimant's registration.

12. In April 2015 Ms Hollywood produced a further report for the Trust, in which she found that the Hayter allegation against the claimant was supported by evidence. The claimant resigned from the Trust in May 2015 prior to any disciplinary hearing, under a settlement agreement, at which point the Trust's process in relation to him ended. The claimant then requested a review of the conditions that the IOP had imposed on his registration, but in June 2015 this was declined.

13. Meantime, in February 2015, a retired consultant radiologist, Dr Mark Charig, raised an allegation with the respondent that the claimant had been involved in a co-ordinated decision to remove the director of Spire Thames Valley Hospital, Parm Sandhu, in order to protect the claimant's own position on that hospital's medical advisory committee (the Spire or Charig allegation). A Senior Investigation Officer of the respondent wrote to the claimant's Responsible Officer at the Trust, Mr Palfrey, about the Spire allegation, and subsequently had a telephone conversation with him about it.

14. In July 2015 the respondent's Assistant Registrar decided that the Spire allegation should be included in the investigation relating the claimant; and this new allegation was also referred to the IOP. An IOP hearing took place on 17 August 2015. In August the respondent received communications indicating that the Spire considered that the claimant had not played any part in the removal of Mr Sandhu. These came in very shortly before the IOP hearing and were not placed before the hearing. The IOP at that hearing revoked all of the restrictions on the claimant's registration. The Spire allegations were considered by the respondent to be resolved by 16 December 2015.

15. The Hollywood report in the case of Mr Laniado found four out of five allegations not to be supported. No further reference was made to an IOP following receipt of the Hollywood report in his case. In March 2015 the respondent updated Mr Laniado that it had received the Hollywood report in relation to him and was awaiting the outcome of the Trust's investigation. The Trust decided later in March not to proceed further against him in relation to the one outstanding matter arising from

Ms Hollywood's investigation. In November 2015 the respondent's Case Managers closed his case.

16. In February 2016 a new Investigating Officer took over the respondent's investigation relating to the claimant. He noted an allegation mentioned in the Roche report and first Hollywood report, that the claimant had taken steps to identify the writer of an anonymous email making allegations about Mr Motiwala, sent in November 2013. That had not been considered before. In August 2016 the Assistant Registrar decided that it should be added to the matters being considered in the investigation relating to the claimant. This was referred to as the reverse-engineering allegation.

17. Having completed its investigation, the respondent sent the claimant draft particulars of the fitness to practise complaint against him on 31 March 2017. The Spire allegation and the MDT-letter allegation were not included. The matters relied upon were the reverse-engineering, canteen-meeting, Robinson and Hayter allegations. He responded on 9 May. There was a delay when Mr Robinson indicated that he might no longer be willing to act as a witness. On 22 May the case was referred to the Case Examiners, who decided on 26 September to refer it to an MPT. The claimant was notified of this on 27 September. There was a 13-day MPT hearing in March and April 2018. The contested allegations were not found proved. While the MPT noted that some of the claimant's actions were not best practice, misconduct was not found and he was not subject to any sanction or warning.

The Employment Tribunal's Decision

18. Having set out its outline findings as to the factual background, and directed itself as to the statutory framework, the tribunal addressed some general points. It rejected criticisms of the claimant, to the effect that he was unable to disentangle criticism of the Trust and of the respondent, and generally as to his credibility. It stated that it took on board that the respondent was not the claimant's employer, but a regulator acting in pursuit of its over-arching responsibility to protect the public, that its staff had never met or had face-to-face contact with the claimant, that its various decisions at each stage were all recorded contemporaneously in writing, and that there were a number of decisions and decision-makers involved in the claimant's case at different stages.

19. There was a list of issues, identifying each matter of conduct, at various stages of the overall process as it unfolded, said to amount to direct discrimination because of race and/or religion. As listed, there were twenty of these. The tribunal indicated at [32] that it would address each of these matters in turn "and finally set out our overall conclusions." It then discussed each of the matters on the list of issues, grouping some together. There was then a final section headed "conclusion".

20. The judgment simply stated that the "complaint of direct race discrimination is well founded", but it is certainly clear that the tribunal rejected a large number of the twenty individual complaints of race discrimination. Mr Hare KC's position was that the reasons were, however, unclear as to precisely which of the race complaints were upheld, and that they were muddled, incoherent or contradictory at points. In this vein, two of the overarching themes of the grounds of appeal were that the decision was not *Meek*-compliant and, in some respects, made findings that were perverse.

21. Mr Hare KC identified six of the individual complaints of direct race discrimination which, on his reading, the tribunal had upheld, or possibly upheld. Using the wording in the list of issues, they related to the following. The first was "the decision to apply for a second time to the IOP in February 2015". The second was the "failure to approach Spire Hospital following the Charig allegation and instead deciding to take the matter up with Mr Palfrey of the Trust." The third was "the failure to interview Mr Motiwala who was present during the conversation with Mr Rao (AR) on the 16 January 2014." The fourth was the "failure to progress exactly the same allegation against Mr Laniado by Mr Rao about the 16 January 2014 meeting." The fifth was: "Despite forming the view that Mr Rao was unreliable and conveying that view to Mr Laniado when ceasing the investigation against him in 2016, proceeding with the allegation concerning Mr Rao against the Claimant." The sixth was the "prolonged delay in dealing with the complaints against the Claimant."

22. Mr Hare KC said it was unclear whether the first of these six complaints had been upheld. Ms Monaghan KC said that it had been upheld. Mr Hare KC read the decision as upholding the second

complaint. Ms Monaghan KC said it did not. Mr Hare KC said it was unclear whether the third complaint was upheld. Ms Monaghan KC said it was not upheld. They agreed that the fourth, fifth and sixth of these complaints had been upheld. In our further summary of the relevant parts of the tribunal's reasons, we will concentrate on what it said about these six complaints, though we also need to refer to findings that it made relating to some other complaints that it did not, as such, uphold.

23. Two of those other complaints related to the respondent's failure to close the investigation relating to the claimant following the decision of the first IOP in November 2014. At the end of the section considering those complaints the tribunal said:

> **"39. To the extent that the Claimant's complaint is that his case should have been closed after the first IOP without reference back to the Case Examiners such a complaint is not well founded because there is not power to do so. The Claimant's complaint properly considered however in our view is that he was treated differently to Mr L because his case continued but Mr L's case was closed.**
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> **40. There was however a difference in the cases of Mr L and the Claimant that explains the difference in treatment at this stage. Following the Hollywood Report, in contrast to the Claimant, none of the allegations against Mr L were considered well founded and the Respondent's Case Examiners in closing his case noted that the Hollywood Report found that four of the five concerns were not supported by the evidence and in respect of the fifth concern the Trust had decided not to proceed with a disciplinary hearing, the Case Examiners decided that the realistic prospect test was not met and closed the case with no further action. This was not the position in the case of the Claimant."**

24. The tribunal considered the first of the foregoing six complaints (relating to the decision to make a second referral to the IOP) in the following passage.

> "**41. The second referral to the IOP was made after the Hollywood Report was published. The Hollywood Report contained additional allegations relating to Dr R where adverse findings were made against the Claimant. The Hollywood Report considered that there was evidence that three of four allegations against the Claimant were well founded. The Claimant was informed that he was to be subject to a disciplinary hearing and the Claimant was excluded from the Trust. Whilst excluded from the Trust the Claimant had a private practise and these patients were not covered by his exclusion from the Trust. It was considered that it was in the public interest to make a second referral to the IOP. Conditions were imposed on the Claimant's practise by the second IOP.**
>
> **42. The positions of the Claimant and the Respondent could not be starker in respect of the second referral to the IOP. The Claimant says that there can be no explanation for the referral: The Respondent on the other hand says that it is difficult to understand how this can be a particular of discrimination when the IOP made an order in relation to the Claimant's registration and he did not exercise his statutory right to challenge it in the High Court under s.41A(10), even though**

> **he was legally represented and his right to do so was clearly explained to him.**
>
> **43. Following the publication of the Hollywood Report Mr L's case was closed by the Respondent. Two of the allegations faced by the Mr L and the Claimant were the same. (See B764 and G16). In the case of Mr L the allegation of threatening AR was not considered well founded (allegation 1) while the same allegation against the Claimant was considered well founded.**
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> **44. In the decision to refer the Claimant to the second IOP there appears to be a difference in the way that the Claimant was treated in comparison to Mr L. Unlike the Claimant the Hollywood Report largely exonerated Mr L making only one adverse finding which was not taken further by the Trust. In Mr L's case the Case Examiner concluded that there was not a realistic prospect of establishing the required standard of proof in respect of these allegations.**
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> **45. One of the allegations that the Claimant was faced with following the first IOP was "That a penile cancer patient of Mr HM's was operated on without the patient's case being discussed by the Multi-Disciplinary Team ('MDT'). This and other guidelines were breached in this case. When the matter was investigated , Mr Karim is said to have bullied members of the MDT to mislead the investigator by signing a letter to the effect the patient's case had indeed been discussed by the MDT, but that the records of the discussion had been lost." This allegation was considered sufficiently serious to warrant the matter being put before the first IOP in the Claimant's case.**
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> **46. In Mr L's case the allegation was made that the same letter had been signed by him knowing that the information in the letter was false. After the Hollywood Report these allegations remained for consideration by the Respondent, in its decision to close the case against Mr L the Respondent dealt with the issue in the following way: "In this case, however, we see that thirteen other members of the MDT also signed the letter agreeing that the case had been discussed, and that the patient had been diagnosed with urethral cancer. We also note the histopathology report which supports this diagnosis. We make no finding in this decision about whether or not the patient had penile cancer or whether it was discussed at MDT: we are aware that there remains a dispute about these matters and that other expert opinion reach a different conclusion about the diagnosis. However, in light of the available evidence, we are of the opinion that there is no realistic prospect of establishing that Mr Laniado signed the letter knowing the contents to be untrue, or that he had not taken reasonable steps to check the contents."**
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> **47. There is evidence of a difference in the treatment of the Claimant in contrast to Mr L. The allegations against the Claimant and Mr L arose out of substantially the same matters and were similar allegations. In the one case it was considered that there was no realistic prospect of success in the other the matter was pursued relying on what must have been the same evidence. In the Claimant's case though there was the additional matter relating to Dr R."**

25. In the following passage the tribunal considered the second of the six complaints (relating to the Spire allegation), as well as one of discrimination by failing to consider that the Trust was manipulating the regulatory process.

