Neutral Citation Number: [2024] EAT 48

Case No: EA-2021-001002-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 27 March 2024

Before:

HIS HONOUR JUDGE TAYLER
MR ANDREW MORRIS
MR NICK AZIZ

- -

Between:

MS K CIOCHON

Appellant

- and –

MR MARK KEMPE T/A NEVILLE ARMS and NEVILLE ARMS INN

Respondent

- -
- -

MR G STANBURY (instructed by Spires Legal Ltd) for the **Appellant**
MS S CLARKE (instructed through direct access) for the **Respondent**

Hearing date: 27 March 2024

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JUDGMENT

SUMMARY

The Employment Tribunal erred in law in holding that there was no evidence from which it could conclude that the claimant was dismissed because of her pregnancy. The matter was remitted for redetermination by a different Employment Tribunal.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal from a Judgment of the Employment Tribunal, Employment Judge Blackwell sitting with members on 17 to 19 May 2021 at Nottingham. The Judgment was sent to the parties on 29 June 2021. The Employment Tribunal set out its findings of fact concisely at paragraphs 9 to 16 of the Judgment:

> "9. Miss Ciochon was employed by Mr Kempe from the 20 May 2018 to 1 February 2019. There has been some confusion about the effective date of termination but in our view having regard to the email sent by Mr Kempe on the 1 February that must constitute a notification of dismissal and therefore that becomes the effective date of termination.
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> 10. Mr Kempe owns both the Neville Arms and separate premises called The White House Inn. He has a number of public bars to run, 2 restaurants and 15 guest rooms in addition. Mr Kempe would be by today's standards recognised as a medium sized employer.
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> 11. Miss Ciochon worked for approximately 15 hours per week though the job for which she applied for required 25 hours per week. The Neville Arms Café we accept suffered a downturn in business from August 2018 as set out in paragraph 7 of Mr Kempe's evidence. We note that those figures are confirmed at S30 by Mr Kempe's accountant. We accept those figures we also accept that Mr Kempe was particularly concerned at the downturn in the month of December i.e. the festive season.
>
> 12. Mr Kempe told us and we accept that he concluded that he needed to reduce staff. He sets out at paragraph 13 of his proof of evidence those employed at the Café Neville at the relevant time. We accept that list although we would add Miss Brown who appears on the disclosed list of employees at page 35. Miss Ciochon asserted that the list was dishonest but provided no evidence to support that contention. We therefore accept Mr Kempe's evidence on the point.
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> 13. At page 75 we have an email from Miss Ciochon in which she informs Mr Kempe's and Miss Difazio that she is pregnant she says: 'just had first scan today to check if everything is okay and I would like to inform you that I am pregnant, my due day is the 24 June'. Miss Difazio replies: 'Dear Kat, congratulations thank you for letting us know in plenty of time'.
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> 14. There follows at page 76 an email from Mr Kempe to Miss Ciochon of the 29 January which is headed 'Pending Notice of Redundancy'. Mr Kempe says 'I am obliged to offer a consultation should you wish and an opportunity to discuss why we are considering

> making you redundant. The main reason for the redundancy however is due to the downturn in business and I have to review the hours and staffing requirement accordingly. In consideration of the redundancy I propose one weeks normal pay and payment of your remaining holiday entitlement'.
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> 15. Still on the same page on the 1 February i.e. not much more than 48 hours later Mr Kempe writes again to the Claimant as follows: 'I haven't heard from you since my email of 29 January offering a consultation with you I assume therefore you understand and accept my proposal of one weeks pay in lieu of notice and your remaining holiday entitlement'.
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> 16. On 3 February Miss Ciochon replies at page 78 she says: 'please note I am not going to communicate with you any longer as it is far too stressful in my current state. You knew that I am heavily pregnant and decided to dismiss me. You knew it was unlawful and unfair dismissal and that you discriminated me on the grounds of pregnancy, I absolutely don't accept your offer and found it absolutely perfidious and disgusting what you have done'. That effectively brings us to these proceedings."

