Neutral Citation Number: [2024] EWCA Civ 770

Case No: CA-2023-001256

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ AUERBACH, MR NICK AZIZ, MR ANDREW MORRIS
[2023] EAT 87

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2024

Before :

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE BEAN
and
LADY JUSTICE KING

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Between :

OMER KARIM	**Appellant**
- and -	
THE GENERAL MEDICAL COUNCIL	**Respondent**

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

Hearing dates : 11-12 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. The Appellant is a consultant urological surgeon. He was the subject of an investigation by the Respondent ("the GMC") which began in November 2014 and ended in April 2018 when a Medical Practitioners' Tribunal ("MPT") found that he had not committed any misconduct and that his fitness to practise was accordingly not impaired.

2. The Appellant is naturally aggrieved, as anyone would be who is subject to a lengthy regulatory process even when it ends with his exoneration. But that does not of itself create a cause of action in law. The question is whether the GMC, as the regulator or "qualifying body" for the purposes of the Equality Act 2010 discriminated against the Appellant, who describes himself as mixed race, Black African/European and a Muslim.

3. On 17 August 2018 Mr Karim issued a claim in the employment tribunal alleging that he had been the victim of conscious or unconscious discrimination on the grounds of race and/or religion in the course of this process. (The allegation of religious discrimination, though pleaded, was not actively pursued at the hearing: the ET dismissed it and no more need be said about it.) A list of issues put forward by his solicitors on 7 March 2019 contained 20 particulars of the alleged less favourable treatment. The ET upheld four of his complaints of racial discrimination, but these findings in his favour were set aside by the Employment Appeal Tribunal ("EAT") which remitted those issues for hearing by a fresh ET. Mr Karim appeals to this court against the EAT's decision.

The statutory framework of fitness to practise proceedings

4. Section 1(1A) of the Medical Act 1983 ("1983 Act") provides that the overarching objective of the Respondent in exercising its functions is the protection of the public. Section 35C(2) of the 1983 Act identifies matters by which fitness to practise can properly be regarded as impaired, which include "misconduct". By rule 4 of the General Medical Council (Fitness to Practise) Rules 2004 (as amended in 2014), where the Respondent's Registrar considers that an allegation meets the 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").

5. At any time, the Registrar may also refer the matter for consideration by what was called an Interim Orders Panel ("IOP") (now called an Interim Orders Tribunal). An IOP is empowered by s 41A of the 1983 Act to make interim orders, such as for interim suspension or conditions upon registration, where satisfied that this is necessary for the protection of the public, or is otherwise in the public interest, or the interests of the registered practitioner.

Factual background

6. In July 2014, the Appellant's then employer, Heatherwood and Wexham Park Hospitals NHS Foundation Trust, later the Frimley Health NHS Foundation Trust ("the Trust"), commissioned Professor Roche to conduct an external review of the Urology

Department. During Professor Roche's preliminary investigation, the Appellant and two colleagues, Mr Laniado (who is white) and Mr Motiwala, were excluded by the Trust. Professor Roche identified a number of concerns about the Appellant and recommended that the Trust should carry out a full investigation into these allegations. The Trust commissioned Ms Julia Hollywood, an independent investigator, for this purpose.

7. A copy of Professor Roche's report was sent to the GMC. On 3 November 2014 the GMC opened investigations into the fitness to practise of the Appellant, Mr Laniado and Mr Motiwala. At this stage, the Respondent's investigation concerning the Appellant related to two allegations. These were (i) that he had threatened and/or intimidated a fellow consultant, Mr Rao, at an informal meeting in the canteen in January 2014; and (ii) that 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. 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.

8. A GMC Case Examiner concluded on 9 November 2014 that the allegations against the Appellant were sufficiently serious to justify referral to an Interim Orders Panel. On 26 November 2014, the IOP decided that it was not necessary to impose an interim order of suspension or conditions on the Appellant's registration. A referral to the IOP was also made in respect of Mr Laniado, which likewise resulted in no conditions being imposed.

