Neutral Citation Number: [2023] EAT 130

Case No: EA-2021-001163-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 October 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

VIRGIN ACTIVE LIMITED	**Appellant**
- and -	
MR C HUGHES	**Respondent**

- -
- -

RUTH KENNEDY (instructed by Travers Smith) for the **Appellant**
ROSS BEATON (instructed through Advocate) for the **Respondent**

Hearing date: 6 September 2023

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JUDGMENT

SUMMARY

Race discrimination, whistleblowing and practice and procedure

The Employment Tribunal erred in its analysis of the treatment of the claimant in comparison with others when deciding that the burden of proof had shifted to the respondent to disprove discrimination. The Employment Tribunal did not err in its analysis of the protected disclosure claim. The allegations of perversity failed. The delay in producing the judgment did not result in a real risk that the respondent was deprived of the substance of the right to a fair trial.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Professor A C Neal, sitting with members. The hearing took place on 23, 24, 25, 26 & 30 July 2019; 3 September 2019; 11 & 25 October 2019, and in chambers on 23 & 24 January 2020 and 16 & 18 February 2021 (via MS Teams). The judgment was dated and sent to the parties on 15 June 2021.

2. The parties are referred to as the claimant and respondent as they were before the employment tribunal. The claimant succeeded in claims of direct race discrimination, "ordinary" unfair dismissal and automatic unfair dismissal on the basis that the reason, or principal reason, for dismissal was that the claimant had made protected disclosures. Claims of direct age and sex discrimination were dismissed.

3. The respondent appeals the determinations that went against it.

4. The judgment was sent to the parties just under a year and 11 months after the start of the hearing and a little less than a year and 7 months after the last day of the hearing. The delay resulted in part from problems caused by the Coronavirus pandemic, but more significantly because of the serious ill health of the Employment Judge. I should make clear at the outset that, now understanding the very serious nature of the ill health of the Employment Judge, the respondent does not criticise the Employment Tribunal for the delays caused by the Employment Judge's ill health, but does rely on the delay as one of the grounds of appeal on the basis that the delay gave rise to a real risk that it was deprived of the substance of the right to a fair trial.

The outline facts

5. The respondent operates fitness clubs. On 8 May 2012, the claimant commenced work as Assistant General Manager at the respondent's Chelmsford Club. The claimant was promoted several times.

6. On 26 January 2017, the claimant became the manager of the respondent's Mayfair Club. Shortly thereafter an audit was conducted. The claimant considered it raised serious concerns about the operation of the club. The claimant was particularly concerned about the Member Services Manager, Jannett George, for whom he set out "expectations and actions". Ms George was suspended from work pending investigation. On 8 March 2017, having conducted an investigation, the claimant recommended that disciplinary proceedings be taken against Ms George.

7. On 27 March 2017, the Claimant was asked by Andre Orr, Operations Manager Mayfair, to conduct a disciplinary meeting with Roya Arasp, a Sales Consultant, about alleged nonadherence to procedures concerning a "change freeze" and issuing guest passes. Shortly before the disciplinary hearing the claimant was told not to proceed with the matter.

8. By April 2017 personal improvement plans (PiPs) were in place for Ms George, Ms Arasp and Darrell Giovanni, an employee whose job title is not given in the judgment, amongst others. The claimant conducted investigation meetings with Ms George and Mr Giovanni on 21 June 2017 and Ms Arasp on 22 June 2017, as a result of which disciplinary processes were commenced.

9. On 26 June 2017, Mr Giovanni raised a grievance against the Claimant complaining about his management style, particularly about the investigation meeting of 21 June 2017. Mr Giovanni said that other employees including Ms George and Ms Arasp could provide information that would support his claims.

10. On 2 July 2017, Ms Arasp raised a grievance against the claimant alleging bullying and harassment based on sexual orientation and race/nationality.

11. On 3 July 2017, Ms George raised a grievance, alleging that the claimant was trying to force her out of her job.

12. All three grievances were investigated by Denise Mackenzie, Head of People Operations. The claimant attended an investigation meeting with Ms Mackenzie on 20 July 2017. Ms

Mackenzie decided that the claimant should face disciplinary action because he had not provided adequate support to his staff; had made a racist comment to Ms Arasp in June 2017, "We had better watch out in the office, you're Iranian aren't you?"; had a tendency towards disciplinary action; had treated Ms George unfairly and sought to influence disciplinary action against her to bring about her dismissal.

13. The claimant was suspended by letter dated 17 July 2017. He was informed that an investigation would be undertaken into allegations that he had made an inappropriate comment of a racist nature to Ms Arasp, made an inappropriate comment about Ms Arasp's sexual orientation and had "treated unfairly and allegedly harassed and bullied" Ms George, Ms Arasp and Mr Giovanni. The claimant received the letter on 24 July 2017.

14. On 27 July 2017, the claimant raised what he described as a "serious concern" about the investigation. He raised substantive and procedural issues.

15. By letter dated 3 August 2017, the claimant was invited to a disciplinary hearing. The allegations were similar to those that Ms Mackenzie had suggested should be pursued. It was specifically alleged that the claimant made the racist comment to Ms George on 3 June 2017.

16. On 4 August 2017, the claimant sent an email complaining about the lack of response to his "grievance" of 27 July 2017, stating that he wished to "escalate this original grievance to senior management". More detailed concerns were raised in a letter attached to an email of 7 August 2017 and a further letter of 9 August 2017.

17. The claimant raised multiple issues in his grievances, alleging that:

    17.1. the process had been stacked against him and the individuals involved were not acting independently in accordance with the formal procedures of the respondent

    17.2. he had been unlawfully harassed by Ms Mackenzie, Ms George and Ms Arasp

    17.3. a threat had been made against him "don't worry Craig will get what's coming to

him"

18. On 10 August 2017, Hilary Tysoe, a member of the respondent's HR department, wrote to the claimant stating that most of the grievances related to the disciplinary proceedings and would be dealt with as part of that process. His concerns about work-related stress would be considered in a separate grievance process.

19. The work-related stress grievance hearing was held by Morag Alabaster, Sales Director, on 16 August 2017.

20. The disciplinary hearing was held before Malcolm Armstrong, Regional Director and Emma Thomas, Head of People Services, on 22 August 2017. The claimant was represented by Paul Forsey. The meeting was reconvened on 19 September 2017. The claimant made covert recordings of the meetings.

21. By letter dated 21 September 2017, the claimant was informed that he was to be summarily dismissed.

22. The claimant appealed against his dismissal on 27 September 2017.

23. On 28 September 2017, Ms Alabaster wrote dismissing the work-related stress grievance stating that there was "no case for any further action to be taken at this time".

24. The claimant appealed against the rejection of the work-related stress grievance on 4 October 2017.

25. The disciplinary appeal hearing took place before Simon Stokes, UK Operations Director, accompanied by Ms Thomas, on 9 October 2017. The appeal was dismissed by letter dated 24 October 2017.

26. The hearing of the appeal against the dismissal of the work-related stress grievance was held before James Archibald, UK Legal Director, on 17 October 2017. The appeal was dismissed.