2. The claimant brought a claim in the Employment Tribunal, including complaints of pregnancy discrimination and automatic unfair dismissal for pregnancy-related reasons. The Employment Tribunal set out its conclusions, so far as is relevant to the appeal, at paragraph 17 to 29 of the Judgment:

> "17. In relation to the first 2 claims both of which are essentially asserting that Miss Ciochon was dismissed by reason of her pregnancy these are the facts from which inferences might by drawn.
>
> 18. The most significant area is the redundancy process itself. As to the question of the pool Mr Kempe's evidence was that he had considered all of the employees at Café Neville but had determined that the appropriate pool were the 2 waitresses namely Miss Ciochon and Libby Lewington. It is not for us to go behind the reasoning of Mr Kempe provided that we are satisfied that he gave due thought to the formation of the pool and we accept that he did.
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> 19. We also accept that the criteria which he took into account in making his decision are set out in paragraph 17 of his proof of evidence namely cross transferable skills, experience, flexibility to work different hours, flexibility to work across different sites, attitude to work including the ability to muck in where needed.
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> 20. Mr Kempe then consulted with Miss Sheriff and Miss Difazio they concluded jointly that Miss Ciochon was less willing, that she was less

flexible, that she preferred only to wait at tables, that she was at times surly with customers and that they had both had to take her to task about her appearance. Both said that they had had informal chats with Miss Ciochon about those matters.

21. There is a conflict of evidence Miss Ciochon says that she was never spoken to about her aptitude, her willingness or her appearance. She asserted she had not been spoken to at all. We do not accept Miss Ciochon's evidence it is not credible that a new recruit at a business that was new to her would not have been spoken to in someway particularly during her early weeks.

22. We would comment generally as to Miss Ciochon's evidence that we did not find her a credible witness. We take into account that giving evidence is highly stressful particularly when accusations are being made against you. We also take into account that the cross examination had to be interpreted because English is not Miss Ciochon's first language. However, in a number of areas Miss Ciochon prevaricated over very simple questions, for example whether her preference was to wait table she eventually conceded that it was. Secondly, whether she was dependent upon her partner now her husband for transport again she eventually conceded that she was.

23. Turning now to procedure or rather in this case the lack of it. Apart from the emails at page 76 there is no written record of the procedure at all. Further Mr Kempe when questioned by the Tribunal said that he did not even make Libby Lewington aware that she was being considered for redundancy. There was no one to one meeting with Miss Ciochon though we accept that Miss Ciochon is partly to blame for that. Mr Kempe should not have concluded that silence over 48 hours could be interpreted as acceptance of voluntary redundancy.

24. Mr Kempe explained that his conduct in terms of the lack of procedure arose essentially from ignorance which we find surprising in an experienced employer who has been in the hospitality business for a number of years.

25. The second allegation from which an inference can be drawn is in relation to employment of other staff after Miss Ciochon's dismissal. We accept as a matter of fact that the only employee that was employed post the dismissal was Laura Snelling who was employed as cover for Miss Sheriff whose mother has been killed in a house fire. As to the other employees we accept that they were all in post at the time of Miss Ciochon's dismissal.

26. Another allegation from which an inference might be drawn in relation only to pregnancy is the assertion by Miss Ciochon in cross examination that she was reluctant to disclose her pregnancy for fear of an adverse reaction from her employer. We do not for one moment accept that evidence. In fact Miss Ciochon disclosed pregnancy to Mr Kempe on the same day as she had her first scan i.e. when she was just

> over 3 months pregnant which is the normal point at which pregnant women would make disclosure.
>
> 27. Another matter is Miss Ciochon's assertion which is in 2 parts paragraph 6 of her proof of evidence. Firstly, she says that her hours were gradually cut down in fact the evidence is to the contrary. She worked her normal hours on the weekends of the 13 and 14 January and 19 and 20 January so there is no evidence to support that contention. Secondly, she says that Mr Kempe completely cut me off in fact after another tortuous piece of cross examination and intervention by the Tribunal Miss Ciochon conceded that in fact that boiled down to the failure to reply to one message sent by her to Mr Kempe on the 20 January.
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> 28. Another matter is the assertion at paragraph 20 of Miss Ciochon's proof of evidence in which she says 'I assume that he i.e. Mr Kempe could have issue with my appearance as my pregnancy was visible and he made me a few times aware that I do not look appropriate for the waiting table service any more due to my appearance'. In cross examination Miss Ciochon accepted that Mr Kempe had never spoken to her directly and that she was relying on what she was told by unnamed colleagues.
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> 29. In reaching our decision we take into account Mr Kempe's evidence that most of his employees are female and that between 2014 and 2018 these were 4 employees on statutory maternity leave receiving statutory maternity pay see S31 to S35. In our view there is nothing in that evidence to shift the burden of proof to the Respondents and we accept that the reason for dismissal was as asserted by Mr Kempe namely redundancy."
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> … In summary therefore Ms Ciochon was not dismissed in any way either because of her pregnancy or because of her Polish nationality. Thus all of her claims must be dismissed. That then is our decision."

