Neutral Citation Number: [2024] EAT 22

Case No: EA-2021-001354-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 February 2024

Before :

THE HONOURABLE MR JUSTICE CAVANAGH
MR NICK AZIZ
DR GILLIAN SMITH MBE

- -

Between :

MR D MARTIN **Appellant**

- and -

THE BOARD OF GOVERNORS OF ST FRANCIS XAVIER 6TH FORM COLLEGE

Respondent

- -
- -

Mr David Stephenson (instructed by Direct Access) for the **Appellant**
Mr Jonathan Heard (instructed by Lyons Davidson) for the **Respondent**

Hearing date: 12 December 2023

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JUDGMENT

SUMMARY

RACE DISCRIMINATION

This judgment considers the law relating to comparators in discrimination cases, including actual statutory comparators, evidential comparators, and hypothetical comparators. The judgment also considers the interrelationship between the use of comparators and the shifting burden of proof in section 136 of the Equality Act 2010.

The Employment Appeal Tribunal held that the majority of the Employment Tribunal in this case did not misdirect itself in law, did not reach a perverse decision, and gave adequate reasons for its conclusions. Accordingly, the appeal is dismissed.

THE HONOURABLE MR JUSTICE CAVANAGH:

Introduction

1. This is an appeal from the decision of the Employment Tribunal (EJ Wright, Ms M Foster-Norman and Mrs S Dengate, sitting at London South, "the Tribunal") sent to the parties and entered in the Register on 24 September 2021, in which the Tribunal, by a majority ("the Majority"), rejected the Appellant's claims of direct race discrimination and constructive unfair dismissal. Permission to proceed to a full hearing was granted by HHJ Tayler, following a rule 3(10) hearing on 28 March 2023.

2. The Respondent is a Sixth Form College for students aged 16-19, based in Clapham South, London. The Appellant was employed by the Respondent as a teacher of English and Head of Faculty (Pastoral). He had been employed by the Respondent since 28 August 2001. The Appellant is black British of Jamaican heritage. In 2017, he was subjected to a disciplinary investigation and then attended a disciplinary hearing. The allegation against him was that he had been late on a number of occasions. The investigation had commenced after an incident on 26 May 2017 when he had arrived late on a day when a group of his students were taking public examinations in English Language and Literature. On that day, clean copies of the set texts could not be located and senior management at the College had to embark upon a search for them. For obvious reasons, this caused alarm. The Appellant could have assisted with that search, as he knew where the set texts were, though he was not primarily responsible for making sure that they were available at the start of the exam. The Appellant arrived a few minutes after the exams were due to start and helped to find the clean copies. The exams started late. On 8 September 2017, immediately after the disciplinary hearing but before the decision had been announced, the Appellant resigned with immediate effect, claiming that he had been constructively unfairly dismissed.

3. Before the Tribunal, the Appellant contended that he had been unlawfully discriminated against on the ground of his race by being subjected to a detriment, contrary to sections 13 and

39(2)(d) of the Equality Act 2010 ("the EqA"). The less favourable treatment was being investigated on 7 June 2017 and then being subjected to a disciplinary process, culminating in the disciplinary hearing on 8 September 2017, further to the events of 26 May 2017. The Appellant alleged that he was subjected to a detriment during the disciplinary process in a number of ways, which we will refer to when we come to summarise the findings of fact by the Majority.

4. The Appellant relied upon two actual comparators. The first was Mr Tom Spindler, Head of the English Department, who bore partial responsibility for the fact that the clean copies of the set texts had been missing when the exam was due to start. Mr Spindler was not investigated or called to a disciplinary hearing. The second was Mr Gavin McQuitty, Co-tutor in English, who had also been late on 26 May 2017, and who had not informed anyone of this and had not followed the Respondent's absence process. This did not come to light until November 2017. Mr McQuitty was not investigated or called to a disciplinary hearing. The Respondent, in turn, relied upon one actual comparator, in defence of the race discrimination complaint. This was Mr Gary White, the Head of Curriculum Policy, who was in charge of exams at the College. Mr White was also investigated in Summer 2017 for breaches of the Respondent's absence policy. He was called to a disciplinary hearing in September 2017, and then given an oral warning, which was to remain on his record for six months. Each of Mr Spindler, Mr McQuitty, and Mr White is white European.

5. The Appellant relies on a number of grounds of appeal. Each of the grounds contends that the Majority of the Tribunal fell into error in one or more of the following ways: (1) by misdirecting themselves in law; (2) by reaching a decision that was perverse; and/or (3) by failing to give adequate reasons. A number of the grounds, which will be discussed below, contend that the Majority erred in the way in which it dealt, in relation to the direct race discrimination complaint, with actual, evidential, and hypothetical comparators.

6. The Appellant was represented before us by Mr David Stephenson of counsel, and the Respondent by Mr Jonathan Heard. We are grateful to them both for their assistance.

The facts as found by the Majority, and their conclusions

7. In order to address the issues raised in this appeal, it is necessary first to set out in some detail the facts as found by the Majority, and their conclusions in relation to race discrimination and constructive unfair dismissal.

8. On 26 May 2017, public examinations were taking place in English Language and Literature for students who were taught by the Appellant. As he was their class teacher, the Appellant was not permitted to invigilate or otherwise to play a part in the examinations. However, he had intended to be present in order to assist if required. An exam inspector arrived at the College at approximately 8.35 am that day.

9. The Appellant's contractual start time was 8.40 am. The Appellant travelled from Norbury to the College each day. He did so by taking a bus to Norbury Station, followed by a train journey to Balham Station, then followed by a tube to Clapham South. During the period in question, there had been rail strikes on Southern Rail which had regularly disturbed the Appellant's journey to work.

10. On the day of the exams, there had been a traffic issue affecting buses which caused him to be late. He did not contact the Respondent to say that he would be late but texted a colleague, Mr McQuitty, saying, "Hi Gavin, traffic problems my end. Trying to get in for the start of the Lang/Lit exam. Clean copies of Othello are in 124 by computer."

11. The Respondent had a staff absence policy which instructed teachers to use a dedicated email address or telephone number for absences, including domestic difficulties, car breakdown etc. Such absences were to be reported by 8.15 am. The Respondent said that this applied if a teacher was running late, not just if he or she was absent altogether, because it might be necessary, for safeguarding reasons, to provide classroom cover in case of lateness, as it would be in the case of absence. The Appellant argued before the Tribunal that this policy did not apply to lateness, but only to absence. The Majority of the Tribunal found that the policy applied both to absence and to lateness. The Appellant did not contact the dedicated email or phone number, as set out in the policy, and did not call his head of department, Mr Spindler. He did not have his phone number. The Appellant said that there was an informal practice of texting a work colleague when a teacher was going to be late.

The Tribunal found that there was no evidence of this being done, save by the Appellant on 26 May 2017 itself.

12. As we have said, a problem arose on 26 May 2017 because clean copies of the set texts for the exam (Othello and The Great Gatsby) could not be found. This, understandably, caused considerable alarm. Mr White, the Head of Curriculum Policy (overall head of exams), was also not present, and the College Principal, Ms Stella Flannery, the Associate Principal, Mr Graham Thompson, and Mr Spindler were involved in trying to locate the clean copies. Mr McQuitty arrived at about 8.45/8.50 am and helped with the search. At the time, Ms Flannery did not realise that Mr McQuitty had arrived late.

13. The Appellant arrived at about 9.08 to 9.10 am. The texts for the exam were obtained from the Appellant's classroom and given to the students. This meant that the exam began late. The students were given additional time to complete the exam, and allowances were subsequently made in the marking process for the effect of the disruption. Nevertheless, this was undoubtedly disconcerting for the students.

14. The Tribunal found that Ms Flannery was frustrated about the morning's events and the impression they would have given to the exam inspector. Ms Flannery asked to see the Appellant and spoke to him forcefully. He explained his travel difficulties and, at Ms Flannery's request, showed her the text message that he had sent to Mr McQuitty. The Majority of the Tribunal rejected the Appellant's contention that Ms Flannery had asked to see the message because she did not trust him. Rather, the Majority found that she did so in order to establish when it was sent and what it said. Ms Flannery was surprised that the Appellant had not used the absence reporting procedure and was annoyed by the events of the morning.

15. There was a dispute between the Appellant and Ms Flannery about whether the Appellant apologised to her during this meeting. The Majority found that he did apologise to her.

