Appeal No. UKEAT/0283/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 17 February 2017
Judgment handed down on 14 March 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MRS S TALBOT — APPELLANT

(1) COSTAIN OIL, GAS & PROCESS LTD
(2) COSTAIN GROUP PLC
(3) COSTAIN LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS SALLY ROBERTSON (of Counsel) Direct Public Access
For the Respondents	MR BEN WILLIAMS (of Counsel) Instructed by: Messrs Pinsent Masons LLP 3 Hardman Street Manchester M3 3AU

SUMMARY

SEX DISCRIMINATION - Inferring discrimination

The Claimant worked on an agency basis as an engineer at Sellafield Nuclear Power Plant; she was the only woman in a male dominated world. After only 12 weeks her contract was terminated and she was escorted from site.

She brought claims for sex discrimination and/or harassment based on 17 allegations, including the termination of her contract. The Employment Tribunal rejected all the claims on the basis either that she had not proved the allegation itself or not proved that any treatment or conduct involved was because of or related to her sex.

The Employment Tribunal did not approach its fact-finding task properly both in relation to finding "primary facts" and in relation to the proper inferences to be drawn on discrimination. They failed to have regard to the overall picture presented by the evidence or the totality of the circumstances from which inferences could be drawn; they failed to make proper assessments of the parties and the witnesses; they failed to properly consider factors pointing towards discrimination; and they placed too ready a reliance on the burden of proof.

Overall, this was an error of law and the appeal had to be allowed and the whole matter remitted to a fresh Employment Tribunal for re-hearing.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against a Judgment of the Employment Tribunal sitting in Manchester (Employment Judge Slater, Mr Tyndall and Mrs Ormshaw) sent out on 23 December 2015 rejecting Mrs Talbot's claims of sex discrimination and harassment against the Respondents. The Judgment followed a four day hearing at which Mrs Talbot represented herself. The Respondents were represented by Mr Williams who has also represented them on this appeal. They are all part of the same group of companies and nothing turns on the corporate arrangements; I will refer to them as "Costain".

2. The relevant provisions of the **Equality Act 2010** are as follows:

> **"13.** ***Direct discrimination***
>
> **(1) A person (A) discriminates against another (B) if, because of [B's sex], A treats B less favourably than A treats or would treat others.**
>
> **…**
>
> **26.** ***Harassment***
>
> **(1) A person (A) harasses another (B) if -**
>
> > **(a) A engages in unwanted conduct related to [B's sex], and**
> >
> > **(b) the conduct has the purpose or effect of -**
> >
> > > **(i) violating B's dignity or**
> > >
> > > **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -**
>
> > **(a) the perception of B;**
> >
> > **(b) the other circumstances of the case;**
> >
> > **(c) whether it is reasonable for the conduct to have that effect."**

The Facts

3. The facts set out below are, unless otherwise stated, taken from the Tribunal's Judgment.

4. Mrs Talbot is a very experienced engineer, having started her career in 1981. She has worked at Sellafield Nuclear Power Station in the past. On 6 May 2014 she was engaged (on an agency basis through a company called Morson International) as a Mechanical Engineer to work for Costain on the so-called "Evap D" project at Sellafield. The project was an important one for the long-term future of the power station and there had been problems with it, highlighted in the Chief Nuclear Inspector's 2013 annual report. She was told in interview that Costain wanted an experienced engineer who could shake things up on site and drive the changes that were needed with the project. Mrs Talbot had been the only female candidate of 12 whose CVs were sent to Costain. Further, although as far as I can see the Tribunal do not record the point, once appointed she was (as Mr Williams himself put it) "the only woman in a male dominated world".

5. Brian Hopcraft, whose job title was Mechanical Manager, was Mrs Talbot's assigned manager. He allocated her the role of "equipment engineer" and at the same time he made Lee Dolan (who started on site with Mrs Talbot but had no previous experience at Sellafield) and Callum Woodend "systems engineers" and instructed her to report her progress to them.