3. Limited grounds of appeal were permitted to proceed by then Deputy Upper-Tribunal Judge Stout. The grounds and reasons for Judge Stout permitting them to proceed are:

> "Regarding paragraph 18 (Ground 1), the claimant argues first that the ET erred in law by not assessing why the respondent chose a pool of just two employees and in fact only notified the claimant that she had been selected for redundancy without informing the other employee that she was at risk. In my judgment this is an arguable error of law. The Tribunal in this paragraph appears to have taken an approach that might have been appropriate in an 'ordinary' unfair dismissal case where a reasonable responses approach applies to selection of a pool (*Mogane v Bradford* [2022] EAT 139). However, this was not an 'ordinary' unfair dismissal case. It was in part a discrimination case and the key question for the Tribunal on the s 18 claim was whether

> the dismissal of the claimant was materially influenced by the claimant's pregnancy. To answer that question, the Tribunal arguably did have to 'go behind the reasoning of Mr Kempe'. It arguably needed to do so in order to consider the automatically unfair dismissal claim under s 99 too.
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> Regarding paragraphs 23-24 (Ground 3), the claimant's argument amounts to a contention that the Tribunal erred in law and/or perversely failed to draw an inference of discrimination from what it found to be unreasonable conduct by Mr Kempe (paragraph 23) for which it considered his explanation inadequate (paragraph 24). It is arguable that the Tribunal has in these paragraphs failed properly to direct itself by reference to (or apply) *Bahl v Law Society* [2003] IRLR 640 at [98]-[101] and *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 at [22]. Alternatively, the Tribunal has arguably failed to give adequate reasons for its refusal to draw an adverse inference from these matters."

4. At the relevant time Section 18 of the **Equality Act 2010** ("**EQA**") provided:

> 18. Pregnancy and maternity discrimination: work cases
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered by her. …
>
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends— …

5. Specific provision is made as to the burden of proof by section 136 **EQA**:

> 136. Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

6. The burden of proof in discrimination claims was considered by the Court of Appeal (CA) in **Igen & Ors v Wong** [2005] ICR 931. The revised **Barton** guidelines were set out from paragraph 76 and in an annex running from subparagraphs (1) to (13):

> 76. As this is the first time that the *Barton* guidance has been considered by this court, it may be helpful for us to set it out again in the form in which we approve it. In *Webster* Burton J refers to criticisms made of its prolixity. Tempting though it is to rewrite the guidance in a shorter form, we think it better to resist that temptation in view of the fact that in practice the guidance appears to be offering practical help in a way which most ETs and EATs find acceptable. What is set out in the annex to this judgment incorporates the amendments to which we have referred and other minor corrections. We have also omitted references to authorities. For example, the unreported case referred to in para. (6) of the guidance may be difficult for ETs to obtain. We repeat the warning that the guidance is only that and is not a substitute for the statutory language.
>
> **Annex**
>
> (1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

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

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

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

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

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

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

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

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

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

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to

> deal with the questionnaire procedure and/or code of practice. [Emphasis Added]

7. The burden of proof provisions were recently considered in the EAT in **Field v Steve Pye and Co & Ors** [2022] EAT 68:

> "37. In some cases there may be no evidence to suggest the possibility of discrimination, in which case the burden of proof may have nothing to add. However, if there is evidence that discrimination may have occurred it cannot be ignored. The burden of proof can be an important tool in determining such claims. These propositions are clear from the following well established authorities.
>
> 38. In *Laing v Manchester City Council* Elias J (President), noted that it was not always necessary to go through the two stage test, but also stressed that evidence of discrimination should not be ignored:
>
> > 76. **Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in *Igen* , it is not necessarily an error of law to fail to do so**. There is no purpose in compelling tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer. **But where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever**.
> >
> > 77. Indeed it is important to emphasise that it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. **Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the tribunal to reach a finding of discrimination even if the prima facie case had not been established. The tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance.** [emphasis added]

39. In *Hewage* the Supreme Court drew on the analysis of Underhill J (President) in *Martin v Devonshires Solicitors* [2011] ICR 352:

