Case No: A2/2005/1299/EATRF

Neutral Citation Number: [2006] EWCA Civ 1136
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 31st July 2006

Before :

LORD JUSTICE WARD
LADY JUSTICE SMITH
and
LORD JUSTICE RICHARDS

Between :

MS H AZIZ	**Appellant**
- and -	
THE CROWN PRESECUTION SERVICE	**Respondent**

(Transcript of the Handed Down Judgment of
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- -

The Appellant appeared in person
Adrian Lynch QC and Ijeoma Omambala (instructed by **DLA Piper Rudnich Gray Cary UK LLP**) for the Respondent

- -

Judgment
As Approved by the Court

Lady Justice Smith :

Introduction

1. This is the appeal of Halima Aziz, brought with permission of Pill LJ, against the decision of the Employment Appeal Tribunal (EAT) dated 24th May 2005. The EAT had reversed the unanimous decision of the Employment Tribunal (ET) sitting at Leeds, which had upheld the appellant's complaint of racial discrimination against her employers, the Crown Prosecution Service (CPS).

2. Ms Aziz is a solicitor and has been employed by the CPS since 1991. Since 1995, she worked for the Bradford Branch of the CPS. She is of Asian origin and of the Moslem faith. Her family originates in Pakistan. On 25 September 2001, that is just two weeks after the Al Qaeda attacks on the World Trade Centre, New York and the Pentagon, Washington, Ms Aziz was involved in conversations about those events with members of staff at the Bradford Magistrates Court. On 5th October 2001, her employers received a written complaint about what she had said on 25th September. Disciplinary proceedings were commenced and the appellant was suspended from duty on 10th October. Her suspension was lifted on 17th October, when it was replaced by a transfer from Bradford to the Wakefield office. By that time, the appellant was unwell and unfit for work.

3. Ms Aziz remained off work and, on the 24th December 2001, she lodged complaints at the ET that her treatment by the CPS during the period leading up to her suspension had been discriminatory on the grounds of both race and sex. Before those complaints came on for hearing, which was not until February 2003, the disciplinary proceedings against Ms Aziz had been discontinued, in April 2002, upon receipt of the report of Mr Bill Budge, who had been appointed by the CPS to investigate the incidents of 25th September 2001. Mr Budge's report exonerated Ms Aziz from any wrongdoing.

4. The hearing before the ET lasted for nine working days, spread over a period of 13 months. The ET's reserved decision was sent to the parties on 11th June 2004. The ET upheld Ms Aziz's complaint of race discrimination but held that there had been no discrimination on the ground of gender. The essence of the decision was that, in commencing disciplinary proceedings against Ms Aziz and in suspending her from duty, the CPS had acted in breach of its own Personnel Management Manual, a document that was referred to throughout the proceedings as the 'disciplinary code'. She had suffered a detriment. Further the ET held that the CPS would not have treated a white solicitor in their employment in the way that they treated her. Thus her treatment was less favourable on racial grounds and was discriminatory.

5. The CPS appealed to the EAT, who held that the ET had erred in holding that the CPS had acted in breach of its own code. The ET had misconstrued the code. This error of law undermined the ET's findings of less favourable treatment and that the treatment was on racial grounds and it followed that the finding of discrimination could not stand.

6. Ms Aziz now appeals to this court, contending that the ET had not misconstrued the code. Their decision was properly based on findings of fact which were open to them. Those findings should not be upset by an appellate court. The CPS contend that the EAT was right to hold that the ET's decision was fundamentally flawed.

The Facts

7. The account which follows is based on the ET's findings of fact, as to which there is now no dispute. On the morning of 25th September, as Ms Aziz was passing through the security check at the entrance to the Bradford Magistrates Court, a security officer named George Gill remarked to her that she was a security risk. Given that the attacks on the USA were so recent, the ET regarded that remark as insensitive, even provocative. However, Ms Aziz took it in good part and jokingly replied that she was a friend of Osama Bin Laden. There was a brief conversation about the events of September 11th. As Ms Aziz proceeded upstairs to the courtroom, she fell into conversation on the same topic with a court usher named Andrew Spencer. Ms Aziz explained that she did not agree with the attacks on the USA but nor did she approve of the actions the USA had taken in other countries, including its support for Israel. Mr Spencer spoke about Afghanistan and there was some discussion of Iraq. It was later alleged that Ms Aziz's remarks had been offensive and had led to a disturbance within the court precincts between white and Asian youths who were attending court in connection with alleged public order offences committed during the Bradford riots in July 2001. Mr Budge's report established that no such disturbance had in fact occurred.

8. By 28th September, Mr Gill had made a report about Ms Aziz to Ms Fiona Philpott, the District Legal Director of Bradford Magistrates Court. There is no record of that report; nor did Ms Philpott give evidence to or provide a statement for the ET. However, it appears that, following a conversation with Ms Gill, Ms Philpott had come to understand that Ms Aziz had suggested that the attacks on America were 'all the fault of the Jews'. She also understood that this remark had caused a disturbance between groups of youths at court.