> **"51. The Claimant carried out work at the Spire Hospital and the Bridge Clinic. By an email, Mark Charig informed the Respondent that he had been told that Parm Sandhu had been suspended or dismissed to stop the investigation into Mr**

Motiwala and that the Claimant and others had manipulated his loss of privileges from Spire and the Bridge Clinic.

52. On 10 December 2014 the registrar contacted them asking for "any further information you might have about this complaint or any other concerns." The Bridge Clinic replied promptly stating "We have received only two formal complaints in relation to his practise at the clinic… In both instances the complaint was resolved to the patient's satisfaction…I can confirm that no concerns have been raised about Mr Karim's practice". The Spire Hospital replied stating that "there have been no complaints or concerns regarding Mr Karim".

53. The registrar carried out further enquires by writing to the Medical Director at the Trust on the 10 March 2015. Mr Edward Palfrey contacted the Respondent by telephone an attendance note of that call recorded that "he had no proof of what had occurred but he gleaned some information from contacts made to the Spire. ..The concern was PS (Parm Sandhu) was removed to ensure that Mr Karim could remain on the MAC and due to the feeling by the MAC that PS was causing trouble". The account given by Mr Palfrey was not correct. The registrar summarised the position in a note that included the following, "It is alleged that Mr Karim was involved in a vote of no confidence against the Hospital Manager, Mr Sandhu, so that he could remain a member of the Medical Advisory Committee (MAC)." The note continues, "Although we do not have a lot of information about his incident and we definitely need to request further information from the Hospital as to the reason for Mr Sandhu's departure, I think that this should be treated as adverse. This appears to be a further example of manipulating and intimidating behaviour which indicates there could be a pattern of concern."

54. The Claimant contends that there can be no explanation for the Respondent's investigator contacting the Trust and the only inference can be that the Respondent's investigator considered she would find support for Mr Charig's allegations from the Trust in the absence of any criticism from Spire. The Claimant says that the Respondent's investigator did not appear to consider that the Trust might itself be hostile to the Claimant and thus inclined to paint a poor picture of the Claimant with a view to manipulating the process. The Claimant argues that the Respondent's investigator was looking for allegations against the claimant, "however trivial, however old and however much they contradicted accounts from those who actually knew about the claimant's conduct and competence". The Claimant contends that this matter could not have been evidencing misconduct of a sort that impairs a doctor's fitness to practise and notwithstanding, the Respondent triaged this allegation.

55. The Respondent contends that there was a complaint about Claimant's role (among others) in the removal of Mr Sandhu from Mr Charig so it was entirely appropriate for the Respondent to write to the Trust since the complaint referred to "the involvement of a number of Frimley Health Consultants" and had been discussed at a recent ELS (Employment Liaison Service) meeting held with the Trust. The Respondent states that it not only wrote to the Trust but it also wrote to the Spire Hospital. Finally it is said that once the investigation into all matters was complete, the Case Examiners decided that this matter should not proceed to the MPT. The Respondent contends that the Claimant has not identified a basis on which the Respondent could or should have concluded that the Trust was manipulating the process.

56. We agree that the Claimant must show some basis on which we could conclude that the Respondent could or should have been aware that the Trust was manipulating the process. From the Respondent's point of view the Trust, like all employers, was required to refer concerns about fitness to practise to the

> **Respondent and it had done so in the Claimant's case. Also the Trust had commissioned two independent reports (Professor Roche and Ms Hollywood) which had identified concerns about the Claimant. In the contact between Mr Palfrey and the Respondent's investigator we apprehend nothing that should have led to the conclusion that the Trust was manipulating the process. The allegation made by Mr Charig was investigated and ultimately was not progressed to the MPT by the case examiner. What is not clear is why in the face of information from the Spire indicating no support for the allegation and stating that there were no complaints about the Claimant the investigation appears to have continued to seek evidence on that issue."**

26. Among the other conduct complained of was said to be the failure to review the claimant's case once it had "become clear" that Mr Palfrey "had lied" about the claimant being involved in the removal of Mr Sandhu; and the failure to review the claimant's case following the third IOP hearing. In the section considering those complaints the tribunal noted that the respondent received, on 14 August 2015, a letter from the Spire and also a copy of an email from it, making clear that the claimant did not play any part in the removal of Mr Sandhu. These documents were not put before the August IOP. This IOP revoked the restrictions placed on the claimant. The tribunal concluded that there was no evidence at this time that Mr Palfrey had lied; that allegation was only made later. It also noted that the August evidence from the Spire came in "very close to the date of the IOP hearing" though it was "not clear why this material was not placed before the IOP". It concluded, at [60]:

> **"We do not consider that the failure to review after the IOP was less favourable treatment because a review is not something that would happen, under the relevant procedures, at that time. What is not so clear is why the matter remained a live issue in the absence of evidence to support the allegation."**

27. The third of the six complaints (failure to interview Mr Motiwala in relation to the canteen-meeting allegation) was considered in the following passage:

> **"61. The Respondent did not at any time interview Mr Motiwala, the Claimant contends that the failure to do this was inexplicable and that the Respondent's explanation for this, put forward by Ms Farrell, was untrue. The Respondent contends that it's general practice is not to interview potential witnesses who are subject to an on-going linked investigation since this may lead a doctor under investigation to incriminate themselves. The Claimant says that this was untrue.**
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> **62. The Claimant says that there were complaints against AR and, notwithstanding this, a statement was sought from AR in an attempt to garner evidence against the Claimant. The reason for the failure to obtain a statement was not the outstanding complaint rather it was that AR was not a credible witness. What Ms Farrell states in her statement is not supported by the evidence, "we had an open investigation against Mr Rao's evidence and in light of that, it would have been inappropriate**

> **to rely on Mr Rao's evidence, as it was inappropriate for the GMC to seek to obtain a witness statement where there is a linked investigation." However, the Respondent did seek to obtain witness statement from AR. It is not clear why there appeared to be a departure from the 'general practice' in respect of obtaining evidence from AR and not Mr Motiwala, both cases were linked to the Claimant's case. The Claimant suggests the distinction between the AR and Mr Motiwala is that in the former case the evidence was in the hope of gathering evidence against the Claimant, while in the latter case a critical witness who might have undermined the case against the Claimant.**
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> **63. The Tribunal do not consider there is a credible explanation for the difference in the way that Respondent treated AR and Mr Motiwala in terms of gathering evidence in the Claimant's case. The distinction in treatment in our view is explained by the fact that AR was a critical witness of the Claimant while Mr Motiwala was a witness who might be thought friendly to the Claimant."**

28. The fourth of the six complaints (failure to progress the allegation against Mr Laniado relating to the canteen meeting) was considered in the following passage:

> **"64. Following the Roche Report, a complaint against Mr L in relation to the meeting of 16 January 2014 in respect of the complaint relating to AR was triaged. This referred to the terms of reference for Mr L's Hollywood Report covering whether Mr L threatened and/or intimated AR on 16 January 2014 or allowed another senior consultant to do so without being challenged. The Hollywood Report found, in Mr L's case, that AR was not credible and rejected his evidence that he felt intimidated or bullied by Mr L.**
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> **65. The Claimant states that the Respondent decided not to pursue the allegation against Mr Laniado but did so against the Claimant, it is the Claimant's case that there is and can be no explanation for this and the only proper inference is that it was because of the Claimant's race and/or religion.**
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> **66. The Respondent contends that there is a distinction between the Claimant and Mr L. The Hollywood Report found none of the allegations against Mr L to be well-founded. Given the very different findings of the Hollywood Report and Mr Laniado's insight the Trust decided to continue working with him. That is very different from the Claimant where the relationship was brought to an end by a compromise agreement after litigation had been issued by the Claimant. The Case Examiners closed the case against Mr L because the realistic prospect test was not met.**
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> **67. The Tribunal is satisfied that there is a difference in the way that the Claimant was treated in contrast to Mr L. The difference was because of the findings made by the Hollywood Report in the case of Mr L did not justify proceeding against him, including the AR allegations which were not considered credible in Mr L's case. While there is a difference in the overall conclusions of the Hollywood report. In the Claimant's case the Respondent presented a basis for continuing proceedings based on AR, a witness not considered credible in the case of Mr L."**

29. We should note what the tribunal said, at [67] to [73], about a complaint relating to "[b]ringing and continuing proceedings against the Claimant in respect of allegations in respect of which there

was no prospect of any MPT finding that the Claimant's fitness to practise was impaired generally …". The claimant's case was that, instead of adding the reverse-engineering allegation to its investigation in August 2016, the respondent should have drawn it to a close.

30. The tribunal noted the respondent's case. This was, in summary, that, as noted by the Investigating Officer in August 2016, there appeared to be a pattern of behaviour arising from the claimant's support of Mr Motiwala; and that, in light of the nature of the allegations, the Hollywood findings, and the conflicts of evidence, these four matters were properly referred to the MDT, which would hear the witnesses. The tribunal's conclusion on this complaint, at [73], was this:

> "**In our view the Claimant admitted that he had conducted an investigation to identify the author of the email, the 16 January incident was about an allegation of threatening or intimidating Mr Rao. They raised issues for the MPT to consider. The conclusion of the Tribunal is that there was no less favourable treatment. The MPT saw and heard witnesses, up until that point there been simply a paper exercise by the Case Examiners. The claims were considered potentially serious. In allowing them to proceed to the MPT there is no less favourable treatment."**

31. The fifth of the sixth complaints (proceeding with the canteen-meeting allegation despite the view formed of Mr Rao) was considered in a passage which also considered complaints that the respondent had failed to take into account that the Trust had ended its investigation in May 2015, and concerning a failure to take account of a report (the Hooper report) on the treatment of whistle-blowers, and to treat the claimant as a whistle-blower. That passage was as follows:

> **"74. The Claimant considers these matters together because of the relationship between them and says that the Hollywood Report expressed doubts about the reliability of AR and in particular concerning his evidence relating to the meeting of 16 January 2014 and Mr L. The Respondent then concluded that the complaint against Mr L concerning the meeting of 16 January 2014 was "not adverse" and did not pursue that allegation against Mr L any further. The Trust ceased its investigation of the Claimant following his resignation and settlement. Notwithstanding that the Trust had ceased its investigation, the Respondent did not reconsider or review the complaints against the Claimant. The Claimant further contends that he was a whistleblower, notwithstanding this, the Respondent paid no attention to the Hooper Report (2015).**
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> **75. The Respondent says, in relation to proceeding with the allegation in respect of AR, the draft allegation put to the Claimant stated that the request for his money back was made with the intention to threaten AR and/or intimidate him and potentially a breach of paragraphs 36 and 37 of Good Medical Practice. The question of the Claimant's intention could only be determined by the MPT after hearing evidence.**

76. As to the failure to take account of the Trust's decision to discontinue the disciplinary proceedings the Respondent states that it did take account of this in refusing the Claimant's request for an early review of his IOP conditions. The Trust did "not come to any conclusion on the issues which were under investigation. … The concerns therefore still remain". The Respondent has an entirely distinct jurisdiction to protect the public.