6. It seems that Mr Hopcraft regarded the job he had allocated to Mrs Talbot as involving "administrative paperwork" rather than being an engineer's job and considered it a waste of time. Mr Hopcraft told the Tribunal that in allocating jobs he regarded experience as the important thing but he accepted he had not seen Mrs Talbot's CV when allocating this job to

her. Although the Tribunal do not expressly say so, it is clear that Mrs Talbot did not regard her job as inferior or a waste of time and she did not complain about being assigned it. She considered that in assembling "work packages" she needed to check everything and assemble all the backup documentation; this view was based on her interview and her understanding of the inadequacies identified by the Inspector. Mr Hopcroft told her frequently that her approach to her work was wrong and that she was putting too much information into the work packages and taking too long to complete them.

7. Over the next few months a hostile atmosphere developed between Mrs Talbot and her male colleagues, Mr Hopcraft, Mr Dolan and Dave Ward, who was based in the same office as her. Mr Dolan and Mr Ward told her that her approach to her work was wrong; the Tribunal found that their view about what was required was taken from Mr Hopcroft. They also frequently and openly questioned and criticised her personality and told her that she was arrogant and aggressive and thought she knew everything and they complained about her to Mr Hopcraft. Mr Ward also declared frequently, openly and loudly that her work was a waste of time and that she did not know what she was doing and he would not work with her, on one occasion (as I read the Judgment at paragraph 36) actually lying about his involvement in something she was asking about. As for Mr Dolan, he said to her on one occasion "I have never met anything like you"; and he would change his clothes in their shared office in front of Mrs Talbot.

8. Mr Hopcraft also frequently and openly questioned and criticised Mrs Talbot's personality and frequently told colleagues that he thought the documentation she was working on was a waste of time and that she was not doing an engineer's job. At a meeting in June 2014 he told her that he had received complaints about her from team members who had said they

had a problem working with her because she was arrogant and aggressive; he told her she was too pushy, forceful and generally unlikeable and that she should be "gentler, kinder and generally nicer" especially to her team. He accepted before the Tribunal that he would not have used such words to a man. He also accepted that he had not had a female engineer working for him before and, although he denied it, the Tribunal found that he told Mrs Talbot that he found it difficult to approach her because she was a female engineer.

9. So far as Mrs Talbot was concerned, the Tribunal found that she had a low opinion of her work colleagues and made it apparent to them, but they rejected allegations that she had abused and insulted colleagues, on the basis that there was nothing on paper to support those allegations and Mr Hopcraft had on his own account sought another job for her on site when he dispensed with her services and that he would not have made these efforts if her attitude was as bad as he alleged.

10. On 24 July 2014, about 12 weeks after she had started, Mrs Talbot was told by Mr Hopcraft that unfortunately her contract was being terminated because of "business HR changes" and he ordered her removal from site immediately under escort. Morson were not informed that this was to happen.

11. In Costain's response form they said that Morson had been told in early July 2014 that Mrs Talbot was being monitored following an incident where she had been spoken to about attitude and language; the Tribunal rejected this because it was not consistent with what Morson's later emails to Mrs Talbot and because Mr Hopcraft himself said he was unaware of it. The response form also said that it was necessary in view of the work that was available to release a mechanical engineer from the project and that Mrs Talbot had been selected because

of concerns over her attitude and interaction with others on site; again, the Tribunal rejected this on the basis that Costain had recruited another engineer just before Mrs Talbot's contract was terminated. As to her being escorted from site the response form said that she was escorted because of her behaviour; the Tribunal rejected this too, on the basis of Mr Hopcraft's evidence that anyone leaving site is escorted which the Tribunal said was consistent with what they would expect. No documents were disclosed by Costain relating to the termination of the contract with Morson under which Mrs Talbot's services were provided.

