Neutral Citation Number: [2019] EWCA Civ 1648

Case No: A2/2018/3017

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
HHJ STACEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2019

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division))
LORD JUSTICE NEWEY
and
LORD JUSTICE HADDON-CAVE

- -

Between:

BASE CHILDRENSWEAR LIMITED	**Appellant**
- and -	
NADIA OTSHUDI	**Respondent**

- -
- -

Mr Daniel Matovu (instructed by **Martin Searle Solicitors**) for the **Appellant**
Mr Changez Khan (instructed by **Southwark Law Centre**) for the **Respondent**

Hearing date: 4th July 2019

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Respondent in this appeal, the Claimant in the original proceedings, was employed by the Appellant company, the original Respondent, between 16 February 2016 and her summary dismissal on 19 May 2016. She is of black African ethnicity: she is in fact from the Democratic Republic of Congo. To avoid confusion I will refer to the parties as they were below.

2. On 19 September 2016 the Claimant presented a complaint against the Respondent in the Employment Tribunal raising a number of claims. The complaint was heard at the East London Hearing Centre, before Employment Judge Hyde and lay members, over four days in September 2017 and another day in November. Both parties were represented by counsel. Partly before the hearing and partly in the course of it a number of her claims (including a claim of unfair dismissal, for which she had insufficient service) were withdrawn, and the only remaining claims concerned seven alleged incidents of racial harassment contrary to section 40 (read with section 26) of the Equality Act 2010: the last of these incidents was based on her dismissal. The claims were out of time, but the Tribunal was invited to extend time pursuant to section 123 (1) (b) of the Act.

3. By a Judgment and Reasons sent to the parties on 21 December 2017 the Tribunal declined to extend time in respect of six of the claims of harassment. However, it did so in relation to the claim based on the Claimant's dismissal and found the claim proved. At a subsequent hearing she was awarded compensation in the sum of £27,505.29, plus interest and a 25% uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The Tribunal also made an order that the Respondent pay her a sum in respect of her preparation time for the claim on which she succeeded.

4. The Respondent appealed to the Employment Appeal Tribunal against the liability decision, but on 31 August 2018 it was dismissed by HH Judge Stacey, sitting alone.

5. The Respondent now appeals to this Court with the permission of Bean LJ.

6. The Respondent was represented before us by Mr Daniel Matovu and the Claimant by Mr Changez Khan. Mr Matovu has appeared in both tribunals below. Mr Khan appeared in the EAT but not the ET. The submissions of both counsel were of high quality.

THE FACTS AND THE PROCEDURAL HISTORY

7. The Respondent's business is selling childrenswear. The Claimant was employed as a photographer, taking pictures of clothes for use on social media and in other sales materials. The evidence was that in the short period before her dismissal the quality of her work was regarded as high.

8. On 19 May 2016 the Claimant was called by the Managing Director, Mr Granditer, to his office. Mr Moore, one of the managers, was present. Mr Granditer told her that she was being dismissed for redundancy. The dismissal was completely out of the blue.

The Claimant told Mr Granditer that she did not believe that redundancy was the true reason. She said that she believed that she was the victim of discrimination by others in the team that she worked with and that that was the real reason why she was being dismissed. Mr Granditer responded by calling in another manager, Mr Potier, whom he asked to confirm that there was a redundancy situation, which he did. Mr Granditer said that he was very upset by the allegation of discrimination and disappointed that the Claimant had made it. He said that he dared her to repeat it, which the Tribunal subsequently characterised as an attempt to "intimidate" her into taking no further action (see para. 158 of the Reasons). She was then asked to collect her belongings and leave.

9. Five days later, the Claimant lodged a grievance complaining that her dismissal was discriminatory, and also of the prior treatment by colleagues to which she had referred on the occasion of her dismissal. Mr Granditer decided that no response should be made to the grievance.