77. Regarding the alleged failure to apply the Hooper Report Guidance the Respondent explains that the Hooper Report was delivered 19 March 2015 by which time the Claimant's case had been triaged and the investigation started. The Hooper Report was not applied retrospectively to any doctor.

78. The Tribunal is satisfied that there was a difference in the way that the Claimant was treated in contrast to Mr L. That is, despite forming the view that AR was unreliable and conveying that view to Mr L when ceasing the investigation against him in 2016, it proceeded with the allegation concerning AR against the Claimant. In respect of the other two matters set out above the Employment Tribunal did not find that there was any less favourable treatment of the Claimant."

32. The sixth complaint (prolonged delay) was considered in the following passage:

"79. The Claimant contends that there was extraordinary delay in investigating and prosecuting the complaints against the Claimant totalling three and half years. The target time for completion of an investigation is 6 months for cases that are not expected to go to a MPT and 9 months if the case is such as to indicate that it might go to the MPT and 12 months for other cases. The Claimant states that the Respondent says it "understands that being under investigation can be stressful and we will try our best to finish our investigation as soon as possible". It is said that the explanations for the delay, (i) the investigation was complex and (ii) to ensure there was no duplication in the interviewing of witnesses, the Claimant's investigation should run parallel with the investigation against Mr Motiwala, are inadequate and incredible. The complaints against the Claimant and the investigation into them in fact were not complex. The Claimant says there was no basis for the delay and the explanations are not credible. The only proper inference is that this treatment was because of the Claimant's race and/or religion.

80. The Respondent contends that there were a number of reasons for the time taken in the investigation of the Claimant's case. The Respondent waited for the outcome of the Trust investigation. The Trust informed the Respondent of the outcome on 27 May 2015 and this accounts for seven months of the time taken. The investigation was complex because of the link to Mr Motiwala's case. 15 out of 32 witnesses were relevant to both the Claimant's and Mr Motiwala's cases. The Respondent points out that the Claimant accepted that it would not have been appropriate to interview those witnesses separately in relation to his case and that of Mr Motiwala. The Respondent pointed to the Claimant's acceptance in questioning that a number of matters in his investigation were linked to Mr Motiwala. The Respondent's witnesses explained that the Claimant's case and Mr Motiwala were linked. A further period of 6 months was attributable to an error in triaging a matter in relation to Mr Motiwala which had previously been found to be not adverse and this accounted for a further six months because the cases of the Claimant and Mr Motiwala were linked. There were numerous others allegations, over and above the final allegations which were relatively short, considered as part of the investigation. Reading into these cases when Investigation officers changed took time. Delays are common in the Respondent's investigations of doctors of all races for a variety of reasons. The investigation plan produced by

the Respondent shows interviews scheduled with witnesses from the beginning of May 2016, this cannot be described as a lengthy delay.

81. The Tribunal's conclusions are that the overall delay, the apparent tenacity in investigation of the peripheral complaints require explanation. A determination whether the explanation is a credible explanation for the delay must be made. We reject the contention that the allegations were complex. The allegations were simple allegations often involving allegations about the behaviour of the Claimant determined from a consideration what one person said and what the Claimant's explanation is. The final allegations, (a) being rude to a colleague (AR complaint), (b) exercising misjudgement in contacting Dr H for assistance in HM's investigation, (c) writing a memo indicating that the cancer was urethral and not penile (MDT), (d) pressurising Dr R to withdraw his statement to the Respondent; (e) investigating the authorship of the "whistleblowing" email, were not complex.

82. The Claimant had agreed the underlying facts into the allegations of being rude to a colleague (AR complaint); exercising misjudgement in contacting Dr H for assistance in HM's investigation; and investigating the authorship of the "whistleblowing". The Claimant did so at an early stage and there was little if any need for further investigation. All the evidence in substance relating to the AR complaint had therefore been obtained by December 2014; All the evidence in substance relating to the Dr H complaint had therefore been obtained by January 2015. All the evidence in substance relating to the authorship of the "whistleblowing" complaint had been obtained by July 2014. At the MPT, the witnesses called by the Respondent included Dr R, Dr Ho, Mr L, Dr H and JK whose evidence was available very early on and in respect of which there is nothing complex about their statements. In the period between 3 November 2014, the first triage decision, and the end of 2016, there appears to have been nothing done by the Respondent to progress the allegations against the Claimant. The Parm Sandhu, Spire Hospital allegations were resolved by 16 December 2015.

83. Of the allegations against Mr Motiwala two matters overlapped with the allegations against the Claimant, the allegation of manipulating waiting lists which the Hollywood Report found that there was no evidence of this in the case of the Claimant, in December 2014. The MDT matter was resolved in February 2014.

84. We reject the contention that the investigation was complex and note that the Trust investigation took up 7 Months, we also note that there was no third party investigation, e.g. police investigation that was awaited, there were no clinical concerns in the Claimant's case that required the use of expert evidence. The connection with the case of Mr Motiwala was a decision made by the Respondent, it was not essential, it was a choice made by the Respondent as to how this matter the Claimant's investigation was managed.

85. The delay caused real problems for the Claimant he was faced with a prolonged threat to his career and reputation, and the stress that accompanied it for a period of about three years. The Respondent did not appear to have a system for monitoring the length of time cases were in the system or these causes of any delay. No data that casts any light on the racial or other breakdown of those affected by delay has been produced other than the anecdotal evidence of Ms Farrell which appeared to show that there were other cases where there was delay in the conduct of cases."

33. The section of the tribunal's decision headed "Conclusion" began with the following:

"99. BME doctors are 29% of all UK doctors however employers make 42% of

> **their complaints about BME doctors. UK graduate BME doctors are 50% more likely to get a sanction or warning than white doctors. There is a chart produced in the papers we were provided (D181) that illustrates the risk of different types and ages of doctors being complained about and of those complaints being investigated, by ethnicity and place of primary medical qualification, in 2010-2013. This further illustrates the position of adverse position of BME doctors when compared to white doctors. In carrying out its work in respect of the complaints about the Claimant the Respondent should have been conscious and aware of this background."**
>
> **100. Mr Donnelly, an Investigation Manager, stated that he had equality and diversity training in 2014 or 2015, that the Respondent considers this mandatory, and there is refresher training every two years. He described the course as being about treating people fairly. Mr Donnelly had not done a course specifically on unconscious bias training but some of the training he has done does talk about that area. Case examiners receive training on unconscious bias but Mr Donnelly had not received it. The course that Mr Donnelly attended covered stereotyping. Mr Donnelly was not clear on whether he had read the Respondent's equal opportunity policy. When questioned by Ms Monaghan he said that the "Equality Opportunity Policy sets out what discrimination means. It is some time since I read GMC policy. I am reluctant to state what it says. I may be referring the Equal Opportunity Strategy document."**
>
> **101. Mr Smyth, Medical Case Examiner, stated that equality and diversity is a mandatory training for all staff. He referred to the Respondent's "Equality, diversity and inclusion strategy 2018-2020" pointing out that training is provided based on this document. He went on to say that he did not remember reading the document and accepted that it is a high level strategy document and not a training document. Mr Smyth at paragraph 23 of his witness statement recognised that BME doctors "are more likely to be referred to the GMC for fitness to practise concerns than their peers… and more likely to be investigated by us and, ultimately, to receive a sanction." Mr Smyth stated that he thought that he had equality, diversity and inclusion training on 5 occasions or less is in 14 years of employment with the Respondent and that this included unconscious bias training.**
>
> **102. Ms Farrell, Assistant Director of Investigations, stated that she had equality and diversity training, she could not remember when this had taken place but stated that the Respondent has "semi-regular training every two years". Some of her training was online and some was face to face training. The online training takes about 1 hour, she stated that she had unconscious bias training, more than 2 years and less 5 years ago, the training covered stereotypes.**
>
> **103. Mr Graves, an Investigations Officer, stated that he joined the Respondent in 2014 and that he did an induction course which included modules about treating people fairly, the training programme was mandated to take place every two years. He has not received unconscious bias training from the Respondent or training about stereotypes."**

34. The tribunal then noted the claimant's case that the respondent did not have an equal opportunities policy, to which the respondent replied that this was a misunderstanding, as it did have such a policy in its capacity as an employer, but had not been asked to produce it.