9. The Respondent later received a copy of Ms Hollywood's report dated 4 December 2014 which express the view that both allegations against the Appellant were well-founded. Ms Hollywood also regarded as well-founded an allegation that the Appellant had sought in April 2014 to interfere with the evidence that Mr Robinson, another member of the urology team, was planning to give to the GMC in connection with an ongoing investigation of performance allegations relating to Mr Motiwala.

10. On receipt of the completed Hollywood Report, the Trust excluded the Appellant and commenced disciplinary proceedings. The Respondent's usual practice is to await the outcome of any employer's or external investigation before proceeding with its own. An Assistant Registrar of the GMC decided on 29 January 2015 that the matter concerning Mr Robinson's evidence merited investigation. The Trust informed the GMC of a further allegation against the Appellant, namely that he 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.

11. In February 2015, a GMC Case Examiner decided that the findings in the Hollywood Report and the subsequent allegation merited a further referral to an IOP. At a hearing on 3 March 2015, the IOP imposed conditions on the Appellant's registration.

12. Additionally in February 2015, a retired consultant radiologist, Dr Charig, raised an allegation with the GMC that the Appellant had been involved in a co-ordinated decision to remove the director of Spire Thames Valley Hospital ("Spire"), Mr Parm Sandhu, in order to protect the Appellant's own position on that hospital's Medical

Advisory Committee. A Senior Investigation Officer of the GMC wrote to the Appellant's Responsible Officer at the Trust, Mr Palfrey, about this allegation, and subsequently had a telephone conversation with him about it.

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

14. In July 2015, an Assistant Registrar of the GMC decided that the allegation raised by Dr Charig should be included in the investigation relating to the Appellant. In due course this allegation was also referred to an IOP. A third IOP hearing took place in August 2015. Shortly before the hearing, the Respondent received communications from Spire indicating that the Appellant had not played any part in the removal of Mr Sandhu. Following the hearing, the IOP revoked all restrictions on the Appellant's registration. The allegation raised by Dr Charig was considered to be resolved by the Respondent by December 2015.

15. Ms Hollywood's report in the case of Mr Laniado found four out of five allegations against him not to be supported. No further reference was made to an IOP in his case. In March 2015 the Respondent told Mr Laniado that it had received Ms Hollywood's 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 Examiners closed his case.

16. In February 2016 a new Investigating Officer took over the GMC investigation relating to the Appellant. He noted an allegation mentioned in the report of Professor Roche and the first report of Ms Hollywood that the Appellant had taken steps to identify the author of an anonymous whistleblowing email to the Trust sent in November 2013, which raised concerns about Mr Motiwala. That allegation had not been considered before. In August 2016 an Assistant Registrar decided that it should be added to the matters being considered in the investigation relating to the Appellant.

17. The Respondent completed its investigation and sent the Appellant the draft particulars of the fitness to practise complaint against him on 31 March 2017. These did not include the allegations concerning the MDT letter, or Spire. The Appellant responded on 9 May 2017. There was a further delay when Mr Robinson indicated that he might no longer be willing to act as a witness. On 22 May 2017 the case was referred to Case Examiners, who decided on 26 September to refer it to an MPT. The Appellant was notified of this on 27 September.

18. A 13-day MPT hearing took place in March and April 2018. The Tribunal found that the contested allegations were not proved. While the MPT noted that some of the Appellant's actions were not best practice, misconduct impairing fitness to practise was not found to be made out.

19. On 17 August 2018, the Appellant commenced ET proceedings against the Respondent, claiming that the investigation and regulatory action against him was at various points

tainted by direct race and/or religious discrimination. The GMC took no issue as to any of the complaints being out of time, and the ET accordingly held that it was just and equitable to extend time in so far as that might be necessary.

20. The ET (Employment Judge Gumbiti-Zimuto, Ms D Ballard and Ms B Osborne) heard witness evidence over seven working days between 5 and 15 October 2020, with closing submissions on 22 February 2021 (the delay was caused by counsel's availability). The tribunal's reserved decision was sent to the parties on 16 June 2021.