The decision of the Employment Tribunal

Protected disclosure dismissal

27. The Employment Tribunal held that the claimant had made two protected disclosures. The first was about the alleged threat of violence. Mr Cawthorne had reported to Ms Mackenzie that a comment had been made to the effect "…don't worry Craig will get what's coming to him" and "If Virgin don't sort this out then Darrell will sort him out". In addition, "personal drawers" in the claimant's office had been broken into. The claimant reported these issues to the Metropolitan and Essex Police.

28. The Employment Tribunal concluded that the disclosure had been made and that it was a qualifying disclosure:

> 40 The Tribunal has had regard to the provisions of section 43A onwards of the Employment Rights Act 1996 as amended, and we find that this disclosure was made as described in the case management notes (indeed, it has not been challenged). We further find that it falls both within section 43B(1)(a) – ie. commission of a crime – as well as section 43B(1)(d) – ie. the health and safety of a person involved.

29. The second disclosure was a report asserting direct debit fraud. The Employment Tribunal held that a qualifying disclosure had been made by the claimant:

> 41 So far as the second of these (the direct debit fraud) is concerned, the circumstances were that, in the course of the Claimant's investigation into alleged wrongdoing by Mr Giovanni, it emerged that a member had informed Mr Giovanni that she would be using somebody else's bank details for the purposes of a transaction with the Respondent. Mr Giovanni had admitted that he had permitted the member to sign a direct debit agreement for someone else's bank details, and had further admitted that he had done this previously. The Claimant characterised this in his "Darrell Giovanni – Investigation Notes Key Points" … as "fraudulent", and noted that "Darrell admitted he knew who should sign for the DD".
>
> 42 We find that this was also made as described and that it falls within section 43B(1)(a) – ie. commission of a crime.

30. The Employment Tribunal concluded that the disclosures had been made to the claimant's employer (and in the case of the threat of violence disclosure to the Police). The Employment

Tribunal stated:

> 46 The question for us thus becomes whether there was a reasonable belief on the part of the Claimant that these disclosures were made in the public interest. In this regard the evidence is consistent to the effect that the Claimant regarded these matters as serious and their disclosure as being in the public interest. This was confirmed to the satisfaction of the Tribunal during the course of the Claimant's evidence and under cross-examination during the hearing. It is our view that there was a reasonable belief on the part of the Claimant that these were made in the public interest.

31. The Employment Tribunal went on to consider whether the making of the protected disclosures was the reason for the claimant's dismissal. The Employment Tribunal decided that issue in the claimant's favour, relying primarily on the transcripts of the covert recording of the disciplinary hearings, including what had been said in the claimant's absence:

> 47 The question then arises as to causation – in other words, whether the protected act was something which led to the dismissal of the Claimant by reason of having made the disclosure or disclosures. Our evidence in relation to this is drawn substantially from the disciplinary hearing transcript derived from the covert recording made by or on behalf of the Claimant, which involves the voices of Mr Armstrong and Ms Thomas. The transcript is not challenged (there having been a tape recording behind it), and it is common ground that this is a record of a disciplinary meeting in relation to the Claimant held on 22 August 2017.
> …
>
> 48 It is clear that, in discussing some of the background …, Ms Thomas draws the attention of Mr Armstrong to the fact that, "He's gone to the police for support. He's reported", at which Mr Armstrong indicates that he was unaware of that previously, queries this in a concerned manner, and is told by Ms Thomas that, "He's reported this as a crime". Ms Thomas also says that (the Claimant) is "scared that someone is going to attack him outside of work".
>
> 49 The Tribunal finds the response of Mr Armstrong to this revelation to have completely changed the trajectory of the proceedings on the part of the Respondent. The verbatim quotation from Mr Armstrong is:
>
> "Fucking Christ. What's the outcome here Emma? [referring to Ms Thomas]. This is your baby (laughs), what do we do here?" To this Ms Thomas replies:

"He can't come back now. Let's be honest."

50 Close attention was drawn to that exchange on frequent occasions during the course of cross-examination. The Tribunal is satisfied – and Mr Armstrong did not seek to deny this – that there was, indeed, a "change in the wind" at this stage, and that this indicated very clearly an inevitability that the Claimant should leave the Respondent organisation. When the point was put directly to him in crossexamination on the afternoon of Day 4, Mr Armstrong answered:

"There was a notable change in attitude, yes."

51 The Tribunal finds, from the evidence before them and taking into account the cross-examination that they have heard, that the reason for this "change in attitude" was triggered by the discovery on Mr Armstrong's part that the Claimant had gone to the police in respect of the incident disclosed.

52 A follow-up meeting was held on 19 September 2017, and the eventual outcome of the disciplinary procedure was set out in a letter dated 21 September 2017 which informed the Claimant that he was to be dismissed summarily. The purported reasons given by the Respondent for that dismissal are set out in extensive form over four pages …. Those reasons are challenged by the Claimant as not being the true reasons for his dismissal.

53 The Tribunal has had regard to the record of the disciplinary hearing held on 19 September 2017 … and is satisfied that the primary purpose of that meeting was to "tie up loose ends" in constructing a set of "reasons for dismissal" in order to justify the already pre-determined decision of the panel – as indicated by Mr Armstrong and the statement by Ms Thomas that the Claimant would be parting company with the Respondent organisation.

54 Subsequent to that letter of termination the Claimant exercised his right of appeal. A transcript of comments made and recorded during an appeal meeting convened on 10 October 2017 was produced for the hearing … and that supplements the formal record of the meeting.

55 Once again, the picture painted by the covert recording of the discussions between members of the appeal panel indicates to the Tribunal that there was an inevitability about the Claimant being required to leave the Respondent organisation. Indeed, this is so to such an extent that the Tribunal has formed the view that this "appeal meeting" would appear to have been a complete sham. In particular, regard is had to observations by Mr Simon Stokes, who was chairing that meeting ….

56 With the benefit of hindsight it can clearly be seen that neither Ms Thomas nor Mr Armstrong (at the disciplinary hearing) nor Ms

Thomas and Mr Stokes (at the appeal hearing) had any inkling that a covert recording of various parts of the procedure had been and was being made by, or on behalf of, the Claimant. A number of examples can be seen at … onwards.

57 The Tribunal finds that the covert recordings demonstrate very sharply a clear difference between the version being put forward by the Respondent witnesses Mr Armstrong and Ms Thomas and the actual transactions between the participants during the discussions at that meeting. The same conclusion is drawn in relation to the appeal hearing involving Mr Stokes and Ms Thomas.

58 Counsel for the Respondent, in her submissions to the Tribunal, makes a valiant effort to play down the significance of the covert recordings evidence, suggesting that they do nothing more than to reflect "a few comments" which the participants have "no recollection of making".

59 The Tribunal, however, is of the view that it is not acceptable to say that these were "a few comments which the makers have no recollection of making". What was said is incontrovertible and was not challenged in evidence. The Tribunal is entitled to, and does, take the words uttered at face value.

60 Furthermore, the conscious intention of Mr Stokes, as the chair of the appeal committee, can clearly be gathered (from comments at … and elsewhere) that he was content to "put matters into confusion", in order that the Claimant should not really focus upon particular matters of appeal for determination at that hearing. By way of example, there is an exchange … where Mr Thomas said:

"… this is the thing. He keeps throwing bits. He is very muddled in the way he is presenting everything."
to which Mr Stokes replied:

"I know, which is good for us."