35. The tribunal continued:

> **"106. The Respondent's witnesses and Ms Monaghan may or may not have been at cross purposes during her questioning of the witnesses when in discussion about equal opportunity policy and the question whether the Respondent had such a policy as Mr Hare contended. Whether Mr Hare is right or wrong about that we noted that the Respondent's witnesses were aware that BME doctors are more likely to be referred to the GMC for fitness to practise concerns than their peers and are more likely to be investigated by the GMC and, ultimately, to receive a sanction. The Tribunal was concerned that there was, in our view, a level of complacency about the operation of discrimination in the work of GMC or that there might be discrimination infecting the referral process. We formed this view after considering the answers given to the questions around the Respondent's equal opportunity policy, training around equality and diversity issues and the failure of all the witnesses to express how if at all the awareness of the overrepresentation of BME doctors in complaints to the GMC was considered in the investigation process at any stage or whether discrimination may have been a factor consciously or unconsciously in the allegations faced by the Claimant.**
>
> **107. We are asked to make a comparison of the cases of Mr L and the Claimant. For this purpose we must be satisfied that there is no material difference between the circumstances relating to each case. We note that in the case of Mr L the Hollywood report found that there was an issue of probity and dishonesty in respect of the signing of the letter at the MDT. This is comparable to findings made in the Claimant's case by the Hollywood report on this issue. The Respondent considered that there was a link with the case of Mr L and Mr Motiwala as they did with the Claimant. In Mr L's case the Respondent considered that this need not hold up the index concerns, whilst in the Claimant's case, it remained linked to Mr Motiwala resulting in a significant further delay. In the case of Mr L the Respondent took into account that he was operating in a dysfunctional environment at the Trust, but in the Claimant's case any such recognition was not given the same weight.**
>
> **108. We have come to the conclusion that there is a difference in the treatment of the Claimant in contrast to Mr L, a white doctor. We do not consider that there has been a credible explanation for the difference in the treatment. While the conclusions on the Hollywood Report may have justified no further action by the Trust in respect of Mr L, where substantially the same matters arise in the case of the Claimant and Mr L we would expect to see them treated in substantially the same way. They were not, in the case of the Claimant the AR incident continued under investigation and in Mr L case the matter was not continued by the Respondent it was referred back to the Trust.**
>
> **109. The Tribunal consider that the way that the Respondent dealt with the allegations made by Mr Charig concerning alleged events at the Spire Hospital suggests that the Respondent was looking for material to support allegations against the Claimant rather than fairly assessing matters presented. While the Respondent can be excused for not going behind the allegations made by an employer and taking them at face value it must have to give those allegations a fair review and proper investigation.**
>
> **110. There was a significant delay in this case. The Respondent received the Roche report in October 2014 and the Hollywood Report in December 2014, the Claimant's case was not concluded until April 2018. Much of the delay in this case arose from the linking of the Claimant's case to that of Mr Motiwala. Some of the delay arose due to the time that the Trust took to conclude its internal investigations. However, the Tribunal is of the view that the link between the**

> **Claimant's case and Mr Motiwala's case was a matter of convenience, it was not necessary for justice to be done in either case that they were linked. The administrative convenience of linking the cases for the purposes of the investigation is extinguished when the investigation is concluded in either case. In the Claimant's case much of the evidence was available from an early stage.**
>
> **111. The Tribunal was concerned that there is a level of complacency about the possibility of the operation of discrimination in the referral made to the GMC. The Tribunal noted that the answers given to the questions of the Tribunal about the equal opportunity policy.**
>
> **112. Taking all these matters into account we have come to the conclusion that there was less favourable treatment of the claimant in the way that he was treated in contrast to Mr L and also in the delay in dealing with his case. Taking into all the evidence including the statistical evidence about race which show a higher degree of adverse outcomes for BME doctors we consider that there is evidence from which we could conclude that the difference in treatment of the Claimant in comparison with Mr L and the delay were on the grounds of his race. We have not been able to conclude that we accept the explanations provided by the Respondent for the difference in treatment as showing that the Claimant's race did not form part of the considerations. The circumstances we have come to the conclusion that the Claimant's complaint of race discrimination is well founded.**
>
> **113. While there was statistical evidence underpinning the Claimant's case on race there was no similar evidence in respect of religion. We did not consider that the Claimant's religion is likely to have been a factor in the less favourable treatment of the Claimant."**

Grounds of Appeal – Overview

36. The grounds of appeal have ten numbered paragraphs. Mr Hare KC acknowledged that there were elements of overlap. He also indicated that paragraph 6 of the grounds (relating to [99] of the reasons) was not pursued. In his skeleton and oral submissions he regrouped the other paragraphs.

37. In overview, the nature of the challenges raised by the grounds are as follows. First, the tribunal misunderstood or misapplied the law in relation to sections 13 and 23, in particular by treating Mr Laniado as an appropriate comparator notwithstanding its own findings that there were material differences in the circumstances relating to him and to the claimant. Mr Hare KC cited the *dictum* of Lord Scott of Foscote in **Shamoon v Chief Constable of the RUC** [2003] UKHL 11; [2003] ICR 337 at [110] that an actual comparator must be "in the same position in all respects" as the complainant; and the observation of Mummery LJ in **Stockton-on-Tees BC v Aylott** [2010] EWCA Civ 910; [2010] ICR 1278 at [40] that "[t]he relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or

decision of which complaint is made." He also referred to Lord Hope of Craighead's statement in **Macdonald v Ministry of Defence** [2003] UKHL 34; [2003] ICR 97 at [64], that "all characteristics of the complainant which are relevant to the way that his complaint was dealt with must be found in the comparator. They do not have to be the same. But they must not be materially different."

38. Secondly, the tribunal erred in its approach to whether the respondent had shown facts sufficient to shift the burden on proof under section 136, or, if it had shifted, whether it had been discharged. Thirdly the tribunal failed to give adequate reasons for some conclusions, including reaching some that were incomprehensible or contradictory. The decision did not comply with the minimum requirements set by Bingham LJ in **Meek v City of Birmingham DC** [1987] EWCA Civ 9; [1987] IRLR 250 at [8]. Finally, the tribunal is said to have reached some conclusions that were perverse, or erroneous, because they were unsupported by evidence, contrary to the evidence or, on certain points, based on a misunderstanding or confusion about it.

39. Mr Hare KC cited Sedley's LJ's observation in **Anya v University of Oxford** [2001] EWCA Civ 405; [2001] ICR 847 at [26] that, just as it is not acceptable to comb through a decision for "hints of error and fragments of mistake" nor is it acceptable to comb through "a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which had failed in this basic task, whatever its virtues."

40. In summary the claimant's overarching position was that this appeal represented an impermissible attempt to challenge the tribunal's findings of fact, and to rerun the respondent's case. Ms Monaghan KC reminded us of the long-established principles that a tribunal's reasons are primarily directed to the parties, who know the issues, evidence and arguments, that a tribunal does not have to refer to every aspect of the evidence, the facts or the arguments in its decision, and that its reasons should not be subjected to a hypercritical or overpedantic level of analysis. She cited

Derby Specialist Fabrication Ltd v Burton [2001] ICR 833; **Sullivan v Bury Street Capital Limited** [2021] EWCA Civ 1694; [2022] IRLR 159, and the recent summary of these principles in **DPP Law Limited v Greenberg** [2021] EWCA Civ 672; [2021] IRLR 1016.

41. Ms Monaghan reminded us that we had not heard the witnesses cross-examined, nor the oral submissions and argument. Though a considerable quantity of material was in our bundles, we had seen only a part of the documentary material that was presented to the tribunal. We should beware of a challenge that sought to rely on selected parts of the evidence. She reminded us also, of course, of the high threshold for a perversity challenge.

42. Following the hearing the claimant's counsel also sent us **McQueen v General Optical Council** [2023] EAT 36, as, it was said, a further example of the approach to be taken to reading tribunal judgments. There Kerr J found that a tribunal had not erred in law, despite (at [50] – [51]) finding the decision to be "difficult to understand and interpret" and "curiously structured and drafted in an unorthodox manner" which features were "not conducive to clarity of thought, expression and reasoning." It had, nevertheless, made a legally sound finding which was dispositive of the claim.

43. In relation to comparators and the application of section 23 Ms Monaghan KC submitted that it was for the tribunal to decide what were the circumstances "relevant to the way [the claimant's] case was dealt with" (**Macdonald** at [64]) or "relevant to the reason for the action or decision of which complaint is made" (**Aylott** at [40]). She cited also Lord Hope of Craighead DPSC's observation in **Hewage v Grampian Health Board** [2012] UKSC 37; [2102] ICR 1054 at [21] – [22], that a tribunal was entitled to treat two colleagues of the complainant as appropriate comparators, even though the situations being compared in each case were "not precisely the same", as whether the situations were comparable was "a question of fact and degree."

The Grounds in More Detail; Discussion

44. We start this section by considering the first of the six particular complaints to which we have

referred, concerning the decision of February 2015 to refer the claimant's case to the IOP for a second time. In relation to this matter the grounds, and Mr Hare KC, contended, in summary, that the tribunal erred: by failing to reach a clear or comprehensible conclusion as to whether this complaint was upheld, by making inconsistent findings, at one point recognising that there were differences between the circumstances of the claimant and Mr Laniado at this point in the process, at another suggesting that the circumstances relating to each were materially the same; and by failing to take into account relevant factors when considering whether Mr Laniado was a valid comparator (grounds 2 and 3).

45. Ms Monaghan KC submitted that the tribunal had upheld this complaint, and had properly done so. The claimant was at this point referred to a second IOP whereas Mr Laniado was not. It was not necessary for all of the circumstances relating to the two of them to be the same. The tribunal had properly identified that both of them faced allegations relating to the canteen meeting and to the MDT letter, and it properly regarded the allegations against each of them, in respect of those matters, as materially the same, and as based on the same evidence. This was an example of discriminatory treatment being found to have influenced a decision, even though there were other aspects of the claimant's circumstances which were not applicable to Mr Laniado and were not material.

46. Our observations at this stage in relation to this complaint are as follows.

47. First, we agree with Mr Hare KC that there is a lack of clarity as to whether the tribunal did or did not uphold this specific complaint. There was no specific conclusion in relation to it, in the section at [41] – [47]. At [47] the tribunal observed that there was a difference in treatment, as the allegations against the claimant and Mr Laniado "arose out of substantially the same matters and were similar allegations" and that in the claimant's case the matter was pursued "relying on what must have been the same evidence." The tribunal then added that, in the claimant's case "though", there was the additional matter" of the Robinson allegation. There was no final verdict at that point on whether the circumstances of the claimant and Mr Laniado were, in respect of this complaint, *materially* the same or not, whether the burden shifted, or, if it had, whether it had been discharged.

48. We appreciate that, while the tribunal felt able effectively to dismiss some of the complaints in the course of its initial discussion of them, in relation to others the final verdict was left over to the concluding section. Turning then to the concluding discussion, at [107] – [108] and then at [112], it identified that the tribunal had concluded that there was less favourable treatment of the claimant in the way he was treated in contrast to Mr Laniado (as well as on the question of delay) and that the tribunal considered that the burden shifted to the respondent under section 136, which it then did not discharge, leading to the final conclusion that the "complaint of race discrimination is well founded."

49. But in this section the introductory and concluding references to the claimant and Mr Laniado were generalised, and, while the discussion in these paragraphs referred to certain particular matters relating to their respective cases, from which the reader can infer that certain particular corresponding complaints were upheld, it did not specifically refer anywhere to *this* particular complaint. It is not satisfactory that whether a given complaint of race discrimination was upheld or not, was not unambiguously clear, and led to a debate before us as to the right interpretation of the decision.

50. Further, if it *was* the tribunal's intention, by the generic overarching language of the concluding discussion relating to the claimant and Mr Laniado, to include this complaint among those that it upheld, then we consider that it did not sufficiently explain why, and/or that there were conflicts or inconsistencies in its reasons. That is for the following reasons.

