

Neutral Citation Number: [2026] EAT 154

Case No: EA-2023-001209-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 October 2026

Before:

JOHN BOWERS KC
DEPUTY JUDGE OF THE HIGH COURT

Between:

MR WYC SHING

Appellant

- and -

UNIVERSITY OF THE ARTS LONDON

Respondent

Ms E Cho, Advocate (instructed by Pro Bono) for the **Appellant**
Mr A Ohringer (instructed by Legal Services Department) for the **Respondent**

Hearing date: 6 October 2026

JUDGMENT

SUMMARY

Comparators; involvement of HR in decision making in dismissal cases

Where the case for the Chinese claimant was that he had not been treated as leniently as actual comparators G & H, it was open to the tribunal to decide that the circumstances of both G & H were materially different. It was not necessary for the tribunal to consider a hypothetical comparator which would have been an empty and arid exercise given that the hypothetical comparator would have been the Claimant who was other than Chinese.

The decision in **Ramphal v Dept of Transport** [2015] IRLR 985 was not authority that any intervention by HR in advising on a decision to dismiss rendered a dismissal unfair. Indeed it was important that HR helped to maintain consistency between decisions in different parts of an organisation.

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT:

1. This appeal raises important points on the law on hypothetical comparators and the extent to which HR managers may be involved in a decision to dismiss. There is also a reasons challenge.
2. The tribunal carry out a masterful analysis of the facts which I will not repeat here. The essence of the case is that Mr Shing who was a Senior Lecturer at the Respondent's Chelsea, Camberwell and Wimbledon Colleges carried on a relationship with a student which was deemed to be inappropriate (although he was not her allocated tutor at any point). The student was known in the tribunal only as EA. She was a mature student on the BA Honours Interior and Spatial Design course. The relationship was briefly romantic during the course of which he offered her a ticket to New York. She complained to the Respondent about the behaviour of the Claimant. He was in due course dismissed summarily. The decision was taken by Prof Crow.
3. In the course of the disciplinary procedure, the Claimant wrote "I acknowledge clearly that I made unintentional errors in my relationship with EA. I am now aware of the 'professional boundaries' policy. I am very keen to do any training available and to receive support on this policy".
4. One of the Claimant's claim in the tribunal was of discrimination on the grounds of his Chinese race (ethnic and national origin). It was however solely based on a comparison between his case and that of G and H. (para.126) who were also employed at UAL in essentially similar positions. The Claimant's main point was that they were each treated more leniently than he was when they had committed similar misconduct.
5. The Equality Act 2010 says in s23 that to be statutory comparators there must be no material difference between the circumstances relating to the claimant and the comparator(s). The tribunal

here found that G and H were not comparators for these purposes (often called statutory or direct comparators); neither did they assist as “evidential” comparators. (para.136) because their conduct was not as serious as that of Mr Shing and one of them was very contrite.

Comparators

6. Ms Cho Counsel for the Claimant relied on para 21 of **Balamoody v UKCCNMV** [2002] ICR 646 which says that “it is necessary to construct a hypothetical comparator to show how a person of the other racial group would have been treated.” As **Shamoon v Chief Constable of the RUC** [2003] ICR 337 makes clear, comparators even if they fail the statutory test may have an evidential role. The Claimant also relied on paras 35.3 and 35.4 of **Jones v Secretary of State** [2025] ICR 1503 so that that “shows how the ET should have considered an evidential comparator where there are material differences, but circumstances are sufficiently similar, and how the ET should have considered how another person would have been treated”.

7. Paragraph 4 of the Revised Grounds of Appeal puts the point well when it states that G was investigated for misuse of power; inappropriate conduct relating to students; inappropriate physical touching whilst H was investigated for sending inappropriate and unwanted text messages. It may be said that these are similar matters to those of which the Claimant was accused but the tribunal found major differences which is a conclusion with which the EAT will not interfere save on grounds of perversity which is not alleged here.

8. The tribunal made clear and extensive findings about the cases of both G & H. Against G, only two allegations were upheld at the disciplinary hearing – ‘going to the pub to socialise [with students] when he was due to engage in final year assessments of the students the following week’ and ‘breaching the terms of his suspension by meeting a work colleague and discussing the subject matter of the investigation.’ This was held to be less serious than the conduct found against the

Claimant. H was given a Final Written Warning but this reflected his recognition of the impact his conduct had, his apology, acknowledgment of personal boundaries required, and his long service since 1998 with no previous disciplinaries’.

9. At para 128 the tribunal conclude “we find that a comparison between the Claimant’s case and H’s treatment does not reveal any less favourable treatment in materially similar circumstances”.