10. When the Claimant lodged her ET1 she complained, as I have said, of her dismissal as well as other matters, saying that it was "both unfair and a discriminatory act". The Respondent's ET3, which seems to have been drafted by Mr Granditer without legal assistance, said that she was made redundant "purely for financial/economic reasons". His response included what the Tribunal (at para. 147 of the Reasons) described as "a strident assertion" that he had no racial motivation, which he described as "a vile accusation".

11. At the interlocutory stages of the proceedings the Claimant pressed for disclosure of documents relating to the supposed redundancy. In August 2017, about three weeks before the hearing, solicitors instructed by the Respondent lodged amended grounds of resistance. These raised for the first time a wholly new explanation for the dismissal. What was pleaded (as slightly amplified in the subsequent witness statements) was that earlier on the day of the dismissal Mr Moore and a Mr Kirby, a warehouse assistant employed by the Respondent, found "concealed" in the photography department (a space which it was said was only ever used by the Claimant) a crate containing five items of new designer clothing. Clothing required for the purpose of a photoshoot should have been in the stockroom and there was no reason why it should have been left in the photography department. They had left the clothes out on the workbench and Mr Moore went to tell Mr Granditer. While he was doing so Mr Kirby saw the Claimant taking what he believed to be the same clothes from the photography department to the stockroom, while talking on her phone in French, in what appeared to him to be an agitated and suspicious manner. He came and told Mr Granditer and Mr Moore. It seemed to them that the Claimant must have been responsible for taking the clothes from the stockroom to the photography department in the first place with a view to stealing them. Despite the absence of any investigation Mr Granditer decided that she was guilty of theft and should be dismissed forthwith, but that he would tell her that it was for redundancy. As pleaded at para. 31 of the Amended Grounds:

> "Whilst it is admitted that redundancy was not the true reason for terminating the Claimant's employment, it was Mr Granditer's preference to give a seemingly innocent reason in order to minimise the potential confrontation. Mr Granditer was also mindful that whilst Mr Moore and Mr Kirby had presented very persuasive evidence, he had

not witnessed the attempted theft itself or seen any conclusive evidence. … [R]ace had absolutely no bearing in Mr Granditer's decision."

12. The Respondent was given permission to amend the grounds of resistance, and the case proceeded in the Employment Tribunal on the basis of the amended case. Not only Mr Granditer but also Mr Moore and Mr Kirby gave oral evidence at the hearing in support of the Respondent's case that the Claimant had been suspected of theft.

THE BACKGROUND LAW

13. Section 40 (1) of the 2010 Act reads (so far as material):

> "An employer (A) must not, in relation to employment by A, harass a person (B) –
>
> (a) who is an employee of A's;
>
> (b) …"

14. "Harassment" is defined in section 26 of the Act. For present purposes I need only set out sub-section (1), which reads:

> "A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

The relevant protected characteristics are defined at sub-section (5) and include race. The phrase "related to a protected characteristic" has caused some problems in other cases, but for present purposes it is enough to note that conduct will be "related to" race if the claimant's race was a significant part of the mental processes (conscious or unconscious) of the person responsible – as it is often put, of their "motivation".

15. I am bound to say that I find it odd that the present claim has been characterised as one of harassment. The natural way of bringing a claim for a discriminatory dismissal is under section 39 of the 2010 Act, which proscribes various kinds of detriment caused to an employee because of a protected characteristic, including dismissal. Neither counsel was able to explain definitively why that was not the course taken here, but Mr Khan said that it was his understanding that at a case management hearing in the ET the Claimant, who was not at that time represented, had withdrawn her claims of racial discrimination but that it had apparently been accepted that she was intending to complain of her dismissal as an act of harassment. However, no point was taken on this by the Respondent at the hearing, and even if it had been I have no doubt that the Tribunal would have wished to consider the substance of the claim. Accordingly I say nothing more about it.