16. Ms Flannery asked the Appellant to provide a written report, which he did later that morning. He said that he had arrived at the bus stop in good time to get the 8.20 or 8.27 train from Norbury to

Balham, but that the buses were delayed by a traffic accident and when this became clear he walked to Norbury. He missed the 08.27 train by a minute and took the next train, the 08.50, which was delayed by two minutes. He said that he had intended to arrive before the exam began, at 9.00 am. He had intended to pass on clean copies of the text to the person responsible for starting the exam.

17. The Majority found that this meeting with Ms Flannery was both an informal meeting and the "fact-finding" stage which was required by the Respondent's disciplinary procedure.

18. There was a dispute about whether the Appellant bore any responsibility for providing clean copies of the set text for the exam. The Majority accepted that Mr Spindler, as head of department, had ultimate responsibility for ensuring that clean set texts were provided. However, the department worked as a team and the Appellant admitted and accepted that he had a role to play in helping to ensure that unmarked copies of the set texts were available. He had intended to arrive by 9.00 am to hand them over.

19. An investigation was commenced by the Respondent into the events on 26 May 2017.

20. The following week was half term. The next school day was 5 June 2017. On 7 June 2017, Ms Flannery observed the Appellant appearing to arrive at 08.51 am. She was concerned that there was a pattern of lateness. On 7 June, Ms Flannery was given access to a log of the gate to assist her in determining whether there was such a pattern. She was told, however, that the log was not admissible evidence for disciplinary purposes and that the data should not be shown to the Appellant or included in the pack for the disciplinary hearing. The Majority was, quite rightly, critical of this. Either the data should not have been used at all, or, if it was used, it should have been shown to the Appellant.

21. In the event, examination of the data identified nine occasions since 1 January 2017 on which it appeared that the Appellant had arrived late.

22. It came to light part-way through the hearing at the Tribunal that the Respondent's Human Resources department had obtained the gate data in relation to the Appellant on 26 May 2017, the day of the incident itself. The Appellant contended that this showed that Ms Flannery had not been

telling the truth when she said that she had first seen the gate data on 7 June, that she had actually looked at it on 26 May, and that this demonstrated that she had been unduly suspicious of the Appellant on 26 May. Ms Flannery was recalled, and her evidence, which the Majority plainly accepted, was that she did not ask for or see the gate data until 7 June 2017. On 26 May, in addition to obtaining the gate data for the Appellant, HR had obtained the gate data in relation to Mr White, who had also been late that day.

23. A letter was sent to the Appellant on 7 June 2017, informing him that there was to be a further investigation into:

i) the measures which he took to ensure that students sitting public examination were not disadvantaged;

ii) the measures which he took to ensure his prompt arrival at the Respondent to meet the contractual requirement of directed hours; and

iii) whether or not this instance of late arrival was an isolated event or part of a pattern of poor punctuality.

24. The Appellant attended an investigation meeting with Mr Thompson on 21 June 2017. He was accompanied by his trade union representative. The Majority rejected the Appellant's contention that Mr Thompson should not have been involved in the investigation, because of his involvement in the events of 26 May 2017. He had been involved in the events of 26 May but only to the extent of helping in the search for the set texts.

25. Mr Thompson found that there was no case to answer in relation to issue i), because there had been no impact on the students taking the exam.

26. Mr Thompson found that there was a case to answer in relation to issues ii) and iii). In the normal course of events, Mr Thompson's report would have been passed to Ms Flannery to decide whether disciplinary action was necessary. However, as Ms Flannery had been involved in the events, it was decided that the decision would be taken by Mr Andrew Taylor, Strategic Director of Finance and Physical Resources and another member of the College's senior management team.

27. The Majority found that the Respondent was entitled to take the view, in relation to issue ii), that if the Appellant's default position was to catch the 08.27 train, then he could not guarantee arriving at the school on time at 08.40. This would not leave time for any delays or contingencies.

28. Mr Taylor decided that issues ii) and iii) should be considered at a disciplinary hearing. On 28 June 2017, a letter was sent to the Appellant, informing him of this. The letter outlined the various potential sanctions. The potential sanctions referred to in the letter were a formal written warning and dismissal, with or without notice. There was no reference to the sanction of a formal oral warning.

29. The Appellant submitted to the Tribunal that it was unreasonable to leave open the sanction of dismissal for a matter such as this. The Majority noted that the same list of potential sanctions had been sent in a similar letter to Mr White, who also faced disciplinary proceedings. Both letters were signed by a Ms Houston of HR, and the Majority held that, if there was fault in this, responsibility lay with Ms Houston. In fact, however, the Majority considered that it had been appropriate to leave all options open, including dismissal, so as to leave it to the chairperson of the disciplinary proceedings to decide upon an appropriate sanction. Neither the Appellant nor his trade union representative had complained about this at the disciplinary hearing, when they were told that an oral warning was an option.

30. In fact, before he received the letter from Mr Taylor, the Appellant considered resigning, with effect from 31 December 2017. He drafted a resignation letter to this effect on 22 June 2017, but did not send it.

31. On 3 July 2017, the Appellant received a copy of Mr Thompson's investigation report. The disciplinary hearing was fixed for 12 July 2017, the last day of term. At the Appellant's request, this was postponed until 8 September 2017. The Appellant criticised the Respondent for scheduling the hearing on the last day of the Summer Term, saying that it had been chosen to cause him additional stress and anxiety, but the Majority of the Tribunal accepted that there were good reasons why the disciplinary hearing could not have been held before the end of the Summer Term and said that the Respondent might have been criticised if it had delayed the hearing until the Autumn Term.

32. The disciplinary hearing took place on 8 September 2017. The Appellant was accompanied by his trade union representative. Mr Taylor clarified at the start of the hearing that the potential sanction of an oral warning had been mistakenly omitted from the letter of 28 June 2017. As we have said, neither the Appellant nor his trade union representative took objection to this. The Appellant was given the opportunity to put forward his case in relation to the two remaining complaints against him, issues ii) and iii). He challenged the view of Mr Thompson that it was inconceivable that he could catch the 8.27 train from Norbury Station and still arrive on time, and said that even when he was running late he would still hope to arrive at work on time. Mr Thompson had referred to the Appellant arriving late on two other occasions since 26 May 2017, but the Appellant was able to show that on one of these occasions he had arrived early and had then left to buy milk or coffee.

33. At the end of the disciplinary hearing, the Appellant was told that he would be notified of the outcome subsequently. The Majority accepted Mr Taylor's evidence that he would have imposed an oral warning on the Appellant, which would have lain on his personnel file for six months and would then have been expunged.

34. On the same day as the disciplinary hearing, 8 September 2017, the Appellant decided to resign with immediate effect, and did so. In the event, therefore, the Appellant resigned before he had been made aware of the outcome of the disciplinary hearing. As we have said, the Appellant had previously decided to resign with effect from the end of the Autumn Term but had not sent the resignation letter. It follows that the Appellant resigned before being notified of the disciplinary sanction that was to be imposed upon him by Mr Taylor. Under the Respondent's Disciplinary Policy, if the Appellant had been dissatisfied with the disciplinary sanction, he could have appealed to the College's Governors.

35. As we have said, the Appellant relied upon two comparators, each of whom is white European, and each of whom the Appellant submitted was an actual comparator.

36. The first comparator was Mr Spindler. He was not late on 26 May 2017, but he was the head of department and was ultimately responsible for the department's examination processes. He was

not disciplined in respect of the events of 26 May 2017. The Respondent's senior management decided that it was not appropriate to do so as he was new to the role, and these were the first exams for which he was responsible.

37. The second comparator was Mr McQuitty. Like the Appellant, he was late on 26 May 2017. He arrived five minutes late that day. Unlike the Appellant, however, he was not subjected to disciplinary action. The College's senior management team had not realised, in the melee on the day itself, that Mr McQuitty was late. This only came to Ms Flannery's attention in November 2017 and the view was taken by senior management that, in view of the passage of time, and in view also of the fact that Mr McQuitty did not have a pattern of lateness, no disciplinary action would be taken against him.

38. The Respondent also relied upon an alleged actual comparator. This was Mr White, the Head of Curriculum Policy. Mr White is also white European. Mr White was absent on 26 May 2017 and on other occasions. His absence was investigated by Mr Graham who reported the results to Ms Flannery. Ms Flannery decided that the matter would proceed to a disciplinary meeting. The letter sent to Mr White was in the same terms as that sent to the Appellant: it referred to the sanction of dismissal, but it did not mention the possibility of an oral warning. The proposed date for the disciplinary meeting was, like the Appellant's, in July 2017, but, again like the Appellant, Mr White asked to postpone it until September. The disciplinary meeting took place on 5 September 2017 and Mr White was given an oral warning, to remain on his record for six months.