The ET's decision

21. At paragraph 29, the ET rejected the Respondent's attacks on the Appellant's credibility, noted that none of the matters of concern related to clinical issues, and found that the Appellant understood the difference between the role of the Trust and the GMC in his complaints. At paragraph 31, the ET stated that it took on board that the Respondent was not the Appellant'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 Appellant, 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 Appellant's case at different stages.

22. The ET then addressed the Appellant's list of issues, which identified 20 particularised instances of less favourable treatment said to be because of either race and/or religion, in other words instances of unlawful direct discrimination. The overall judgment of the ET was that "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." It is clear, however, from the section addressing the Appellant's list of issues, that the majority of the complaints were dismissed.

23. It is now common ground between the parties that the ET decision upheld four of the Appellant's complaints of direct race discrimination. These were:

(1) The decision of the Respondent to make a second referral of the Appellant's case to the IOP in February 2015, whereas no such second referral was made of Mr Laniado's case ("Complaint 1").

(2) The failure of the Respondent to progress "exactly the same allegation" by Mr Rao about the 16 January 2014 meeting against Mr Laniado, in contrast with how it was dealt with in relation to the Appellant ("Complaint 4").

(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, the Respondent proceeding with the allegation concerning Mr Rao against the Appellant ("Complaint 5").

(4) The Respondent's prolonged delay in dealing with the complaints against the Appellant ("Complaint 6").

24. The ET anonymised several of the witnesses in their judgment, but the EAT did not, and it was not suggested that we should do so in giving our judgments on this appeal.

25. The ET addressed Complaint 1 in the following terms (at [41]-[47]):

> "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 practice by the second IOP.
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> 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.
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> 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."

26. The ET considered Complaint 4 as follows (at [64]-[67]):

> "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."

27. The ET considered Complaint 5 together with an additional complaint that the Respondent did not treat the Appellant as a whistleblower. The relevant passages are as follows (at [74]-[78]):

> "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………………
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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.
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> 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………..

> 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."

28. The ET addressed Complaint 6 as follows (at [79]-[85]):

> "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.
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> 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.
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> 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.
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> 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."

29. The ET began the section headed "Conclusion" by setting out statistical evidence of a disparity between BME and other doctors in respect of complaints and regulatory procedures, taken from a 2014 GMC document "The state of medical education and practice in the UK". The ET stated:

> "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."

30. The ET then addressed in some detail the evidence it heard from a number of witnesses employed by the Respondent concerning the Respondent's equality and diversity training and policy and the parties' respective submissions on this evidence. In respect of this issue, the ET found:

> "106. …….[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."

31. The ET then set out its conclusions in the following terms:

> "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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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."

The decision of the EAT

32. The Respondent advanced ten grounds of appeal to the EAT, although one of these was not pursued at the hearing. The EAT summarised the grounds as follows:

> "37. … 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. …
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> 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.
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> Thirdly the tribunal failed to give adequate reasons for some conclusions, including reaching some that were incomprehensible or contradictory. …
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> 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."

33. The EAT identified two strands in the ET's reasoning as to why the burden had both shifted to the Respondent and not been discharged in relation to those complaints which it had upheld. These were "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" [100]; and second, were "the statistics, and the finding that the respondent's witnesses were "complacent" in relation to them" [103]. The EAT stated (at [105]):

> "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."

34. Returning to consider Complaint 6 (delay), the EAT held:

> "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.

> 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 to 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."

35. Under the heading "Conclusions", the EAT then stated the following:

> "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.
>
> …
>
> 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."

36. The outcome of this decision was that the EAT allowed the appeal, remitting the matter for consideration by a differently constituted tribunal restricted to those four complaints of direct race discrimination it determined the ET had upheld (Complaints 1, 4, 5 and 6).