Ms Thomas then responded:

"So, because he's just throwing so much that bits are getting lost."

Ms Thomas continued:

"It's just very haphazard."

Whereupon Mr Stokes interrupted by saying:

"That's good … that's what I'm kind of letting him do."
and Mr Stokes then went on to make the telling comment:

> "Because I want him to be muddled, I want him to admit that he's covered everything off, I want him to, and then we can hit him with the hard stuff."
>
> 61 Having due regard to these matters, setting them in the context of the totality of the available evidence, and having particular regard to the cross-examination of Mr Armstrong, Mr Stokes and Ms Thomas, the Tribunal finds, in relation to the allegation of dismissal by reason of having made a protected disclosure (so-called "whistleblowing"), that (1) disclosures of information were made by the Claimant to his employer; and (2) they were disclosures in relation to two matters – the perception of fear for the Claimant's physical integrity and the allegation of a crime committed by way of the direct debit fraud. The circumstances relating to those disclosures satisfied the requirements of Section 43B of the Employment Rights Act 1996 and were therefore "protected disclosures".
>
> 62 Focusing solely upon the allegation in relation to the alleged threats and sense of fear on the part of the Claimant, the Tribunal finds that this particular disclosure clearly influenced the minds of Mr Armstrong and Mr Thomas at a point in the disciplinary hearing where they were unaware that their exchanges were being covertly recorded.
>
> 63 The Tribunal finds that the formal record of that meeting fails properly (indeed, almost completely) to indicate what was transacted during the course of that meeting between the people responsible for the decision-making. The Tribunal finds that the disclosure of the "crime" to the police indubitably influenced the mind of Mr Armstrong and led Ms Thomas to make the observation, which was subsequently carried through, that the Claimant "had to go".
>
> 64 That being the case, and there being a disclosure of information – the information tending to show a crime being committed or, in this case, a fear of health and safety under section 43C(1)(d) – the Tribunal finds that there was a protected act; the decision to terminate was accelerated by and overwhelmingly influenced by the discovery of that protected disclosure; and from there onwards the fate of the Claimant in terms of summary dismissal from his employment was inevitable.
>
> 65 The Tribunal is satisfied that the true reason for the Claimant's dismissal was his having made the protected disclosure. That being the case, therefore, the unanimous decision of the Tribunal is that the Claimant's claim of unfair dismissal by reason of having made a protected disclosure is upheld.

"Ordinary" Unfair Dismissal

32. The Employment Tribunal went on to consider the claim of ordinary unfair dismissal. The

Employment Tribunal concluded that the respondent had not established that the real reason for the claimant's dismissal was one that related to the claimant's conduct with the consequence that the dismissal was necessarily unfair:

> 76 … the Tribunal finds, the decision to dismiss the Claimant was made during the covertly recorded exchange with Miss Thomas and was triggered by the revelation that the Claimant had made a report to the police concerning his perception of threats to his personal security. The outcome of dismissal was set in stone from there on. The reasoning leading the Tribunal to that conclusion has already been set out in relation to our finding that the Claimant was dismissed for having made a protected disclosure and does not need to be repeated here.
>
> 77 The Tribunal is in no doubt that the procedures put in place by the
> Respondent's People Hub in relation to the Claimant had been orchestrated to lead to and justify (with copious supporting documentation) a dismissal for "gross misconduct" – namely a reason constituting "conduct" falling within Section 98(2)(b) of the Employment Rights Act 1996.
>
> 78 However, having regard to the unequivocal statements made in the covert recording during the course of the recess to the disciplinary hearing, and for the reasons already stated, the Tribunal finds that the intended "conduct" scenario was overtaken by the reaction to discovery of the Claimant's "protected disclosure". In consequence, it was this impermissible reason for dismissal which constituted the "principal reason" for the dismissal of the Claimant.
>
> 79 It follows that the Tribunal does not accept the reasons put forward by the Respondent in the letter of dismissal [B/653A] in so far as they indicate otherwise. From the moment when "the wind changed" in the disciplinary hearing, the actions of the Respondent in the name of and with the authority exercised by Mr Armstrong – and primarily orchestrated by Ms Thomas – effectively amounted to an attempt to "stitch together" reasons ostensibly to justify a "conduct" dismissal and thereby conceal the true ground.
>
> 80 Nor did anything of significance change in relation to that during the appeal hearing conducted by Mr Stokes. Indeed, the Tribunal has gone so far as to find that the appeal stage hearing conducted by Mr Stokes and influenced by Ms Thomas was little short of a "complete sham".

33. The Employment Tribunal went on to hold that there were also multiple procedural failings

that would have meant that the dismissal was unfair. The Employment Tribunal was particularly critical of the way in which the respondent had dealt with investigation of the racist comment the claimant had allegedly made to Ms Arasp. In the invitation to the disciplinary hearing it had been alleged that:

> "… you made a comment of a racist nature on 3rd June: "We had better watch out in the office, you're Iranian aren't you?"

34. The date 3 June 2017 came from a statement produced as part of the investigation by Ms Arasp who said that the comment had been made after a briefing about the terrorist attack at London Bridge and Borough Market. The claimant took the allegation at face value. He denied that he had made the comment and asserted that Ms Arasp could not have fixed the date of the incident, 3 June 2017, as being the date of the terrorist attack as the attack had occurred in the evening of 3 June 2017, after working hours so he could not have made the comment to her that day. The date of the alleged comment was not corrected until the outcome of the disciplinary hearing was given in the dismissal letter in which it was stated:

> "… the date of 3 June is an error and should have read after the terrorist attacks on 3 June."

35. The Employment Tribunal was also critical of the respondent for failing to investigate "duty rotas" that it considered would have demonstrated, had the respondent conducted a proper investigation, that Ms Arasp could not have worked with the claimant after the issue of the terrorist attack had been raised in the work briefing until 16 June 2023.

36. The Employment Tribunal was also highly critical of the way the respondent dealt with the claimant's grievance, holding:

> 97 Having regard to the provisions in the Grievance Policy, and in particular the "Formal grievance procedure" … set out there, it is the view of the Tribunal that this denial by Ms Tysoe of recourse to that procedure was contrary to the provisions set out in the Respondent's Grievance Policy. Not only did it close off access to the right to a grievance meeting, as well as precluding the potential for "further

> investigation as necessary, for example interviewing witnesses", but it flew in the face of the proclamation that:
>
> "Virgin Active is committed to ensuring that all grievances are investigated fully. This may involve carrying out interviews with the employee concerned and third parties such as witnesses, colleagues and managers, as well as analysing written records and information."
>
> 98 Instead, the Claimant was forced to raise his grievances in the context of the Respondent's Disciplinary Policy, where they were to be treated as his "defence against the allegations being made".
>
> 99 That being the case, far from facilitating "a fair and meaningful consideration" of the Claimant's case, Ms Tysoe's decision rendered the Claimant incapable of presenting his grievances with any prospect of "ensuring that all grievances are investigated fully". The Claimant was immediately placed "on the back foot", was deprived of the potential for his complaints to be treated to "further investigation as necessary", and faced no realistic prospect that investigatory interviews would be conducted with "third parties such as witnesses, colleagues and managers" to elicit responses to the matters being raised by the Claimant. The Tribunal finds that the treatment of the Claimant's grievances was not in conformity with the Respondent's relevant policies and was unreasonable in the circumstances.