9. At the end of a meeting which took place on Friday 28th September, Ms Philpott spoke to Mr Nigel Cowgill, who was at that time the Head of the Bradford Criminal Justice Unit (Magistrates Courts). He was not Ms Aziz's immediate line manager (that was Mr Peter Mann, a prosecution team leader) but he was on the next rung of line management. Ms Philpott told Mr Cowgill that she had had a report that Ms Aziz had made offensive remarks at the Magistrates Court. According to Mr Cowgill, Ms Philpott did not mention any disturbance. Mr Cowgill told the ET that his reaction to this information was that he could not do anything on the basis of this purely hearsay report. Ms Philpott had no direct knowledge of the facts being reported. The report was unsubstantiated. Mr Cowgill told Ms Philpott that he could not take any action unless he received a formal complaint in writing, setting out specifically what it was that Ms Aziz had allegedly said or done.

10. The following working day, 1st October, Mr Cowgill spoke to Mrs Jean Ashton, the CPS Area Business Manager (ABM), who had direct responsibility for disciplinary

matters which were too serious for line management to deal with. The two agreed that nothing should be done unless and until Ms Philpott put her report into writing.

11. By letter dated 2nd October, Ms Philpott wrote to Mr Cowgill as follows:

> "I have heard from two members of staff that Halima Aziz has been making inappropriate remarks in court and at the security arch at the main entrance. The remarks have been insensitive and occasionally offensive and refer to recent events in America. Whilst I accept that every person has a right to their own views and respect for those views, I am concerned that the remarks as reported are discriminatory. For example on one occasion I am told that Miss Aziz stated that (it) was "all the fault of the Jews". This particular remark caused a security officer some concern as it sparked off a disturbance between white and Asian youths who had overheard the remark. I believe that it is unnecessary to express such opinions in front of waiting defendants in court where there is the potential for an inflammatory effect. I would be grateful if you would discuss this matter with Miss Aziz and ensure that her behaviour on court premises is a little more circumspect."

12. The ET observed that, as a complaint, this letter was imprecise and lacking in vital information. Also, such information as it contained was all hearsay. The ET was of the view that these factors should have raised questions about the reliability of the report in the mind of any recipient, particularly employees of the CPS who would be aware of the danger of relying on such information. The ET also noted that Ms Philpott, who held a very responsible position, was suggesting only that Ms Aziz should be advised as to her future conduct. There was what the ET described as a 'dissonance' between the apparent gravity of the allegations and the view Ms Philpott took as to the appropriate response.

13. Ms Philpott's letter was received in Mr Cowgill's office on 5th October but he did not see it until 9th October. It contained the new allegation of causing a disturbance. On reading it, Mr Cowgill faxed it to Mrs Ashton. He made no attempt to enquire as to the truth or reliability of the hearsay report. He did not attempt even to identify the persons who had supplied information to Ms Philpott, let alone speak to them. He did not attempt to find out whether a disturbance had taken place and if so when. He told the ET that, because of Ms Philpott's senior status, he was bound to take her written complaint at face value. It was not for him, he said, to question the reliability of its content. The ET rejected that as irrational. They said that Mr Cowgill had very properly refused to take action on the basis of Ms Philpott's oral report, recognising as he did that it was based on unsubstantiated hearsay evidence. It was irrational to suggest that putting that same information into writing made it any more reliable. The ET also regarded Mr Cowgill's approach to the letter as revealing inconsistent attitudes towards Ms Philpott. On the one hand, he was saying that, because Ms Philpott was so senior, he had to take her report at face value. On the other hand, he was saying that the CPS could not accept Ms Philpott's suggestion that Ms Aziz should only be advised as to the future conduct. It was for the CPS to decide upon the appropriate response to

these allegations, which he regarded as serious. Within paragraph 15.21 of the reasons, the ET observed:

> "Thus, the respondent (CPS) exercised its own judgment and rejected Ms Philpott's conclusions as to what should be done but paradoxically considered that it was not in a position to challenge or enquire about the basis of those allegations. This was an intellectually untenable position to adopt."

14. The ET was critical of Mr Cowgill's decision to pass the matter over to Mrs Ashton without making any enquiries, particularly because, as a prosecutor, he would be aware of the danger of acting on unsubstantiated hearsay evidence. At paragraph 15.23 of the reasons, they said:

> "Given Mr Cowgill's very sound reservations about these less serious complaints (*viz the inappropriate remarks*), his failure to go back to Ms Philpott and check on the new and much more serious allegation of inciting a racial disturbance is quite astonishing. Mr Cowgill was aware of the implications of these allegations on the career and professional standing of the applicant. At the same time, being a prosecutor, he would have had at the forefront of his mind the overriding necessity to ensure that any allegations had a sufficient basis of truth."