> 38. The tribunal does not in the passage which we have set out at para 18 above, or anywhere else in the reasons, refer explicitly to either section 63A of the 1975 Act or section 17A(1C) of the 1995 Act, which provide, in terms too well known to require setting out here, for the so-called 'reverse burden of proof', or to the decision of the Court of Appeal in *Igen Ltd (formerly Leeds Career Guidance) v Wong* [2005] ICR 931, which gives guidance on the effect of those provisions. Mr Stephenson submitted that that showed that the tribunal had 'failed to deal properly with the burden of proof' and had 'failed to have due regard to the guidance in *Igen Ltd v Wong*'.
>
> 39. **This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination**—generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head—'the devil himself knoweth not the mind of man (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). **But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law.** In the present case, once the tribunal had found that the reasons given by Mr Hudson and Mr Buckland in their letters reflected their genuine motivation, the issue was indeed how that was to be characterised and the burden of proof did not come into the equation. (Cf our observations in *Hartlepool Borough Council v Llewellyn* [2009] ICR 1426, 1448c , para 55.) [emphasis added]

40. In *Hewage* Lord Hope of Craighead DPSC; stated having considered *Igen* and *Madarassy v Nomura International plc* [2007] EWCA Civ 33; [2007] ICR 867:

> **The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed**, and **I see no need for any further guidance**. Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors (para 39), **it is important not to make too much of the role of the burden of proof provisions**. **They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination**. **But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.** [emphasis added]

> 41. It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in *Hewage* that the burden of proof requires careful consideration if there is room for doubt.
>
> 42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an *Igen* analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one *Igen* threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the **Igen** guidelines."

8. In **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054 the Supreme Court accepted that there are circumstances in which it may be appropriate to go directly to the reason why question, but it should be remembered that the **Igen** guidelines were also approved. It is important to note that to establish discrimination the protected characteristic need only have had a material influence in the detrimental treatment (see **Nagarajan v London Regional Transport** [2000] 1 AC 501 at 512H to 513B:

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

9. Pregnancy is unusual amongst protected characteristics in that an employer often suddenly discovers that an employee is pregnant and so now possesses the protected characteristic. In **Alcedo Orange Ltd v Mrs G Ferridge-Gunn** [2023] EAT 78 it was noted that this is a common feature in pregnancy dismissal claims:

> "1. This case involves a scenario that many employment lawyers will have encountered at some point in their careers. A woman tells her employer the good news that she is pregnant. A few days later she is told the bad news that she no longer has a job. But one must be careful to avoid the fallacy commonly known by its Latin tag; post hoc ergo propter hoc. Just because one thing follows another, it does not necessarily mean that the latter was caused by the former. That said, the fact that a woman is dismissed shortly after telling her employer that she is pregnant often provides compelling support for an inference of discrimination to be drawn. The fact that the scenario may be familiar does not of itself assist in determining whether the inference should be drawn. Each case must be determined on its own facts, depending on the evidence about the reason for dismissal and, where appropriate, if the claim is brought under the **Equality Act 2010** ('**EQA**'), by application of the burden of proof provisions."

10. The Employment Tribunal in this claim focused their analysis on the **EQA**. There was also an **Employment Rights Act 1996** ("**ERA**") claim. Section 99 **ERA** provides:

> **99. Leave for family reasons.**
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
>
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
>
> (b) the dismissal takes place in prescribed circumstances.
>
> (2) In this section 'prescribed' means prescribed by regulations made by the Secretary of State.
>
> (3) A reason or set of circumstances prescribed under this section must relate to—
>
> (a) pregnancy, childbirth or maternity, …

11. Regulation 20 of the **Maternity and Parental Leave Regulations 1999** provides:

> "20—(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—
>
> (a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
>
> (b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.
>
> (2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;
>
> (b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
>
> (c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).
>
> (3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—
>
> (a) the pregnancy of the employee; …

12. It is to be noted that there are different tests under the **EQA** and **ERA**, although there is often an overlap in outcome.

13. The Employment Tribunal's analysis in this claim was relatively brief. There were significant background facts. In its findings of fact at paragraph 13, the Employment Tribunal referred to the claimant informing the respondent by email that she was pregnant. The date of the email is not given. The email was sent on 4 January 2019. The claimant knew nothing of the possibility of redundancy until she received an email on 29 January 2019 in which it was suggested that there would be consultation, but the proposal was that the claimant was to be dismissed as redundant. The claimant was absent from work at the time. Slightly over 48 hours later, the claimant was informed that because she had not replied to the

email, the respondent assumed that she had accepted the proposal and therefore she was treated as dismissed. Thus, we have a situation in which a pregnant woman informed her employer that she was pregnant and shortly after was informed that she was to be dismissed.

