Neutral Citation Number: [2024] EAT 136

Case No: EA-2023-000937-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 August 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

ARTEM LIMITED
Appellant

- and –

MRS K EDWINS
Respondent

- -
- -

Mr Benjamin Uduje (instructed by Moorepay Ltd) for the **Appellant**
Mr Thomas Pacey (instructed by Thomas Mansfield Solicitors) for the **Respondent**

Hearing date: 6 August 2024

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JUDGMENT

SUMMARY

Sex and Race Discrimination

The majority of the Employment Tribunal erred in law in holding that the burden of proof had shifted to the respondent to disprove discrimination and the full panel erred in holding that if the burden had shifted the respondent had failed to discharge it. The discrimination complaints were remitted to the Employment Tribunal to be redetermined.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against a judgment of the Employment Tribunal sitting at Watford from 18 to 31 January 2023; EJ Quill sitting with Ms S Boot and Mr P Miller. The judgment was sent to the parties on 17 July 2023. This appeal concerns the findings of the Employment Tribunal that the claimant was subject to race and sex discrimination through her constructive dismissal and that her dismissal was unfair.

2. The task faced by Employment Tribunals can be complex. The tribunal often has to deal with multiple allegations and a great deal of factual material. The parties often fail to focus on the key issues. There is a risk that the wood will not be seen for the trees. Employment Tribunals resolve factual disputes on the balance of probabilities. They often have to decide why individuals acted as they did. Such determinations are challenging; you cannot open a person's head and look inside to understand their reasoning. What motivated a person is usually determined on findings of fact about the surrounding circumstances and anything that was said or done by the individual.

3. Employment Tribunals regularly determine multiple complaints to which different legal tests apply. Employment Tribunals have to ensure that their findings of fact are consistent throughout.

4. Taking account of these challenges, it is important to read Employment Tribunal judgments fairly and as a whole, without nit-picking criticisms. If the Employment Tribunal has properly directed itself to the law, the likelihood is that the correct self-direction has been applied. That said, while a judgment should be properly and fairly analysed, the difficult task faced by Employment Tribunals does not mean that their judgments should be so generously read that no error can ever be detected.

5. This claim involved a large number of individual complaints, the majority of which failed. I shall refer to the relevant facts found by the Employment Tribunal in relation to the

complaints that succeeded. I am aware that most of the judgment dealt with the complaints that failed. That may explain the brevity of some of the reasoning for those claims that succeeded.

6. The respondent is a company that provides products and services for the special effects and creative model making industry. The respondent was set up in 1988. There were five shareholders, three of whom remained with the company at the relevant time. They were Michael Kelt, who owned 50% of the shares, Simon Tayler who owned 25% of the shares and a person referred to only as "Stan", who owned the final 25% of the shares. The Employment Tribunal held that Mr Kelt was the most senior person and had been managing director and chairman. At the time in question Mr Kelt, Mr Tayler and Stan were involved in succession planning to find a new management team that could take over the business from them.

7. The claimant was employed by the respondent from 1 January 1996, initially part-time, for three hours a day, two to three days a week, working as an admin clerk. She was promoted from time to time. In January 2004 she was appointed as finance manager. Later in 2004 she joined the board and was given the title of finance director.

8. That significant history of promotion was a factor that the Employment Tribunal should have had some regard to when considering the events that occurred towards the end of the claimant's employment.

9. The claimant described her race, for the purposes of the race discrimination complaint, as being Chinese Caribbean and British Guyanese in origin.

10. A colleague of the claimant, Mr Stewart, had worked for the respondent while studying for his degree and joined as an employee in around 2008. He left for a short period but returned. He was appointed as a director in 2018.

11. An employee referred to as "SB", who was described in the claimant's witness

statement as “the only other BAME woman other than me” worked for the respondent from around 2007. She started working on reception, but was gradually promoted.

12. Despite having the title “finance director”, the claimant is not a qualified accountant, and the respondent used external accountancy services.

13. The Employment Tribunal did not have up-to-date information about the makeup of the respondent’s workforce, by reference to their protected characteristics. There was a list produced some two years after the end of the claimant’s employment that showed that there were 27 male employees and 9 female. At that stage it appears that there were four individuals who described themselves as persons of colour and one person whose entry referred to “passport, other”. All but five entries under ethnicity or country of origin stated “British”. It must be stressed that this information dates from two years after the claimant’s employment ended.