The application for permission to appeal

37. The Appellant sought to advance eight grounds of appeal to this court:

(1) The EAT was wrong to determine there was a lack of clarity as to whether the ET had upheld Complaint 1.

(2) The EAT was wrong to find that the ET did not sufficiently explain why it upheld Complaint 1 and that there were inconsistencies or conflicts in the ET's reasoning.

(3) The EAT was wrong to find that the reliance by the ET on the differential treatment of the Appellant and Mr Laniado to shift the burden of proof to the Respondent, was not properly reasoned, was inconsistent, or did not engage with the Respondent's case.

(4) The EAT erred in determining that the ET was required to mention expressly the research evidence the Respondent relied on to rebut the Respondent's own statistical material relied on by the Appellant.

(5) The EAT was wrong to determine that because the linking of the Appellant's case with that of Mr Motiwala was not raised as a specific complained of discrimination, it could not materially support the Appellant's case, or be relied on to shift the burden of proof.

(6) The EAT was wrong to describe the ET's finding in relation to delay, that the linking of Mr Motiwala's case was "unnecessary and a matter of limited administrative convenience", as not pointing to race discrimination. The ET's findings were much wider and more critical and were matters from which inferences of discrimination could properly be drawn.

(7) The EAT impermissibly engaged in a wholesale review of the ET's written reasons.

(8) If, contrary to the grounds above, the EAT were entitled to allow the appeal, it ought not to have restricted the remittal to the four complaints it found that the ET had upheld but remitted either the entire claim for rehearing or the six complaints the judgment addressed.

38. On 23 October 2023 I granted permission to appeal on Grounds 1 to 7 but refused it on Ground 8. The GMC did not seek permission to cross-appeal and to argue that the EAT should have allowed the appeal outright and simply dismissed the four complaints which the ET had upheld.

The parties' submissions

39. Although Mr Karim is the Appellant in this court, it is well-established that our primary task is to examine the reasoning of the ET, not that of the EAT. I will therefore summarise the submissions of Mr Hare KC on behalf of the GMC criticising the ET's reasoning on each broad topic before those of Ms Monaghan KC, assisted by Mr Jupp KC, on behalf of Mr Karim supporting it.

The use of Mr Laniado as a comparator

40. Mr Hare submits that by the time of the second referral to the IOP, the differences between the cases of the Appellant and Mr Laniado were numerous and fundamental. These included, inter alia, a pattern of behaviour in the Appellant's case (to protect Mr Motiwala). These differences were summarised by the Respondent in a table put before the EAT and this court. In relation to the concerns which related to the same subject matter (the canteen meeting and MDT letter allegations), the Appellant and Mr Laniado were treated identically (both were referred to the IOP, which did not impose an order on either of them). By the time of the second referral in the case of the Appellant, the situation had changed. There were new allegations in his case; Ms Hollywood's report had reached different findings in respect of each doctor; and the Trust was pursuing a disciplinary investigation in the case of the Appellant. Those concerns (different from those relating to Mr Laniado) informed the second referral. The ET failed to determine whether the doctors were in the same position in all material respects for the purposes of s.23 of the 2010 Act.

41. Mr Hare submits that the ET itself had pointed to a material difference between the Appellant and Mr Laniado, namely the additional allegation that the Appellant had sought to intimidate Dr Robinson, which did not apply to Mr Laniado. When the ET returned to the comparison in its conclusion, it made no reference to this material difference. Further, the ET did not in its concluding section refer specifically to Complaint 1 at all.

42. The GMC accepts that, in principle, it was open to the ET to have rejected its case that the differences between the Appellant's case and Mr Laniado's were not material (subject to a possible perversity challenge). However, it submits, if the ET was going to do so, it had to explain why, and it amounted to an error of law to simply assert that the differences were not material. Further, the ET's findings on the canteen meeting allegation were inconsistent, and the Appellant does not address the fact that Ms Hollywood's report found the (different) allegation relating to the canteen-meeting to be made out in relation to the Appellant but not to Mr Laniado.