51. First, we note that the first of the claimant's complaints related to the first decision to refer his case to the IOP, in November 2014. In respect of that, the tribunal noted that Mr Laniado was treated the same way at that point (as Mr Laniado's case was also, at that point, referred to the IOP), and considered that it was unable to draw an inference that that particular decision to make the first referral was related to race [35]. It also rejected a complaint about the failure to close the claimant's case immediately following the decision of the first IOP, as there was no power to do so [39].

52. As the tribunal found, what followed the IOP decisions in relation to the claimant and Mr

Laniado, were the Hollywood reports in relation to each of them. The tribunal found that the Hollywood report in relation to Mr Laniado found four out of five concerns relating to him not to be well-founded [40], whereas that in relation to the claimant considered that there was evidence to support three out of four allegations against him, one of which was the Robinson allegation [41]. The Hayter allegation was also referred by the Trust to the respondent in January 2015. It was then determined that both the Robinson and Hayter allegations merited investigation. In its initial factual summary the tribunal also found that the Case Examiner decided that "the findings in the Hollywood report and the further matter concerning Dr H merited [a further] referral to the IOP." [10]

53. At [43] the tribunal observed that two of the allegations against the claimant and Mr Laniado were "the same", and it is apparent from the discussion which immediately followed, that it was referring to the allegations against each of them relating to the canteen meeting and to the MDT letter. The tribunal observed at [47] that the allegations against the claimant and Mr Laniado arose out of "substantially the same matters" and were "similar allegations" and that the respondent relied in pursuing them against the claimant on "what must have been the same evidence". The implication, though not stated, is that it was of the view that there was here a difference in treatment between the claimant and Mr Laniado, in materially the same circumstances, which called for an explanation.

54. There are, however, a number of difficulties with this reasoning. First, the specific complaint of discrimination considered in this passage was about the decision to refer the claimant to the second IOP. But [43] to [47] are about the difference between the absence of a decision to close the claimant's investigation, contrasting it with the decision to close Mr Laniado's investigation. They are not, as such, specifically about the decision to make a second referral to the IOP.

55. Ms Monaghan KC submitted that the tribunal permissibly considered that the decision to make a second referral to the IOP in the claimant's case called for an explanation, because it found that the circumstances in relation to his case and Mr Laniado's case, with respect to the canteen-meeting and MDT-letter allegations against each of them, were materially the same.

56. However, the tribunal's observations at [47], that the cases against the claimant and Mr Laniado arose out of "substantially the same" matters and were "similar allegations" relying on "what must have been the same evidence" did not engage at this point with the respondent's specific case that the allegations, and the evidence described in their respective Hollywood reports, in respect of both the canteen meeting and the MDT letter, were materially different.

57. In relation to the canteen meeting, Mr Hare KC referred to Ms Hollywood's finding that, by his own admission, the claimant had raised with Mr Rao a matter of repaying MSc fees that had been paid for Mr Rao ten years before, because he believed Mr Rao to be the author of the November 2013 email, and to have written it in an attempt to damage Mr Motiwala; whereas Ms Hollywood found that there was nothing to suggest that Mr Rao felt intimidated by Mr Laniado at that meeting, and in fact she found evidence tending to suggest the contrary. In relation to the MDT letter, Ms Hollywood found that the claimant was clearly the author, and, again by his own account, was motivated by his desire to support Mr Motiwala, and had influenced or manipulated other colleagues, including Mr Rao and Mr Laniado, to sign the letter and thereby provide inadvertent support for a misleading statement. Mr Laniado's involvement was merely that he was one of the signatories. No issue of probity was raised by Ms Hollywood in relation to him.

58. Ms Monaghan KC submitted that this was an impermissible attempt to challenge the tribunal's factual finding and evaluation. It was for the tribunal to decide whether, in its judgment, the circumstances were materially the same. The EAT did not have all the evidence, and could not and should not re-evaluate it. Nor could the tribunal's evaluation be said to be perverse. It was entitled to take the view that the canteen allegations were materially similar, as both the claimant and Mr Laniado were accused of threatening behaviour, and that the MDT-letter allegations were materially similar, as issues *were* raised by Ms Hollywood in relation to them both, that amounted to issues of probity. This was in fact a point that was explored in cross-examination, which we had not heard.

59. However, in this case we do not think that is a sufficient answer to the challenge. That is because the factual features to which Mr Hare KC referred were a foundational part of the respondent's case, as to why the circumstances of the claimant and Mr Laniado, in relation to these two episodes, were materially different, because (on its case) they were pertinent to the non-discriminatory explanation as to why the respondent came to its respective decisions, in light of reports in which Ms Hollywood herself identified such differences in the evidence. The tribunal itself had found that, following the initial referrals in the wake of the Roche report, the claimant and Mr Laniado had both been referred to the IOP, without discrimination. It was the respondent's case that it was the more detailed Hollywood report that then threw up more unique evidence about the claimant's conduct on these occasions, and contributed to the decision to make a second referral.

60. In our judgment, this was a case where, whether the differences between the claimant and the actual comparator's circumstances were material, and whether the non-discriminatory explanation – the reason why – for the conduct put forward by the respondent was accepted, were inextricably bound up together, because what the respondent said was the reason for the conduct was the same thing as what it said amounted to a material difference between the claimant's and Mr Laniado's circumstances. If the tribunal did not accept the respondent's case in that regard, it was incumbent upon it to explain why. Further, the tribunal's observation that the evidence "must have" been the same, does not bespeak an engagement with the respondent's case that the specific evidence about their respective roles in each of these episodes was *not* in fact the same.

61. Further, and in any event, we also agree with Mr Hare KC that the tribunal failed to engage with the respondent's explanation (and, hand in hand with that, its case that this was a point of material difference from Mr Laniado's case) that the decision to make the second referral to the IOP was also prompted by the Hollywood report raising, uniquely to the claimant, the new Robinson allegation, and again uniquely to the claimant, the Trust also having raised with the respondent, the new Hayter allegation, both of which the Assistant Registrar had decided should be added to the investigation,

and the Case Examiner then considered required a further referral of the claimant's case to the IOP.

62. Again, it is not, in our judgment, a sufficient answer to this point to say that it was enough that the tribunal considered that the claimant's circumstances and those of Mr Laniado, in relation to the canteen-meeting and MDT-letter allegations, were materially the same (if that was itself a sufficiently-reasoned view); and that the tribunal did not need to refer to all of the evidence, or all of the arguments, and so did not need to refer to what it made of the fact that the Robinson and Hayter allegations, which were unique to the claimant, had now also been referred to the respondent.

63. Again that is because it was the very substance of the respondent's case that these developments, which followed the conclusion of the first IOP reference, and were unique to the claimant (all of which was factually found by the tribunal), together with the particular evidence relating to his involvement in the canteen-meeting and MDT-letter matters supplied by Ms Hollywood, provided a complete non-discriminatory explanation for the decision to make a second referral in his case. If the tribunal did not accept that case, it was incumbent upon it to explain, however briefly, why. Whilst it referred, at the end of [47] to "the additional matter" relating to Dr Robinson, it did not say any more about it; and it did not mention there, the Hayter allegation, or its earlier finding that the Case Examiner had decided that it, too, merited referral to the IOP.

64. In relation to this complaint, the tribunal's reasons were, at least, not *Meek*-compliant, because it did not state clearly and unequivocally at any point whether this particular complaint was upheld. If we are wrong about that, and what it said in its conclusions makes it clear that this complaint was upheld, then the integrity of that decision rests on whether those conclusions properly and permissibly explain why it considered, in respect of this complaint, that the burden had passed to the respondent, and that the non-discriminatory explanation advanced by it was not accepted. To that we will come.

65. We turn to the second of the six complaints, relating to the Spire allegation. As we have noted, Mr Hare KC's position was that it was not wholly clear whether the tribunal had upheld it. If

it had, its reasoning was defective and perverse, because of a fundamental confusion in relation to the evidence, by mixing up two different exchanges with the Spire (ground 9). This complaint was about how the respondent reacted to an allegation made by Mr Charig, in the email referred to at [51]. That email was dated 7 February 2015. The email of 10 December 2014 referred to at [52] predated the Charig allegation, and was not about it. It was by way of general enquiry that the respondent had made of these hospitals, because it was seized of complaints relating to the claimant, and he had worked with them. The replies mentioned at [52] also predated the Charig allegation.

66. It was also the respondent's case that, following receipt of the Charig allegation, it was normal for the enquiries made to include contacting the Trust, for the reasons the tribunal noted at [55]. Nor was it the premise of this particular complaint of discrimination, that it had done so "instead of" approaching the Spire hospital, factually correct. The tribunal had evidence before it of a further letter from the Spire in August about the Charig allegation – which it in fact referred to at [57] – and which could be seen on its face to be a reply to a letter from the respondent about it. The concluding sentence of [56] showed that the tribunal had mixed up these two different chains of communications.

67. Ms Monaghan KC submitted that the tribunal had not got mixed up and that it had in fact not upheld this particular complaint (nor the related complaint addressed in this section of its decision). It (correctly, she said) found at [56] that the Charig allegation was investigated and ultimately not progressed by the Case Examiner. In the final sentence of that paragraph it was addressing something different, namely that the investigation of the Charig allegation was continued after August despite the Spire indicating no support for it. It was there simply making a further observation in order to flag something to which it would later return in its conclusions at [109].

68. Our observations, at this stage, in relation to the tribunal's consideration of the discrimination complaint relating to the respondent's handling of the Spire allegation, are as follows.

69. First, whereas it is clear, from [56], that the tribunal rejected the other complaint considered

in this section, the tribunal does not in terms state there, or in the concluding section, the outcome of this particular complaint of race discrimination. We think that Ms Monaghan KC's reading is in fact right, that this complaint, as such, was not upheld, because the tribunal did not indicate that it rejected the respondent's case in relation to it, described at [55], and because the complaint, as formulated, is not identified as upheld in the concluding section. But the tribunal should have stated the outcome explicitly, rather than it being left to the reader to infer what it was, by an exercise in textual exegesis.

70. Secondly, nevertheless, because of what is said at [109], we do need to consider the reasoning in this section. It appears to us that the tribunal did attach some weight to the Spire's response to the December 2014 enquiry. It referred to it at [52], and the last sentence of [56] appears, in part, to refer back to it. Further, the tribunal's reference to it, at [52], follows [51], which introduces the Charig allegation, and is followed by [53], which refers to "further enquiries" into the Charig allegation. So the passage as a whole gives the impression of being a chronological narrative about the handling of the Charig allegation. It is not apparent from it that [52] is out of chronological order, and that the email referred to there was not about the Charig allegation. The tribunal may not have been confused about this, but the way this material is presented does not make the reader entirely sure of that.