14. The only specific evidence before the Employment Tribunal was that of the claimant; that she and SB were the only employees who she would describe as BAME women. There was some limited evidence that the special effects industry has a predominance of male employees.

15. The Employment Tribunal recorded that there was some evidence of inappropriate comments being made by members of staff. SB stated during a grievance interview that there were “always comments about colours, races, northern, ginger. They say it without thinking”. Although there was specific evidence that a comment was made about someone being “ginger” and “northern”, there was no evidence of any specific comment about race. The Employment Tribunal did not make a finding of fact that racist comments had been made.

16. The Employment Tribunal did make findings of fact that comments had been made that were related to sex; that a member of staff had been told she had got her “knickers in a twist”, that Mr Kelt used the phrase “pretty young ladies” in respect of receptionists and

referred to a female employee as an "old nag".

17. In late 2018, staff were given an opportunity to apply for the role of managing director. The claimant and Mr Stewart applied and were considered for the role. They gave presentations on 21 November 2018. After the presentation there was a vote that went substantially in Mr Stewart's favour. The respondent suggested that relations with the claimant deteriorated from that point onwards.

18. The Employment Tribunal held that Mr Kelt had previously thought of the claimant as a possible MD.

19. The Employment Tribunal recorded that there was a staff review on 17 December 2018, in which the claimant stated:

> "I would like the environment at Artem to be much more politically correct and colleagues should respect each other."

20. In a December 2019 staff review, the claimant said that she felt she was being forced out of her job.

21. In December 2019, after board minutes had been circulated, on 17 December 2019, by Mr Kelt, the claimant wrote suggesting that the minutes were misleading. Her email was circulated to all those on the circulation list for the minutes. Thereafter, further critical emails were circulated by the claimant to all members of the board.

22. In March 2020, as lockdown started as a result of the coronavirus pandemic, the respondent made furlough arrangements. The special effects business had all but come to a halt as a result of the pandemic. A decision was taken that everyone, except SB, would be on furlough. SB's role was required because of her involvement in financial matters. The respondent decided that all staff would receive 80% of their salary, including SB who would be working. There was no rigorous assessment of precisely what hours SB worked.

23. The claimant also undertook some limited duties while on furlough, that were thought to be permitted within the terms of the scheme. Therefore, for the majority of the lockdown

period all staff but SB were on furlough, paid 80% of their salaries that could be recovered under the CJRS scheme, whereas SB was paid 80% of her salary by the respondent.

24. In May 2020, the claimant asserted that SB should be receiving her full salary. The respondent suggested that if SB was able to return to work five days per week, she would be put back on to a full salary.

25. In the latter part of 2020, the respondent decided to undertake a review of its financial systems. A wide-ranging review was to be undertaken by Ms Shingleton. The claimant expressed concerns about the review because she was worried about the possible consequences for her role.

26. The claimant was called to a meeting on 12 August 2020. She was not given advance notice of the purpose of the meeting. The tribunal concluded that the claimant gave a more accurate description of the meeting than the respondent's witnesses. Mr Kelt started by referring to the claimant's queries to Ms Shingleton about the scope of the finance review. The tribunal rejected the respondent's contention that they had patiently offered the claimant the opportunity to ask any questions and that their intention was to use the meeting to draw up terms of reference for Ms Shingleton. The Employment Tribunal rejected the respondent's evidence that the claimant was obstructive. The tribunal found, contrary to the respondent's version of events, that the claimant was not unresponsive or sullen.

27. The Employment Tribunal found that the purpose of the meeting was to discuss the finance review and that the discussion led on to the respondent raising concerns about the claimant. In the respondent's note, Mr Kelt was recorded as stating that the working relationship with the claimant was not currently effective and that her attitude had to improve. Mr Kelt stated that the concern was not about the claimant's competence but the respondent's confidence in her. This comment, that there was a loss of confidence in the claimant, was the fundamental factor that led the claimant to conclude that the employment

relationship was no longer tenable, as a result of which she tendered her resignation.

28. A ground of appeal seeking to challenge the finding that there was a fundamental breach of contract, through Mr Kelt saying that the respondent had lost confidence in the claimant, and that she resigned in response, was not permitted to proceed.