14. It is not entirely clear how the Employment Tribunal went about their analysis. At paragraph 17, the Employment Tribunal refers to facts from which inferences might be drawn. We are not persuaded, that there is any real distinction between facts from which inferences might be drawn or could be drawn. Paragraph 17 suggests that the Employment Tribunal considered that there were facts that could lead to an inference of discrimination which would result in the burden of proof shifting to the respondent.

15. At paragraph 18, the Employment Tribunal refers to the most significant area being the redundancy process itself. That issue is then dealt with at paragraphs 18 through to 24. The redundancy process as a whole, including the selection of the pool and lack of consultation, was treated as the first matter that might give rise to the drawing of an inference.

16. The Employment Tribunal considered the possibility that an inference might be drawn from other matters but rejected them. The grounds of appeal that were permitted to proceed relate to the redundancy issue.

17. The Employment Tribunal when considering the pool used stated:

> "It is not for us to go behind the reasoning of Mr Kempe provided that we are satisfied that he gave due thought to the formation of the pool and we accept that he did."

18. We consider that passage demonstrates that the Employment Tribunal failed properly to grapple with the claim and to consider whether the claimant's pregnancy might have been

a factor in her selection for redundancy. The selection of the pool had to be seen in the wider context of the redundancy process as a whole.

19. At paragraph 23, the Employment Tribunal noted that there were substantive failures of procedure, there were no written records, the other potentially redundant employee was not contacted, and there was no one-to-one meeting with the claimant. The Employment Tribunal considered that Mr Kempe should not have treated silence as consent to voluntary redundancy. At paragraph 24, the Employment Tribunal recorded that Mr Kempe explained that his conduct essentially arose from ignorance, which was something that the Employment Tribunal found surprising for an experienced employer who has been in the hospitality business for a number of years. Thus, the explanation was not expressly accepted by the Employment Tribunal.

20. The Employment Tribunal identified factors that might shift the burden of proof but went on to hold that the burden had not shifted.

21. The Employment Tribunal appears to have taken account of the respondent's explanation for the claimant's treatment when deciding that the burden of proof had not shifted to the respondent . At paragraph 18, the Employment Tribunal referred to Mr Kempe having satisfied them that he gave due thought to the formulation of the pool. That evidence appears to have been accepted. If paragraph 24 is to be read as determining that, despite their surprise, the Employment Tribunal accepted that the failures in procedure arose from Mr Kemp's ignorance, that would involve taking into account his explanation at stage one. At paragraph 29 the Employment Tribunal appears to have accepted that the reason for dismissal was redundancy as asserted by Mr Kempe. Taking account of the explanation for the treatment at the first stage of the application of the burden of proof provision is contrary to the guidance in **Igen** at clause 6.

22. The respondent contends that there was nothing at the first stage that shifted the burden of proof because there was nothing more than unfair treatment. The possible relevance of unfair treatment was considered in **Bahl v Law Society** [2003] IRLR 640:

> "98. Accordingly, to the extent that the tribunal found discriminatory treatment from unreasonable treatment alone, their reasoning would be flawed and the finding of discrimination could not stand. That is the clear ratio of *Zafar* and that decision remains unaffected by *Anya*.
>
> *The relevance of unreasonable treatment.*
>
> 99. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable. This is not inevitably so since sometimes there is a choice between a range of reasonable conduct and it is of course logically possible the discriminator might take the less favourable option for someone who is say black or a female and the more favourable for someone who is white or male. But the tribunal would need to have very cogent evidence before inferring that someone who has acted in a reasonable way is guilty of unlawful discrimination.
>
> 100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the *Zafar* case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.
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> 101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light,

> perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself."