The discrimination claims

Age and Sex discrimination

37. The Employment Tribunal dismissed the age and sex discrimination claims, rejecting the claimant's arguments based on comparators, concluding that the claimant had not established facts from which it could conclude, in the absence of any other explanation, that his treatment was because of his age or sex.

Race discrimination

38. The question arising in the race discrimination complaint was described in the list of issues:

> Was the handling of the Claimant's disciplinary and grievances as set out in his tribunal claim and/or his dismissal direct race … discrimination?

39. On the first day of the hearing the claimant provided further particulars setting out the detail of the race discrimination claim which were summarised by the Employment Tribunal:

1. Reported a racist … comment "you are only doing this to me as I am old, black and fat" made towards me by Jannett George.
Treated differently due to … race.

Detriment: grievance ignored, precedent set.

2. Grievance above ignored and dismissed by Denise MacKenzie.
…
Detriment: grievance ignored and Denise MacKenzie became investigating officer – impartial treatment.

3. Roya Arasp raised concerns to have me removed as disciplinary officer – HR investigated and put her disciplinary on hold.
I raised concerns about Denise MacKenzie and was ignored. Investigation continued.

… Race …

Detriment: grievance ignored, suspension and disciplinary action taken.

4. My grievances were not heard in line with Policy. Roya Arasp, Jannett George and Darrell Giovanni all had grievance hearings and investigations into theirs, without a dictated scope. Grievances treated differently.

Due to Race…

Detriment: grievances not heard separately. No grievance meetings/investigations leading to unfair disciplinary process. Lead to unfair dismissal.

5. Treated differently in disciplinary process regarding racial allegation compared to Jannett George.
… Race …

Detriment: led to dismissal.

6. Inconsistent disciplinary sanctions applied by Respondent
Fraud – Darrell Giovanni – not dismissal
Racist comment – Jannett George – not dismissal
Malicious rumours/bullying – Roya Arasp no action taken

Treated differently … race …

Detriment: Dismissal.

7. Grievance meetings were handled differently and their grievances taken at face value with no set agenda.

> Comparators: Roya Arasp, Jannett George and Darrell Giovanni
>
> … Race …
>
> Detriment: led to dismissal.
>
> 8. Threat to safety not taken seriously by the Respondent. There was a witness statement provided to the Respondent confirming the threat. Roya Arasp denied the allegation despite a witness confirming the threat. Respondent took no further action with her.
> In comparison, I denied making the racial allegation. Roya Arasp also had a witness to her allegation. The Respondent dismissed me.
>
> Due to Race …
>
> Detriment: Led to dismissal.
>
> 9. …
>
> 10. Racial allegation changed by Malcolm Armstrong/Respondent (3 June) (evidence provided showed it could not have happened).
>
> Comparator: Jannett George admitted to making racist, ageist comment – no action taken by Respondent.
>
> Due to … race ...
>
> Detriment: Dismissal.

40. By allegation 1 the claimant asserted that his grievance that Ms George had made a comment to him when he was seeking to manage her performance "you are only doing this to me as I am old, black and fat" which he considered to be racist, was not investigated, whereas the allegation against him of making a racist comment to Ms Arasp resulted in disciplinary action.

41. The Employment Tribunal held that the claimant had established facts from which it could conclude that the claimant had been subject to direct race discrimination:

> (1) The Tribunal has already considered the Respondent's treatment of this matter by reference to allegations that this was motivated by either the age or sex of the Claimant. So far as those two protected characteristics are concerned the Tribunal has found nothing in the available evidence to call for explanation on the part of the Respondent.
>
> In relation to the component of the claim brought by reference to the

> protected characteristic of race, however, the nature of the reported comment raises an initial question as to whether any alleged different treatment of the Claimant might have been with that characteristic in mind and because of that characteristic.
>
> In the view of the Tribunal the evaluation of an alleged "racist comment" in this context must have brought into consideration the respective racial characteristics of the alleged comment maker and the alleged recipient of that comment. Further, given the seriousness with which the Claimant's alleged "racist comment" to Ms Arasp was treated, it might be expected that at least a similar level of seriousness would be accorded to the alleged comment by Ms George to the Claimant. An explanation is therefore called for in relation to the way in which such consideration took place, including the reason for Ms Mackenzie's dismissal of the Claimant's grievance.
>
> The Tribunal finds that the Claimant has established facts in relation to this matter from which the Tribunal could decide, in the absence of any other explanation, that the Respondent contravened Section 13 of the Equality Act 2010 because of the Claimant's race.

42. The Employment Tribunal also held that the burden of proof had shifted in respect of allegation 2 (dismissal of the grievance in respect of the alleged racist comment by Ms George); allegation 4 (failure to comply with the respondent's grievance procedure); allegation 5 (the alleged racist comment by Ms George); allegation 6 (inconsistent disciplinary sanctions in comparison to Mr Giovanni, Ms George and Ms Arasp); allegation 7 (differential treatment in the course of the handling of the respective grievances); allegation 9 (the way in which the date of the comment the claimant was alleged to have made to Ms Arasp was dealt with in the disciplinary process);

43. The Employment Tribunal summarised its conclusion on the shifting of the burden of proof:

> 130 By way of summary, the matters in relation to which the Tribunal finds that an explanation from the Respondent is required are: (1) the decision of Ms Tysoe which determined that the Claimant's grievances (with the exception of the "health and safety" grievance) should be dealt with as part of a disciplinary process rather than within the framework of the Respondent's grievance procedure; (2) the decision to refuse to make any adjustment to the personnel involved with the disciplinary and appeal procedures in the light of the Claimant's complaints and observations about Ms Thomas; (3) the handling by Mr Armstrong of the disciplinary allegation against the Claimant in respect of a "racist comment"; and (4) the application of different sanctions (or lack of sanctions) for the

> Claimant by contrast with his comparators. In relation to each of those matters the Tribunal has found that there is a difference between the Claimant and his comparators by reference to the protected characteristic of race and that the Claimant has been subjected to less favourable treatment.

44. The Employment Tribunal analysed whether the respondent had discharged the burden of disproving race discrimination by considering 4 issues.

45. The first issue was whether the respondent had proved that "the decision of Ms Tysoe which determined that the Claimant's grievances (with the exception of the "health and safety" grievance) should be dealt with as part of a disciplinary process rather than within the framework of the Respondent's grievance procedure" was not because of the claimant's race. The Employment Tribunal considered the evidence about Ms Tysoe's decision and concluded that she had been unable to properly explain it, and that she had not acted in accordance with the respondent's procedures. The Employment Tribunal held:

> 150 Looking in the round at these explanations for the different treatment of the Claimant, the Tribunal finds that Ms Tysoe has failed to put forward a plausible non-discriminatory explanation for her decisions. She set out from a position that her decisions were "in line with" the Respondent's grievance and disciplinary policies. However, after that proposition was effectively demolished in the course of cross-examination, the best she could come up with was that she had made "a general assessment in the light of all the information before me" that the Claimant's complaints should be treated as part of the disciplinary.
>
> 151 No cogent evidence has been put before the Tribunal, other than the unsuccessful attempt to hide behind the Respondent's policies, to discharge the burden of proof. Nor does any of the explanation put forward by Ms Tysoe come anywhere near amounting to what might be adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.
>
> 152 That being the case, and bearing in mind the "Barton Guidance" in relation to the application of Section 136(3) of the Equality Act 2010, the Tribunal finds that the Respondent has failed to prove, on the balance of probabilities, that her decisions in this regard were in no sense whatsoever on the grounds of race.
>
> 153 In consequence, Section 136(2) of the Equality Act 2010, which

> provides that the Tribunal "must hold that the contravention occurred", leads to the inevitable conclusion that, in relation to the decision of Ms Tysoe to direct that the Claimant's grievances should be handled as part of his disciplinary process in the form of his "defence against the allegations being made", and could be dealt with as "part of the mitigation", the Respondent is guilty of unlawful direct discrimination against the Claimant by reference to the protected characteristic of race.