29. Accordingly, the starting point for the analysis of this appeal is that the claimant was constructively dismissed by the respondent when she was informed that the respondent lacked confidence in her.

30. The Employment Tribunal analysed what occurred at the meeting on 12 August 2020 at paragraphs 712 to 719 of the judgment:

> “712. Our assessment is that it was not the Respondent’s (or Mr Kelt’s or Mr Stewart’s) to use the meeting of 12 August 2020 as an attempt to make the claimant concerned about the risks from Covid. We do not uphold the Claimant’s suggestions that seating arrangements, or mask wearing arrangements, or the choice of room were deliberate intimidation techniques. …
>
> 713. In terms of describing the scope of the review to her, the choice of words was not necessarily unreasonable. The meeting was prompted by the email exchange between the claimant and Ms Shingleton which Ms Shingleton had forwarded to Mr Stewart and Mr Kelt. Within the emails, the claimant was challenging the necessity for a review; whereas Mr Kelt and Mr Stewart were of the opinion that it had already been settled that it would take place. …
>
> 714. On the balance of probabilities, we are satisfied that the words ‘there was a question mark that we might need someone else to deal with this stuff’ and ‘we are in charge not you’ or similar. We are also sure that the Claimant was told that the review was going to take place whether she liked it or not and that Mr Kelt regarded her attitude to the review as unhelpful.
>
> 715. We were satisfied that the Claimant’s account of the words used during the meeting was more accurate that Mr Kelt’s and Mr Stewart’s. We were also satisfied that they displayed anger towards her in the meeting and were critical of her. It was suggested that working relationships needed to improve, and that the Claimant was entirely to blame for poor relationships between her on the one hand and Mr Kelt and Mr Stewart on the other, and that the changes needed to improve the working relationships were entirely from her.
>
> 716. Very significantly, she was told by Mr Kelt that he had lost confidence in the Claimant. He was the company chairman, and owner of 50% of the shares. The managing director was present and (at least tacitly) agreed.

> 717. There was no reasonable and proper cause for this statement. We reject the Respondent's account of what led to (their version of) the comment. We do not accept that, during the meeting, after a patient attempt to engage the claimant in relation to the finance review, and agree terms of reference for it, the Claimant's refusal to co-operate prompted the comment. Rather, Mr Kelt (in particular) and (to a lesser extent) Mr Stewart went into the meeting with the attitude that they would be laying down the law to the Claimant. They were not trying to make her resign (and they were not contemplating dismissing her in the meeting) but they had decided that they were going to be giving her a telling off for the correspondence with Ms Shingleton. The comment about having lost confidence in the Claimant was based on an opinion Mr Kelt had before the meeting, not one he arrived at during the meeting. He told the Claimant that it was (in part) because of a 'few things dramatically wrong' and said this without the Claimant ever having had the safeguards of any performance management process, allowing her to know the specific alleged performance concerns, and the evidence, and the opportunity to give a considered response.
>
> 718. The statement was not deliberately calculated to destroy the relationship of confidence and trust between employer and employee, but it was likely to have that effect, and it did so. As a result of what was said to her in the meeting, and as a result of this comment in particular, the Claimant believed that there was no way back for her. She believed that she could not continue as an employee.
>
> 719. This was a repudiatory breach of contract by the Respondent. The Claimant resigned in response to it. She did not affirm the contract before doing so. (We therefore do not need to address her alternative argument that the events at this meeting were 'the last straw'.)"

31. It is important to note that at paragraph 717 the Employment Tribunal stated that Mr Kelt and Mr Stewart were not trying to make the claimant resign and were not contemplating dismissing her in the meeting.

32. The Employment Tribunal accepted, at the very least, that the context of the comment was the correspondence between the claimant and Ms Shingleton about the terms of the finance review.

33. The Employment Tribunal went on to consider the unfair dismissal claim. They dealt with this briefly at paragraphs 721 to 722:

> "721. The Respondent has not proven the dismissal reason. Although it says in the Grounds of Resistance, 'To the extent that there were ever any concerns regarding the Claimant's performance in the role, these concerns were justified', it has not proven what specific performance issues (if any) were the reason for the dismissal. Furthermore, the Respondent has not

> shown that there was some other substantial reason justifying dismissal; on its own account (and the Claimant agrees) Mr Stewart said that he wanted to, and thought they could, carry on working together.
>
> 722. In any event, even if there had hypothetically been a fair reason for dismissal, no fair procedure (or any procedure) was followed. The Claimant was given no advance notification of the meeting, and was not given details of any concerns over particular performance issues, or working relationship issues, that would be discussed."