39. The Majority found that neither Mr Spindler nor Mr McQuitty was an actual comparator. Their circumstances were materially different from his for the purposes of section 23 of the Equality Act 2010. Mr Spindler was not late on 26 May 2017, and did not have a pattern of lateness. He had been ultimately responsible for the department's exam processes, but he was new in his role and these were the first ones that he had undertaken. He acknowledged the error on 26 May 2017 and took steps to prevent it. Mr McQuitty had been five minutes late on 26 May 2017, but his case was materially different from the Appellant's in that this did not come to senior management's attention

until November 2017. Furthermore, it was an isolated incident. There was no evidence, in his case, of a pattern of lateness. The Majority understood management's view that, by then, it would have been futile to take any disciplinary action.

40. The Majority found that Mr White was an actual comparator for the purposes of the race discrimination claim.

41. The Majority considered the four main allegations of direct discrimination that were made by the Appellant.

42. First, the Majority was satisfied that there was no less favourable treatment in relation to Mr Thompson's investigation. Mr Thompson did not find there to be a case to answer in relation to every matter, and the Majority found that there was indeed a case to answer in relation to the matters which Mr Thompson recommended should proceed to a disciplinary hearing. Mr Thompson had acted in accordance with the Respondent's policy. Furthermore, there was no difference in the treatment of the Appellant and the treatment of Mr White. Both were formally investigated when concerns about lateness of absence arose. Their circumstances were very similar. The Tribunal was satisfied that there was no less favourable treatment of the Appellant because of his race in this regard.

43. The second allegation was that Ms Flannery and/or Mr Thompson discriminated against the Appellant by subjecting him to a disciplinary process. Again, the Majority rejected this allegation. The Majority found that there had been no less favourable treatment of him because of his race, and both he and Mr White had been subjected to disciplinary action due to absence/lateness, in breach of the College's policy.

44. Third, the Appellant alleged that he was discriminated against by being warned in the letter inviting him to the disciplinary hearing that a potential sanction was summary dismissal. Once again, the Majority rejected the contention that this amounted to race discrimination, observing that Mr White had been treated in exactly the same way. The letter had been drafted by HR, not by the senior management team. At the start of the disciplinary hearing, Mr Taylor had clarified to the Appellant and his trade union representative that an oral warning was an option for the disciplinary sanction.

45. The final allegation was that the Respondent had directly discriminated against the Appellant on the ground of race by dismissing him by way of resignation on 8 September 2017. The Majority pointed out that this was not a free-standing allegation of any additional act or omission. It was an allegation that the course of treatment up to and including the disciplinary hearing on 8 September 2017 amounted to direct race discrimination. The Majority held that, as it had found that there was no less favourable treatment of the Appellant on the ground of his race during the period leading up to his resignation on that day, it followed that the dismissal by way of resignation was not race discrimination.

46. The Majority added that, even if it had been wrong to regard Mr White as an actual comparator, it would have regarded him as an evidential comparator. The Majority found that it could be inferred from the way that Mr White had been treated that if the Appellant had not resigned the disciplinary sanction would have been an oral warning, to be kept on file for six months.

47. For these reasons, the Majority dismissed the Appellant's claim of race discrimination.

48. The Majority then addressed the claim of unfair constructive dismissal. The Majority held that, whilst there were some respects in which the procedure followed by the Respondent could be criticised, the Appellant had not been constructively dismissed. There had been no race discrimination. He had not been disciplined, because he had resigned before the disciplinary process was concluded. The Majority rejected the submissions on behalf of the Appellant that there was no policy for reporting lateness, and that the absence policy did not apply to lateness. The Appellant was aware of the policy and had received emails about it. There was nothing improper in Mr Thompson carrying out the investigation even though he had been involved in the search for the set texts on 26 May 2017. In the event, Mr Thompson did not recommend that the Appellant should be disciplined for his part in the problems that arose in relation to the exam texts. The allegations against the Appellant were not weak: there was evidence of a pattern of lateness and grounds for suspecting that the Appellant was not taking sufficient responsibility to ensure that he was at work on time. His travel itinerary from Norbury was such that any delays would put him at risk of being late. There

was always a risk that public transport would make him late, especially as there had been a series of rail strikes in 2017. The Tribunal rejected the Appellant's contention that it had been Ms Flannery who took the decision, in light of the investigation report, that there should be a disciplinary hearing: that decision had been taken by Mr Taylor. He had taken it with an open mind. It was not unreasonable for the Respondent to decide to deal with this matter within the formal disciplinary framework, especially as lateness could give rise to safeguarding issues. There was no reason to think that the Appellant would have been summarily dismissed, notwithstanding the terms of the HR letter. Mr White was treated in the same way as the Appellant.

49. The Majority accepted that, in certain respects, the Respondent could have done better. The disciplinary process could be criticised for the use of gate data without disclosing it to the Appellant, and for failing to mention an oral warning in the invitation letter. However, the Majority concluded that, even taking these matters into account, the Respondent had not acted unreasonably or in a manner calculated to destroy the relationship of trust and confidence. It was reasonable to address the Appellant's time keeping. There was no breach of the implied term of trust and confidence.

50. The member who was in the minority ("Minority") took the view that the Respondent had discriminated against the Appellant on the ground of his race. The Minority reached different conclusions on the facts, and the inferences to be drawn from the facts, from those reached by the Majority in a number of respects. The Minority concluded that, as at 26 May 2017, the absence procedure did not cover lateness; that the Appellant had no responsibility for the students on the day of the exam and that Mr Spindler had sole responsibility for them; that there had been breaches of the Respondent's disciplinary procedure including that there had been no fact-finding meeting, and none of those involved on 26 May 2017 had been interviewed; that there had been insufficient investigation into the events on 26 May 2017; that Mr Thompson should not have been involved in the investigation because he had been involved in the search for the set texts on 26 May 2017; that Ms Flannery had been involved and was conflicted and, contrary to the evidence she had given to the Tribunal, had asked for the gate data on 26 May 2017, and had been motivated by racial considerations in so doing;

that the Respondent had not clarified the charges against the Appellant; and that there had been no pattern of lateness on his part. The Minority took the view that Mr McQuitty was an actual comparator who had been treated more favourably than the Appellant, that the Respondent had not given a satisfactory explanation for the unequal treatment, and that the Appellant's race had played a part in the Respondent's actions, whether consciously or unconsciously.

The applicable law

Direct race discrimination

51. Section 13(1) of the EqA provides:

> "(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. Race is, of course, a protected characteristic: section 9.

53. As Mr Stephenson pointed out, less favourable treatment may exist not only where the two people in the same circumstances are treated differently, but also where the employer treats two people in different circumstances in the same way: **Fletcher v Blackpool & Fylde and Wyre Hospitals NHS Trust** [2005] ICR 1458 (EAT), at paragraph 64.

Comparators

54. Section 13 of the EqA requires that two matters be established for there to be a finding of direct discrimination. The first is that there has been treatment of the claimant (A) which is less favourable than the treatment that was meted out, or would have been meted out, to a comparator (B). The second is that the less favourable treatment was on the ground of the protected characteristic. Whilst it is open to an Employment Tribunal to go straight to the second question, the "reason why" question (see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11; [2003] ICR 337, at paragraph 8, per Lord Nicholls of Birkenhead) it is common for a Tribunal to consider the "comparator" question, as the Tribunal did in the present case.

55. There are three potential types of comparator: an actual (or statutory) comparator, an evidential comparator, and a hypothetical (statutory) comparator.

56. An actual comparator exists when there is no material difference between the circumstances

relating to the claimant's case and the comparator's case. Express statutory provision is made for such a comparator in section 23(1) of the EqA, which states,

> "(1) On a comparison of cases for the purposes of section 13…. there must be no material difference between the circumstances relating to each case."

57. A comparison with an actual comparator (also known as a statutory comparator) may support or undermine a claimant's case.

58. However, it is clear that, even where the circumstances of a proposed comparator are not materially the same as those of the claimant, a Tribunal may take account of the way in which the respondent treated that person if there are some relevant similarities between their circumstances. A Tribunal may be assisted by seeing how unidentical, though not wholly dissimilar, comparators had been treated in relation to other individual cases. See **Chief Constable of West Yorkshire Police v Vento** [2001] IRLR 124 (EAT), at paragraph 7, per Lindsay J. Such comparators are known as evidential comparators.