16. Section 136 of the 2010 Act is headed "Burden of Proof". It reads, so far as material, as follows:

> "(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.
>
> (4)-(5) …
>
> (6) A reference to the court includes a reference to –
>
> (a) an employment tribunal;
>
> (b)-(f) …"

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in *Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054. In *Efobi v Royal Mail Group Ltd* [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in *Madarassy*; but that decision was overturned by this Court in *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913, [2018] ICR 748, and *Madarassy* remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> "56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could

> conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"

(2) If the claimant proves a *prima facie* case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

THE DECISION OF THE EMPLOYMENT TRIBUNAL

19. The introductory part of the ET's Reasons contained a very short section headed "Relevant Law", but this says nothing relevant to the issues before us: specifically, there is no reference to section 136 or the case-law about it.

20. The Tribunal then proceeded to a section headed "Facts Found and Conclusions". The principal part dealing with the Claimant's dismissal is at paras. 125-163, but there is an earlier passage in which it makes some relevant findings. In particular, at paras. 59-64 it draws attention to various statements in the witness evidence and observes (at para. 64) that the fact that there was "so little precision about the potential offence" was "another reason why the Tribunal rejected the Respondent's entitlement to draw the conclusion that the Claimant had probably been involved in an attempted theft": that anticipates a conclusion to the same effect at para. 160 and I will return to it below.

21. Turning to the part directly concerned with the "dismissal harassment allegation", the structure can be summarised as follows.

22. At paras. 125-148 the Tribunal examines the evidence, particularly that of the Respondent's witnesses, about the sequence of events leading to the meeting at which the Claimant was dismissed, and also about why Mr Granditer initially gave the Claimant a false reason for dismissing her and why he eventually gave what he said was the true explanation. I have already summarised the main findings of primary fact. The Tribunal does not in these paragraphs directly address the question whether Mr Granditer was motivated by the Claimant's race, but it makes various particular findings, and interpolates a fair amount of commentary, relevant to that question. In particular:

(1) It makes it clear that it regards the evidence that the Claimant had been attempting to steal the clothes as "flimsy", noting that part of Mr Granditer's own explanation for having given her a false reason for her dismissal was that he recognised that he would not be able to prove the allegation: see para. 139.

(2) At para. 140 it records a submission by Mr Matovu to the effect that the picture given to Mr Granditer could have led him genuinely (sc., even if unreasonably) to believe that the Claimant had stolen the clothes. It continues:

> "The Tribunal reminded itself that the question was not whether the Claimant had actually stolen the items or attempted to do so or indeed whether, in accordance with an unfair dismissal case, this was a case in which the Respondent had reasonable grounds for believing that she had done so. The issue was whether the belief that the Claimant had attempted to steal the items was genuine and was reached in a way which was influenced by the Claimant's race … ."

Mr Matovu accepted that that was a correct self-direction.

(3) Generally, and hardly surprisingly given the history, it expressed itself at several points as highly sceptical about the evidence given by Mr Granditer. At para. 147 it expresses great surprise that he had not volunteered what he now said was the true explanation of the dismissal at least when the Claimant brought proceedings accusing him of racial discrimination, an accusation by which he claimed to be deeply hurt; by that time at least it would have been clear that his original false reason had not avoided "confrontation".

23. At paras. 149-154 the Tribunal addresses the extension of time issue. I need say nothing about this.

24. At paras. 155-163 the Tribunal turns to consider directly the question whether the Claimant's dismissal constituted harassment within the meaning of section 26. Its reasoning can be summarised as follows:

(1) At para. 155 it says that Mr Granditer's reliance, persisted in until a very late stage, on what he accepted was a false account of his reason for dismissing the Claimant "raised a huge question mark", though it does not identify the specific question raised.

(2) At para. 156, having observed that the primary facts relied on by the Claimant were largely undisputed, it says that the crucial question was whether there were facts from which it "could conclude that race was a factor": that substantially adopts the language of section 136 (2), and Mr Matovu accepted that it was a correct self-direction. It continues:

> "The Tribunal considered that the reaction of Mr Granditer to the discrimination allegation on 19 May and in a context where he knew he was not being truthful with the Claimant and his subsequent reaction to the discrimination grievance and the allegation of discrimination in the claim form not simply by a denial but by the asserting of a contrary false case when his current case is that he had a valid defence for his actions led the Tribunal to the inference that he was trying to cover up what was a dismissal which was tainted by considerations of the Claimant's race."