34. The Employment Tribunal then dealt with the Equality Act complaints. The Employment Tribunal first dealt with the victimisation complaint at paragraphs 727 to 728:

> "727. We note that Mr Kelt's comments in the meeting on 12 August included, even based on the Respondent's own note, "the corrosive effect of copying unsubstantiated comments by email to the whole Board" when listing their (alleged) concerns about her attitude. That being said, there was extensive correspondence and interaction between the Claimant, on the one hand, and Mr Kelt and/or Mr Stewart on the other hand since 18 December 2019, about a wide range of topics. We are satisfied that they had in mind the emails which they believed unnecessarily were circulated to the whole board, rather than comments about Board meetings/minutes. We could not safely conclude that the two paragraphs about Stan in the 18 December 2019 email were part of what was being referred to in the notes, or part of the reason for what occurred during the meeting.
>
> 728. In all the circumstances, the burden of proof in relation to victimisation does not shift. The reason why the criticisms of the Claimant were made in the meeting were because of more recent events and emails."

35. Paragraph 728 suggests that the Employment Tribunal concluded that the reason the claimant was criticised in the meeting was because of recent events and emails. The term "recent events" is a reference to the finance review by Ms Shingleton, and the "emails" are those concerning the review and/or that had been circulated to all members of the board. The victimisation complaint was rejected.

36. The Employment Tribunal then split, the majority setting out the reasons why the burden of proof had shifted for the sex discrimination complaint at paragraph 731:

> "The reason that the burden of proof shifts for sex is that the workforce was more than 80% male. Mr Kelt had had this drawn to his attention, and said he would consider it. He had failed to take any action. He made the 'old nag' comment. According to the grievance interviews, not disclosed until part way through the hearing, the only two female interviewees each remarked on specific comments he had made which had offended them.

(knickers in twist; pretty young lady for reception). These are facts which show that Mr Kelt's actions potentially could be motivated by the sex of the person he was talking to, or talking about and from which the Tribunal could conclude that his words and actions on 12 August 2020 were, at least partially, and at least unconsciously, influenced by the Claimant's sex."

37. The majority stated why the burden of proof shifted for the race discrimination complaint at paragraph 732:

> "The reason that the burden of proof shifts for race is that the workforce was predominantly white. During the first few weeks of the covid lockdown, all the white employees (not counting the directors) were not working and were receiving 80% of pay. One employee, SB, was required to work and received 80% of pay. That is a fact which could indicate that the Respondent (Mr Kelt and Mr Stewart) were capable of treating employees differently where there was a difference in race. They made no attempt to reimburse SB for the hours that she had worked in April and part of May after they were told that she was working full-time, and SB's comments to the grievance investigator do not support their claims that SB was content or that she thought they were being reasonable to her. SB's own opinion was that sometimes remarks were made about colour (albeit she did not give specific examples). These are facts which show that Mr Kelt's and Mr Stewart's actions potentially could be motivated by the race of the employee they were dealing with, and from which the Tribunal could conclude that his words and actions on 12 August 2020 were, at least partially, and at least unconsciously, influenced by the Claimant's race."

38. The Employment Tribunal then made some general points, possibly relevant to the shifting of the burden of proof both in respect of sex and race:

> "733. Furthermore, the Tribunal have unanimously rejected Mr Kelt's and Mr Stewart's account of the facts of what happened in the meeting. They have put forward a false explanation of what happened, and this contributes to there being 'something more' than just less favourable treatment and a difference in sex or race.
>
> 734. The conduct of 12 August 2020 was suspicious and surprising. With no prior warning, the Claimant was told that the respondent (Mr Kelt, in particular) had lost confidence in her. She was not called to any formal performance, or disciplinary, meeting, or given an advance notice that the Respondent had lost confidence in her, or the alleged reasons. She was not given the opportunity to prepare a defence or counter-argument."