15. The ET noted that Mr Cowgill claimed to believe that, once he had referred the matter to Mrs Ashton, he no longer had any role to play. He considered that he had to rely on the expertise of Mrs Ashton and a department at Headquarters known as 'Personnel 2', who together were responsible for disciplinary proceedings. The ET observed that, in taking that attitude, Mr Cowgill overlooked the fact that, as a prosecutor, he had an expertise in evaluating evidence that Mrs Ashton (whose expertise lay in personnel management and development) probably did not have.

16. Once Ms Philpott's letter came into Mrs Ashton's hands, matters moved quickly to the suspension of Ms Aziz. Mrs Ashton told the ET that, on reading Ms Philpott's letter, she 'became aware' that Ms Aziz's remarks had led to a disturbance at Court. She took the view that, if the allegations were proved, they amounted to gross misconduct. Mrs Ashton consulted Mr Peter Clark at Personnel 2. They discussed the possible suspension of Ms Aziz. Mr Clark apparently consulted Mr Cameron, his line manager, and their joint view was that, if proved, the allegations amounted to gross misconduct. The allegations were so serious that the Area (whose decision it was) should consider suspension. Transfer to another centre was also an option. Mrs Ashton thought that suspension was appropriate because the remarks allegedly made in the public foyer had led to a disturbance.

17. Mrs Ashton consulted Mr Neil Franklin, the Chief Crown Prosecutor. They had to speak by telephone, as he was away at a training conference. She told him about the complaint, read the letter of complaint to him and told him of the advice of Personnel 2.

She said that she supported suspension. Mr Franklin said that he needed time to think about his options.

18. Although Mrs Ashton did not mention this in her written statement, it emerged in evidence that Mr Clark advised her that, before suspension was authorised, three specific enquiries should be made. Mrs Ashton instructed Mr Cowgill to undertake them. The ET expressed surprise that there was no note of any of these exchanges, although Mrs Ashton did make a rough note of the replies that Mr Cowgill gave her. We do not have the note and it is not clear exactly when Mr Cowgill reported back to Mrs Ashton. Certainly, he did not report back on 9th October and Mr Franklin seems to have been unaware of any further enquiries that were to be made at the time when he was consulted by Mrs Ashton.

19. The first enquiry that Mrs Ashton asked Mr Cowgill to make was to find out the identity of the persons who had made the complaints about Ms Aziz. Mr Cowgill reported two names, Mark Adamson, a legal adviser, and Mr Gill, the security officer. The ET noted that the two people referred to (although not named) in Ms Philpott's letter were in fact Mr Gill and Mr Spencer, not Mr Adamson. They also noted that, in his investigation, Mr Budge identified seven eye witnesses to the events of 25th September. Second, Mr Cowgill had to find out whether the persons identified would cooperate in an investigation. He reported that they would. The third question from Mrs Ashton and Mr Clark was whether there was evidence that a public order offence of criminal incitement had been committed. Mr Cowgill reported that there was not. In her record of Mr Cowgill's replies, Mrs Ashton noted that Mr Cowgill had said that not enough was known about the incident, that no complaint had been made and the remark (*relating to it all being the fault of the Jews*) had been overheard and had not been directed at the persons involved in the alleged disturbance.

20. The ET was unimpressed by Mr Cowgill's inability to recollect reporting these things to Mrs Ashton. They considered that these recorded reservations about the quality of information available at that time were inconsistent with the view he expressed to the tribunal, which was that it was entirely acceptable to refer the matter to Mrs Ashton and for her to take action on the basis of Ms Philpott's report, without making any other enquiries. At paragraph 15.27 of the decision, the ET said:

> "Mrs Ashton's note strongly suggests that, insofar as the criminal incitement element was concerned, this was merely a desk top exercise and that Mr Cowgill did not make any substantial enquiries. Although it seems likely that Mr Clark at HQ had had the wit to appreciate that before one proceeded on a complaint such as this you had to establish some essential facts, that appreciation was apparently not shared by Mrs Ashton and Mr Cowgill. Thus, despite the fact that Mrs Ashton's note makes it quite clear that Mr Cowgill had identified significant problems with the allegations, this does not appear to have given rise to any questioning of the evidential basis on which the respondent was proceeding. Mr Cowgill ought to have been aware of the potential consequences to the applicant of merely raising such allegations. Given that Mr Cowgill had had very proper

> reservations about the allegations from the inception, the questions raised by Mr Clark should have alerted him to the need to ensure that there were adequate grounds for pursuing such serious allegations. Furthermore when carrying out his review of the incitement allegation, Mr Cowgill had identified further deficiencies beyond those he had initially found in the original complaint. In the light of all this, Mr Cowgill's position that he had no material involvement in the proceedings after he passed the note to Mrs Ashton does not appear to be credible. However, in any event, it is to be noted that this further information was not available at the point the decision to suspend was taken."