43. Ms Monaghan submits that the ET had firmly in mind the specifics of Complaint 1 when using Mr Laniado as a relevant comparator. In relation to the canteen-meeting and MDT letter allegations, the finding made by the ET was that the "allegations against [the Appellant] and Mr L arose out of substantially the same matters and were similar allegations". It is implicit in the ET's findings that the Tribunal rejected the Respondent's submissions that the cases of Mr Karim and Mr Laniado were materially different. This was a view the ET was entitled to reach and to express in clear and simple terms, following its hearing of the evidence and having before it detailed submissions. In respect of the canteen-meeting allegation, the ET was critical of the fact that the GMC relied on Mr Rao in the Appellant's case, but regarded him as unreliable in Mr Laniado's case. The ET properly held that the canteen-meeting allegation and the MDT letter allegation were substantially the same in both the Appellant's and Mr Laniado's cases. Even though the Appellant faced additional allegations at the date of referral to the second IOP, the referral was also on the basis of the canteen meeting and MDT letter allegations, when Mr Laniado was not referred on those same matters.

44. The Appellant submits that the ET was required to approach the question of whether unlawful discrimination has occurred by reference to section 136 of the 2010 Act and the relevant case law. The ET clearly held in its conclusion, with detailed and adequate reasons, why the first stage of the burden of proof analysis had been met. At the second stage it is for the respondent to prove that the treatment was in no sense whatsoever on the grounds of race. The ET held that the Respondent had not done so. The EAT criticised the ET's acceptance of Mr Laniado as an appropriate comparator. However, the ET had made a factual finding that two allegations against the Appellant and Mr Laniado (relating to the canteen-meeting and the MDT letter) arose out of substantially the same matters and were similar allegations. The ET throughout its reasons is entirely consistent in respect of the difference in treatment arising out of the canteen-meeting allegation, for which it finds there is no adequate explanation.

Delay and the use of statistics

45. The GMC contends that the ET's findings of race discrimination were based on the comparison between the Appellant and Mr Laniado, and on the Tribunal's approach to the statistical evidence. The ET made clear that there were no available statistics on

delays generally or in the cases of different groups. The ET's conclusion on delay in Mr Karim's case fails to identify any basis upon which this was because of the Appellant's race. All the ET relied on was a rejection of the Respondent's explanation, however, the authorities are clear that explanation should not be relevant to the first stage of the burden of proof under section 136. The ET's reference to the absence of a system for monitoring the length of cases in the Respondent's disciplinary process is true of registrants of all races. The EAT was correct to point out both that the linking of the cases of Mr Karim and Mr Motiwala was not relied on by the Appellant as a detriment and that the ET does not identify the primary facts from which it inferred that the linking was an act of discrimination. The mere fact that the ET did not accept the Respondent's reasons for the delay is not evidence of race discrimination and using it for this inference reverses the burden of proof.

46. The GMC relied on the analysis of the statistical evidence in a Plymouth University report of 2014 as a fundamental part of its explanation as to why the headline statistical data did not justify a finding of discrimination; this report and other analytical material occupied hundreds of pages of the ET bundles; it was dealt with extensively in the witness evidence and was a major part of the parties' submissions. However, it was not referred to by the ET in its Reasons at all. It was incumbent upon the ET to provide some reasons as to why the Respondent's case at this stage was rejected.

47. Ms Monaghan responds to this by submitting that the ET was fully entitled to find that the Respondent had decided that in Mr Laniado's case, the linking to Mr Motiwala should not hold up consideration of the allegations against him, whereas in the Appellant's case it should. The fact that the Appellant did not specifically allege the act of linking as one of direct race discrimination is irrelevant: the act could still be used as evidence of discrimination in respect of other broader allegations. The EAT was wrong to describe the ET's finding that the linking was unnecessary and a matter of administrative convenience as not pointing to race discrimination. The ET's detailed findings include one that the Respondent showed "tenacity in investigating peripheral complaints"; a rejection of the Respondent's case that the case against the Appellant was complex; and noting the fact that only two matters overlapped between the Appellant's and Mr Motiwala's cases, which were resolved at an early stage.