46. The second issue was whether the respondent had proved that "the decision to refuse to make any adjustment to the personnel involved with the disciplinary and appeal procedures in the light of the Claimant's complaints and observations about Ms Thomas" was not because of the claimant's race.

47. The Employment Tribunal found that the respondent had disproved discrimination:

> … there is nothing to suggest to the Tribunal that Ms Tysoe made her decisions concerning the involvement of Ms Thomas other than in good faith. The Tribunal is satisfied that there is no suggestion of anything putting Ms Tysoe on notice of a risk in relation to Ms Thomas in that regard. Nor could Ms Tysoe have been aware at the time of making her decisions of the extent to which Ms Thomas was eventually established to have been prepared to "play fast and loose" with due process.
>
> 160 That being the case, the Tribunal is satisfied that the Respondent has put forward cogent evidence to explain the appointment and continuing involvement of Ms Thomas and that the explanation given by Ms Tysoe in that regard is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the decisions in relation to the involvement of Ms Thomas in the various stages of the procedures under which the Claimant's issues were being dealt.
>
> 161 In respect of the Claimant's allegations concerning the participation and behaviour of Ms Thomas in his grievance and disciplinary procedures, therefore, the Tribunal finds that nothing in this context renders the Respondent responsible for unlawful discrimination by reference to the protected characteristic of race.

48. The third issue was whether the respondent had proved that "the handling by Mr Armstrong of the disciplinary allegation against the Claimant in respect of a "racist comment"" was not because of the claimant's race.

49. The Employment Tribunal considered that Mr Armstrong had no proper explanation for the

fact that the respondent did not correct the date of the racist comment the claimant had allegedly made to Ms Arasp or for his failure to go back to the witnesses to clarify the matter. The Employment Tribunal after a detailed consideration of the evidence concluded:

> 180 Looking in the round at Mr Armstrong's explanations for his conduct of the disciplinary procedure and his decision to dismiss the Claimant, the Tribunal finds that there has been a failure to put forward a plausible non-discriminatory explanation for what took place. Mr Armstrong's evidence was unsatisfactory in various parts: He failed to provide a cogent non-discriminatory explanation as to why he chose to "reconfirm" the allegation in relation to the "racist comment"; He was unable to explain or justify the failure to investigate Ms George's admitted use of language which the Claimant had characterised in his grievances as a "racist comment"; and he was unable to provide a satisfactory explanation as to why the alleged threats by Ms Arasp – which had been reported by Mr Cawthorn, who was described by Mr Armstrong as "a senior manager at that time" – were not followed up and accorded serious investigation. Nor was Mr Armstrong's performance as a witness enhanced by his claimed inability to recall whether he had been in possession of key documents during the course of the disciplinary procedure leading to the summary dismissal of the Claimant.
>
> 181 It follows that the Tribunal finds insufficient in Mr Armstrong's evidence to get anywhere near what would be adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.

50. The fourth issue was whether the respondent had proved that the "application of different sanctions (or lack of sanctions) for the Claimant by contrast with his comparators" was not because of the claimant's race.

51. The Employment Tribunal again set out the treatment of the claimant in comparison with Ms Arasp, Ms George and Mr Giovanni that had resulted in the shift of the burden of proof:

> 185 Once again, it is common ground that Mr Giovanni was not dismissed before he resigned, and that neither Ms Arasp nor Ms George was subjected to disciplinary sanctions – still less summary dismissal – in respect of the matters raised in the Claimant's grievances. The Claimant, by contrast, was dismissed and subjected to less favourable treatment than his comparators.
>
> 186 It has also been established that there is a difference of racial

> characteristic as between the three comparators (all of whom are black) and the Claimant (who is white).
>
> 187 The thrust of the Claimant's complaints has been directed towards his dismissal. This was said by the Respondent to have been by reason of "gross misconduct". The dismissal letter of 21 September 2017, drafted over the signature of Mr Armstrong, concluded that:
>
> "I believe there is evidence to suggest you made a racist comment to Roya and have bullied Jannett. In relation to Roya and Darrell I believe that the PIP process was not managed appropriately and this isn't acceptable for a General Manager of your experience. I therefore believe that, on the balance of probabilities, you did make a racist comment towards Roya and did bully Jannett."

52. Having considered the evidence of Mr Armstrong in considerable detail, the Employment Tribunal concluded:

> 194 In summary, no cogent evidence was presented to justify or explain the appearance at the stage of the disciplinary hearing of a charge of "gross misconduct" by reason of "bullying". Mr Armstrong struggled under cross-examination to establish his view that there had been "bullying" within the Respondent's procedures. In the light of his performance under oath the Tribunal has formed the view that Mr Armstrong – as with other parts of his activity in this context – was content to proceed on a highly selective basis with a pre-determined view that the Claimant should be dismissed for "gross misconduct". As Mr Armstrong put it himself:
>
> I am not saying I "ignored" information, but there was a lot of it. Clearly I did not use all of it.
>
> 195 Even more problematic was the reliance upon the alleged "racist comment" as a ground for dismissal by reason of "gross misconduct". The Tribunal has already set out its findings in relation to Mr Armstrong's decision to "reconfigure" the allegation as regards the date of the alleged incident. The Tribunal has also expressed its view in respect of Mr Armstrong's decision that there was no need to check with the complainant and her alleged witness once the confusion in relation to the date of the alleged "racist comment" had been brought to light. In both respects the Tribunal has found that the Respondent has failed to put forward a non-discriminatory explanation of those actions which would prove, on the balance of probabilities, that Mr Armstrong's handling of the disciplinary procedure against the Claimant and his decisions in this regard were in no sense whatsoever on the grounds of race.
>
> 196 In so far as the Respondent purported to dismiss the Claimant for

> "gross misconduct" on the basis of (1) the making of a "racist comment" and (2) "bullying" of Ms George, therefore, the Tribunal finds, bearing in mind the "Barton Guidance" in relation to the application of Section 136(3) of the Equality Act 2010, that the Respondent has failed to prove, on the balance of probabilities, that such a purported dismissal was in no sense whatsoever on the grounds of race. This applies to the process leading to that purported dismissal and the reasoning set out in the letter dated 21 September 2017.
>
> 197 In consequence, Section 136(2) of the Equality Act 2010, which provides that the Tribunal "must hold that the contravention occurred", leads to the inevitable conclusion that the Respondent is guilty of unlawful direct discrimination against the Claimant by reference to the protected characteristic of race.