59. Furthermore, a Tribunal may consider whether it is assisted by considering how a hypothetical comparator in a similar (i.e. not materially different) position to the claimant, but who does not have the protected characteristic, would have been treated. Such a hypothetical comparator will be a statutory comparator, for the purposes of section 23.

60. It should be borne in mind, however, that the purpose of a Tribunal's consideration of comparators is to use it as an evidential tool to see whether an inference of discrimination is justified. It is not an end in itself. This was made clear by Lord Scott of Foscote in **Shamoon**, in the course of a very helpful summary of the law relating to comparators, at paragraphs 107-110:

> "107. There has been, in my opinion, some confusion about the part to be played by comparators in the reaching of a conclusion as to whether a case of article 3(1) discrimination - or for that matter a case of discrimination under section 1(1) of the Sex Discrimination Act 1975 , or under section 1(1) of the Race Relations Act 1976 , or under the comparable provision in any other anti-discrimination legislation-has been made out. Comparators come into play in two distinct and separate respects.
> 108. First, the statutory definition of what constitutes discrimination involves a comparison: "treats that other less favourably than he treats or would treat other persons". The comparison is between the treatment of the victim on the

> one hand and of a comparator on the other hand. The comparator may be actual ("treats") or may be hypothetical ("or would treat") but "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other" (see article 7). If there is any material difference between the circumstances of the victim and the circumstances of the comparator, the statutory definition is not being applied. It is possible that, in a particular case, an actual comparator capable of constituting the statutory comparator can be found. But in most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator. In **Khan's** case [2001] ICR 1065 one of the questions was as to the circumstances that should be attributed to the statutory hypothetical comparator. It is important, in my opinion, to recognise that article 7 is describing the attributes that the article 3(1) comparator must possess.
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> 109. But, secondly, comparators have a quite separate evidential role to play. Article 7 has nothing to do with this role. It is neither prescribing nor limiting the evidential comparators that may be adduced by either party. The victim who complains of discrimination must satisfy the fact-finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. ***But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground***, ***e g sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim***. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, e g, under article 7 , by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was treated less favourably than she would have been treated if she had been the article 7 comparator.
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> 110. In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim."
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> **Emphasis added**

61. We mention in passing that, at paragraph 109 of the passage cited above, Lord Scott was using the phrase "actual comparator" in a different way from the way in which the Tribunal in the present case, and we, have been using it. Lord Scott used the phrase "actual comparator" to mean a real

person, as opposed to a wholly hypothetical person, whether that real person satisfied the statutory test in s23 or was an evidential comparator. The Tribunal and the Appeal Tribunal have been using the phase "actual comparator" to mean a real person who is a statutory comparator for the purposes of s23, and the phrase "evidential comparator" to mean a real person who is not a statutory comparator. Nothing rests on this difference of terminology. We should add that a hypothetical comparator will be a statutory comparator, because of the words "or may treat" in section 23 (see, **Shamoon**, at paragraph 108): when looking at a hypothetical comparators, a tribunal will be looking at someone who is in the identical circumstances as the claimant, but who does not possess the protected characteristic.

62. For practical purposes, it may not make a great deal of difference as to whether a comparator is an actual comparator or an evidential comparator. In **Watt (formerly Carter) v Ahsan** [2007] UKHL 51; [2008] 1 AC 296, Lord Hoffman, with whom all of the other Lords agreed, said:

> "37. It is probably uncommon to find a real person who qualifies under section 3(4) as a statutory comparator. Lord Rodger's example at para 139 of Shamoon of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator."

63. The question, in direct discrimination cases, as to whether the situations of the claimant, on the one hand, and the proposed comparator, whether actual or evidential, on the other, are comparable is a question of fact and degree: **Hewage v Grampian Health Board** [2012] UKSC 37; [2012] ICR 1034. The Supreme Court upheld the view of the Inner House of the Court of Session, restoring the decision of the Employment Tribunal, that unless the Employment Tribunal's judgment could be said to be absurd or perverse it was not for the Appeal Tribunal to impose its own judgment on the point.

To like effect, in **Kalu v Brighton & Sussex University Hospitals NHS Trust** (UKEAT/0609/12), Langstaff P said, at paragraph 24, that the identification of a comparator is a question of fact.

64. In order for a comparator to be an actual or statutory comparator, is not necessary that the circumstances are the same in every particular. In **Vento**, above, Lindsay J said, at paragraph 12:

> "…. it is all too easy to become nit-picking and pedantic in the approach to comparators. It is not required that a minutely exact actual comparator has to be found."

65. In **Kalu**, at paragraph 24, Langstaff P said, "The purpose of making the comparison … needs to be understood before a comparator may properly be identified." In our judgment, this is of central importance. Whether a point of difference has any significance or not depends on the nature of the less favourable treatment about which complaint is made. So, for example, if the complaint is about the claimant not being selected for a job, whilst the comparator was selected, the fact that the claimant and comparator have similar academic qualifications may well be relevant if the job required developed intellectual skills, but it is not relevant if the job requires solely manual labour or (to use one of Langstaff P's examples) is to model clothing.

The burden of proof

66. Section 136 of the EqA provides for what is colloquially called the shifting burden of proof. The burden ordinarily rests with a claimant to prove on the balance of probabilities that he or she has suffered direct discrimination. However, this is subject to section 136, which provides, in relevant part:

> "(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."

67. The interrelationship between the use of comparators and the shifting burden of proof has recently helpfully been considered by the EAT (HHJ Tayler) in **Virgin Active v Hughes** [2023] EAT 130; [2024] IRLR 4, at paragraphs 61-69,

"61. In many direct discrimination claims the claimant does not rely on a comparison between his treatment and that of another person. The claimant relies on other types of evidence from which it is contended that an inference of discrimination should be drawn, the comparison being with how the claimant would have been treated had he had some other protected characteristic.

62. In other cases, the claimant compares his treatment with that of one or more other people. There are two ways in which such a comparison may be relevant. If there are no material differences between the circumstances of the claimant and the person with whom the comparison is made (the person is usually referred to as an actual comparator), this provides significant evidence that there could have been discrimination. However, because there must be no material difference in circumstances between a claimant and a comparator for the purpose of section 23 EQA it is rare that a claimant can point to an actual comparator. The second situation in which a comparison with the treatment of another person may provide evidence of discrimination is where the circumstances are similar, but not sufficiently alike for the person to be an actual comparator. The treatment of such a person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping to consider how a hypothetical person whose circumstances did not materially differ to those of the claimant would have been treated (generally referred to as a hypothetical comparator). Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ to those of the claimant. That distinction is not always sufficiently considered when applying the burden of proof provisions in section 136 EQA:

…

63. Probably the most regularly quoted passage concerning section 136 EQA is from the judgment of Mummery LJ in **Madarassy v Nomura International plc** [2007] I.C.R. 867 at paragraph 56:

> "56. The court in **Igen Ltd v Wong** [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

64. It is worth noting that in **Madarassy** the Employment Tribunal did not analyse the treatment of the claimant in comparison to actual comparators. Ms Madarassy's claim was not analysed on the basis that there were men who were actual comparators, but that the scoring of men in a redundancy exercise could help establish how a hypothetical comparator would have been treated.

65. Where there is an actual comparator, it might be said that there is more than the bare fact of a difference of status and a difference of treatment. In **Laing v Manchester City Council and another** [2006] I.C.R. 1519 Elias J noted:

> "65. In our view, if one considers the burden of proof provision in the context of what a claimant needs to establish in a discrimination claim, what it envisages is that the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn. Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation)."

66. Laing was approved by the Court of Appeal in **Madarassy**, which itself was approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37; [2012] ICR 1034 and **Efobi v Royal Mail Group Ltd** [2017] UKEAT 0203/16, [2018] ICR 359 ; see the analysis of Underhill LJ in **Base Childrenswear Limited v Nadia Otshudi** [2019] EWCA Civ 1648 at paragraphs 16-18 .

67. If anything more is required to shift the burden of proof when there is an actual comparator it will be less than would be the case if a claimant compares his treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator.

68. For example, if two people who differ in a protected characteristic attend a job interview and one is appointed but the other is not, that, of itself, would not be enough to shift the burden of proof, but if they scored the same marks in the assessment, so there is an actual comparator, the difference of treatment would seem to call out for an explanation. As Elias J noted in **Laing** at paragraph 73:

> "As I said in **Network Rail Infrastructure Ltd v Griffiths-Henry** (unreported) 23 May 2006, para 17, it may be legitimate to infer that a black person may have been discriminated against 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."

69. Accordingly, where a claimant compares his treatment with that of another person, it is important to consider whether that other person is an actual comparator or not. To do this the Employment Tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination."