The Claims, the Tribunal's Decision and Mrs Talbot's Appeal

12. On 13 August 2014 Mrs Talbot wrote to Morson stating that she thought Mr Hopcraft's behaviour had been appallingly discriminatory, both during the contract and by his termination of it, and that this was only the second time in her career that she had sought legal advice on such issues. In due course she brought claims in the Tribunal, raising 17 allegations of sex discrimination and/or harassment variously against Messrs Hopcraft, Ward and Dolan, culminating most importantly with the claim that in terminating her contract Mr Hopcraft was discriminating against her.

13. The Tribunal rejected all her claims, either on the basis that she had not proved the facts that she said involved less favourable treatment or harassment or that, where she had done so, her treatment was not "because of" or "related to" her sex. On the all-important question of why her contract was terminated by Mr Hopcroft the Tribunal found that it was because he considered she was not doing her work in the way that he wanted her to do it and therefore not getting enough done and because of complaints about her from others; neither of these reasons, they found, were because of or related to her sex.

14. Mrs Talbot appeals against the Tribunal's decision on the basis that they took an unduly "fragmented approach" to the evidence and applied the burden of proof wrongly. She also says that the Tribunal misapplied the law in section 26 of the **Equality Act 2010** in relation to harassment.

The Proper Approach to the Facts in Equality Act Cases

15. My attention was drawn to no fewer than ten authorities on the vexed question of how a Tribunal should approach the issue of whether there has been unlawful discrimination under the **Equality Act 2010** and its statutory predecessors, most importantly **Qureshi v Victoria University of Manchester** [2001] ICR 863 EAT (decided in 1996 though reported much later) and **Anya v University of Oxford** [2001] EWCA Civ 405. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination. It seems to me that the principles to be derived from the authorities are these:

(1) It is very unusual to find direct evidence of discrimination;

(2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;

(3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;

(4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;

(5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;

(6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;

(7) If it is necessary to resort to the burden of proof in this context, section 136 of the **Equality Act 2010** provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination.

16. Those principles relate particularly to deciding whether proven unfavourable treatment involves unlawful discrimination but it is also necessary in this kind of case for Tribunals to keep in mind general principles about fact-finding when deciding the so-called "primary facts" (which will often, as here, include matters which are themselves said to amount to discriminatory treatment). Thus, as juries are told every day in the criminal courts, it is necessary to have regard to the overall picture presented by the evidence in deciding any discrete issue of fact. It is also necessary to consider the inherent probabilities of what a

witness is saying and how well it fits with "objective" facts (i.e. things which are undisputed or indisputable). And in deciding where the truth lies the fact-finding tribunal should make some overall assessment of the relevant witness or party, which includes taking account, for example, of how he dealt with questions in cross-examination, any demonstrable lies or exaggerations, and (perhaps only to a limited degree nowadays) his so-called "demeanour". Reference to the burden of proof in a civil case is really a matter of last resort, to be avoided if at all possible.

Findings of Primary Fact

17. The Tribunal's general approach to its fact-finding task in this case was set out in paragraph 5 of the Reasons in this way:

> **"5. The tribunal was faced, in relation to many of the complaints, by a situation where there was oral evidence only from each party, which differed in important respects, with no corroborating documentary evidence. The tribunal did not feel there was any basis on which the tribunal could prefer generally the evidence of the claimant to the respondent. We set out, in relation to each allegation, our reasons for making the relevant findings of fact. We are aware of the difficulties victims of discrimination face in proving discrimination. However, we must act in accordance with the law which places the initial burden of proof on the claimant. Where there is no basis on which we consider we can properly prefer the evidence of the claimant to the respondent in relation to a particular allegation, the operation of this burden of proof means that we cannot find that complaint to be well founded."**

It is right of course that a Tribunal's precise approach to the facts will differ in every case and depend on the nature of the evidence presented, but it seems to me that in this passage the Tribunal are indicating too narrow an approach to their fact-finding task. They appear to be forgetting to look at the overall picture when deciding any discrete issue, to be eschewing any attempt to reach views about the witnesses overall, to be forgetting about inherent probabilities and to be placing too ready a reliance on the burden of proof. When they refer to "corroborating documentary evidence" they appear to be forgetting the potential significance of documents not recording things or not being produced by the party in possession of them.