(3) Para. 157 refers to the fact that in the ET3 Mr Granditer had referred to himself and his wife as "persons of ethnicity", apparently on the basis that he has French ancestry (though he had subsequently accepted that he was "White British") and that his wife was partly French and partly North African. No doubt Mr Granditer had been trying to suggest that one "person of ethnicity" – or someone married to such a person – would not discriminate against another person of ethnicity. Although the point is obviously unconvincing the Tribunal does not identify how it treats that fact in its reasoning, and neither party placed any reliance on this aspect in their submissions before us.

(4) Paras. 158-159 are directed to the "unwanted conduct" element in the definition under section 26 and to a point about victimisation. They are not as such relevant for our purposes, though they include the characterisation of Mr Granditer's conduct as "intimidatory" which I have referred to above.

(5) Paras. 160-163 read:

> "160. Mr Granditer's strong reaction to the allegation of discrimination followed by his unsatisfactorily explained failure to make use of what he says was the genuine reason for dismissal until three weeks before the hearing some 15 months later led the Tribunal to reject the suspected theft explanation for the dismissal on the balance of probabilities.
>
> 161. The Tribunal considered that a big question was raised about why the Respondent reached such an adverse conclusion so readily about the Claimant's integrity based on rather flimsy evidence and no investigation.
>
> 162. It was appropriate in all the circumstances to infer that there was a racial element which had contributed to or caused the dismissal.
>
> 163. The Tribunal took into account in assessing whether it was appropriate to draw the inference of race in Mr Granditer's favour that there was no background of Mr Granditer treating the Claimant unfavourably indeed on the contrary he had given her permission to work separately as she had requested. The Tribunal considered that such background evidence was highly material but was not determinative of the question whether it was appropriate to draw the inference. In this context the Tribunal also took into account Mr Granditer's ready acceptance that the Claimant was a talented photographer and was an asset to the company. There was therefore no good reason why he should not have treated her well up to that point."

25. Although the Tribunal does not at any point in that reasoning (or indeed elsewhere in the Reasons) make any explicit reference to the statutory burden of proof provisions, I think it is adequately clear that it had them mind – as one would expect when it was

chaired by a highly experienced Employment Judge – and was seeking to follow the two-stage process which they require. I would analyse its reasoning as follows.

26. The starting-point is para. 156. It seems clear from the way that the Tribunal stated the issue which it was addressing – "whether there were facts from which the Tribunal could conclude" – that its conclusion was intended as a finding that the burden of showing a *prima facie* case imposed by section 136 (2) was satisfied. It is true that the wording of the conclusion itself – that the Tribunal was "led … to the inference" that Mr Granditer had a racial motivation which he was trying to cover up – is more appropriate to the second stage of the exercise than the first; but I think that that is no more than slightly loose wording.

27. The Tribunal's reasons for finding a *prima facie* case appear in the second half para. 156 but should be read in the context of its earlier findings and observations. I think they can be summarised as follows:

    (a) Mr Granditer's strong and "intimidatory" reaction to the Claimant's allegation of discrimination, in a context where he knew he had given a false reason for the dismissal – as I understand it, the point is that he "protested too much";

    (b) his refusal to address the Claimant's grievance;

    (c) his persistence in advancing a false reason for the dismissal in the ET proceedings, even when the supposed reason for the original lie (to "minimise confrontation") was evidently no longer operative.

    Those matters are said to indicate that Mr Granditer was "trying to cover up what was a dismissal which was tainted by considerations of the Claimant's race". That must, I think, mean that (at least at some level) he realised that race had played a part in his decision.

28. The Tribunal's conclusion in section 136 (2) transferred the burden to the Respondent to show that no unlawful harassment had occurred. In the context of this case that meant showing that the reason for the dismissal was one in which the Claimant's race played no part.