Outline of the Appeal

53. The claimant appealed on six overlapping grounds:

53.1. Delay (Ground 1)

53.2. Perversity (Ground 2)

53.3. Bias (Ground 3) – no longer pursued

53.4. Wrong legal test applied to the race discrimination claim (Grounds 4 and 5)

53.5. Wrong legal test applied to the protected disclosure claim (Ground 6)

54. The primary ground was asserted to be Ground 1 as it was contended that the other errors resulted, at least in large part, from the delay in the case being determined and judgment being given.

The legal test to be applied where there is delay

55. In the Notice of Appeal, the first ground was put in terms that "The egregious delay resulted in the Tribunal's findings being unsafe". In a supplementary skeleton argument submitted shortly before the hearing Ms Kennedy, for the respondent, stated that the correct test is whether there is "a real risk that the litigant has been denied or deprived of the benefit of a fair trial of the proceedings and where it would be unfair or unjust to allow the delayed decision to stand". Mr Beaton, for the claimant, accepted that the latter is the correct test, but contended that the respondent could not

assert that there was a real risk that the respondent had been deprived of a fair hearing as that was not how the ground was asserted in the Notice of Appeal. Ms Kennedy asserted that because ground 1 was permitted to proceed by John Bowers KC, Deputy Judge of the High Court at the sift stage, he could only have done so by application of the correct legal test, which he must have concluded was advanced in the Notice of Appeal. I do not accept that analysis, which amounts to an attempt by Ms Kennedy to pull herself up by her bootstraps, is valid. The correct legal test was not set out in the Notice of Appeal. However, ground 1 clearly asserted that the judgment could not stand because of the excessive delay, and I consider it is necessary when considering that ground to apply the correct legal test. Ground 1 has been permitted to proceed and it must be analysed by application of the correct legal test.

56. The parties accepted that the correct legal approach to delay is set out in **Connex South Eastern Ltd v Bangs** [2005] I.C.R. 763 per Mummery LJ at 43:

> 43. In my judgment, an appeal from an employment tribunal on the ground of unreasonable delay in promulgating its decision is governed by the following principles.
>
> (1) It is confined to questions of law. Section 21(1) of the 1996 Act says so in the clearest terms. In general, there is no appeal on the independent ground that the tribunal made erroneous findings of fact. The employment tribunal is the final arbiter of facts found by it so long as there was no error of law. It is not the function of the Employment Appeal Tribunal or of this court to interfere with findings of fact by weighing the evidence and assessing its importance with a view to "correcting" erroneous findings of fact by the tribunal or requiring them to be re-litigated before another employment tribunal.
>
> (2) No question of law arises from the decision itself just because it was not promulgated within a reasonable time. Unreasonable delay is a matter of fact, not a question of law. It does not in itself constitute an independent ground of appeal. Unreasonable delay may result in a breach of article 6 and possibly give rise to state liability to pay compensation to the victim of the delay, but it does not in itself give rise to a question of law, which would found an appeal challenging the correctness of the delayed decision and for obtaining an order reversing the delayed decision or for a re-trial. I agree with the appeal tribunal ([2004] ICR 841, para 12) that in cases of delayed decisions:

> "it also cannot be just that there should be an automatic sanction of a rehearing, because, quite apart from the adventitious loss to one or the other party of a result in his or her favour, that will only compound the problem, in leading to yet further delay, and to the risk of yet further dimming of recollections."

(3) No question of law arises and no independent ground of appeal exists simply because, by virtue of material factual errors and omissions resulting from delay, the decision is "unsafe". A challenge to the tribunal's findings of fact is not, in the absence of perversity (see (4) below), a valid ground of appeal and there is no jurisdiction under section 21(1) of the 1996 Act to entertain it.

(4) In order to succeed in a challenge to the facts found by the tribunal it is necessary to establish that the decision is, as a result of the unreasonable delay, a perverse one either in its overall conclusion or on specific matters of material fact and credibility. Perversity is a question of law within section 21(1) of the 1996 Act. It is extremely difficult to establish in general (see Yeboah v Crofton [2002] IRLR 634) and particularly where the challenge is to findings on credibility.

(5) It is not incompatible with article 6 of the Convention for domestic legislation to limit the right of appeal from an employment tribunal to questions of law. It was not argued that there was any such incompatibility.

(6) Even if it were incompatible with article 6 to limit appeals to questions of law, it is not possible by use of section 3(1) of the Human Rights Act 1998 or otherwise to interpret section 21(1) of the Employment Tribunals Act 1996 as expanding a right of appeal expressly limited to questions of law to cover questions of fact. To interpret section 21(1) of the 1996 Act as allowing appeals to be brought because the decision is factually "unsafe" and the findings of fact were "wrong" would be an exercise in amending the Employment Tribunals Act 1996. It would be outside the scope of legitimate judicial interpretation.

(7) There may, however, be exceptional cases in which unreasonable delay by the tribunal in promulgating its decision can properly be treated as a serious procedural error or material irregularity giving rise to a question of law in the "proceedings before the tribunal". That would fall within section 21(1) of the 1996 Act which is not confined to questions of law to be found in the substantive decision itself. Such a case could occur if the appellant established that the failure to promulgate the decision within a reasonable time gave rise to a real risk that, due to the delayed decision, the party complaining was deprived of the substance of his right to a fair trial under article 6(1). Article 6(1) guarantees a right to a fair trial. A point on whether or not a person has had a fair trial in the

> employment tribunal is capable of giving rise to a question of law. Section 21(1) of the 1996 Act does not, in my view, expressly or impliedly exclude a right of appeal where, due to excessive delay, there is a real risk that the litigant has been denied or deprived of the benefit of a fair trial of the proceedings and where it would be unfair or unjust to allow the delayed decision to stand. That could give rise to a question of law "in the proceedings before the tribunal", which are still pending while the decision of the tribunal is awaited. Although this interpretation of section 21(1) of the 1996 Act is more restrictive of the right of appeal than in an ordinary civil case, it would be not be incompatible with article 6(1).

57. Accordingly, the mere fact that there may be challenges to findings of fact or assertion of errors of law in a decision that has been delayed does not mean that the decision is unsafe, for an appeal to succeed there must be a real risk that, due to the delay, the appellant was deprived of the substance of his right to a fair trial. In deciding whether there is a risk that a party has been deprived of a fair trial it is nonetheless helpful to consider what errors of law are asserted in the judgment, the reason for the delay and whether on an overview there is a real risk that the trial was not fair. The respondent contends that all the grounds of appeal are interrelated, and that the overall picture that emerges is that there is a real risk that the hearing was unfair. In those circumstances, I consider it is helpful to analyse the asserted errors of law first, although in a different order to that in the grounds of appeal. Obviously, insofar as any error of law is established, that is sufficient for that ground of appeal to succeed, irrespective of whether that error arose from the delay in determining producing the judgment. However, it does not necessarily follow if an error of law is established that the whole judgment is vitiated by the delay in the judgment being produced. Having considered any errors of law that are established, I will go on to consider the reason for the delay and whether there is anything else in the judgment that demonstrates that the hearing may not have been fair.

Race discrimination

58. Race is a protected characteristic for the purposes of the **Equality Act 2010** ("**EQA**"). Direct discrimination is prohibited by section 13 **EQA**:

> (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.