18. It seems to me that this over-narrow approach has undermined the Tribunal's findings of primary fact in relation to a number of the allegations made by Mrs Talbot which the Tribunal rejected without considering whether they involved discrimination. This applies in particular in my view to allegations 1, 7, 5(e), 6(d) and 15 for the reasons which follow.

Allegations 1 and 7

19. In allegations 1 and 7 Mrs Talbot alleged in effect that she was excluded by Mr Hopcraft from team meetings and technical meetings with other departments. It was her evidence (which appears not to have been challenged) that during her time on site she attended only one team meeting and no technical meetings. Costain's case was that there was only one team meeting during this period (not four as she alleged) and that, although there were technical meetings which Mr Hopcraft attended with Mr Dolan and Mr Woodend, they did not relate to her area of work. Although Costain produced no documents at all relevant to these allegations and the Tribunal stated at the outset of the Judgment that they had in general not complied with their disclosure obligations, the Tribunal found that there was nothing which led them to prefer Mrs Talbot's evidence about the meetings to that of Costain's witnesses and that she had not therefore satisfied the burden of proof on these allegations and rejected them on those grounds.

20. Apart from the fact that the Tribunal made no overall assessment of the witnesses, it seems to me that in making this finding they have rather overlooked the inherent probabilities and failed properly to consider what inferences that they could draw from the lack of documents. This was, after all, an engineering project run by a large company in a nuclear power station with a history of problems. Any suggestion that there were not regular meetings of all kinds and that things were not written down surely needed to be looked at carefully. I

cannot help but feel that the Tribunal have failed to approach the matter as rigorously as they should have in considering these allegations.

Allegation 5(e)

21. Mrs Talbot alleged that whenever she tried to discuss work with Mr Ward he would tell her "to stop giving him earache because he got enough of that at home from his wife and daughter" (paragraph 37 of the Judgment). This would obviously be an important matter when it came to assessing whether Mr Ward's overall treatment of her involved sex discrimination but the Tribunal simply record that the two witnesses concerned gave conflicting evidence about the matter and that, there being no basis for preferring one over the other, the allegation was not proved.

22. It seems to me that in approaching matters in this way the Tribunal failed to have regard to the overall picture or to take account of any assessment of the two witnesses involved, or indeed to consider the overall probabilities by asking themselves a question along the lines of whether this allegation "had the ring of truth". So far as Mr Ward is concerned not only did they have the benefit of seeing him give evidence but there was material in paragraphs 33 to 36 of the Judgment from which it seems to me they could have made such an assessment: (as I read paragraph 33) they had found that he was partly responsible for a hostile working environment with Mrs Talbot; they had found that he frequently, openly and loudly criticised her work and said it was a waste of time and that she was building a document empire for her own financial gain; and they had found that he had refused to work with her, on one occasion (as I read paragraph 36) lying about a missing pipe.

Allegation 6(d)

23. Mrs Talbot alleged that Mr Dolan told her that "she was not like a bloke in supporting a family" (see paragraph 42 of the Judgment). This was potentially an important factor (betraying as it does a highly stereotypical view of a woman's role) for the Tribunal to take into account when it came to assessing the reason for Mr Dolan's treatment of Mrs Talbot, but again the Tribunal simply stated that there was no basis for preferring Mrs Talbot's evidence to Mr Dolan's and that she had therefore not proved the allegation.

24. Again, it seems to me the Tribunal failed to look at the overall picture here and that they ought to have made and taken into account some assessment of the two witnesses involved. So far as Mr Dolan was concerned, there were a number of potentially relevant findings in paragraphs 37 to 42, not least that he had said to Mrs Talbot that he had never met anything like her and that he had said in his witness statement that Mrs Talbot said of most people that they were "stupid, thick or a wanker which coming from a lady is not usually heard". In fairness, I should say that the Tribunal did consider the latter statement and conclude that it was not sufficient to persuade them that Mr Dolan would also hold the stereotypical view that only men were "breadwinners"; it seems questionable to me whether that can possibly have been a reasonable conclusion but, in any event, as I have said, there was plenty of other material which they ought to have considered in deciding where the truth lay on this discrete allegation.