29. The reason advanced by the Respondent to satisfy section 136 (3) was that the Claimant was dismissed because Mr Granditer believed that she had been stealing. At para. 160 the Tribunal says that it rejected that explanation. There is an issue to which I will have to return about exactly what it meant by that statement, but the reasons which it gives for it are essentially the same as those relied on as establishing a *prima facie* case.

30. As for para. 161, exactly how this is intended to fit in to the Tribunal's overall reasoning is not clear. Again, I return to this later.

31. The rejection in para. 160 of the Respondent's explanation means that it had not proved its case under section 136 (3); and it accordingly followed that the act complained of by the Claimant was proved. As already noted, the Tribunal does not in fact refer to section 136 at all, and it expresses its final conclusion in para. 162 as being that it was "appropriate to draw the inference that there was a racial element" in the dismissal. But it seems clear that it was intending to apply the burden of proof provisions, and it is not

in fact inapt to describe the exercise required by section 136 as one of drawing an inference, albeit one guided by the statutory process: indeed that terminology might be thought to be positively appropriate, because it acknowledges that the exercise should not be purely mechanistic but should represent an actual finding of fact to which the tribunal feels able to come on the evidence.

32. That leaves para. 163. As I read it, this is intended as an acknowledgment that the inference that the Claimant's race played a part in Mr Granditer's motivation was not supported, as such inferences often are, by evidence of any other racially-motivated conduct on his part. It makes clear that it has put the absence of any such evidence into the balance, but it says that it does not regard it as decisive.

THE APPEAL

33. Without intending any disrespect to Judge Stacey, I need not set out her reasons for dismissing the Respondent's appeal in the EAT. The issue for us is whether the decision of the ET was legally flawed.

34. Mr Matovu's primary challenge was to the ET's finding at para. 156 of the Reasons – that is, that the Claimant had proved a *prima facie* case that her dismissal was influenced by her race. He submitted that there was no evidential basis for such a finding. It was not enough simply that she was black and that she was dismissed; as Mummery LJ made clear in *Madarassy*, that in itself only raised a possibility of discrimination and was not, without more, a sufficient basis for a *prima facie* case. He reminded us of the statements in *Chapman v Simon* [1994] IRLR 124 that inferences of racial discrimination cannot be drawn merely speculatively or on the basis of a "mere intuitive hunch" – see *per* Balcombe LJ at para. 33 (3) (p. 128) and Peter Gibson LJ at para. 43 (p. 129); and also, to similar effect, Lord Rodger's statement in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337, that "a tribunal cannot draw inferences from thin air" – see para. 144 (p. 384D). He submitted that there was nothing in the facts found here which could justify an inference of a racial motivation on the part of Mr Granditer. The facts relied on by the Tribunal in para. 156 amounted simply to the fact that he had reacted strongly to the initial allegation of discrimination and that he had given a false explanation for the dismissal and persisted in it long after the supposed justification for it had passed. Those facts were not, Mr Matovu submitted, in themselves indicative of a racial motivation. He reminded us of a number of well-known authorities that establish that discrimination cannot be inferred simply on the basis that the respondent has acted unfairly or unreasonably – in particular *Law Society v Bahl* [2003] IRLR 640, per Elias J at paras. 93-98 (pp. 650-1) (applying *Glasgow City Council v Zafar* [1998] ICR 120), approved in this Court ([2004] EWCA Civ 1070, [2004] IRLR 799) at para. 98-101 of the judgment of the Court. He submitted that if the material relied on by the Tribunal here were sufficient to raise a *prima facie* case that Mr Granditer was motivated by the Claimant's race it is hard to see why it did not also raise such a case as regards her sex.