48. The Appellant submits that the ET took into account all the evidence including the statistical evidence of the parties. It was not persuaded by the Respondent's explanation and preferred the Appellant's submissions on this issue. The EAT should have rejected the frontal attack on the ET's factual findings launched by the Respondent on appeal. The EAT was drawn into, and impermissibly acceded to, a detailed review of the ET's fact finding and reasons. The EAT did not have a full picture of what was a detailed, document-heavy and nuanced case. It did not hear and observe the witnesses' evidence or the oral submissions of counsel and saw only a fraction of the documents before the ET. Standing back, it is tolerably clear from the ET judgment why the Respondent lost on the claims it lost and the EAT ought not to have allowed its appeal, given that there was no question of law arising.

Discussion

49. It is notable that the judgment of the ET, which runs to 114 paragraphs, contains no references to case law. Ms Monaghan is right to say that the fact that an ET does not refer to authorities does not demonstrate that the Tribunal ignored them, any more than

a dutiful recital of leading cases in a decision means that a tribunal has applied them correctly. Before us there was no disagreement between counsel on what the authorities establish. It is sufficient for me to refer to some, but not all, of the authorities cited to us and included in the substantial bundle of authorities.

The use of comparators

50. Section 23(1) of the Equality Act 2010 provides that on a comparison of cases for the purposes of a claim of direct discrimination under s 13 "there must be no material difference between the circumstances relating to each case". In *Macdonald v Ministry of Defence* [2003] UKHL 34; [2003] ICR 97 Lord Hope of Craighead, considering the equivalent provision in the predecessor legislation, said 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". In *Hewage v Grampian Health Board* [2012] UK SC 37; [2012] ICR 1054, Lord Hope said the question whether the situations of a claimant and his comparator were comparable was "a question of fact and degree". I would only add a cautionary note. Although the word "comparable" is convenient shorthand, the statutory question is not whether the situations of the two cases are "comparable" but whether there is "no material difference" between them, as the citation from *Macdonald* makes clear.

The burden of proof and the drawing of inferences

51. Section 136(1)-(3) of the Equality Act 2010 provides:-

> "(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."

52. Several of the leading cases on the drawing of inferences from primary facts by a tribunal in a discrimination case were referred to in the judgment of the EAT, Elias J presiding, in *Law Society v Bahl* [2003] IRLR 640 (later upheld by this court: [2004] IRLR 799) at paragraphs 117-124, in a classic passage which remains authoritative more than 20 years later:-

> "117. A tribunal does of course have an obligation to give a clear reasoned decision. The basic principle is that set out by Bingham LJ, as he then was, in *Meek v City of Birmingham District Council* [1987] IRLR 250 at page 251 when he said this:"
>
>> "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……"

118. 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 Peter Gibson LJ in the course of his judgment said this:

> "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."

119. These comments were cited with approval in the *Anya* case to which we have made reference [*Anya v University of Oxford* [2001] EWCA Civ 405; [2001] ICR 847]. In the course of giving judgment, Sedley LJ said this (at [26]):

> "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."

120. 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."

121. 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."

122. 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:
>
> > "Justice will not be done if it is not apparent to the parties why one has won and the other has lost"
>
> 123. 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):
>
> > "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…."
>
> 124. 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."* [emphasis added]

53. The issue of the burden of proof has recently been considered by the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] ICR 1263; [2021] UKSC 33, but it was not suggested that any of Elias J's judgment in *Bahl* has been superseded. *Efobi* also emphasises that at the first stage of the analysis the ET must consider what inferences can be drawn in the absence of any explanation given by the respondent for the treatment complained of: see per Lord Leggatt JSC at paragraphs 22 and 40.