Allegation 15

25. Mrs Talbot alleged that at the only team meeting she did attend Mr Hopcraft dismissed her comments as irrelevant. The Tribunal dismissed this allegation in two sentences saying that there was no reason to prefer her version and she had not satisfied the burden of proof.

26. Again, it seems to me the Tribunal have not done her case justice here: they failed to make an overall assessment of the witnesses; they failed to consider the implications of Costain's failure to produce relevant documents and they failed to take account of their findings about Mr Hopcraft's view of the work she was doing.

Findings on Discrimination

27. In spite of the approach the Tribunal took in relation to issues of primary fact, the Tribunal actually found the majority of Mrs Talbot's allegations proved. Thus, they found: (1) that Mrs Talbot's personality was criticised by Mr Hopcraft, Mr Ward and Mr Dolan (allegation 3); (2) that they told her she was wrong in her approach to her work (allegation 4); (3) (if I read the findings correctly) that Messrs Ward and Dolan contributed to the creation of a hostile environment for her to work in (allegations 5 and 6); (4) that Mr Dolan said that he had never met anything like her (allegation 6(c)); (5) that she was made to report her progress to Messrs Dolan and Woodend (allegation 8); (6) that Mr Hopcraft told team members that what she was doing was not an engineer's work and was a waste of time (allegations 9 and 10), a view which was adopted by Messrs Ward and Dolan; (7) that Mr Hopcraft failed to complete a skills and experience assessment for her (allegation 11); (8) that Mr Hopcroft told her at a meeting that he found her difficult to deal with because she was a woman engineer and that she was too "pushy, forceful and generally unlikeable" and should be "gentler, kinder and nicer" (allegation 13); (9) that he ordered her immediate escorted removal from site which involved the termination of her contract (allegations 16 and 17).

28. But the Tribunal nevertheless rejected all her claims arising from the proven allegations on the basis that she had not proved that the treatment or conduct in question was because of or related to her sex. Looking at the relevant paragraphs under the heading "Conclusions" in the

Tribunal's Judgment, I think Ms Robertson is right to say that in deciding whether there was discrimination in relation to any particular allegation the Tribunal fell into the error of looking at the evidence about the allegation in isolation and simply failed to have regard to the totality of the relevant circumstances. Those circumstances should have included not only all the other proven allegations but possibly the rejected allegations which I refer to above, and also, crucially, proper assessments of the parties and their witnesses.

29. In relation to Mr Hopcroft, and in particular the all-important decision to terminate Mrs Talbot's contract, the Tribunal accepted his evidence as to the reasons for the termination (see paragraph 63 of the Judgment) and then stated baldly that there was no evidence that his view about Mrs Talbot's work was influenced by her sex and that there was "insufficient evidence" of any link between complaints made about her by others and her sex (paragraph 116). It seems to me that in deciding whether or not it was proper to draw the inference that her contract was terminated because of her sex, the Tribunal ought to have had regard to and properly considered not only Mr Hopcroft's explanation for the termination but also, as part of the totality of the circumstances and/or an assessment of the man, such factors as (a) his treatment of Mrs Talbot from the outset, including the fact (which the Tribunal seem to totally ignore) that he assigned her a job which he regarded as a waste of time reporting to Mr Dolan without even looking at her CV; (b) the fact that he never carried out a site required skills and experience assessment on her as he should have (allegation 11, which the Tribunal appear to totally ignore); (c) the fact that he told her to be "gentler, kinder and generally nicer", words he admitted he would not have used to a man; (d) the fact that there was nothing in writing about any problems with her work and the Tribunal found at paragraph 63 that her attitude was not as bad as he alleged; (e) the fact that Costain's response wrongly suggested (i) that Morson had been told she was being monitored in early July 2014 and (ii) that she was terminated in effect because of a redundancy

situation; (f) whether, assuming the disagreement about the scope of her job was genuine, Mr Hopcroft would have treated a man with whom he had a similar disagreement in the same way. It does not seem to me from the Judgment that these factors, which may have pointed towards a finding of discrimination, were properly considered in assessing Mr Hopcroft's reasons for terminating Mrs Talbot's contract.