35. Mr Matovu further submitted that, even if the Tribunal had been entitled to find a *prima facie* case, its decision that the Respondent had not proved its case under section 136 (3) was flawed because there was no clear finding as to whether it rejected Mr Granditer's evidence that he had dismissed the Claimant because he genuinely, however unreasonably, believed that she had been stealing. Although it said in para. 160 that it "reject[ed] the suspected theft explanation" (and had said something similar

at para. 64), there was no explicit, still less reasoned, finding that Mr Granditer had fabricated the story of having been told by Mr Moore and Mr Kirby about the circumstances which he believed showed that the Claimant had been stealing. That would have been a very strong finding, even given Mr Granditer's initial admitted lie, and would have involved not only him but also Mr Moore and Mr Kirby having given false evidence to the Tribunal – as to which, again, there was no finding. He drew attention to a passage in the Claimant's witness statement which appeared to accept that she could well have been seen carrying clothes on the morning in question and which confirmed Mr Kirby's account that she had been talking in French on her phone shortly before she was called in to see Mr Granditer. Without a clear and reasoned finding on whether the story was indeed a fabrication the Tribunal was not entitled simply to say that the Respondent's explanation was rejected.

36. Those are powerful submissions, and I have not found this appeal easy; but in the end I am not satisfied that any error of law on the part of the ET has been established. I take the two stages of Mr Matovu's argument in turn.

37. As regards the primary challenge, the question is whether the factors relied on by the Tribunal at para. 156 of its Reasons – summarised at para. 27 above – could reasonably justify the conclusion, in the absence of a satisfactory explanation, that the Claimant's race was a factor in her dismissal. As to that, I feel bound to say that I am not sure that I would have reached the same conclusion as the Tribunal. But the question of what inferences should be drawn from the primary facts is a question of fact and not of law. It is not legitimate for this Court to substitute its own view unless the Tribunal's conclusion was one which was not reasonably open to it. I am not prepared to go that far. If the Tribunal had relied only on Mr Granditer's expression of outrage at the dismissal meeting it might be a different matter, since that seems to me equivocal at best: even if it indicated a guilty conscience, that would be readily explicable by his having been caught out giving a false reason for the dismissal. But his persistence in lying about that reason seems to me a defensible basis for the Tribunal's conclusion. Giving a wholly untruthful response when discrimination is alleged is well-recognised as the kind of conduct that may indicate that the allegation is well-founded. Of course it will not always do so: Judge Stacey referred in her judgment to the fact (often stressed in criminal cases) that lies may be told for many different reasons. But in this case the Tribunal explicitly considered the explanation given for the initial lie – to minimise confrontation, or soften the blow of dismissal – and pointed out that that ceased to be operative once the Claimant had brought proceedings. Even so, it could be argued that once Mr Granditer was committed to the initial lie it was understandable that he would feel obliged to persist with it, so that there is no need to treat it as a tacit acknowledgment of guilt (and discriminators are not always themselves even aware of their own discriminatory motives). But once we are into debates of that kind it seems to me that we are in the realm of legitimate differences about matters of fact; and it is important to bear in mind that the Tribunal had the opportunity to observe Mr Granditer as a witness.

38. On that basis, Mr Matovu's point that the Tribunal's reasoning would equally support the conclusion that there was a *prima facie* case that she was discriminated against because of her sex falls away: the allegation to which he gave a lying response was of racial discrimination. But I would also add that, if – as, to anticipate, I think was the case – the form that the Tribunal found that the discrimination in the present case took

was a predisposition to believe that the Claimant was dishonest, it is inherently more plausible that that was because of a prejudice relating to her race rather than because of a prejudice about women.

39. There was, I would therefore hold, a sufficient basis for an inference of racial discrimination, going beyond simply the fact of the Claimant's ethnicity, though I have to say that the case seems to me near the borderline.