21. By 10th October, Mr Franklin had consulted with some of his senior colleagues at the training conference. He had also spoken to Ms Rohan Collier who was the Head of Diversity Unit at the CPS. The ET found that the basis of this consultation was premised on two assumptions. First, it was assumed that everything stated in Ms Philpott's letter should be considered as a basis for action without further enquiry. Mr Franklin told the ET that Mrs Ashton had told him that everything alleged could be proved. He said that the source of the complaint, Ms Philpott, was a person carrying out what he described as a 'quasi-judicial function'. It did not cross his mind that there might be any error or any malice in the allegations. Second, Mr Franklin understood that all the procedural steps required by the CPS disciplinary code had been taken. Mrs Ashton was a very experienced HR manager and would not have advised him to proceed to suspension had those steps not been taken. On the basis of those assumptions and on receiving the advice from colleagues with whom he must have shared those assumptions, Mr Franklin decided to suspend Ms Aziz. He took the view that the situation was 'exceptionally serious' and raised questions of public confidence in the CPS. The ET was of the view that another reason that was important to Mr Franklin in reaching his decision was the possibility of media interest in the story if and when it broke. Mr Franklin said that, if that happened, he wished to be able to demonstrate that the CPS was dealing with the matter appropriately. The ET understood this to mean that Mr Franklin was concerned that, if the story got out and he had not suspended Ms Aziz, he might be criticised.

22. On the morning of 10th October, Mr Franklin spoke to Mrs Ashton and authorised her to suspend Ms Aziz pending the completion of a formal investigation. Mrs Ashton did not tell him that she was awaiting the result of any enquiries to be made by Mr Cowgill. Mr Franklin authorised Mrs Ashton to write the letter of suspension and to ask Mr Cowgill to conduct the suspension interview.

23. Mrs Ashton instructed Mr Cowgill to suspend Ms Aziz. She told him that before he actually suspended her, he should ask her briefly about the incident, although he should not question her in detail or engage in too much discussion. If Ms Aziz said anything which caused him to doubt that the incident had occurred, he was to report that back immediately before suspending her. The ET interpreted this evidence as demonstrating that Mrs Ashton instructed Mr Cowgill to obtain an admission from Ms Aziz that an incident had taken place. They considered that this was contrary to the procedures laid out in the disciplinary code. Mrs Ashton told the ET that seeking an admission was forbidden. Mrs Ashton claimed that it was Mr Clark who had advised her that this step should be taken. The ET inferred that Mr Clark had some reservations about the

soundness of the original complaint. They thought it unfortunate that Mr Clark had not given evidence of the advice he gave. They also observed that neither Mrs Ashton nor Mr Cowgill appeared to have shared Mr Clark's reservations.

24. Mr Cowgill instructed Mr Mann to bring Ms Aziz to a meeting during the afternoon of 10th October. Ms Aziz was not to have the right to be represented or to be accompanied by a friend. She was not to be given a copy of the letter of complaint. Nor was she to have the opportunity to make representations. Mr Cowgill said that he carried out the suspension as instructed by Mrs Ashton. The ET accepted Ms Aziz's evidence that, at the suspension meeting, she was told very little about the allegations against her. After being told that she was suspended, Ms Aziz was given the suspension letter, which according to Mrs Ashton had been drafted by Mr Clark. The main paragraph which described the allegations said:

> "As a result of remarks allegedly made while you were at the Bradford Magistrates Court during the week commencing 24th September, 2001, in relation to the incident in America on 11th September 2001, it has been decided to instigate a formal investigation. The alleged remarks have been reported to the CPS by the Bradford District Legal Director."

As the ET observed, there is there no reference to any alleged public disturbance.

25. Ms Aziz was very distressed by the end of the interview. She was escorted to her desk by Mr Mann. He had been present during the interview but had not spoken. His instructions were that Ms Aziz was to leave the premises immediately. Ms Aziz had to collect her belongings from her desk in an open office, where several other prosecutors worked. She found this experience deeply humiliating. In reflecting on the decision to suspend, the ET observed that the CPS had accepted that between 25th September, the date of the alleged incident and 10th October, the date of suspension, Miss Aziz had worked without incident or complaint. She had been able to function normally and her working relationships with others had apparently been largely unaffected.

26. I can deal with the remaining history quite briefly. Soon after the suspension, Mr Franklin began to receive representations from various persons expressing concern about the inappropriateness of the decision to suspend. The detail of these is not germane to the decision of the ET or of this Court. Mr Franklin gave the matter further consideration and, by 14th October, had reached the conclusion that suspension was not necessary. He considered that transfer of Ms Aziz to the Wakefield office would suffice. He had not received any new factual information to produce that change of mind. He invited Ms Aziz to come into the office to discuss her transfer but by this time she was suffering from depression and was unfit for work. That remained the position at the time of the hearings.

The Statutory Provisions

27. Section 1(1) of the Race Relations Act 1976 (RRA) provides that:

> "A person discriminates against another in any circumstances relevant for the purposes of any provision of the Act if, on racial grounds, he treats that other less favourably than he treats or would treat other persons; "

28. Section 4 of the RRA covers discrimination in the employment field. Section 4(2), on which Ms Aziz relied provides:

> "It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee …..
>
> c) by dismissing him or subjecting him to any other detriment."