39. The majority concluded that, the burden having shifted, the Respondent had failed to discharge it, at paragraphs 735 to 737:

> "735. There are facts from which the Tribunal could conclude that the reason for this treatment was her sex, and there are facts from which the Tribunal could conclude that the reason for this treatment was her race.

> 736. The burden of proof shifts. The Respondent has failed to prove that:
>
> 736.1. a hypothetical comparator, being a Finance Director who was a man, and whose performance, attitude and other circumstances were the same as the Claimant's would have been treated the same way.
>
> 736.2. a hypothetical comparator, being a Finance Director who was a different race to the Claimant, and whose performance, attitude and other circumstances were the same as the Claimant's would have been treated the same way
>
> 737. Therefore the sex discrimination and the race discrimination complaints succeed."

40. The minority member, EJ Quill, concluded that facts had not been established that shifted the burden of proof but, if he were wrong in that conclusion, he agreed with the majority that the respondent had not disproved discrimination.

> "738. The minority opinion (EJ Quill) is that the burden of proof does not shift for either sex or race. The reason why the meeting was called was that Mr Kelt and Mr Stewart were annoyed by (what they perceived as) her attitude to the finance review. They had no plans to hide that annoyance. On the contrary, they planned to assert their authority (as they saw it) over her. The reason why they made the comments that they did in the meeting is that they believed that the Claimant was in the wrong, and they planned to tell her that emphatically. It has not been proven (because their account about what happened in the meeting has not been found to be truthful and accurate) whether they planned to tell her before the meeting that they had lost confidence in her, or whether that was more of a spur of the moment remark which happened as the meeting unfolded. Either way, they acted unlawfully, as the Tribunal has explained when determining that there was a constructive dismissal which was unfair. However, there are no facts from which EJ Quill could conclude that a hypothetical comparator might have been treated differently in the same circumstances. For that reason, EJ Quill would have dismissed the complaints that the dismissal was sex or race discrimination. However, had he been persuaded that the burden of proof had shifted, EJ Quill would have agreed with the majority that the Respondent has not shown that the dismissal was, in no sense whatsoever, because of sex or because of race."

41. The appeal is brought on two remaining grounds. Ground 2 challenges the unfair dismissal finding, contending that the Employment Tribunal should have found there was a potentially fair reason for dismissal on the basis of its own findings of fact. The respondent does not challenge the conclusion that, even were there a potentially fair reason for dismissal, the dismissal was unfair, and in light of findings made about the appropriate reduction to the

award for unfair dismissal in the remedy judgment, accepts that the unfair dismissal appeal is academic. The reason the ground is pursued is to challenge the apparent finding that there was no reason for dismissal. It is suggested that this may have infected the assessment of the discrimination complaints challenged by Ground 3.

42. Ground 3 contends that the Employment Tribunal erred in ignoring its earlier findings as to the reason for the dismissal and/or that there was an improper application of the burden of proof in that the majority did not properly direct itself that there must be evidence from which it could properly and fairly infer that the repudiatory conduct in response to which the claimant resigned was done because of the claimant's race or sex and/or that the Employment Tribunal erred in its approach to a hypothetical comparator and reached conclusions that were inadequate to justify a shift in the burden of proof. The respondent asserts that the findings made by EJ Quill should have been made by the whole tribunal.

43. Section 98 of the **Employment Rights Act 1996** ("**ERA**") provides as follows:

"**98 General.**

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> ……….
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

44. When assessing a claim of unfair dismissal, it is for the respondent to establish the reason for dismissal. There are two questions; what was the reason for dismissal as a matter of fact, and does that reason come within one of the potentially fair categories of reasons for dismissal. The task of determining the reason for dismissal is a little more challenging in a constructive dismissal claim. Constructive dismissal is provided for by section 95(2) **ERA**:

"**95 Circumstances in which an employee is dismissed.**

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

45. Because it is the employee who decides to resign, in a claim of constructive dismissal the reason for dismissal is the respondent's reasons for the conduct that constituted the repudiatory breach of contract; see **Berriman v Delabole Slate Ltd** [1985] ICR 546 at 550H to 551A:

"In our judgment, the only way in which the statutory requirements of the Act of 1978 can be made to fit a case of constructive dismissal is to read section 57(1) as requiring the employers to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employers. We can see nothing in the decision in *Savoia v Chiltern Herb Farms Ltd*. [1982] I.R.L.R. 166 which conflicts with this view."