71. As noted, the specific complaint considered in this section was that the respondent had *failed* to contact the Spire about the Charig allegation and *instead* taken the matter up with Mr Palfrey of the Trust. The tribunal appears not to have upheld it, because it accepted that the respondent *did* contact the Spire about that complaint, and that it *was* appropriate to contact the Trust about it as well.

72. The point raised at the end of [56] is not about that complaint of discrimination, as framed, but is that the respondent, *after* it had the Spire's response, "appears to have continued to seek evidence on that issue." This appears to be echoed in the observation at the end of [60]: "What is not so clear is why the matter remained a live issue in the absence of evidence to support the allegation."

73. In relation to this, Ms Monaghan KC showed us correspondence that was before the tribunal

in which the claimant's solicitor chased for an update on the enquiry in the claimant's case in November 2015 and for a copy of the Spire correspondence from August. The respondent's enquiry officer replied attaching a copy of the Spire's 14 August letter, explaining that she was on leave at the time, and that unfortunately it was not picked up in time for the IOP August hearing. That letter also said that they were currently waiting for Spire to provide additional information, finalising a statement from Dr Sandhu and arranging to take statements from a number of staff at the Trust. She added: "Unfortunately it looks like at least some of these will be delayed until the new year."

74. There was also a reply from Spire to the Investigation Officer's "request (12 November) for further information" providing various documents and information relating to Mr Sandhu, and commenting: "I hope that this provides you with the information you require to complete your investigation." This was dated 16 December 2015 – and we note that the tribunal also observed at [82] that the Spire allegations "were resolved by 16 December 2015." We agree with Ms Monaghan KC that there was, therefore, indeed evidence before the tribunal that there had been some further investigation of this allegation after August. That finding, as such, was not, therefore perverse.

75. We turn to the third of the six complaints. The conclusion that there was less favourable treatment by failing to interview Mr Motiwala regarding the canteen-meeting allegation is said by the respondent to have been perverse, as there was no evidential basis for any finding that it had sought a statement from Mr Rao on this matter (ground 10). The only evidence was that the respondent had contacted Mr Rao, not in relation to the canteen-meeting allegation, but in relation to the separate Spire allegation, because it had been told that he was a relevant witness in relation to it.

76. Ms Monaghan KC, in response, submitted that it could be inferred that the tribunal was referring to that very evidence, of the approach made to Mr Rao in relation to the Spire allegation, and to which Mr Rao provided a substantive response. That evidence showed that it was not true that witnesses who were themselves under investigation would not be approached for such statements. So the tribunal was entitled to conclude that it undermined the explanation put forward for why Mr

Motiwala was not interviewed, and to draw the inference that it did. That was not perverse.

77. That said, as we have noted, Ms Monaghan KC's position was that the tribunal had *not* found at [63] that there was direct race discrimination in this regard. Again, the tribunal was not, in our view, unambiguously clear about whether that complaint was upheld, as it should have been. But, in light of the content of the concluding section, we think she is right about that. Nevertheless, Ms Monaghan KC also submitted that this passage resonated with the tribunal's observations in relation to the approach to the Spire allegation, and informed its conclusions. We will return to this.

78. We turn to the fourth and fifth of the sixth complaints. We take them together because they both in substance complained that there was an inconsistency in the respondent's approach to the canteen-meeting allegation, in relation to Mr Laniado, which was not pursued, on the basis that Mr Rao was not a reliable witness, and yet which was still pursued in relation to the claimant. In upholding these complaints the tribunal is said to have erred, because it failed to take into account material differences between the claimant's and Mr Laniado's cases which the tribunal had itself identified, so that Mr Laniado was not a valid comparator (ground 3).

79. The tribunal, Mr Hare KC submitted, once again wrongly failed to take into account its own finding that the claimant was alleged specifically to have threatened Mr Rao over the funding matter, that Ms Hollywood came to different views about the evidence relating to his conduct at the meeting and to that of Mr Laniado, and that, as it found at [67], it was in relation to *Mr Laniado's* role that Mr Rao was considered by Ms Hollywood not to be a credible witness, whereas the claimant's case was progressed, essentially on the basis that his own conduct, and his motive, relating to Mr Motiwala, and the email, authorship of which he attributed to Mr Rao, had been admitted by him.

80. It was also, he submitted, a mistake to say (at [78]) that the respondent conveyed to Mr Laniado when notifying the ending of the case against him in November 2015, that Mr Rao was unreliable (in some general sense). The document setting out the reasons for that decision did not

refer to the canteen-meeting incident at all; but, in discussing another, wholly unrelated, incident, in relation to which there was a disputed conversation between Mr Laniado and Mr Rao, it stated that it was one person's word against the other, with no evidence to corroborate Mr Rao's account.

81. Ms Monaghan KC again relied on the fact that the tribunal had found, in relation to the canteen-meeting allegation, that the circumstances of the claimant and of Mr Laniado were materially the same; but yet, having found Mr Rao unreliable in the case of Mr Laniado, the respondent proceeded with this allegation in the case of the claimant.

82. Once again, as with the second reference to the IOP, the respondent's case as to the non-discriminatory explanation for this conduct relied on the same features which were absent in Mr Laniado's case and which the respondent therefore also contended made it materially different. The tribunal appears to have concluded, at [67] and [78], that the differences were not material, but that conclusion, and its upholding of these complaints, must rest on its reasons for finding that the burden had shifted, and rejecting the non-discriminatory explanation put forward by the respondent. Those are not to be found in these two sections. We will come to what is said in the concluding section.

83. We turn to the last of the sixth complaints, relating to the matter of delay. The tribunal was said to have erred by misinterpreting and misapplying sections 13 and 23 (ground 1), reversing the burden of proof (ground 4) and failing to provide any, or any adequate, reasons for concluding that any delay was because of race (ground 5). Mr Hare KC submitted that the tribunal erred in concluding both that there was less favourable treatment and that it was because of race, when there was no actual comparator in respect of this complaint. By relying, at [85], on the *absence* of specific data on the racial breakdown of those affected by delay, the tribunal had effectively reversed the burden of proof.

84. Mr Hare KC submitted that the tribunal's reasoning was also flawed in a number of other ways. It referred at [110] to the receipt of the Roche report in October 2014 and the (first) Hollywood report in December 2014, and described the claimant's case as not having concluded until April 2018.

But, as the tribunal found, the respondent first awaited the conclusion of the Trust's investigation, which was notified to it on 27 May 2015; and April 2018 was the end of the *MPT* process, about which there was no complaint, as such. The *respondent's* investigation concluded by 31 March 2017 when the particulars of the allegation of impaired fitness to practise were formally put to the claimant. Further, before that, the overall investigation of the claimant's fitness to practise could not conclude, until investigation of the last matter being considered as part of that investigation was concluded.

85. The tribunal, said Mr Hare KC, also failed properly to engage with the non-discriminatory explanation advanced by the respondent for the delay, which it mischaracterised. In particular, the respondent's case was not that the investigation relating to the claimant was inherently complex, but that the case relating to Mr Motiwala was, as it involved allegations relating to some 33 patients, and he was also not well enough to undergo a performance assessment. It was also the respondent's case that a six-month delay occurred in the Motiwala investigation from August 2015 to February 2016, because of the need to revisit and correct a flaw in the process. The tribunal failed to address this.

86. Mr Hare KC submitted that the tribunal was also wrong to rely on its view that the decision to link the investigations was a matter of convenience and on the fact that Mr Laniado's investigation had not been linked to Mr Motiwala's. The decision to link the claimant's investigation and Mr Motiwala's was not itself conduct complained of as discriminatory. In any event, there was a non-discriminatory explanation for it, being the substantial overlap in subject matter, with some 15 witnesses in common, and the common thread among a number of the allegations against the claimant being his motivation to support and defend Mr Motiwala. The overlaps related not just to the two matters referred to by the tribunal at [83] but also to concerns about private work, the email reverse-engineering, canteen-meeting, Robinson and Hayter allegations. There was no suggestion of a similar pattern of inappropriate conduct in support of Mr Motiwala on the part of Mr Laniado.

87. Ms Monaghan KC submitted that the tribunal identified a number of factors on which it properly relied, in particular the overall length of the investigation compared with the respondent's

own target, the apparent tenacity in the investigation of peripheral complaints (a reference, she suggested, to the Spire allegation) and the fact that the allegations against the claimant were not complex. While there was no statistical material specifically in relation to the impact of delay on BME and non-BME subjects, the tribunal was fully entitled to draw, as part of the context, on the statistical material showing disparity of treatment throughout the referral and sanctioning process.

88. Mr Monaghan KC reminded us, in this regard, that statistical evidence showing "a discernible pattern in the treatment of a particular group" may support an inference of discrimination against that group (**West Midlands Passenger Transport Executive v Singh** [1988] ICR 614 at 619); and evidence of widespread discriminatory conduct or attitudes in an organisation may also be considered to make it more likely that the alleged discriminatory conduct occurred (**Chief Constable of Greater Manchester Police v Bailey** [2017] EWCA Civ 425 at [99]). These features of the evidence in this case, together with the finding of complacency, were more than sufficient to shift the burden.

89. We note that there is some overlap, here, with the parties' respective cases on the grounds which related more generally to the tribunal's reasoning in its overall conclusions, on the shifting of the burden, and particularly the respondent's failure to discharge it. Having put down that marker, our observations at this stage on this part of the tribunal's reasons are as follows.

90. Reading the passage at [81] to [85] it appears to us that the tribunal concluded that, in relation to the delay the burden shifted to the respondent to provide a non-discriminatory explanation, because it was not necessary to link the claimant's investigation to Mr Motiwala's investigation, and had it not been so linked, the claimant's investigation could and would have been completed in a very much shorter time. The tribunal was also concerned by the "apparent tenacity" in the investigation of peripheral complaints; and by the fact that the respondent had no system for monitoring the length of time cases were taking, or the causes of delays.