29. Sections 1 and 6 of the Sex Discrimination Act 1975 are in analogous terms. Because the ET found that there had been no discrimination on the ground of gender in this case, I shall say no more about that aspect of the case.

The Disciplinary Code

30. At the hearing, the main submission made on behalf of Ms Aziz was that the actions of the CPS had been inappropriate and unfair in that they had proceeded to suspension without carrying out any preliminary investigation of the allegation against her. They had jumped unjustifiably to the conclusion that the allegations were true. Also, it was submitted that the CPS had acted in breach of its own disciplinary code. Ms Aziz submitted that the code required that there should be a preliminary investigation before disciplinary proceedings were commenced. She also submitted that the circumstances of the suspension meeting breached the code. In suspending her in the circumstances that prevailed, the CPS had subjected her to a detriment and had treated her less favourably than they would have treated a white male solicitor if complaints of a similar nature had been made against him.

31. The CPS witnesses contended that they had followed the provisions of their disciplinary code. All employees of the CPS would be treated in the same way, regardless of race or gender, following the provisions of the code. Because the CPS defence depended so strongly upon the provisions of the code, a good deal of time and effort went into considering its meaning. Its meaning was to become of even greater importance when the case reached the EAT.

32. The disciplinary code purports to provide a complete guide to the conduct of

disciplinary proceedings from the point at which a complaint is made to the stage of an appeal following the imposition of a sanction for a disciplinary offence. The various steps to be taken are set out and a flow chart illustrates those steps visually. Sample letters are provided for adaptation for use at various stages of the procedure.

33. The disciplinary code is Chapter 3 of the Personnel Management Manual. The ET set out a large number of its provisions in full. For the present, I shall seek to explain the structure of the code and will set out only those provisions on which the main issues turned at the EAT and ET and will turn in this appeal.

34. After a brief introduction, the code sets out some general matters under the heading 'Principles'. First, it explains that the disciplinary procedures are designed to ensure that staff keep to the standards of behaviour required and to help managers deal fairly with those who do not. I interpose to observe that the express intention is that the procedures should be fair. Paragraph 3.3 provides, so far as relevant:

> "Maintaining appropriate standards of conduct amongst their staff is the responsibility of line managers. If, in doing so, they decide to take disciplinary action as set out in this chapter, they must:
>
> a) apply the procedures equitably irrespective of the level, sex, race, marital status, …… of the member of staff concerned;
> b) make every reasonable attempt in the circumstances to establish the facts of the alleged misconduct before any disciplinary action is taken;
> c) consider whether any previous disciplinary matter is relevant;
> d) take full account of the background including any relevant personal, social or domestic circumstances. …..
> e) act promptly at all stages."

Paragraph 3.4 provides, so far as relevant:

> "Any member of staff subject to formal disciplinary action has the right:
>
> a) to be advised of the nature of the complaint against them without undue delay;
> b) to be advised as soon as the decision has been taken not to proceed with the discipline procedures;
> c) for the case to be dealt with, as far as circumstances permit, in confidence;
> d) in normal circumstances, to be given a copy of any material supporting a disciplinary charge (including any produced as the result of a formal investigation);
> e) to be made aware of the disciplinary procedures that will be followed and the penalties which may be imposed;
> f) to be given the opportunity to state their case and comment on the evidence before decisions are reached;
> g) to receive advice and representation throughout from a trade union representative or a colleague of their choice;
> h) to receive a full explanation for any penalty imposed;

i) not to be dismissed for a first act of misconduct unless it constitutes gross misconduct;
j) to appeal against the outcome of any penalty imposed."

35. The section headed '**Principles'** finishes with guidance as to how a line manager could decide whether the allegation he was considering might amount to gross, serious or minor misconduct. Examples are given of each type of misconduct.

36. The next main section is entitled '**Procedures**' and begins with guidance as to the levels of management which should be involved in the procedures and the records which must be kept. Then under the subheading '**Preliminary Steps**', paragraph 3.15 advises line managers that they are responsible for starting the appropriate action and following correctly all stages of procedure. Attention is drawn to the flowcharts which help to explain the procedures. Paragraph 3.16 advises that when the manager becomes aware of an allegation of unsatisfactory conduct, his first task is to decide whether it can properly be dealt with by counselling. If counselling is ruled out as inappropriate, the manager must then assess whether the misconduct is minor or more serious. There then follow sections on counselling and on handling minor misconduct.