23. In **Network Rail Infrastructure Ltd v Griffiths-Henry** [2006] IRLR 865 Elias J held:

> "22. We do accept, however, that the observations made by Ms Cunningham demonstrate why it is crucial that the Tribunal at the second stage is simply concerned with the reason why the employer acted as he did. If there is a genuine non-discriminatory reason, at least in the absence of clear factors justifying a finding of unconscious discrimination, that is the end of the matter. It would obviously be unjust and inappropriate to find discrimination simply because an explanation given by the employer for the difference in treatment is not one which the Tribunal considers objectively to be justified or reasonable. If that were so, an employer who selected by adopting unacceptable criteria or applied them inconsistently could, for that reason alone, then potentially be liable for a whole range of discrimination claims in addition to the unfair dismissal claim. That would plainly be absurd. Unfairness is not itself sufficient to establish discrimination on grounds of race or sex, as the courts have recently had cause to observe on many occasions: see *Bahl* and the House of Lords decision in *Glasgow City Council v Zafar* [1998] ICR 120.
>
> 23. That leads us onto the second principal ground in this appeal. It is that the Tribunal did indeed make the mistake to which we have alluded, and concluded that there was discrimination merely on the basis that the employers had not acted reasonably. The relevant paragraph in which the Tribunal sets out its conclusions on this point is paragraph 28 which is as follows:
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> > 'The Respondent's explanation for the non-selection of Miss Griffiths-Henry is that they carried out an exercise based on objective criteria which were non-discriminatory. We find that the process was tainted by subjectivity, and we therefore reject that it was an objective process. In the circumstances, the Respondent has not proven that the process was not tainted by either race or sex discrimination and we find the Claimant's complaint made out.'
>
> 24. We confess that we have some difficulty in the Tribunal treating the process as subjective. There were criteria which the Tribunal accepted were appropriate and Mr Pearson had to apply those criteria. In doing that he had to exercise judgment. In every case of this kind, there is no single right answer to the question of what mark should be given in relation to a particular criterion. It involves the exercise of

> judgment. But that is not the same as saying that the criteria are therefore subjective, or else every exercise of this kind would have to be so described.
>
> 25. However, whether subjective is the right term or not, the Tribunal found that there was a certain inconsistency in the way the criteria were carried out, and that it operated unfairly because Mr Pearson had more knowledge about the relevant skills and abilities of certain persons than others. This was plainly evidence which justified the finding of unfair dismissal. But it does not ineluctably lead to a finding of discrimination. Indeed, the analysis of paragraph 28, it seems to us, is that because the process was not objective, it must then be considered to be tainted by race or sex.
>
> 26. We accept that there was some evidence which might, depending on a careful analysis of the other evidence, have been relied upon by a Tribunal in concluding that there was discrimination on grounds of race or sex. We bear in mind in particular the finding of the Tribunal that the claimant had received only 1.5 for the particular criterion of planning and delivery when another person, namely DN, had scored 3.5. There was also the concern that DM may have been more responsible for missing deadlines than she was, although we are not told whether that effected DM's scores also. The difficulty is that inconsistency may be evidence of discrimination but if the Tribunal is going to reach that conclusion then the evidence needs to be much more fully analysed than it was by this Tribunal. In particular, if, for example, there was evidence of inconsistency across the board and others could say that they had been marked rather lower that DN, that would suggest that this had nothing to do with sex or race."

24. These authorities establish that unfair treatment alone will not generally be sufficient to shift the burden of proof.

25. In this case the Employment Tribunal finally concluded at paragraph 29 that there was nothing in the evidence to shift the burden of proof to the respondent. We cannot see how they could properly have reached that conclusion in circumstances in which, not only was there unfair treatment, it was unfair treatment in circumstances in which the claimant had shortly before informed the respondent of her pregnancy.

26. While the tribunal accepted that there was a genuine downturn in business and a need to save expense, that was not something that, without further analysis, could be relied on to conclude that the burden of proof had not shifted. The Employment Tribunal failed

adequately to explain why the facts that it found did not result in a shift in the burden of proof and appears to have concluded the burden did not shift because, to a greater or lesser extent, it took into account, at the first stage of deciding whether there was evidence that could shift the burden of proof, the explanation for that treatment given by the respondent, which is not permitted under the *Igen* guidance.

27. We consider that the grounds of appeal, as permitted by Judge Stout to proceed, are made out. We do not accept that this is a case in which there could only be one possible answer. We have concluded that the matter must be remitted to the Employment Tribunal to be determined again. We have concluded that it should be remitted to a different Employment Tribunal. The errors in this judgment were fundamental. There would not be a significant saving in time or cost were it to be remitted to the same Employment Tribunal and the claimant might legitimately be concerned that there might be, consciously or unconsciously, a second bite of the cherry should it be remitted to the same tribunal. Accordingly, we allow the appeal and remit the matter for rehearing in the Employment Tribunal. That is subject to the possibility of settlement of the claim prior to its rehearing.