46. Cairns LJ stated in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323:

"a reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

47. That wording was cited with approval by the House of Lords in **W. Devis & Sons Ltd v Atkins** [1977] AC 931.

48. It was subsequently noted by Underhill LJ in **Beatt v Croydon Health Services NHS Trust** [2017] EWCA Civ 401 that the precise wording may not be apt in every case, but that the essential point is that the reason for a dismissal connotates the factual factors, operating on the mind of the decision-maker, which cause them to take the decision or, as it is sometimes put, what motivated them.

49. In **UPS Ltd v Harrison** UKEAT/0038/11/RN, HHJ Richardson noted that an Employment Tribunal should first determine the respondent's factual reason for dismissal and then determine whether it is a potentially fair reason.

50. That said, the burden of proving both the factual reason for dismissal and that it is one of the potentially fair reasons is on the respondent. A respondent may be in difficulty if they have not properly pleaded the reason for dismissal; see the judgment of HHJ Eady QC, as she then was, in **Retirement Security Ltd v Miss A Wilson** UKEAT/0019/19/JOJ, paragraphs 22 to 26:

> "22. The first difficulty for the Respondent in the present case lies, however, in showing that it ever sought to demonstrate a potentially fair reason for the constructive dismissal of the Claimant. Although in its particulars of response (its pleaded case before the ET) the Respondent included the following averment: '*If, which it is denied, the Tribunal decide that the Claimant was dismissed, then that dismissal was for Some Other Substantial Reason and was fair in the circumstances'*, I am unable to see that the Respondent ever stated what the other substantial reason was or more substantively, that it actively pursued this alternative case before the ET. Certainly, the ET records (see paragraph 1 of its Judgment) that the issues to be determined at the Full-Merits Hearing had been identified with the parties at the outset, as follows:
>
> > '1. …. Firstly, was the respondent in fundamental breach of contract by way of breach of the implied term of trust and confidence, if there was a fundamental breach, was the breach the cause of the claimant's resignation, thirdly was there a delay in the claimant resigning, or on the respondent's case did the claimant resign too soon.'

23. Mr Kohanzad has told me that his instructions are that it was in fact the Employment Judge who identified the issues at the outset of the Hearing, but he fairly accepts that the Respondent's solicitor made no attempt to correct the issues thus set out. Certainly, it is clear that it was the ET's understanding that the Respondent was putting no positive case as to the reason for any dismissal. That would also seem to be consistent with how the Respondent's case was put in closing submissions, (summarised by the ET at paragraph 22 of its Judgment) which included no alternative case that any dismissal was, in any event, for a fair reason and fell within the band of reasonable responses.

24. Although the ET did not record any formal concession by the Respondent that a finding of constructive dismissal must mean that the Claimant's case would succeed, I am unable to see that the Respondent pursued any positive case that there was a fair reason for any dismissal found by the ET. Mr Kohanzad says that that should not be fatal to his client's appeal. He says that given the difficulty that an employer faces in establishing the reason for dismissal in a constructive dismissal case, in cases where the reason is obvious the ET should be encouraged to construct the reason – that is, to look at what was in the employer's mind at the relevant time, based on the evidence before it.

25. I am not persuaded that that is right. Section 98(1) of the **Employment Rights Act 1996** ("the ERA") makes clear that the burden is on the employer to show the reason for a dismissal, and that it was for a reason specified at subsection (2) or for some other substantial reason, such as to justify the dismissal of an employee appointed to a position held by the Claimant. If an employer chooses not to put forward any positive case as to the reason for the dismissal in a claim of constructive unfair dismissal, I cannot see that the ET is obliged to try to construct a possible reason on the employer's behalf. In saying this, I recognise that it may well be difficult for a Respondent to make good an alternative case as to the fair reason for a constructive dismissal. In a constructive dismissal case, a Respondent would need to show that the conduct which entitled the Claimant to terminate the contract (thereby giving rise to the deemed dismissal by the employer) amounted to a reason that was capable of being fair for the purposes of section 98 **ERA** (see *Berriman v Delabole Slate* [1985] ICR 546 CA).