37. At paragraph 3.27 begins a section entitled '**How to Deal with Serious and Gross Misconduct**'. So far as relevant this provides:

> "3.27 In the case of what appears to be serious or gross misconduct, the line manager will usually take the following action:
>
> a) make preliminary enquiries, if necessary (for example where a fraud may been committed), to establish whether misconduct has taken place and whether a formal investigation should be instigated. These enquiries would not normally involve interviewing any individuals suspected of involvement;
> b) where these enquiries of other information gives rise to suspicions of serious or gross misconduct, inform ABM/Personnel 2. …….
> c) All cases which appear to constitute gross misconduct must be referred to Personnel 2, who retain the authority for dealing with such cases.
>
> 3.28 As soon as possible after the ABM/Personnel 2 has decided to initiate formal disciplinary action they will:
>
> (a) instigate a formal investigation (see paragraph 3.35 onwards). This may not be necessary in (certain cases which are not relevant here);
> (b) if sufficient evidence of misconduct is available, put a disciplinary charge to the member of staff.
>
> **Action Pending Completion of an Enquiry**
>
> 3.29 Once a decision has been made to initiate formal disciplinary action, the ABM/Personnel 2 will consider whether it would be appropriate to arrange a

transfer to other duties or suspend the member of staff from work whilst an investigation is taking place or until the outcome is decided. The decision to transfer or suspend may also be made at any time during the disciplinary process if considered appropriate. (There is then provision for the level of staff empowered to take the decision to suspend.)

3.30 Suspension in these circumstances, as distinct from suspension as a disciplinary penalty, does not imply that any decision has been taken about the alleged misconduct. The key consideration in deciding whether suspension is appropriate is usually whether the continued presence of the member of staff concerned would:

a) be contrary to the public or departmental interest;
b) prejudice any investigation, e.g. where there is a possibility of someone destroying evidence;
c) have an adverse effect on the work of the officer, e.g. where harassment of colleagues is alleged and may intensify once an investigation is started.

The alternative of a transfer to other duties should always be considered before suspension.

3.31 As soon as possible after a decision has been made, the individual will be informed in writing of the reason for the transfer or suspension, its likely duration and when it will next be reviewed. ….. "

38. Other provisions relating to the practical effects of suspension follow. These are followed, at paragraphs 3.35 to 3.39, by provisions relating to the conduct of a formal investigation. Then, the process having apparently reached the stage where the formal investigation is complete, paragraph 3.40 provides, under the heading '**Putting Disciplinary Charges to the Individual**':

> "If the Area Business Manager/Personnel 2 decides to proceed with a formal disciplinary charge, as soon as possible thereafter the member of staff will be given a minute, which will specify the following:" (and there follows the content of the minute.)

Thereafter there are provisions relating to the conduct of disciplinary hearings, penalties and appeals, none of which is germane to this appeal.

The ET's Findings in Respect of the Code

39. After setting out the provisions of the code and making their findings of fact as I described above, the ET made a number of findings as to the CPS's compliance with its own code. It will be remembered that Ms Aziz's main complaint was that there had been no preliminary enquiries into the reliability of the complaint against her before the

employer proceeded to suspension. Ms Aziz contended that there had been non-compliance with paragraph 3(3)(b), which required the employer to make every reasonable attempt to establish the facts before taking any disciplinary action. Mrs Ashton when giving evidence for the CPS had advanced the proposition that paragraphs 3.3 and 3.4 had to be read in conjunction with the specific provisions later in the code and that, when so read, it was clear that paragraph 3(3)(b) did not apply until the stage when formal disciplinary action was to be taken, namely when a charge was laid under paragraph 3.40. The ET described that contention as 'utter nonsense' (see paragraph 15.43 of their decision). They were quite satisfied that, under the code, the requirement to make reasonable attempts to establish the facts arose before the decision was taken to suspend and indeed, Mr Franklin conceded that that was so.

40. Mrs Ashton informed the ET that, although paragraph 3.27 of the code stated that in a case of what appears to be gross misconduct, the line manager will usually make preliminary enquiries, it was not in fact permissible for her to do that because it was 'against policy' to have two sets of investigations. The ET roundly rejected this contention, pointing out that no justification for it could be found within the code and that any justification remained 'a mystery known only to Mrs Ashton'. They described the contention as 'total nonsense'.

41. The ET held (at paragraph 15.46) that the CPS had failed to comply with its duty to carry out appropriate enquiries before deciding to suspend Ms Aziz.

42. The ET also held that, under 3.4 of the code, Ms Aziz was entitled to receive advice and to be represented from the time that she was subject to any formal disciplinary action. Mrs Ashton informed the ET that these rights did not apply at the suspension interview. Indeed, she said that there was no right under the code to a suspension interview; the only requirement of the code was that the employee should be informed in writing of the decision to suspend and its terms. However, the ET were satisfied that the rights to advice and representation under paragraph 3.4 applied to any member of staff who was 'subject to formal disciplinary action'. As the power to suspend arose only after a decision had been taken to 'initiate formal disciplinary action', (see paragraph 3.29) the rights under paragraph 3.4 had already come into play when Ms Aziz was required to attend the suspension interview. Denial of the right to representation had been a breach of the code. Mrs Ashton claimed that it was on the specific instructions of Mr Clark that representation had been denied. As I have already said, Mr Clark did not give evidence. The ET observed that the denial of the right to representation removed an essential protection from Ms Aziz. Had she been accompanied by someone familiar with the code, that person might have been able to stop the suspension in its tracks.