30. Mr Williams accepted that the Judgment was not perfect. Indeed, he said that it was in some ways unsatisfactory for his clients too in that it failed to make a clear assessment of the motivation of their witnesses. But, he said, the Tribunal was entitled to make the findings of fact they had on the individual allegations and to accept some parts of their evidence and not others and were not obliged to transpose findings against them into each and every complaint.

31. I am acutely conscious that this Tribunal can only interfere with a decision of the Employment Tribunal which involves an error of law. I note that the Appellant has not suggested that the decisions in this case were perverse. I bear in mind that a finding of fact based on inference is as much a finding of fact as any other. But, for the reasons I have set out above, I have come to the firm view that the Tribunal in this case approached matters in an over-fragmented way, failed to make appropriate assessments of the parties and witnesses, did not have regard to the totality of the circumstances in considering what inferences to draw and failed to give proper consideration to factors which pointed towards a conclusion of discrimination. As such, I am satisfied that they went wrong in law and that their conclusions cannot therefore stand.

Harassment

32. There are also two distinct grounds of appeal in relation to Mrs Talbot's allegations of harassment against Messrs Ward and Dolan (allegations 5 and 6). Given my decision on the main grounds of appeal they are perhaps academic but I have considered them anyway.

33. First, the Tribunal found that a hostile environment developed between Mr Ward and Mrs Talbot but said that "… the claimant has not satisfied us, on a balance of probabilities, that this atmosphere was the sole creation of Mr Ward" (paragraph 33 of the Judgment); and they made identical findings in relation to Mr Dolan (paragraph 38 of the Judgment). Ms Robertson says (rightly I think) that it is not entirely clear what the Tribunal really mean here but in any event she says that, assuming what the Tribunal mean is that both Mrs Talbot and Mr Ward (or Mr Dolan) contributed to the hostile environment between them, that would not in itself be an answer to an allegation of harassment against Mr Ward (or Mr Dolan). Mr Williams says that the fact that Mrs Talbot contributed to the hostility must be a relevant consideration in deciding whether there was harassment. It seems to me that they are probably both right in these submissions. The problem is that the Tribunal has not made clear and explicit findings about what was going on and, as such, their reasons are in my view clearly deficient on this point. Mr Williams also pointed out that if there was any error of this nature it would make no difference in relation to the harassment claims because the Tribunal had also found that any conduct by Messrs Ward and Dolan was not "related to sex"; given my decision on the main grounds of appeal, that answer to the point has obviously gone.

34. Second, in relation to allegation 6(c) (that Mr Dolan told Mrs Talbot he had never met anything like her), the Tribunal found that, even if his comment related to sex, he had not violated her dignity or created the relevant environment for her because she was "… a resilient

character and she [had] not … suffered detriment by reason of the remark" (paragraph 101 of the Judgment). Ms Robertson says that the fact that Mrs Talbot may have been resilient could not mean that the conduct was not harassment. Mr Williams says in effect that the Tribunal was entitled to reach the view that there was no harassment taking Mrs Talbot's character into account in this way. I would agree that where harassment is alleged a Tribunal will obviously want to look at the whole picture, including the subjective reaction of the alleged victim, but it cannot be right that conduct which would otherwise be harassment is somehow excused because the person on the receiving end is able to deal with it and, if that was what the Tribunal were intending to convey, that must be an error. Again, the truth is I am afraid that the Tribunal's findings are simply lacking in sufficient clarity on this point.

Disposal

35. The appeal is allowed and the Tribunal's Judgment must be set aside in its entirety. Regrettably the whole case will have to be remitted to a fresh Tribunal for re-hearing.