68. We respectfully agree with this analysis, but it is important to emphasise that HHJ Tayler did

not say that in every case in which the claimant has been treated less favourably than an actual (statutory) comparator, the burden of proof will shift. It is more likely that the burden of proof will shift, but it does not follow that in every case the burden of proof will shift. The Tribunal must apply the statutory test as set out in section 136(1), when deciding, in a particular case, whether the burden of proof has passed to the respondent.

Constructive dismissal

69. An employee is constructively dismissed if the employer commits a repudiatory breach of his or her contract of employment, which the employee accepts as terminating their contract of employment. Such a breach may arise if the employer breaches the implied term of trust and confidence that exists in every contract of employment in such a way as to destroy or seriously damage the relationship of employer and employee. A course of conduct or series of actions may result in a repudiatory breach of the implied term of trust and confidence.

Perversity

70. The law relating to the scope for a successful appeal against the decision of an Employment Tribunal on a question of fact, or a question of fact and degree – such as whether, in a direct discrimination case, there is an actual or evidential comparator – is very well-established. Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care": **Crofton v Yeboah** [2002] EWCA Civ 794; [2003] IRLR 634; **British Telecommunications PLC -v- Sheridan** [1990] IRLR 27 at para 34. As HHJ Tayler said in **Virgin Active v Hughes** at paragraph 56(4), perversity is extremely difficult to establish in general, and particularly where the challenge is to findings on credibility.

71. It is also trite law that an appeal is not simply an opportunity to re-run arguments that were unsuccessful before the Employment Tribunal.

Failure to give adequate reasons

72. The law relating to the circumstances in which an appeal should be allowed because the Tribunal failed to give adequate reasons for its ruling is similarly well-established. In **DPP Law v Greenberg** [2021] EWCA Civ 672; [2021] IRLR 1016, Popplewell LJ, with whom Lewison and Lewis LJJ agreed, summarised the relevant principles as follows:

> "57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
> (1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In **Brent v Fuller** [2011] ICR 806, Mummery LJ said at p. 813:
>
> "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid".
>
> This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in **Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")** [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in **Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd** [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.
> (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be **Meek** compliant (**Meek v Birmingham City Council** [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In **Meek**, Bingham LJ quoted with approval what Donaldson LJ had said in **UCATT v. Brain** [1981] I.C.R. 542 at 551:
>
> > "Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."

> (3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in **RSPB v Croucher** [1984] ICR 604 at 609-610:
>
> > "We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in **Retarded Children's Aid Society Ltd. v. Day** [1978] I.C.R. 437 and in the recent decision in **Varndell v. Kearney & Trecker Marwin Ltd** [1983] I.C.R. 683."
>
> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

The grounds of appeal

73. Against this factual and legal background, we move on to consider in turn the five grounds of appeal relied upon by Mr Stephenson on behalf of the Appellant.

Ground 1: Error in finding that Mr White was not an appropriate actual/statutory comparator under section 23 of the EqA.

74. There are three parts to Ground 1, described as Ground 1A, Ground 1B and 1C.

Ground 1A

75. Mr Stephenson submitted that the Majority failed to recognise that the misconduct allegations against Mr White were far more serious than those against the Appellant. Mr White was absent without permission on seven occasions, on 10, 12, 17, 19, 22, 25 and 26 May 2017. Further, he carried out private work when absent on 10 and 12 May 2017, did not attend on the day of the exam, and was, as the Head of Curriculum Services, ultimately responsible for ensuring that students had clean copies of the texts for the exam. Mr Stephenson contended that, unlike the allegations against the Claimant, these were capable of constituting gross misconduct, warranting a disciplinary investigation and hearing where dismissal with or without notice was a legitimate sanction that was open to the Respondent.

76. Mr Stephenson said that the Majority erred in law in failing to apply the test laid down in section 23 of the EqA and failing to enquire, first, as to what were the relevant circumstances and, second, whether the circumstances of Mr White were "not materially different" from the circumstances of the Appellant. He submitted that the Majority erred in concluding that there was a material difference between the circumstances of Mr White and the Respondent. The allegations against Mr White were far more serious. Had the Majority applied the test correctly, they could only have concluded, on the facts of this case, that the circumstances of Mr White were materially different from those of the Appellant. Given the serious nature of the allegations against Mr White, the disciplinary process and threat of dismissal were entirely legitimate, whereas the Appellant was merely late on 26 May 2017, a day on which he was not required to attend the English examinations.

Ground 1B

77. Mr Stephenson submitted that the Majority erred in law in not making specific findings of fact as to the extent of the pattern of lateness as alleged by the Respondent. The Majority did not make findings about each specific allegation of lateness and whether the Respondent put that allegation to the Appellant during the disciplinary process.

Ground 1C

78. Further and alternatively, Mr Stephenson submitted that the Majority erred in the same way that it had erred, as described above, in relation to the actual/statutory comparator issue when it went on to find that it would have reached the same conclusions if Mr White had been an evidential, rather than an actual, comparator.

79. Finally, on this ground, Mr Stephenson submitted that the Majority's failure properly to engage with and consider the two questions that it was required to ask by EqA, s23, infected its decision in relation to evidential and hypothetical comparators.

Discussion

80. In our judgment, there are essentially three aspects to these grounds, which need to be considered separately. The first is that the Majority misdirected itself in law in its approach to the actual comparator issue for the purposes of section 23 of the EqA, and that this affected the Majority's approach to the evidential and hypothetical comparator issues. The second aspect is that the Majority's conclusion that Mr White was an actual comparator and, if the Majority was wrong about that, he was an evidential comparator, was perverse. The third is that the Majority had failed to give adequate reasons for its conclusion that Mr White was an actual, or at least an evidential, comparator.

81. As for the first aspect, we are unable to find any misdirection of law on the part of the Majority. The Tribunal specifically referred to section 23, and set it out in its judgment, at paragraph 16. Mr Stephenson did not point to any passage in the Tribunal's judgment which contained a misdirection. The contention on behalf of the Appellant that the Majority had misdirected itself in law in relation to the comparator issues relating to Mr White worked backwards from the contention that the ET had reached a perverse decision on this issue: the argument in relation to a misdirection of law was based upon the proposition that, as the Majority's finding on this issue was perverse, it must follow that the ET had misdirected itself. In other words, this first part of Mr Stephenson's argument in relation to Ground 1 is not, in reality, an argument based upon a free-standing misdirection of law, but is, rather, just another way of putting the perversity challenge.

82. Having said that, we note that, having reminded itself of section 23 at paragraph 16 of its

judgment, the Tribunal went on to say, at paragraph 17, that "The relevant authorities were set out in the written submissions and were considered." In our view, it would have been better if, in its judgment, the Tribunal had set out a summary of the guidance in the relevant authorities. Such a summary need only have been brief, perhaps very brief, but the reader of the judgment, if not a party to the proceedings, would not have had access to the written submissions to which the Tribunal referred. We have sympathy for the Tribunal in the particular circumstances of this case, however, for two reasons. First, the hearing of the proceedings before the Tribunal had been prolonged and disrupted by the pandemic. Second, the written submissions of the parties did not deal in any detail with the law relating to comparators. In any event, this does not give rise to an error of law. We have looked at the written submissions that were lodged by the parties. Reference was made in the submissions of Mr Stephenson, who appeared for the Appellant below, to a passage in **Qureshi v Victoria University of Manchester** [2001] ICR, which set out the section 23 test, and the submissions of Mr Heard, for the Respondent, set out section 23 itself. Neither submission set out any legal argument or cited authorities specifically on the comparator issue, and that was no doubt because there was no dispute about the principles to be derived from the authorities, which are well-established. There is no basis, therefore, for inferring from the absence of any detailed review of the authorities in the judgment, that the Tribunal misdirected itself as to the legal test to be applied when considering actual, evidential, or hypothetical comparators. It is clear from the remainder of the judgment that the Majority fully understood the difference between actual, evidential, and hypothetical comparators.

83. The next issue is whether the Majority's conclusion that Mr White was an actual comparator, and would in any event have been an evidential comparator, was perverse. In our judgment, the clear answer is "no". There is no doubt, in light of the authorities to which we have referred, that the question whether a person is an actual or evidential comparator is a question of fact and degree. It is not a pure question of law. In our view, the key point is the one that we made at paragraph 63, above, namely that whether a point of difference has any significance or not depends on the nature of the

less favourable treatment about which complaint is made.