43. Mrs Ashton also contended that paragraph 3.30 did not apply to this case. She claimed again that she was relying on the express advice of Mr Clark (who, because he did not give evidence, neither confirmed nor denied that he had given such advice). The ET observed that in advising Mr Franklin that he should suspend Ms Aziz, she not only misled him into thinking that all the facts alleged could be proved but she also ignored the essential requirements of the disciplinary code. They said that they were 'not prepared to accept that qualified personnel professionals did not breach the disciplinary code without fully realising what they were doing'. That was a very important finding when it came for the ET to consider whether the CPS had acted in good faith believing

that what they were doing was right and fair and that they would have done the same had the person under investigation been a white solicitor rather than an Asian.

44. The ET also considered that the CPS had failed to comply with that part of the code which, at paragraph 3.3(d) required the line manager (or the ABM/Personnel 2 in the case of alleged gross misconduct) to take account of any relevant personal or social background when deciding whether to take disciplinary action. Mrs Ashton agreed that she had not found out before the suspension that which was known to Mr Cowgill and Mr Mann, namely that Ms Aziz had relations in Northern Pakistan and was very concerned about them. Mrs Ashton sought to justify her failure to do this by contending that this duty did not arise until Ms Aziz had been charged with an offence. The ET described this as 'wholly untenable'. Mrs Ashton had also told the ET that it had not occurred to her that the complaints against Ms Aziz could have been motivated by improper considerations involving her race and ethnic origins. The ET found this statement 'very unsatisfactory'. They considered that Mrs Ashton had approached the matters she had to decide with a closed mind.

45. I have not mentioned every finding which the ET made against the CPS in their very long decision. I can summarise their conclusions by saying that they found that the treatment accorded to Ms Aziz by the CPS managers breached the code in several important respects, including, most importantly in the context of this appeal, by deciding to commence formal disciplinary proceedings and suspend Ms Aziz without carrying out any preliminary enquiries into the reliability of the complaint against her. The ET might also have said, although they did not, that the procedures followed by the CPS did not accord with good employment practice. The ET held that Ms Aziz had been subjected to substantial detriments.

46. At paragraph 23 of their decision, the ET turned to consider why the CPS had treated Ms Aziz in this way. They considered a range of possible reasons; one was that the staff were incompetent and had made innocent mistakes. However, that was not the CPS's case. Their case was that what they had done was right and proper, proportionate to the facts of the case and in accordance with their disciplinary code. Further the CPS witnesses had contended that their actions were free from any consideration of race; they would have treated a white solicitor in exactly the same way. The ET also considered the possibility that the CPS' treatment of Ms Aziz was in fact attributable, either wholly or in part, to Ms Aziz's race and ethnic origins and held, for reasons they set out in paragraphs 25 to 28 of their decision that it was.

47. The ET considered the proposition advanced by Mrs Ashton that the CPS treated all its employees as it had treated Ms Aziz. They had acted in accordance with policy. The ET were not prepared to accept that the CPS would so seriously breach its own disciplinary code as a matter of policy. On the contrary, the ET thought that an employer such as the CPS would take great care to comply with it. The ET concluded that the CPS had knowingly breached its code in this case.

48. The ET reverted to the question of why Mrs Ashton, Mr Cowgill and Mr Franklin had accepted the truth and reliability of the allegations against Ms Aziz without

investigation. They concluded that, because of Ms Aziz's race and ethnic origins, they had assumed the allegations had substance. That was not an assumption they would have made in respect of a white solicitor employee.

49. In summary, the ET considered that bearing in mind that the events under discussion took place shortly after 11th September 2001, that feelings were running high against Muslims in some parts of the local community, the possibility that a Muslim employee had made anti-American remarks which had led to a disturbance between white and Asian youths on court premises was a 'set of facts redolent with race'. Mr Franklin had conceded that, if the media had got hold of the story, it would have been headline news. The ET were not prepared to accept as truthful the assertions of the CPS witnesses that they saw the case only as one of an allegation of improper conduct by a prosecuting solicitor on court premises. They considered that the CPS witnesses' 'studied denials' that there was no connection between their actions in respect of Ms Aziz and her racial origin was the most revealing aspect of their evidence. The ET simply did not believe their evidence. As a consequence of the stance they took, the CPS witnesses were unable to advance an adequate explanation for their treatment of her. In the absence of such an explanation, the ET inferred that the CPS had been improperly influenced by racial considerations throughout the disciplinary process.

The Appeal to the Employment Appeal Tribunal

50. The CPS appealed to the EAT. Burton J, the President, summarised the argument for the CPS at paragraph 13 of the judgment. The submission was that the ET had erred in holding that the CPS had not followed its own procedures and had breached its own disciplinary code. As the result of that error, the CPS' defence had been 'foreclosed'. It had been precluded from putting forward the defence that it had been acting or believed itself to be acting properly in accordance with its own procedures.

51. Mr Adrian Lynch QC, who appeared for the CPS for the first time before the EAT, identified four stages at which the ET had found that there was a breach of the code. He submitted that, in each case, the finding had been based upon a misunderstanding or misconstruction of the code and had not been justified. It is necessary to deal with each in turn.