The comparison between Mr Karim and Mr Laniado

54. The ET did say at paragraph [107] of their decision that in making a comparison of the cases of Mr Karim and Mr Laniado "we must be satisfied that there is no material difference between the circumstances relating to each case". But, with respect, they did

not make a clear finding, in respect of any of Complaints 1, 4, and 5 that the differences between the two cases were not material. Unless the cases of a claimant and any comparator are identical, which plainly those of Mr Karim and Mr Laniado were not, a tribunal making a decision of this kind must set out such differences as there are and explain why in the tribunal's judgment they are not material.

55. Mr Hare is right to point out that originally Mr Karim and Mr Laniado were both referred to the IOP on concerns arising out of the canteen meeting and the MDT letter, and the IOP did not impose an interim order on either of them. By the time of the second referral in the case of the Appellant, the situation had changed. In particular, Ms Hollywood had made markedly different findings in the two cases. The Trust was continuing a disciplinary investigation in the case of the Appellant but not Mr Laniado. If the ET considered that the differences between the two cases were not material it had to explain that conclusion. I take the view that even if this ground stood alone, the ET's findings in respect of points 1, 4, and 5 would have to be set aside and those complaints remitted for a re-hearing. I am also concerned that their view of these complaints may have been affected by the headline statistical evidence, to which I turn, as the ET did, under the heading of delay.

Delay and the use of statistics

56. There was no evidence before the ET that fitness to practise cases brought against BME registrants are typically more prolonged than those brought against white registrants. If there had been, that might have been a powerful piece of evidence from which the ET could, in the absence of a satisfactory explanation, find that the burden of proof had shifted.

57. The ET's reasoning on the subject of delay can, I think, be summarised as follows:-

a) the delay in investigating and prosecuting the complaints against the Claimant totalled 3½ years;

b) the claimant contends that this was "extraordinary" and relies on the target times for completion of an investigation, none of which exceeds 12 months;

c) the tribunal rejected the contention that the allegations were complex;

d) it held that the overall delay and "the apparent tenacity in investigation of the peripheral complaints" required explanation;

e) it found that linking the case with that of Mr Motiwala was "not essential but was a choice made by the Respondent".

f) although the ET did not consider that there was any less favourable treatment in Mr Karim's case being put to the MPT, nor in the conduct of the MPT hearing, these findings did not alter their overall conclusion;

g) "taking into [account] 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 that we could conclude that the difference of treatment of the Claimant in comparison with Mr L and the delay were on the grounds of his race".

58. There are a number of gaps in this reasoning which cause me concern. The most serious of these is the ET's treatment of the statistical evidence. There was no dispute before the ET, and there is no dispute before us, that (as the ET recorded at paragraph 99 of their judgment) BME doctors are the subject of more complaints to the GMC than non-BME doctors, nor that (at least if the comparison is confined to UK graduates) they are more likely than others to receive a sanction or warning. But those figures, taken from a GMC document of 2014 placed before the tribunal, related to proportionate numbers of complaints and to outcomes and sanctions, not to delays. Moreover, they were only one element of the statistical evidence which the ET was asked to consider.

59. The evidence adduced on behalf of the Appellant included a 77-page report "Fair to Refer?: Reducing disproportionality in fitness to practise concerns reported to the GMC" by Dr Doyin Atewolugun and Roger Kline with Margaret Ochieng which, as its title suggests, was concerned with the statistics on referrals. It found that the factors likely to account for disproportionate referrals are "multiple and intricately linked". Statistics on the volume of complaints against BME doctors are not obviously relevant to support an argument that the delay in the Appellant's case gave rise to an inference of discrimination. If the referral statistics were to be relied on, the analysis in "Fair to Refer?" should have been considered. Statistics on outcomes are not obviously relevant either in a case where, as here, the MPT dismissed all the allegations that the registrant's fitness to practise was impaired: if they were to feature in the Tribunal's conclusions their relevance needed to be explained.