91. The tribunal's point about the lack of data on the racial breakdown of those affected by delay,

appears to us to have been that, because of this absence, and because Ms Farrell's evidence was (merely) anecdotal, the respondent was not in a position to point to any persuasive evidence which might have countered a potential adverse inference being drawn from the fact of the overall length of time that the process took. However, that would not, by itself, supply the answer to the prior question of whether the tribunal's primary findings of fact supported such an inference being drawn, nor whether, if so, there was other evidence which made good a non-discriminatory explanation.

92. Mr Hare KC's point is that when, at [81], the tribunal rejected "the contention that the allegations were complex" and went on to explain why the allegations against *the claimant* were not complex, it was not addressing the case that the respondent had advanced. However, the tribunal did fairly summarise, at [80], the respondent's points about the timing of the conclusion of the Trust's investigation, that the case was complex because of the link to Mr Motiwala's case, the 15 overlapping witnesses, the multiple allegations against the claimant relating to Mr Motiwala, the procedural delay in Mr Motiwala's case, and other points made by it. Though that particular sentence in [81] could have been better expressed, our overall reading is that the tribunal did not take issue with the respondent's points at [80] about the combination of factual features which gave rise to the timeline as such. However, its point was that, as the allegations against the claimant were not complex, the decision to link his investigation to Mr Motiwala's, which it considered was unnecessary, had a significant adverse impact, by causing the resolution of his case to be significantly delayed.

93. However, Mr Hare KC correctly reminded us that a conclusion that the respondent's systems and practices could and should be improved, or that they impacted unfairly or unreasonably in the claimant's case, was not by itself to be equated with the conclusion that the conduct complained of was because of race. Once again, therefore, we need to consider the tribunal's further reasons for concluding that the burden had shifted and not been discharged, and the appeal's challenge to those.

94. That brings us to the grounds of appeal which contend that, more generally, the tribunal erred, at [112], in its reliance on the statistical evidence discussed at [99], and its assessment that there was

a "level of complacency" in that respect at [106], as contributing to a shifting of the burden of proof, which was not then discharged. In particular, the tribunal made no mention of the research relied upon by the respondent, which found no evidence of race discrimination in its investigation processes, and so failed adequately to explain this part of its reasoning (ground 7). Nor had it explained how its finding of "complacency" supported an inference of less favourable treatment because of race, or what it drew from witnesses' answers to questions about the equal opportunities policy (ground 8).

95. Mr Hare KC referred in particular to the respondent having put before the tribunal, a Policy Studies Institute report: "The Handling of Complaints by the GMC a study of decision-making and outcomes", which found no evidence of discrimination or racial bias in the handling of complaints against doctors; and a "Review of decision-making in the General Medical Council's Fitness to Practise procedures" by Plymouth University Peninsula Schools of Medicine & Dentistry, which found an overrepresentation of BME doctors in those procedures, but did not identify any factors within the respondent's activity which might constitute bias or discriminatory practices against particular cohorts, and identified other factors which might serve to explain the over-representation.

96. Mr Hare KC relied on Sedley LJ's discussion in **Anya** at [24], of the need, in order for a conclusion to be *Meek*-complaint, for the tribunal to explain why, on a disputed issue, one party's evidence is preferred to the other's; and Peter Gibson LJ's observation, in **Chapman v Simon** [1993] EWCA Civ 37; [1994] IRLR 124, at [46], that it is of the "greatest importance" that the primary facts from which an inference of discrimination is drawn to be set out by the tribunal with clarity, in its fact finding role "so that the validity of the inference can be examined." Similar points were reiterated by the EAT (Elias J presiding) in **The Law Society v Bahl** [2003] IRLR 640. It also said at [20] that "a tribunal should take special care to explain how it has reached its conclusions if it finds unconscious discrimination", citing discussion of this point in earlier authorities. Those remarks were echoed by the Court of Appeal in that case: [2004] EWCA Civ 1070; [2004] IRLR 799 at [104].

97. Ms Monaghan KC submitted that it could be inferred that the present tribunal was not

persuaded by the research evidence on which the respondent relied. This material was addressed in closing submissions on both sides, in which she had, in particular, critiqued the Plymouth report. It would be wrong to infer from the tribunal's failure to refer to this evidence, that it had not considered it: **Greenberg** at [57(3)]. It properly relied upon the statistics to which it did refer as supporting an inference or shifting of the burden. The tribunal had also clearly explained at [106] how it had formed the view that the respondent's witnesses were complacent, and why it drew inferences from that. It was also fully entitled to reject the respondent's case that it was necessary to link the claimant's case to Mr Motiwala's investigation in order to avoid duplication in the interviewing of witnesses.

98. Our conclusions on this aspect follow.

99. Reading the decision as a whole, and in particular [81] to [85] and the concluding section from [99] to [112], we draw out the following strands from the tribunal's reasoning, as to why the burden had not only shifted, but also not been discharged, in relation to those complaints which it upheld.

100. First, the tribunal considered that there had been differential treatment of Mr Laniado in materially the same circumstances, in continuing the claimant's investigation in relation to the canteen-meeting and MDT-letter allegations in relation to each of them. In relation to the MDT-letter the tribunal explained at [109] that this was because it considered that Ms Hollywood had raised issues of probity in relation to Mr Laniado, as well as having done so in relation to the claimant. That, finding as such, was not perverse. We note, however, that the tribunal did not address the fact that the MDT-letter allegation against the claimant was *not* among those which was referred to the MPT.

101. Further, the tribunal did not, in this concluding section, engage with the respondent's case that the canteen-meeting allegation relating to the claimant was materially different from that relating to Mr Laniado. We also cannot reconcile what it said about that at [108] with its finding at [67] that the difference between the decision to progress the canteen-meeting allegation in the claimant's case, but not in Mr Laniado's case, was "because" the Hollywood findings relating to Mr Laniado did not

justify proceeding against him, and Mr Rao's allegations were considered not credible "in Mr L's case". The tribunal appears at that point to have accepted the respondent's case on this.

102. Nor did the tribunal refer at [108] to the other allegations that were referred to the MPT, being the Robinson, Hayter and reverse-engineering allegations. Again, its conclusion in this final section is hard to square with its earlier conclusion, rejecting the complaint of discrimination about the decision to refer to the MPT, at [73], referring to the claimant's admission regarding the reverse-engineering allegation, and the particular nature of the canteen-meeting allegations, and apparently accepting the respondent's case that these raised issues that were for the MPT, as the body equipped to hear witnesses and resolve factual disputes. The tribunal also appears to have accepted that case in the first part of [95] (rejecting a complaint about the decision to proceed to an MPT hearing) although – apparently, in the second part of [95] – not in relation to the canteen-meeting allegation, but again without any reference to the respondent's case or its own finding about that at [67].

103. The second main foundation of the tribunal's conclusions that the burden had shifted and not been discharged, in relation to those complaints of race discrimination which were upheld, is the statistics, and the finding that the respondent's witnesses were "complacent" in relation to them. The tribunal relied upon its finding that the respondent's witnesses were aware of the over-representation of BME doctors particularly in referrals to the respondent, but also investigations and sanctions, but were complacent about this [106], [111]. We agree with Mr Hare KC that this was a key and essential part of its reasoning. That is reflected in the final conclusion on the complaints of race discrimination at [112] and the contrasting conclusion at [113] that there was no similar statistical evidence underpinning the claimant's case in respect of religion, and the dismissal of those complaints.

104. We also agree with Mr Hare KC that it was incumbent upon the tribunal in this regard to explain what it made of the respondent's case relating to the research evidence in relation to its processes and procedures on which it relied. Once again, it is not a sufficient answer to say that the tribunal had detailed submissions from counsel on this aspect of the evidence, and was not obliged to

refer to either the evidence, or the submissions, in its decision. The research material relied upon by the respondent was a key part of the evidence it sought to rely upon in rebuttal of that plank of the claimant's case based on the statistical evidence on which it relied. It was incumbent on the tribunal, if it rejected the respondent's case by reference to that material, to explain why.

105. It appears clear from [112] that the statistics relied upon by the claimant, together with the tribunal's finding of complacency in relation to them, influenced its decision that the burden had not merely been shifted, but had not been discharged by the respondent making good its proffered explanations, both in respect of the particular complaints for which Mr Laniado was relied upon as a comparator which the tribunal upheld, and in respect of the complaint about delay which it upheld.

106. In relation to the delay, on the tribunal's findings the major factor was the decision to link the claimant's case and that of Mr Motiwala. It appears to us that the tribunal considered (though it did not spell it out) that that decision was conduct amounting to (at least) unconscious direct race discrimination. The difficulty with this is two-fold. First, it was not among the conduct which the claimant specifically identified as discriminatory conduct of which he complained (the **Chapman v Simon** point). That is a material point, particularly in a case where a represented claimant had identified prior to trial some twenty discrete and specific instances of conduct complained of.

107. Secondly, in any event, the tribunal's findings that this decision was unnecessary, and a matter of limited administrative convenience, would not, in and of themselves, point to the conclusion that the conduct was because of race. As to that, it again appears that it was the tribunal's view of the statistics, and the complacency of witnesses in relation them, which was an essential part of its (implicit) conclusion that it was not satisfied that race was not, at least, an unconscious factor influencing the decision to link the two cases. But, once again (and even had the linkage been specifically complained of as conduct amounting to direct discrimination), it was, in our judgment, necessary for the tribunal to explain what it made of the research evidence on which the respondent relied, in answer to the case drawing on the statistics relied upon by the claimant as undermining the

non-discriminatory explanation put forward by the respondent for that particular decision.

108. Finally, the tribunal also relied upon what it called the "apparent tenacity in the investigation of peripheral complaints". Like Ms Monaghan KC, we infer (though the tribunal unhelpfully did not specifically say) that this was a reference to the evidence of further follow-up in relation to the Spire allegation, between August and December 2015. As we have said, we do not think that the factual finding in that regard was perverse; and the tribunal was entitled to rely upon it, as such, as contributing to a factual matrix from which it might infer discrimination in the absence of an explanation showing otherwise. But this does not affect the flaws in the tribunal's reasoning as to why it rejected the respondent's case as to the non-discriminatory explanations for its decisions.

Conclusions

109. Standing back, as we come to our own conclusion, we have been mindful of Ms Monaghan KC's forceful submission that this was a detailed and lengthy decision by a highly experienced employment tribunal which, unlike the EAT, heard and considered all of the evidence, arising from a multi-day hearing, and had the responsibility of making the findings of fact and deciding what inferences and conclusions to draw from them; and of the strict limits of our role as an appellate court.