10. Seven paragraphs on, they say of the two cases “For all these reasons, we find that the circumstances of G and H were both materially different to those of the Claimant and they are not comparators within the definition in s 26 of the EA 2010. Nor do we think that they assist the Claimant as ‘evidential’ comparators. For the reasons we have set out, we do not consider that the Claimant was less favourably treated than them.” The tribunal do not in terms answer the question about hypothetical comparators.

11. The tribunal may of course, instead of considering comparators, focus on ‘the reason why’ the claimant was treated in a particular way (Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 paras.8, 10-12 applied by Eady J(P) in The No 8 Partnership v Simmons [2024] ICR 380, para.55) but here the concession was made by the Claimant’s then Counsel before the tribunal that race did not operate on the minds of any of the decision makers.

12. It should indeed thus be reiterated that the Claimant’s whole case was based on comparison with G&H. When the tribunal said that they failed to qualify either as actual or evidential comparators, the case would inevitably fail in my view. The tribunal found no evidence at all that race was a part of reason why he was dismissed; indeed none was put before them. The case proceeded only on comparison of treatment with those others.

13. I agree with how HH Judge Auerbach who put it in this way on the initial sift “The tribunal considered very thoroughly and with care the cases of comparators G and H, at [96ff]. It properly concluded that H’s conduct could be regarded as less serious than that of the claimant [127ff]. It also then very closely considered G’s case, and reached soundly-reasoned conclusions as to why there were material differences from that of the claimant.” The tribunal as the forum of fact finding was entitled to reach the view it did.

14. Still, Ms Cho says that the tribunal failed to produce hypothetical comparators and to answer the question how they would have been treated and that this is a fatal legal flaw. The question of the treatment of a hypothetical comparator was indeed on the long agreed List of Issues for the tribunal to consider. Although the tribunal do not address it in terms, it is clear that they would not have found any appropriate comparison here given the differences which were found as facts in the other cases. The Claimant’s Counsel recognised that in **Bahl v Law Society** [2003] IRLR 640 the EAT had rejected “the contention that it is an error of law for a tribunal to fail to identify a hypothetical comparator or to determine the issue of less favourable treatment prior to asking the ‘reason why’ question”. Ms Cho said that the tribunal should have at least given reasons why a hypothetical comparator could not be created. I think this is obvious on the facts of this case. The essential question here was whether inferences of discrimination may be drawn from how G and H were treated in comparison with the Claimant but the tribunal were clear that no such inferences could be drawn. This is a matter for the tribunal considering all the evidence and circumstances.

15. I agree with Mr Ohringer, Counsel for the Respondent, that it is clear from the tribunal’s overall findings that there was no evidence to suggest that a hypothetical comparator, of different race to the Claimant, would have been treated any differently to the Claimant, let alone less favourably because of race. The Tribunal was not required to undertake the task of constructing a hypothetical comparator where this would have been an entirely empty and arid exercise. It would inevitably here

have been merely someone like Mr Shing in comparison with the cases of G and H. I therefore dismiss the first ground of appeal.

The role of HR and Ramphal

16. There was also an unfair dismissal complaint. The Claimant appeals here in respect of the tribunal's treatment of the decision in **Ramphal v Dept of Transport** [2015] IRLR 985 and claimed that because of their criticisms of it the tribunal failed to apply it as they were required to do as a matter of binding precedent. This **Ramphal** case says in apparently wide terms that HR should not be involved in decision making in a dismissal case. The role of HR in this present case was however minimal and rather less than in **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194 (which **Ramphal** purported to apply) or **Ramphal** itself, in both of which HR got involved in decision making.

17. The key relevant findings of this tribunal are at para 83 "Likewise, Mr Culver's [the HR person] subsequent email of 27 November 2020 shows no improper pressure, he simply states that he understands from speaking to "Michelle", who it appears Professor Crow has also spoken to, that he is likely to pursue the dismissal route."

18. **Ramphal** at para 48 states that "the integrity of the final decision to dismiss" should not be "influenced by persons outside the procedure" and that this may render the dismissal unfair, one reason being because the Claimant would have no knowledge of it. It may be emphasised that **Ramphal** was thus not a principle solely in respect of the involvement by HR being unfair, but the "outside influence" that made it unfair was that of HR in **Ramphal**. This was consistent with **Chhabra** at para 37 where the Supreme Court stated that HR's involvement undermined the fairness of the disciplinary process in that case. This also constituted a breach of an undertaking given by the Trust's solicitors.