59. Section 23 **EQA** provides:

> 23 Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

60. Determining a claim of direct discrimination is inherently a comparative exercise. The Employment Tribunal has to consider whether the claimant was treated less favourably than a person with whom he does not share the protected characteristic was treated, or would have been treated, and whether the difference of treatment was because of race, in the sense that race was a material factor.

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:**

> 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.

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**. [emphasis added]

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 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.

70. The Employment Tribunal did not direct itself by reference to section 23 **EQA** or analyse whether there were material differences between the circumstances of the claimant and his comparators. The Employment Tribunal did not state whether the comparators the claimant relied on were actual comparators or were being used as providing evidence from which an inference of discrimination might be drawn. The Employment Tribunal clearly thought it was highly significant that the allegation that the claimant had said to Ms Arasp “We had better watch out in the office, you’re Iranian aren’t you?” resulted in disciplinary action, whereas the claimant’s allegation that when he sought to performance manage Ms George, she said to him "you are only doing this to me as I am old, black and fat". The Employment Tribunal did not state whether it thought there were material differences between the circumstances of the two alleged comments. There was no analysis of the possible significance of the fact that the allegation was that the claimant had referred to the race of Ms Arasp whereas Ms George referred to her own race, so that any asserted racial element to the comment would have to be based on a contention that Ms George stereotyped the claimant by assuming that as a white person he would be prejudiced against her as a Black person. On the face of it, the circumstances do appear to be materially different.

71. Mr Beaton, for the claimant, did not contend that Ms George, Ms Arasp or Mr Giovanni were actual comparators. He contended that on a fair reading of the judgment the comparison between the treatment of the claimant and Ms George, Ms Arasp or Mr Giovanni was used, along with other evidence, to draw an inference of race discrimination, albeit that much of the analysis

was in the sections of the judgment dealing with the question of whether the respondent had discharged the burden of disproving discrimination once it had shifted. Regrettably, I cannot agree with that analysis. On a fair reading of the judgment, I consider that the Employment Tribunal treated Ms George, Ms Arasp and Mr Giovanni as actual comparators without analysing whether there were material differences between their circumstances and those of the claimant. The Employment Tribunal held that because of the difference of treatment alone the burden of proof shifted to the respondent to disprove discrimination. Accordingly, I conclude that Ground 4, that challenges the legal analysis that resulted in the burden of proof shifting, is made out. I do not consider it assists to go on to consider ground 5, that challenges the decision of the Employment Tribunal that the respondent had failed to discharge the burden in respect of the detriments that it found against the respondent. However, I can see nothing in the Employment Tribunal having made the error of law in its analysis that the burden of proof had shifted to the respondent that inherently suggests that it resulted from the delays in producing the judgment.

Public interest disclosure

72. By Ground 6, the respondent asserts that the Employment Tribunal "Failed to apply the appropriate tests when asking whether the Claimant was dismissed as a result of a protected disclosure". The way in which the ground is put has varied significantly between the grounds of appeal, skeleton argument and oral submissions. The focus of the oral submissions was that the Employment Tribunal failed properly to consider whether the claimant had a genuine belief that the disclosures were made in the public interest. It was contended that could not have been the case as the disclosures were only made after disciplinary proceedings had been taken against the claimant. The respondent asserts that the Employment Tribunal failed to consider its argument that the claimant was not truthful.

73. The term "qualifying disclosure" is defined by section 43B Employment Rights Act 1996 ("**ERA**"), which provides, so far as is relevant:

> "43B.— Disclosures qualifying for protection.

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed, ...
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered …

74. There must be a disclosure of information. In the reasonable belief of the worker making the disclosure, the information must tend to show one of the matters set out at paras. 43B(1) (a) to (f) ERA 1996, defined as the "relevant failure" by section 43B(5) **ERA**.

75. In the reasonable belief of the worker making the disclosure, it must be made in the public interest. The worker must believe, at the time of making the disclosure, that it is made in the public interest, and that belief must be reasonable. Underhill LJ considered this requirement in **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731;

> "26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B(1).
>
> 27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula's case [2007] ICR D 1026 (see para 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
>
> 28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps E particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury approach" (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of F whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking- that is

indeed often difficult to avoid – but only that that view is not as such determinative.

> 29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because G the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.
>
> 30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.
>
> 31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. Although Mr Reade in his skeleton argument referred to authority on the Reynolds defence (Reynolds v Times Newspapers Ltd [2001] 2 AC 127) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras 10—13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. This seems to have been essentially the approach taken by the tribunal at para 147 of its reasons."

76. While the worker must reasonably believe that the disclosure is made in the public interest it is not necessary that belief is his motive for making the disclosure.

77. I consider it is clear, on a fair reading of the judgment, that the Employment Tribunal concluded as a matter of fact that the claimant did reasonably believe that the making of the

disclosures was in the public interest. That was a factual finding that was open to the Employment Tribunal. Even if the claimant was motivated to make the disclosures by being subject to disciplinary proceedings that would not prevent him having a reasonable belief that the disclosure was made in the public interest. I consider that the scattergun approach adopted to this ground demonstrates that it is, in reality, an attempt to go behind the factual findings of the Employment Tribunal. In the Notice of Appeal, it is asserted that the Employment Tribunal "failed to properly consider points disputed by the Appellant at the hearing". It is not necessary for the Employment Tribunal specifically to refer to every point raised by a party in a skeleton argument. The respondent asserts that the Employment Tribunal failed properly to consider the assertion that the claimant's "allegations about threats to his safety did not tend to show that a crime was likely to be committed". I consider that it is clear that the Employment Tribunal concluded that the claimant did have a reasonable belief that the information he disclosed tended to show that a crime was likely to be committed. The respondent asserts that the Employment Tribunal failed to consider the assertion that the claimant "made a protected disclosure in respect of the credit card fraud, in circumstances where this had already been subject to an investigation". The fact that there had been an internal investigation would not prevent the claimant making a disclosure of information that the claimant reasonably believed tended to show that the commission of a crime was likely, and that the disclosure was in the public interest. The Employment Tribunal was not required to recite every point made by the respondent. The respondent contends that the Employment Tribunal failed to consider its argument that "the allegations regarding credit card fraud and threats to his safety were made against Darrell Giovanni in retaliation for him raising a grievance against the Claimant" and that the Employment Tribunal should not have held that the "disclosure was in the public interest and not because of the disciplinary case against the Claimant". These points go to the motive of the claimant for making the disclosure rather than the relevant statutory test the application of which required the Employment Tribunal to consider whether the claimant made a disclosure of information which he reasonably believed tended to

show a relevant failure and was made in the public interest. The tribunal applied the correct test and reached a legitimate conclusion that the claimant had made a protected disclosure and legitimately went on to hold that was the reason, or principal reason, for the claimant's dismissal. Ground 6 fails.