40. I turn to the second limb of Mr Matovu's challenge. This too is not straightforward. I agree with him that when the Reasons are read as a whole the Tribunal cannot be said to have found that the Respondent's evidence that the Claimant was dismissed because she was suspected of theft was a fabrication; and I am also inclined to doubt whether there was an adequate basis for such a finding. As he says, if that is what the Tribunal meant to find it would have had to explain itself a good deal more fully. Quite apart from anything else, it would seem necessarily to follow from a finding that the suspected theft explanation was a fabrication that the Claimant had been dismissed purely and simply because she was black, without any triggering event or context: it is unusual to find blatant discrimination of that kind, and the Tribunal at para. 163 explicitly acknowledged that there was no other evidence of racially motivated treatment of the Claimant (or anyone else) by Mr Granditer. It is true that, read in isolation, the bald statement in para. 160 that the Tribunal "rejected the suspected theft explanation for the dismissal" might appear to mean that the story was a fabrication, but when one looks at the rest of the Reasons there are in fact clear indications that that was not the route that it meant to take.

41. The first of those indications is in para. 140, where the Tribunal first identifies the issue that it has to decide: it expresses it as being "whether the belief that the Claimant had attempted to steal the items was genuine *and* was reached in a way which was *influenced* by the Claimant's race [my emphasis]". That clearly acknowledges that even if Mr Granditer's belief was genuine it might still be influenced by the fact that she was black. Mr Khan astutely referred us to a more explicit statement to the same effect in the reasons which the Tribunal later gave for making a preparation time order in the Claimant's favour. At para. 36 it characterised the issue which it had had to decide in the liability decision as "whether a suspicion on the Respondent's part that [the Claimant had attempted to steal the clothes] was really their reason for the dismissal *and <u>if so</u>, whether their suspicion, devoid of almost any investigation as it was ..., was caused by her race* [my emphasis]". Returning to the liability Reasons, at para. 156 the Tribunal refers to the question being whether race was "a *factor*" in the dismissal and concludes (strictly, as I have said, prematurely) that it was "*tainted* by considerations of the Claimant's race". Although, as I have said, how para. 161 fits into the reasoning is not clear, its wording does tend to suggest that Mr Granditer did in fact reach the "adverse conclusion" that the Claimant was stealing, and that the "big question" was why he did so on such an inadequate basis; in which case the implicit answer is presumably that he was predisposed to believe that as a black person, or an African, she was dishonest. Para. 162, which states the Tribunal's actual conclusion, refers to there being "a *racial element* which had *contributed to* or caused the dismissal" (again, my emphases). Finally, it may be significant that in para. 64 of the Reasons (referred to at para. 20 above) the Tribunal expressed its rejection as being of "the Respondent's *entitlement* to draw the conclusion" in question.

42. The language in all those passages seems to me much more consistent with an analysis which adopts the second alternative identified in para. 140 of the Reasons (and in the subsequent costs Reasons) – that is, that Mr Granditer did believe, or at least may have believed, that the Claimant had stolen the clothes but that he was influenced in coming to that conclusion, so precipitately and on so little evidence, by a stereotypical prejudice based on her race. The nature of any such prejudice is not spelt out, but the Tribunal would of course be well aware that some people do (not always consciously) have prejudices against black people, or Africans, which predispose them to suspect misconduct.

43. That also seems to me inherently a much more plausible basis for a finding of discrimination. It is much easier to accept that Mr Granditer may, for racially tainted reasons, have jumped to the conclusion that the Claimant was stealing, despite the flimsiness of the evidence, than that he dismissed her for some other unexplained race-related reason and then invented, and suborned his staff to support, a story about a suspected theft.

44. If this was, as I believe, the Tribunal's reasoning, I accept that it would have been better if it had been more clearly expressed. But in fact I suspect that its failure to commit itself definitively as between the two "theories of the case" was deliberate. The consequence of the way that section 136 works is that, if a respondent fails to show that the relevant protected characteristic played no part in its motivation for doing the act complained of, a tribunal is not obliged to make a positive finding as to whether or how it did so: indeed one of the reasons for the (partial) reversal of the burden of proof which it effects is that it can often be very difficult for a claimant to prove what is going on in the mind of the putative discriminator. I believe that the Tribunal had this very much in mind.

DISPOSAL

45. I would accordingly dismiss this appeal.

Lord Justice Newey:

46. I agree.

Lord Justice Haddon-Cave:

47. I also agree.