19. The Respondent in response contends that the Tribunal correctly acknowledged that the ratio of **Ramphal** was binding on it. It was however entitled to doubt whether the *dicta* at paragraph 55 of **Ramphal** were correct and to suggest that the *dicta* went too far. That was all the tribunal were doing in my view. The tribunal say “we record that we are not satisfied that what the EAT said at para 55 in **Ramphal** is a correct statement of the law as **Chhabra** was concerned with the application of contractual disciplinary procedures which required an investigation report to be the product of the appointed case investigator, so that where human resources had interfered to the extent that it was no longer the product of the case investigator that was a breach of contract and also unfair. We consider that the decision in **Chhabra** cannot properly be applied to all cases where there is no contractual disciplinary procedure.” This passage is not in terms stating that certain parts of **Ramphal** are *obiter*. Indeed it may be said to be bold criticism by the ET of an EAT decision.

20. The contours of what is and is not permissible by HR in a dismissal case is however quite difficult and must be addressed on the specific facts of each case. In **Ramphal** at paras 53 and 55 the EAT criticised HR

- a. going beyond discussing issues of procedure and law and
- b. discussing “emerging findings”.

The EAT also considered it inappropriate of HR to advise on “appropriate action”. I think all of this must be read in the context of the facts of the particular case and I also note that Judge Serota at para 55 said that HR must be “very careful to limit advice to questions of law and procedure”, rather than lay down an injunction against it happening or saying that this would automatically render such a dismissal unfair.

21. It may indeed be said that the reasoning in **Ramphal** is not of universal application in that it relies on **Chhabra** which was a case concerned with the requirements of a particular contractual

disciplinary processes (and in the medical area so one which was very tightly drawn and agreed between the parties) rather than the general requirements of fairness under s.98(4) ERA 1996.

22. However, I see no reason why in an appropriate case HR should not advise on the application of the suitability of the concepts of misconduct and serious misconduct and the dividing line between them, not least because otherwise it would be difficult for a company to maintain consistency of application between different persons who carried out dismissals, which is important as may be seen in this very case.

23. Ms Cho indeed properly accepts that HR may advise on a dismissal but she says here that the intervention of HR crossed the line and was improper. I respectfully doubt that HH Judge Serota in **Ramphal** intended to lay down firm guidance about all forms of “undue pressure” or include the drafting of a letter for the decision maker. There was a note of caution in his remarks.

24. I think the *ratio* of the **Ramphal** case is merely that if “undue pressure” is placed on decision making by HR (or indeed anyone outside the proper processes) that could in the appropriate case be weighed as a factor in determining fairness as is stated, in paragraph 48 of the EAT Judgment. The weight of such a factor depends on the facts and circumstances of each case and in para 55 of **Ramphal** the judge was not intending to set down a comprehensive guide to what was and was not permissible or undue. He merely said that the HR department should “avoid straying into areas of culpability”.

25. In any event I agree with Mr Ohringer that the point (whilst interesting) is moot in this case because of the findings by the tribunal that in this case there was no improper pressure exerted by HR such as there was found to be in the other two cases. It was said on behalf of the Claimant that the ET should have decided whether Prof Crow was influenced by HR but I think there are sufficient findings

to the effect that he was not and that he took the decision himself; it was then ratified by the VC of the Respondent. Mr Culver here did not go beyond drafting a letter for Prof Crow to send after Prof Crow had decided that he was going to dismiss. It did not alter a report. There was no basis for a finding of undue pressure. Although the tribunal was critical of **Ramphal**, it was guided by its ratio. I therefore dismiss this second ground of appeal.

Prof Crow and inferences

26. Sadly Prof Crow the decision maker in this case had died in June 2022, by the time of the tribunal hearing. The tribunal therefore had to reconstruct his reasoning from contemporary sources, to fill the gaps in the narrative of the case. I cannot see any mistake by the tribunal in doing so.

27. There was a subsidiary onus of proof point taken by the Claimant but it was just that the tribunal had not seen something more because beyond difference in treatment and in race there was the different in treatment between claimant and the actual/hypothetical comparators. I think that this was clearly dealt with and there was no misapplication of the principles in **Royal Mail Group Ltd v Efofi** [2021] UKSC 33 at para 46) or any other case.

28. Generally, as a matter of general principle Mr Ohringer rightly relies on the passages in **DPP v Greenberg** [2021] IRLR 1016 at para 58 to the effect that where an ET has correctly set out correct principles unless the contrary appears the appellate tribunal should be slow to find that the tribunal has erred in their application. They should only do so and should generally “do so only where it is clear from the language used that a different principle has been applied to the facts found”. The distillation of the legal principles here is impeccable and I believe they have been properly applied.

29. Notwithstanding the persuasive advocacy of Ms Cho, I thus dismiss the appeal.