26. In the present case, the Respondent's conduct was the carrying out of an investigatory process that was so flawed the Claimant could reach no other view than the Respondent wanted rid of her (see the ET's Judgment at paragraph 44). Mr Kohanzad says that given the incidents in the Respondent's mind at the relevant time, it should have been obvious that it carried out the investigatory process in that way for reasons relating to the Claimant's conduct or, at least, for some other substantial reason; namely its desire to investigate her conduct. In support of this submission, Mr Kohanzad observes that the Respondent itself characterised the two-hour investigation meeting as '*an ambush*'. He contends that the employer is entitled to conduct such an approach at an investigatory stage, which does not necessitate the same standards of fairness as a disciplinary hearing. More than that, he contends that such a dismissal can fall within the range of reasonable responses, notwithstanding the ET's finding, for the purposes of establishing the breach of the implied term, that it was objectively unfair; the 'range' test allowing for the possibility of a fair dismissal even where there is objectively unreasonable conduct, the two tests being different (see Vickers Ltd v Smith [1977] IRLR 11, *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, and *Post Office v John Foley* [2000] ICR

1283."

51. Section 13 of the **Equality Act 2010** ("**EQA**") provides:

"**13 Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

52. Specific provision is made that can assist in analysing the burden of proof by section 136 **EQA**:

"**136 Burden of proof**

(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."

53. The correct approach to the burden of proof was considered in **Igen v Wong** [2005] EWCA Civ 142, [2005] ICR 931:

"76. As this is the first time that the Barton guidance has been considered by this court, it may be helpful for us to set it out again in the form in which we approve it. In Webster Burton J. refers to criticisms made of its prolixity. Tempting though it is to rewrite the guidance in a shorter form, we think it better to resist that temptation in view of the fact that in practice the guidance appears to be offering practical help in a way which most ETs and EATs find acceptable. What is set out in the annex to this judgment incorporates the amendments to which we have referred and other minor corrections. We have also omitted references to authorities. For example, the unreported case referred to in para. (6) of the guidance may be difficult for ETs to obtain. We repeat the warning that the guidance is only that and is not a substitute for the statutory language.

Annex

(1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s41 or s42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that ‘he or she would not have fitted in’.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word ‘could’ in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since ‘no discrimination whatsoever’ is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in

> the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

54. In **Laing v Manchester City Council & Anor** [2006] ICR 1519 Elias J further considered the correct approach to the burden of proof in discrimination claims:

> "*Discussion*
>
> 71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the Employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.
>
> 72. The Courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the Burden of Proof directive, as Peter Gibson LJ recognised in *Igen*.
>
> 73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* (at para. 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.
>
> 74. Another example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at paras 7-12, it must surely not be inappropriate for a Tribunal in such cases to go straight to the second

stage.

75. The focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race.'

76. Whilst, as we have emphasised, it will often be desirable for a tribunal to go through the two stages suggested in *Igen*, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the Employer. But where the Tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.

77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the Tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the Tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the Tribunal to reach a finding of discrimination even if the prima facie case had not been established. The Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance."

55. In **Madarassy v Nomura International** [2007] EWCA Civ 33; [2007] ICR 867 Mummery LJ held that the wording "could conclude" means that a reasonable tribunal could properly conclude from all of the evidence before it:

"57. 'Could conclude' in section 63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the

> complaint. Subject only to the statutory ‘absence of an adequate explanation’ at this stage (which I shall discuss later) the tribunal would need to consider all the evidence relevant to the discrimination complaint”

56. In **Field v Steve Pye & Co (KL) Ltd and Others** [2022] EAT 68, [2022] IRLR 948, I noted that an Employment Tribunal should not ignore evidence that suggests discrimination. However, I should also add that it is important that Employment Tribunals do not ignore evidence that suggests there has not been discrimination. What must be ignored at the first stage is any exculpatory explanation for the treatment.

57. I will deal first with the discrimination ground of appeal, starting with the approach adopted by the majority at stage one of the analysis. When considering race discrimination, the first reason the majority relied on for the shift in the burden of proof was that the workforce was predominantly white. That could not logically be a reason for shifting the burden of proof where the majority of the workforce and population in the UK is white. Next, it was stated that white employees were not working and were receiving 80% of pay, whereas SB was working and received 80% of pay. The majority did not return to the previous findings of fact and consider how the situation had arisen; particularly the fact that the arrangement appeared to have been agreed with SB. The majority did not consider the fact that while white employees on furlough were receiving 80% pay, so was the claimant. The circumstances of SB and other employees was different in that she was being paid by the respondent whereas other employees were being paid through the coronavirus retention scheme.