84. In the present case, there were three aspects to the less favourable treatment complained of by the Appellant. These were, in summary, that he was investigated on 7 June 2017, that he was subjected to a formal disciplinary process (requiring him to attend a disciplinary investigation meeting on 21 June 2017), and that he was then subjected to a formal disciplinary hearing on 8 September 2017. (The claim form alleges a fourth aspect, which is that the Appellant was constructively dismissed on 8 September 2017, but this is really just referring back to the cumulative effect of the other three aspects of treatment that the Appellant complains of). When considered in the context of this treatment, it was not perverse for the Majority to find that the circumstances of the Appellant and of Mr White were not materially different.

85. As for the allegation that the Appellant was being discriminated against by being investigated for his lateness on 26 May and 7 June 2017, he was, in fact, in the same position as Mr White because both were suspected of a pattern of absences or lateness in breach of the Respondent's absence policy. The fact that, arguably, Mr White's alleged breaches were somewhat more serious, in that the allegations were that he was absent, rather than just late, that he was absent more often than the Appellant, and that he was attending business meetings on two of the days, are not material differences. What matters is whether the allegations met the threshold for the commencement of a disciplinary investigation for breach of the absence procedure. In both cases, the Majority was, in our view, plainly entitled to find that the answer was "yes" and so that the Appellant and Mr White were in the same or not materially different circumstances. The details of the alleged breaches were irrelevant for this purpose.

86. Again, it was not perverse for the Majority to find that there was no material difference in the circumstances of the Appellant and of Mr White in relation to the decision to hold an investigation and to commence formal disciplinary proceedings against them. Both had been the subject of similar preliminary investigation processes, and in both cases there was evidence of prima facie breaches of the absence procedure which were sufficiently serious to merit disciplinary proceedings.

87. Once again, it was not perverse for the Majority to find that there was no material difference in treatment in relation to the decision to call the Appellant and Mr White to a formal disciplinary hearing.

88. Standing back, there was ample evidence before the Tribunal to justify the conclusion of the Majority that both Mr White and the Appellant were treated the same, and that there was no material difference in their circumstances. In both cases the trigger for the investigations were the events of 26 May 2017. The fact that Mr White had greater responsibility for the organisation of exams than the Appellant was not a material difference, because the Appellant was not subjected to disciplinary process for the fact that the exams were disrupted; he was only subjected to disciplinary process for his lateness. In both cases, the gate data was recovered. In both cases, there was an investigation before a decision to proceed to a formal disciplinary hearing. In both cases, evidence came to light to suggest that the issue on 26 May 2017 was not an isolated incident. In both cases, the letter inviting them to a hearing did not mention the option of an oral warning. In both cases, they were called to a disciplinary hearing at the end of the summer term which, at their request, was postponed to the beginning of the autumn term. Even on the assumption that Mr White's alleged infringements were somewhat more serious, this did not mean that a different disciplinary process should have been applied to him than the one that was applied to the Appellant. In the context of the nature of the allegations of race discrimination, there was no difference between their circumstances.

89. The tribunal found that, if the Appellant had not resigned, he too would have been given an oral warning, to remain on his record for six months, as Mr White had been. Once again, the Majority was entitled to find that if this had happened, the Appellant and Mr White would have been in a materially similar position and would have been treated the same. Even if it is accepted that Mr White's breaches of the absence policy were somewhat more serious, the Majority was entitled to find that both his breaches and the Appellant's breaches fell within the same general type of offences which merited an oral warning. The category of offences which merited an oral warning did not consist solely of the exact set of breaches of which the Appellant was accused, or of the exact set of

breaches of which Mr White was accused: it was a broad category covering a wide range of minor and moderately serious infringements, and the Majority was fully entitled to find that both Mr White's infringements and the Appellant's fell into the same general category and so that they did not give rise to a material difference between them.

90. It follows that, for the purposes of the allegations of direct race discrimination made by the Appellant, the fact that the detail of the allegations was, in some respects, different is neither here nor there.

91. The reasons why the Majority was entitled to find that Mr White was an actual comparator are, equally, reasons why the Majority was entitled to find in the alternative that Mr White was at least an evidential comparator.

92. We should add that, in so far as this part of the appeal is a challenge to the findings of primary fact by the tribunal, we reject it. There are no grounds for challenging the findings of primary fact that were made by the Tribunal, on the basis that they were perverse. The Tribunal made clear findings, for which reasons were given. As appellate courts have said time and again, the threshold for an appeal on perversity grounds is a high one, and that threshold has not been met here.

93. The Grounds of Appeal state that the Appellant relies on the reasoning of the Minority. Sensibly, if we may say so, Mr Stephenson did not emphasise this aspect in his oral submissions. The Minority essentially differed from the Majority in the findings of primary fact and the inferences to be drawn from the findings of primary fact that were made by the Majority. As we have found that the Majority's findings, and the conclusions drawn from the Majority's findings, are not perverse, the fact that one member of the Tribunal took a different view of the facts and the conclusions to be drawn cannot assist the Appellant in his appeal. The fact that one member of a Tribunal took a different view of the facts cannot, of itself, be the basis for a perversity challenge.

94. The final aspect to Ground 1 is a challenge to adequacy of reasons. Once again, we are unable to uphold this challenge. The Majority made clear findings of fact and gave a clear and thorough explanation of the conclusions that it drew from its findings of fact. Applying the case law that we

have referred to, we are satisfied that the Majority complied with its obligation to give sufficient reasons for its decision on the comparator issues relating to Mr White. There was no need for the Majority to make detailed findings of fact about the allegations against the Appellant, or, for that matter, about the allegations against Mr White. As we have said, the Majority made sufficient findings of fact to enable it to decide whether Mr White was an actual or an evidential comparator for the purposes of the specific allegations of discrimination, and, for the reasons we have given, did not need to descend into the details of the allegations of lateness or absence.

95. Mr Stephenson submitted that the Tribunal had failed to deal with the Appellant's contention that it was unusual and suspicious to have a formal investigation after one episode of lateness, and that this was a material difference between the Appellant and Mr White. However, in our view this submission is based on a view of the facts which was not accepted by the Tribunal. The Appellant had contended that Ms Flannery had accessed the gate data, and was contemplating disciplinary proceedings, on 26 May 2017, at which point the Respondent was only aware of one occasion of lateness by the Appellant, on 26 May 2017 itself, but was aware of a number of periods of absence on the part of Mr White. However, the Majority accepted Ms Flannery's evidence that, whilst HR had accessed the gate data on 26 May 2017, she herself did not see it until 7 June, and that the decision to proceed with the disciplinary investigation was taken when there was prima facie evidence of a number of occasions of lateness by the Appellant, and when Ms Flannery suspected that the Appellant had been late on 26 May and on 7 June. It follows that the decisions to proceed to disciplinary investigations relating to both the Appellant and Mr White were taken at a point at which the Respondent had grounds for suspicion that there was a pattern of lateness/absence. In other words, this submission is based on a premise which is not borne out by the unassailable findings of fact by the Majority.

Ground 2A: the Majority erred in law in holding that neither Mr Spindler nor Mr McQuitty was an appropriate comparator

96. This ground can be dealt with relatively shortly, because it is effectively the mirror image of

the grounds relating to Mr White. Mr Stephenson submitted that the Majority should have asked itself why neither Mr Spindler nor Mr McQuitty was investigated given their involvement on 26 May 2017. As with the issue relating to Mr White, Mr Stephenson submitted that the Majority erred in law and/or reached a perverse conclusion and/or failed to give adequate reasons.

Discussion

97. In our judgment, this ground must be rejected.

98. As we have said, there is no basis for concluding that the Majority misdirected itself in law.

99. So far as perversity is concerned, in light of the undisputed facts before the Tribunal, the Majority was plainly entitled to find that Mr Spindler was not an actual comparator as regards the Appellant. There was no issue of lateness in his case. The focus of the investigation and disciplinary proceedings against the Appellant was that he had a pattern of lateness. Although concerns about his lateness first arose in the context of the events of 26 May 2017, the disciplinary issue was more wide ranging. There was no suspicion of a pattern of lateness so far as Mr Spindler was concerned. The Appellant was not disciplined for his involvement in the disruption to the exam, and so the fact that Mr Spindler was not disciplined for that either does not mean that he was a relevant comparator who was treated differently. Furthermore, there was a reason, which did not apply in the Appellant's case, why Mr Spindler was not disciplined, which was that he was new in his job.

100. As for Mr McQuitty, the Majority was entitled to find that he was in a very different position from the Appellant because (a) he did not have a suspected pattern of lateness, and (b) his lateness on 26 May 2017 did not come to light until November 2017, by which time it would have served no purpose to conduct an investigation.