110. It also comes across clearly, that the tribunal was very troubled by the picture which it found, of a context in which (in the terminology used by it and the parties) BME doctors are over-represented in those referred to the respondent and whose conduct is investigated, and in adverse outcomes; of a process relating to a case against a BME doctor (relating to his conduct in support of another BME doctor) which was – in the tribunal's view – needlessly prolonged; in which allegations against a non-BME doctor arising out of some of the same incidents were resolved appreciably sooner; and in which there was no system for proactively monitoring or analysing the length of time which each case was taking to progress and complete.

111. However, the complaints which the **Equality Act** enables an aggrieved doctor to bring to the

employment tribunal are (among others) of indirect or direct discrimination. This was not a complaint of indirect discrimination. Direct discrimination may be either conscious or unconscious. But while the respondent to such a complaint is the organisation itself, the particular instance of conduct complained of must always be identified, and the tribunal must consider in each instance whether that conduct, on the part of the person(s) concerned in it, was because of the characteristic relied upon.

112. Statistics are not only potentially relevant to complaints of indirect discrimination. As Ms Monaghan KC rightly submitted, in some cases they may properly be found to support an inference that race has, consciously or not, directly influenced an individual decision. However, the authorities also establish that the tribunal must tread with particular care when considering drawing an inference of discrimination from primary facts, and particularly when inferring unconscious discrimination; and, where a respondent has put forward what it says was the non-discriminatory explanation for the particular conduct concerned, it must engage with that case in relation to that particular conduct.

113. These points are all discussed in the following passage from the EAT's decision in **Bahl** (upheld by the Court of Appeal), to which we have already made some reference.

> **"117. A tribunal does of course have an obligation to give a clear reasoned decision. The basic principle is that set out by Lord Justice Bingham as he then was, in Meek v City of Birmingham District Council [1987] IRLR 250 at page 251 when he said this:**
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> **'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 a refined legal Draughtsmanship but it must contain an outline of the story which has given rise to the complaint and a summary of the tribunals basic factual conclusions and a statement of the reasons which led them to reach the conclusion which they do so on those basic facts. The parties are entitled to be told why they have won or lost. There should be a sufficient account of the facts and the reasoning to enable EAT or on further appeal this court to see whether the question of law arises……'**
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> **116. However, in discrimination cases, where inferences from primary facts play such an important role, it is necessary for the tribunal to set out its principal findings of primary fact and also the basis on which it has made any inference from those facts. In addition the tribunal should consider all relevant issues which may cast light on the question of whether or not discrimination has occurred. Two Court of Appeal decisions consider the nature and extent of the reasons, which tribunals should provide in discrimination cases. In Chapman v Simon [1994] IRLR 124 Lord Justice Peter Gibson in the course of his judgment said this:**
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> **'More often racial discrimination will have to be established, if at all, as a matter**

of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the Tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the Tribunal can say what those facts are. A mere intuitive hunch, for example, that there has been unlawful discrimination, is insufficient without facts being found to support that conclusion.'

He added later in his judgment (paragraph 47) that:

'…in my judgment it is not fair to those found guilty of racial discrimination that…an inference should stand in the absence of primary facts that would support it.'

117. These comments were cited with approval in the Anya case to which we have made reference. In the course of giving judgment, Sedley LJ said this:

'There is at least one further obstacle to Mr Underhill's stalwart defence of the industrial tribunal's decision. The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues.'

118. Moreover, a tribunal should take special care to explain how it has reached its conclusions if it finds unconscious discrimination. In Governors of Warwick Park School v Hazelhurst [2001] EWCA Civ 2056 Pill LJ, giving judgment in the Court of Appeal, commented (paras 24-25):

'In my judgment the Employment Appeal Tribunal were correct to hold that there was an error of law in the decision of the Employment Tribunal as identified by the Employment Appeal Tribunal. In a situation in which it is expressly found that there was no deliberate or conscious racial discrimination, it is necessary, before drawing the inference sought to be drawn, to set out the facts relied on and the process by which the inference is drawn. In some cases that process of reasoning need only be brief; in other cases more detailed reasoning will be required. The Employment Appeal Tribunal approached the matter in this way:

'... we do suggest that the less obvious the primary facts are as pointers or the more inconclusive or ambivalent the explanations given for the events in issue are as pointers, the more the need for the Employment Tribunal to explain why it is that from such primary facts and upon such explanations the inference that they have drawn has been drawn. The more equivocal the primary facts, the more the Employment Tribunal needs to explain why they have concluded as they have.'

At page 11:

'As we have mentioned the tribunal repeatedly said that there had been no intention to discriminate. That, of course, is not in itself an answer but it is likely to lead to a position in which the reasons for the inference of racial discrimination need to be fully explained.'

> **119. In addition to approving the approach of the Employment Appeal Tribunal, Pill LJ also observed, in a passage relied upon by Lord Hutton in the House of Lords in Shamoon (see para. 88), that 'in the absence of reasoning, there is a danger that the inference has been wrongly drawn.'**
> **120. Mr de Mello submitted that even where the reasoning of the tribunal itself is less than satisfactory, it is legitimate for a court to have regard to the submissions, which are made to the judge, and to consider the reasoning in the light of those submissions. For this proposition he relied on the case of English v Emery Reimbold & Strick Limited [2002] 1 WLR 2409 and [2002] EWCA Civ 605. In that case Lord Phillips MR commented that:**
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> **'Justice will not be done if it is not apparent to the parties why one has won and the other has lost'**
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> **121. But he also indicated that in an appropriate case the parties as informed observers may be able to spell out any deficiency in the formal reasons from the submissions made by the parties. His Lordship put the position as follows (para 26):**
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> **'Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed….'**
>
> **122. It be must be emphasised, however, that it will only be in a limited class of case that it will be possible to make good inadequate reasoning in this way. The submissions may make plain what was the issue in dispute as was indeed the position in the English case itself, for example: see paragraphs 42 to 43 of the judgment. It is not, however; legitimate to infer that a tribunal must properly have directed itself in law because it was referred to relevant authorities by the parties; nor that it must have had regard to relevant facts because the submissions made reference to them. It is no answer to a challenge to the reasoning of the tribunal that disputed questions of law, fact or inference were raised as issues before the tribunal. The crucial question is how the tribunal resolved those disputed questions, and only the tribunal's reasoning can disclose that."**

114. Ms Monaghan KC submitted that the present tribunal had worked through each of the discrete complaints of discriminatory conduct, in a structured way, carefully taking account, in a nuanced way, of the nature of each particular decision, and how matters stood, at the particular stage in the process when the given decision was taken. A large number of the particular complaints of race discrimination had failed, which was also reflective of the tribunal's meticulous approach.

115. But while the tribunal did indeed work through the complaints in turn (permissibly grouping some together) there were, in our judgment, as we have explained, some inescapable conflicts or contradictions between certain of the findings it made along the way. The tribunal also failed to

explain why important aspects of the respondent's defences did not succeed. It also described its conclusions on the question of which particular race discrimination complaints were upheld, with too broad a brush. This resulted, regrettably, in a situation in which two leading counsel were unable to agree on a definitive list of which complaints had actually been upheld, and, in respect of one of them we were left uncertain. We have accordingly upheld the particular points raised by grounds 1 – 5, 7 and 8 that we have identified in this decision.

Outcome

116. A draft of this judgment was circulated to counsel. In the final paragraph we wrote: "All of this leads us to our conclusion that the judgement upholding the complaints of direct race discrimination, both as to complaints for which Mr Laniado was a comparator, and in relation to the matter of delay (being possibly the first, and certainly the fourth, fifth and sixth, of the complaints of race discrimination that we have identified at [21] of our decision above), cannot stand; and the appeal must be allowed." We invited submissions on the appropriate order.

117. Mr Hare KC submitted a draft order remitting those four complaints to a differently constituted tribunal, and a submission as to why the matter should not return to the same panel. Ms Monaghan KC and Mr Jupp accepted (for slightly different reasons) that remission should be to a different panel. However, they invited us to remit all twenty of the complaints of race discrimination in the list of issues, or, alternatively, all six of those that we have referred to at [22]. They submitted that we have the power to do so, and that, given the related nature of the complaints and our reasoning, it would be artificial and unjust not to do so, citing **Askew v Victoria Sporting Club Limited** [1976] ICR 302 and **Rodriguez-Noza v Abertawe Bro Morgannwg University Health Board** [2013] EWCA Civ 1860 at [13]. That drew a further written submission from Mr Hare KC in reply and opposition on that point. We then also received a further submission from Ms Monaghan KC and Mr Jupp focussing on the contention that, at least, the six complaints at [22] should be remitted.

118. Our conclusions are these. First, in neither of the foregoing two authorities was the scenario

on all fours with the present case. In this case, the appeal related, only, to the particular complaints of race discrimination that the tribunal had upheld. Ms Monaghan KC's case on behalf of the claimant was that four complaints of race discrimination had been upheld. We have found that she was right about that. Had the claimant wished to challenge the decisions in respect of some or all of the other complaints, that were not upheld, it would have been open to him to appeal, or cross-appeal, in respect of those complaints. Had he done so the scope of the arguments and our decision would also have been quite different. Justice does not require us to remit all twenty complaints to the tribunal, and it would be unfair to the respondent to do so.

119. As to the two complaints referred to at [22] above in relation to which Mr Hare KC submitted the outcome was unclear, but, if they had been upheld, then the tribunal had erred, Ms Monaghan KC submitted that the tribunal had not upheld them. While we considered those complaints, in the event we ultimately agreed with Ms Monaghan KC that they had not been upheld. There was no challenge by the claimant to that outcome, nor in any event did we find that the tribunal had been wrong not to uphold them. Once again we conclude that it would be neither necessary nor fair to direct that the outcome of those complaints be reopened and reconsidered by the tribunal.

120. We therefore allow the appeal, and remit, only, for fresh consideration, the complaints that the respondent directly discriminated against the claimant because of race by (1) the decision to apply for a second time to the IOP in February 2015; (2) the failure to progress exactly the same allegation against Mr Laniado by Mr Rao about the 16 January 2014 meeting; (3) despite forming the view that Mr Rao was unreliable and conveying that view to Mr Laniado when ceasing the investigation against him in 2016, proceeding with the allegation concerning Mr Rao against the claimant; and (4) the delay in dealing with the complaints against the claimant. We will direct that remission be to a differently constituted tribunal. That is having regard in particular to the nature of the issues, that requires a fresh eye, and the passage of time.