58. The majority relied on SB’s opinion that remarks were sometimes made about race, albeit that she did not give any specific examples. There is no finding of fact that such comments were made. The only specific finding was that a comment had been made about a person being “ginger” and “northern”. The majority did not consider why SB could recall that comment but could not recall any specific comments about “colour” or “race”.

59. The majority referred to facts that showed that Mr Kelt and Mr Stewart's actions "potentially" could be motivated by the race of the employees they were dealing with. The correct test requires that the Employment Tribunal could properly conclude from all of the relevant evidence at stage 1 that the treatment was because of race.

60. The majority did not consider any facts that might have suggested there was no discrimination, including the claimant's history with the respondent prior to her not being appointed as managing director.

61. The findings in respect of sex discrimination are clearer. The majority referred to the workforce being 80% male and to the comments made by Mr Kelt about an "old nag", a member of staff having her "knickers in a twist" and a "pretty young lady for reception". However, there was no reference to any features of the evidence that might have pointed against discrimination. The career trajectory of the claimant, from joining as a part-time receptionist to becoming finance manager, was a factor that the Employment Tribunal should have considered to some extent. Furthermore, the majority stated that there were facts which showed Mr Kelt's actions "potentially" could be motivated by sex, rather than that they had concluded that they could properly conclude from all the evidence, that the treatment was because of sex.

62. While I accept that the Employment Tribunal also referred to the respondent's false explanation for what had occurred at the meeting on 12 August 2020 and the conduct of the meeting being "suspicious" and "surprising", I do not consider the additional factors are sufficient to satisfy me that the majority properly applied the correct test to determine whether the burden of proof had shifted, including properly considering evidence that suggested discrimination and any other evidence that suggested otherwise.

63. I also consider that there was an error in the approach to the unanimous decision that, assuming the burden of proof had shifted, the respondent had failed to discharge it. When

dealing with the claim of victimisation the Employment Tribunal appears to have identified a, or the, reason why Mr Kelt made the comment about a breakdown in trust in the meeting on 12 August 2020. There appears to be a finding of fact at paragraph 717 as to the reason why the comment was made.

64. Even if the claimant's reaction to the financial review and her sending email correspondence to the entire board was the primary reason for the comment being made that resulted in her resignation, that does not preclude the possibility of her sex or race being a subsidiary reason. To make out a complaint of race or sex discrimination it would only be necessary that the protected characteristic was an effective cause of the treatment. However, because the Employment Tribunal made findings as to the reason for the treatment that resulted in the claimant's resignation, when rejecting the victimisation complaint, it was incumbent on the Employment Tribunal to explain why it concluded that the explanation was insufficient to establish that race or sex was in no sense whatsoever the reason for the dismissal.

65. There was no clear pleading of a reason for dismissal. While there is a potentially interesting point as to whether if an Employment Tribunal identifies a reason for dismissal when analysing a complaint other than unfair dismissal, it must apply that reason when analysing the unfair dismissal complaint, even if it was not pleaded, I have concluded that it does not arise in this appeal because the appeal is academic in the light of the remedy decision. This was accepted by the respondent. Accordingly, the appeal succeeds to the extent that the findings of sex and race discrimination are overturned.

66. I do not accept the respondent's contention that there is only one possible answer to the discrimination complaints. I have concluded that the analysis of the majority in respect of whether the burden shifted at stage one, and that the unanimous decision that the burden had not been discharged if it had shifted, involved an error of law. That resulted from a failure to

analyse the evidence properly. I do not consider that there can only be one proper answer to the complaints of discrimination on a full and proper analysis of the evidence. Accordingly, the discrimination complaints are remitted.

67. Neither party suggested the remission should be to a differently constituted Employment Tribunal. Properly so, in circumstances in which the Employment Tribunal made substantial findings of fact that have not been challenged. Accordingly, the matter is remitted for redetermination of the discrimination claims by the same Employment Tribunal. It may be that there is no need for any further evidence. Indeed, it is unlikely that there is any proper basis for further evidence, but that will be a matter for the case management discretion of the Employment Tribunal.