60. The ET also had before them (adduced by the GMC) a 91-page research study by a team of six authors at the Plymouth University Peninsula Schools of Medicine and Dentistry "Review of decision-making in the General Medical Council's Fitness to Practise Procedures", published in 2014. The researchers were asked to consider, among other questions, "what factors within the GMC's purview contribute to the over-representation of demographic cohorts of doctors in the FtP procedures, if any?". Their conclusions include a statement that "this analysis has not identified discriminatory practice or bias in decisions in sampled case files or in the GMC guidance and criteria documentation".

61. It would be wrong for me even to attempt to summarise the nuanced conclusions of the Plymouth report. Ms Monaghan tells us that aspects of it were raised in her cross-examination of at least one witness called on behalf of the GMC. But, be that as it may, before reaching conclusions based (at least in part) on the headline statistics set out at paragraph 99 of their judgment, the ET had to grapple with the evidence put forward by the GMC by way of explanation. It would have been open to them to reject the explanation, but that required a careful analysis of the Plymouth study which the judgment does not contain.

62. There are other errors in the analysis on the issue of delay. The decision to link the Appellant's case to that of Dr Motiwala may well have increased the length of the process, and (like many case management decisions of courts, tribunals or regulatory bodies) was not inevitable, but for my part I find it difficult to see why it was a fact from which an inference of discrimination might be drawn. It was not even in the Appellant's solicitors' list of issues. Turning to the ET's remark about the GMC's "apparent tenacity in pursuing peripheral complaints" this brief reference is not followed up. If the "apparent tenacity" was to be considered to raise an inference of conscious or subconscious racial discrimination, the GMC's answer to it was that once

an allegation is referred to Case Examiners by an Assistant Registrar it has to be dealt with until and unless it is dismissed under Rule 8(2)(a) of the 2014 Rules. We do not know what the ET made of this explanation because it is not referred to in the decision.

63. In short, the reasoning of the ET in upholding Complaint 6 was not *Meek*-compliant, and did not meet the standards laid down in the case law cited by Elias J in *Bahl*.

Conclusion

64. For these reasons and those given by the Vice President, I consider, in agreement with the EAT, that the ET's decision upholding complaints 1, 4, 5, and 6 was inadequately reasoned and cannot stand. I would therefore dismiss Mr Karim's appeal, the result is that in accordance with the order of the EAT those four complaints will be remitted for re-hearing before a freshly constituted ET.

Lady Justice King*:*

65. I agree with the judgments of Bean LJ and the Vice-President, and would in particular endorse the concern expressed by each of them as to the ET's treatment of the statistical evidence.

Lord Justice Underhill (Vice President, Court of Appeal, Civil Division):

66. I agree that this appeal should be dismissed for the reasons given by Bean LJ. Since the case was not argued before us, or the EAT, on the basis that the evidence before the ET was incapable of supporting a finding of discrimination, it is inevitable, though very regrettable, that the claim – or, rather, those parts of it which the ET upheld - will have to be remitted for re-hearing. But I would encourage the Appellant and those advising him to think carefully about the way in which they formulate his case on remittal, if indeed he decides that he wishes to pursue it. As regards the differences in the treatment of himself and Mr Laniado on which he relies, there appear to have been no specific reasons to infer a racial motivation on the part of the relevant decision-takers beyond the fact he and Mr Laniado are of different ethnic backgrounds. That is no doubt why the statistical evidence discussed by Bean LJ was put at the forefront of the Appellant's submissions in the ET. Although it has not been necessary, or indeed possible, for us to attempt a definitive analysis of that evidence, the questions raised by Bean LJ at paras. 58-61 above show that it cannot be relied on as raising a *prima facie* case of racial discrimination without a careful consideration of how it sheds light on the reasons for the particular instances of differential treatment of the kind of which the Appellant complains. Simple reliance on headline figures about adverse outcomes is not good enough, at least where the ultimate outcome in his case was a decision that he was not guilty of any misconduct and his essential complaint is about delays in the process. Like Bean LJ, I can well understand that the Appellant feels aggrieved by those delays; but what he has to prove in this case, albeit with the benefit of section 136 of the 2010 Act, is that they were caused or significantly contributed to by his race.