101. The Majority was entitled to find that there were reasons, unrelated to race, why the Appellant was treated differently from Messrs Spindler and McQuitty so far as the disciplinary process was concerned.

102. The Majority gave ample reasons for its conclusion that Messrs Spindler and McQuitty were not actual comparators for the purpose of the Appellant's discrimination complaint.

103. With respect to him, in relation to this aspect of the appeal, Mr Stephenson was in reality simply rearguing points that had been considered and rejected by the Majority of the Tribunal below.

Ground 2B

104. In this Ground, Mr Stephenson submitted that the Majority erred in law in that it failed to consider the position of a hypothetical comparator. He submitted that the Majority erroneously focused solely on Mr White and failed to have regard to the alleged differences in circumstances and other evidence, including how Messrs Spindler and McQuitty were treated, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator.

Discussion

105. We do not accept that the Majority fell into error in this regard. The authorities cited above, and especially **Shamoon**, make clear that consideration of comparators is a tool to determine whether unlawful discrimination has taken place, not an end in itself. It is not necessary, in every case, that a Tribunal must spell out that it has considered, in turn, whether there is a real-person actual (statutory) comparator, an evidential comparator, and then how a hypothetical statutory comparator would have been treated. In the present case, the Majority was assisted by its conclusion that there was a real-person actual comparator who was treated the same as the Appellant. As Lord Hoffman said in **Watt v Ahsan**, it is relatively rare that a real-person actual comparator will be found. Where, however, such a comparator exists (whether or not they are treated the same as, or differently from, the claimant), it is likely that they will shed much more light on the discrimination question than consideration of a hypothetical comparator would do. A real person who is an actual statutory comparator is a much more useful tool than a hypothetical statutory comparator. In the present case, therefore, as there was a real-person, actual, statutory comparator, the Majority did not have to rely upon a hypothetical comparator. In any event, it is clear, in our view, from the conclusions reached by the Majority in the judgment as a whole, and in paragraphs 89-94 in particular, that the Majority took the view that a hypothetical comparator would have been treated as the Appellant was treated.

Ground 3: The Respondent impermissibly relied upon an alternative reason to justify its actions

which did not form part of its pleaded case

106. In their conclusions at paragraph 89 of the judgment, the Majority said that:

> "in light of safeguarding requirements and against a backdrop of rail strikes, the respondent was justified in investigating both the exam incident and the claimant's time-keeping."

107. At the Tribunal hearing, the Respondent had argued that there are safeguarding issues in respect of classes of 16-19 year olds being unsupervised, if their class teacher is running late. This point was not made in the Grounds of Resistance. It was mentioned for the first time in Ms Flannery's witness statement. The first time it became apparent to the Appellant and his legal team that substantial reliance was being placed on the point was when closing submissions were exchanged. There was no provision for reply submissions, and so, Mr Stephenson submitted, the Appellant was placed at a disadvantage.

108. Mr Stephenson submitted that the Tribunal should not have allowed this point to be advanced, as it meant that the Respondent had relied upon an alternative reason for its actions which did not form part of its pleaded case. This issue had not been raised with the Appellant at his disciplinary hearing, and the effect of raising it for the first time at the Tribunal hearing was that the Tribunal had not afforded the Appellant a proper opportunity to be heard. Mr Stephenson also submitted that the Respondent should have specified the dates and times for which there were safeguarding issues.

Discussion

109. We do not accept that there is force in this ground of appeal. The Respondent's safeguarding concerns were not put forward as a separate, free-standing, and unanticipated reason for the treatment of the Appellant. Rather, it was an explanation as to why lateness had to be taken seriously by the College. As Mr Heard put it, it was a piece of evidence which fleshed out the defence advanced in the Respondent's pleaded case. As such, in our judgment, it did not need to be mentioned specifically in the Grounds of Resistance, and there was nothing improper in the Respondent relying on the safeguarding concerns to bolster their case, or upon the Majority taking them into account. Moreover, in reality, it is doing no more than to state the obvious to say that if a teacher arrives late at a school

or college, that may mean that a classroom is unattended and that may mean, in turn, that there are safeguarding issue. The Appellant's team were made aware that the Respondent would refer to safeguarding concerns in advance of the Tribunal hearing, because it was mentioned in Ms Flannery's witness statement. Ms Flannery was cross-examined about this. If the Appellant's legal team had wanted to submit that the Tribunal should not take account of safeguarding concerns, then they could have said so in their closing submissions, or could have written to the Tribunal after closing submissions were exchanged to say so (we should add that, generally, employment tribunals should consider, where closing submissions are to be in writing only, affording the parties a brief written opportunity to make points in reply). In any event, however, as we have said, it was clear to the Appellant, before the written closing submissions were exchanged, that the Respondent had said that lateness by teachers gave rise to safeguarding concerns, and, indeed, it was no more than common sense.

110. The suggestion that the Respondent should have specified dates and times when there were safeguarding issues is misconceived: the point is that in principle lateness may give rise to safeguarding issues and so that the College must take punctuality seriously, not that the Respondent was obliged to show that, on a particular occasion, the Appellant's lateness had given rise to a safeguarding issue.

Ground 4: the Majority failed to determine the Appellant's claims of race discrimination properly and/or misapplied the burden of proof under EqA, section 136, and/or reached conclusions that were inadequately reasoned

111. The main focus of the Appellant's argument on this issue was that it was incumbent upon the Tribunal to consider and to set out all of the material facts, so as to decide whether the burden of proof shifted in accordance with section 136. Mr Stephenson submitted that the Majority failed to do so. He said that the Tribunal failed to consider and/or make findings of primary fact on the following matters:

a. Ms Flannery's false and/or inconsistent/contradictory explanation for initiating the

formal investigation against the Claimant on 7 June 2017 after observing him arrive late. Mr Stephenson said that it was incumbent upon the ET to resolve the inconsistencies in her evidence and make primary findings of fact to consider if discrimination could be inferred;

b. Mr Thompson's failure to take notes and/or failure to keep records of his interviews with Mr Spindler, Ms Preece, and Mr McQuitty as recommended by paragraph 17:04 of the Equality and Human Rights Commission Code of Practice for Employment;

c. Mr Taylor and Ms Houston failed to keep any written record of their rationale for taking the decisions in respect of the Claimant's disciplinary;

d. The Respondent did not have an equal opportunity policy;

e. Mr Thompson had not attended any formal equality training since 2003 or 2004;

f. Mr Thompson and Mr Taylor failed to investigate the Claimant's complaints of race discrimination raised during his disciplinary hearing on 8 September 2017.

112. Mr Stephenson submitted that had the Majority correctly applied the statutory test under section 136, it would have concluded that the Appellant had proved facts from which inferences of unlawful discrimination could properly be drawn.

Discussion

113. We have already dealt, earlier in this judgment, with a submission that the Majority failed to give adequate reasons for its decision. Under this heading, there are two issues: (1) did the Tribunal properly direct itself in law in relation to section 136 and does it matter that section 126 was not expressly set out in the judgment?; and (2) did the Tribunal fail to make sufficient findings of primary fact?

114. As for (1), it is true that the Tribunal did not specifically refer to section 136 in its judgment. It would be better if it had done so, but its failure to do so does not mean that this ground of appeal should succeed. As we have already said, the Tribunal decided not to set out the relevant authorities or all of the statutory provisions in its judgment, but, rather, to say that they were set out in the parties' written submissions and had been considered (paragraph 17 of the judgment). Both Mr Stephenson's

submissions and Mr Heard's submissions referred to section 136 and the shifting burden of proof, and section 136 is set out at paragraph 51 of Mr Stephenson's submissions. There is no reason to doubt the Majority's statement that the relevant authorities were considered, and it would be surprising indeed if an Employment Tribunal did not have regard to section 136 in a discrimination case. There is nothing in the body of the Majority's reasoning to suggest that the Majority did not bear section 136 in mind. In light of the findings of the Majority, and in particular, the finding that Mr White was an actual comparator and Mr Spindler and Mr McQuitty were not, it is obvious that the Majority did not consider that the evidential basis existed for the burden of proof to shift under section 136.

115. As for (2), the case-law, most recently **Greenberg**, makes clear a Tribunal does not need to set out in its judgment every single finding of fact or every single matter that it has taken into account. It is not a good ground of appeal that a Tribunal has failed to do so.