Perversity

78. By the second ground of appeal that respondent asserts perversity. The respondent accepts that there is a very high threshold to be surpassed if perversity is to be established, **Crofton v Yeboah** [2002] IRLR 634 at paragraph 93:

> "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"…"

79. I do not consider that the grounds of appeal come close to establishing perversity. The respondent relies on the fact that the Employment Tribunal referred to having paid particular regard to the cross-examination of Mr Stokes, who heard the Claimant's appeal, whereas he did not give evidence. The Employment Tribunal was asked to comment on the allegations about the conduct of the hearing and delay in giving judgment. The Employment Judge explained that the erroneous reference to Mr Stokes giving evidence occurred in a section of the judgment shortly after a passage in which the Employment Tribunal considered the covert recording of his discussion with Ms Thomas. I consider this is a minor error of the type that occur from time to time in judgments, being no more than a Homeric nod.

80. The respondent criticises the focus of the Employment Tribunal on the precise date on which the claimant was alleged to have made a racist comment to Ms Arasp. I do not consider this is a fair criticism. The Employment Tribunal was making the point that the respondent put the allegation to the claimant on the basis that 3 June 2017 was the date on which the comment was

made. Despite the claimant explaining that could not have been the date the respondent only corrected the allegation to assert that the comment was made after 3 June 2017 when giving the outcome of the disciplinary hearing. The Employment Tribunal was entitled to consider that this shortcoming was significant.

81. The respondent criticises the way the respondent analysed the extent to which the claimant and Ms Arasp might have worked together after 3 June 2023. That was a factual determination for the Employment Tribunal, and I do not consider that their approach was perverse.

82. The respondent asserts that the Employment Tribunal "wrongly treated the covert recordings as if they were a transcript of evidence in a hearing". The Employment Tribunal was fully entitled to consider that the transcripts were highly significant. The fact that Mr Armstrong said he could not recall making the comments he was recorded as making was a matter of little significance. The recording spoke for itself and the Employment Tribunal was entitled to conclude that Mr Armstrong's attitude changed after he discovered that the claimant had made a report to the Police.

83. The respondent notes that at paragraph 186 of the judgment the Employment Tribunal referred to all of the claimant's comparators being Black, whereas Ms Arasp was elsewhere referred to as Iranian. I do not consider this is of any real significance. On an overview of the judgment, it is clear that the Employment Tribunal had fully in mind the assertion that the claimant had made a racist comment to the claimant based on her being Iranian. Ground 2 fails.

Delay

84. As stated at the outset of this judgment there was lengthy delay in the judgment being produced, mainly because of the very serious ill health of the Employment Judge. The Employment Judge has provided a very detailed explanation of the delay and how the judgment was produced. I do not consider it helpful to set out that explanation in full, but will refer to what appear to me to be some of the most important aspects. The Employment Judge took 117 pages of handwritten notes

which were available to the Employment Tribunal at all stages of its deliberations. All members of the Employment Tribunal, at all stages of its deliberations, had the hearing bundle in hard or soft copy. During the deliberations the Employment Judge made recordings of factual findings and of important points discussed in the deliberations. The Employment Tribunal also had supplementary notes taken by the lay members. The Employment Tribunal adopted an iterative approach to decision making, first finding the facts, then applying the law to the facts it found to determine the issues, albeit over several chambers sessions, with substantial gaps between them, sometimes requiring significant reading back into the case.

85. This ground has also varied considerably between the notice of appeal, skeleton argument and oral submissions. I shall consider the specific grounds of appeal that were still relied upon in the skeleton argument and/or oral submissions. The respondent complains that the Employment Tribunal "did not have access to a transcript of the oral evidence". There was nothing unusual in this at the time of the hearing and deliberations. The Employment Tribunal had a detailed note of the oral evidence.

86. The respondent asserts that the "lay members of the Tribunal lost the hard copy bundles that they used during oral evidence and did not have access to those notes when the draft Judgment was produced". While the hard copy bundles of the members were not kept, they did have soft copies. The notes referred to in the ground are any notes that the members made on the documents in the hard copy bundle. However, the Employment Judge specifically states that the members had their notes when they deliberated. There is nothing to suggest that any marking or notes they made on the hard copy bundles were of great significance. The members clearly considered that their hearing notes and other material before them were sufficient to determine the case.

87. The respondent complains that the Employment Tribunal "heard the case over five different sittings, in some cases with months passing in between them". That is regrettable but the

Employment Judge has set out at great length the steps taken to ensure that the case was considered properly, including making recordings of the deliberations so that the panel would have a record of what was said during the course of the deliberations and of the findings they made as they went through the stages of determining the claims.

88. The respondent contends that the Employment Tribunal relied "excessively on transcripts of covert recordings". I have set out the extracts that the Employment Tribunal particularly relied on in the section of this judgment dealing with the facts. When one reads what Mr Armstrong and Ms Thomas said when they thought no-one was listening it is not hard to see why the Employment Tribunal felt the transcript was a smoking gun. I can see no error of law in the weight the Employment Tribunal gave to this evidence.

89. The respondent asserts that the judgment "fails to address one of the Appellant's core points – that the Claimant was a liar and an unreliable witness". It is clear on a fair reading of the judgment that the Employment Tribunal did not consider that was the case.

90. The respondent complains that the judgment fails to address a number of material points raised in its skeleton argument. The Employment Tribunal was not required to address every point raised by the respondent but was entitled to focus on the matters it considered were of the greatest significance to determining the complaints.

91. In the skeleton argument produced for the hearing the respondent raises a number of points said to arise from consideration of the Note provided by the Employment Judge and from his response to a complaint the respondent made against him (that was rejected), although there has been no application to amend the Notice of Appeal. The respondent asserts that the severity of the Employment Judge's ill health meant that the "case and the evidence was plainly not at the top of" his mind while he was being treated and discovered the severity of his condition. The Employment Judge's illness explains much of the delay and the fact that the deliberation took place over a

number of days in chambers with significant gaps between them. However, I do not consider that there is anything to suggest that the Employment Judge did not give his full attention to the case when he was able to meet with the members and deliberate. I do not accept that one can infer from the severity of the illness that the Employment Judge's "recollection of the evidence was (understandably) severely impaired".

92. The respondent complains that there was " no working draft of the Judgment at the time the hearing concluded in October 2019 setting out the panel's substantive findings". Nor would I expect there to have been one. Findings of fact are made after the hearing when the panel deliberates.

93. The respondent notes that deliberations "did not start until some months later at the end of January 2020", that very little "substantive work was done on the case between January 2020 and February 2021 – a period of 13 months", that a "working draft of the Judgment was not prepared and circulated until November 2022" and in " February 2021, the panel were described as having a "provisional view" as to the race discrimination claim". These points establish no more than that the deliberations took place over a number of sessions with substantial gaps between them and that the Employment Tribunal found facts first, then applied the law to them, and did not reach a conclusion on the race discrimination claim until it had made all of its findings of fact and conducted a full analysis of the case. Employment Tribunals have long been told that they should consider the matter as a whole before determining discrimination claims.

94. Standing back and considering the totality of the complaints raised by the respondent I do not consider that they have established that the delay in producing the judgment gave rise to a real risk that the respondent was deprived of the substance of the right to a fair trial. Ground 1 fails.

Disposal

95. The appeal against the findings of direct race discrimination succeed and those findings are set aside. Those claims are remitted for rehearing before a new Employment Tribunal, if necessary.

The parties should consider with care, in light of the claims that have succeeded, whether there is any way of resolving this matter without the need for a further hearing. The grounds of appeal challenging the other determinations of the Employment Tribunal are dismissed.