116. As for the first matter, set out at paragraph 111a, above, there was a hard-fought dispute about when Ms Flannery first saw the complete gate data relating to the Appellant. Having heard Ms Flannery give evidence, the Majority decided that she was to be believed. It is understandable that the Appellant disagrees with this conclusion but that does not give rise to a ground of appeal. The Majority gave sufficient reasons for its conclusion, which ultimately came down to that the Majority believed Ms Flannery's evidence.

117. As for the other matters which the Appellant says should have been dealt with by the Majority in the judgment (paragraph 111b to 111f, above), these were points that were made in writing in Mr Stephenson's closing submissions. There is no reason to think that the Majority overlooked them or failed to take them into account. The reality is that this was a case in which, unusually, the Majority found that there was an actual comparator who was treated in the same way as the Appellant. In those circumstances, the matters referred to at paragraphs 111b-111f have less significance than they might otherwise have done. Reading the judgment as a whole, it is clear that the Majority did not consider that there was anything in their findings of fact which resulted in a shifting of a burden of proof.

118. Mr Stephenson made a further point in his skeleton argument under this heading, which in fact goes to a separate matter. He said that the Majority's conclusion that Mr Taylor would have given the Appellant an oral warning to remain on his file for six months for timekeeping supported an inference of discrimination. In our judgment, this does not follow. Mr White, whom the Majority found to be an actual statutory comparator, received such an oral warning, so there is no indication that the Appellant would have been treated more harshly than him. Nor is it suspicious that they would both have been treated the same. Although the offences were not quite the same, they both fell in the same general category of absence/lateness offences and it is not surprising that the Respondent would have considered that the same punishment was appropriate for both, and that neither offence required a more serious sanction. Moreover, the Majority was plainly entitled to take the view that a time-limited oral warning for this did not give rise to an inference of discrimination on the basis that it was disproportionate. There is nothing self-evidently suspicious about giving an oral warning to a teacher for a pattern of absence, which obviously ran the risk of disruption and potential safeguarding issues for the College.

Ground 5: The Tribunal made a finding of fact which was unsupported by the evidence

119. This is a reference to the Majority's finding, at paragraph 60 of the judgment, about the letter that invited the Appellant to the disciplinary hearing. This had said that the disciplinary sanctions included dismissal with or without notice, but did not say that the lesser sanction of an oral warning was an option was therefore a fault by Ms Houston of HR and not something which was targeted at the Appellant. Mr Stephenson said that Ms Houston did not give evidence before the Tribunal and so there was no evidence of her mental processes and it followed that there was no evidential basis for the Tribunal's finding.

Discussion

120. We do not accept this ground of appeal. It is true that Ms Houston did not give evidence, but the Majority relied on the fact that the letter sent to Mr White was in identical terms, also mentioning the possibility of dismissal, including summary dismissal, but not mentioning the possibility of an

oral warning. There was ample basis for the inference made by the Majority that the letter was a template letter, which had not been drafted with the Appellant in mind. If this was so, then the contents of the letter could not have been discriminatory. Moreover, the allegation of discrimination was primarily directed towards members of the senior management team. Ms Houston was not part of that team and there was no suggestion that she had any connection with the Appellant, or any animosity towards him. Still further, it is significant that Mr White received an oral warning, despite receiving a letter in the same terms; that it was made clear to the Appellant at the start of his disciplinary hearing on 8 September 2017 that an oral warning was an option; and that neither he nor his trade union representative complained about the terms of the letter during his disciplinary hearing.

121. There is no principle of law or practice that a Tribunal cannot make an assessment of a matter such as this without hearing evidence from the person who drafted the letter. The Tribunal was not bound to draw an adverse inference from the failure to call this witness.

Ground 6: The Majority wrongfully concluded that the Respondent had not acted unreasonably or in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence

122. Mr Stephenson submitted that the Majority failed to ask itself the correct questions regarding constructive dismissal, instead simply concluding that the Respondent had not acted unreasonably or in a manner likely to destroy or seriously damage the relationship. In oral argument, Mr Stephenson accepted that this ground of appeal amounted to the contention that the Majority's decision on this issue was perverse and/or insufficient reasons were given for the decision.

Discussion

123. The Majority set out its conclusions on constructive dismissal at paragraphs 95-97 of the judgment as follows:

> "95. The claimant also claims he was unfairly constructively dismissed. Both parties in their submissions set out the relevant test to be applied.

96. At the risk of duplication, the majority addressed the claimant's allegation (list of issues 12a-g) and concludes:

a. The claimant was not disciplined. He resigned before Mr Thompson reached a conclusion. It is not therefore correct to allege he was disciplined and Mr Spindler and Mr McQuitty (who were at least as culpable) were not. Mr Spindler addressed the failings. The respondent did not discover Mr McQuitty was also late on the 26/5/2017 until much later in 2017. The other person who was absent on 26/5/2017 (Mr White) was in fact disciplined.

b. Ms Flannery undertook a fact-finding exercise; she spoke with the claimant; a short note was made and that led to the appointment of Mr Thompson to conduct a formal investigation.

c. The majority absolutely rejects the claimant's contention that there was no policy for reporting lateness and absence included lateness. The claimant was subject to that policy and indeed had received several emails (over time) about it.

d. Mr Thompson was involved in the search for the set texts prior to the exam starting on 26/5/2017. That, however, did not create any conflict of interest or prevent him from conducting the investigation. In any event, the only matter which was taken forward from his investigation outcome, was the timekeeping issue, not what had taken place prior to the exam starting.

e. The Tribunal concludes that Ms Flannery did not take the decision for the outcome of the investigation to lead to disciplinary action to be taken. That was Mr Taylor's decision.

f. The respondent's policy provided that the full range of disciplinary sanctions are available to the disciplining officer. At Mr White's disciplinary meeting, Ms Flannery had the sanction of summary dismissal open to her; and she gave Mr White a formal oral warning. Mr White's absences were seemingly more serious than the claimants. The majority concludes that Mr Taylor approached the disciplinary meeting with an open mind and there is nothing to suggest the sanction of summary dismissal would have been applied to the claimant; albeit the full range of options remained, including the case being dismissed.

g. It is not correct to say the allegations against the claimant were weak. Mr Thompson was satisfied that there was, on the claimant's own admission, evidence of a pattern of lateness. Some of these occasions were when the claimant was due to be teaching. Mr Thompson was also concerned that the claimant was not taking enough responsibility to ensure he arrived at work on time. Mr Taylor clearly agreed with this analysis as he considered there was a case to answer at a disciplinary meeting. Another employer may have dealt with these issues outside the formal disciplinary framework. This respondent did not and there is nothing unreasonable about that, particularly in view of the safeguarding issues. Mr White was also subject to formal disciplinary action for the same

> headline reason of absence. The majority concludes it was reasonable for Mr Thompson to take the view that it was 'inconceivable' that the claimant could arrive at work on time if he caught the 8.27am train from Norbury. At the time, there were ongoing train strikes. Irrespective of that, the Tribunal takes judicial notice that trains do not regularly run on time. They are cancelled and delayed. The claimant's journey comprised various elements of public transport, each of which can fail (as it did on the 26/5/2018). The respondent was entitled to take the view and to communicate the same to the claimant (whether in formal proceedings or not) that he was simply not allowing enough latitude to get to work on time.
>
> 97. There are steps which the respondent has taken which can be criticised (for example, the use of the gate data or missing one of the disciplinary sanctions off the invitation letter). The respondent however has not acted unreasonably or in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust. Any respondent can always handle things in a different way from which they did. In this case, the respondent could have done things better; however all it was seeking to do was to address the claimant's time-keeping.
>
> 98. As a result of those conclusions, the majority finds that the claimant's claims of direct race discrimination contrary to the EQA fail and are dismissed. Similarly, there was no fundamental breach of the claimant's contract of employment by the respondent which entitled him to resign without notice. There was no breach at all of the implied term of mutual trust and confident by the respondent."

124. This was a thorough and detailed review of the evidence relating to the constructive dismissal claim, following on from the findings of primary fact made earlier in the judgment. The Majority gave full reasons for their decision, and we do not consider that the Appellant has put forward any valid grounds for this challenge.

125. As for the allegation of perversity, this is not substantiated. Given the findings of primary fact made by the Tribunal, it was plainly open to the Tribunal to conclude, for the reasons that it gave, that the Appellant was not constructive dismissed, particularly in light of the finding that the Appellant had not been discriminated against on the ground of his race. The Tribunal noted some flaws in the disciplinary process but it was entitled to find, as it did, that these did not amount to a repudiatory breach of the implied term of trust and confidence.

Conclusion

126. For these reasons, the Appellant's appeal is dismissed.