52. The first breach was the decision to initiate formal disciplinary action pursuant to paragraph 3.28 (which leads to the power to suspend under paragraph 3.29) without first making preliminary enquiries pursuant to paragraph 3.27(a). That, it will be recalled provides that in a case of what appears to be gross misconduct, the manager will *usually* make preliminary enquiries, *if necessary,* … to establish whether misconduct has taken place and whether a formal investigation should be instigated (emphases added). Mr Lynch's submission appears to have been that, because the obligation created by paragraph 3.27(a) only applied 'usually' and 'if necessary', there was no positive obligation to carry out any preliminary enquiries before initiating formal disciplinary action and moving to suspension. Thus, the ET had erred. In so far as the ET had relied on paragraph 3.3(b) which required that the employer should make every reasonable attempt in the circumstances to establish the facts of the alleged misconduct before any disciplinary action is taken, Mr Lynch submitted that that

provision did not apply at the early stage prior to the decision to initiate disciplinary action; it applied only at the later stage after disciplinary action had been initiated when the formal investigation was taking place.

53. For reasons which are not explained in any detail, the EAT appears to have accepted Mr Lynch's submission in respect of all four breaches. It is not easy to ascertain from the judgment of the EAT exactly what the other breaches were. Moreover these were not referred to in either the CPS grounds of appeal to the EAT or the skeleton argument in support. However, doing the best I can, it appears that the breaches 2 and 3 related the ET's findings that, pursuant to the code, Ms Aziz should have been permitted to receive advice and to make representations to the employer before she was suspended. It appears that the fourth breach was the ET's finding that Ms Aziz was entitled to representation at the meeting at which she was suspended.

54. As I have indicated, the judgment does not explain why the EAT accepted Mr Lynch's submission that the ET had misconstrued the code. After setting out the submissions very briefly, the judgment at paragraph 24 states:

> "Mr Lynch QC thus establishes that on what he submits to be the correct construction of the rules in law it cannot be said that the Respondent (he meant the appellant, the CPS) acted in breach of the rules in any of the respects found by the tribunal: Breaches 1,2,3 or 4."

55. The judgment then set out Mr Lynch's submissions in a little more detail and dealt with what Mr Lynch was saying was the correct construction. The judgment then went on to consider some of the other findings of the ET and remarked upon the strong language used by the ET in making its findings. For example, the ET had said that some of Mrs Ashton's suggestions as to the meaning of the code were 'total nonsense'. At paragraph 27 of the judgment, the EAT observed that it was apparent that the ET was highly critical of the CPS and that they had concluded that the CPS had acted in 'deliberate and knowing and self-evident and inexplicable breach of its own procedures'.

56. The EAT then set out the submissions advanced by Miss Bamieh on behalf of Ms Aziz. Miss Bamieh submitted that the ET's conclusion had been justified. However, it appears from the judgment that she submitted that the ET had been entitled to regard the evidence of the CPS with scepticism. She reminded the EAT that the ET had been unimpressed by the CPS witnesses and the CPS' failure to call some witnesses. She drew attention to the way in which the suspension interview had been carried out; she noted the unseemly haste with which the CPS had proceeded to suspension and finally she submitted that the pre-conditions for suspension as set out in paragraph 3.30 of the code had not been made out. What, if anything, she said about Mr Lynch's submissions in relation to the ET's misconstruction of the code, we are not told. We are certainly not told that she conceded that the ET had misconstrued the code.

57. At paragraph 29 of its judgment, the EAT observed that the ET had not merely found that the CPS had acted unreasonably or unfairly. Nor had the ET criticised the code for

being unclear or ambiguous in a way that might lead to differences of view about its construction. They said that, had the ET simply said that the CPS had acted unreasonably, then the burden of proving that they had not done so on racial grounds might well have passed to them. The EAT then observed that, if the burden of proof had passed to the CPS in that way, it would have been open to them show that they had acted as they did just through unfairness or unreasonableness or incompetence. They continued:

> "But what occurred here in our judgment is that **by virtue of what we are satisfied was its incorrect and inappropriate construction of the Disciplinary Code,** *(emphasis added by me)* and consequently its incorrect and in appropriate approach towards the conduct of the Respondent (*meaning the CPS*) in relation to it, the Tribunal did indeed foreclose the possibility of such explanations being put forward. What it was looking for, and would never have been able to find, was an explanation as to why the Respondent (*CPS*) deliberately, knowingly and inexplicably breached its own procedures. That would require a very different explanation, and given its absence it is not surprising that the tribunal was left to look around for some other explanation and found no other than that it was on racial grounds."

58. Thus it was that the EAT accepted Mr Lynch's submissions without saying why they were satisfied that they were well-founded. It is clear that their acceptance of his submissions was crucial to the decision to allow the appeal of the CPS and to remit the case for rehearing.

59. Because we do not know why the EAT accepted Mr Lynch's submissions, we are left on this appeal to consider them for ourselves as he has repeated them before us.

The Appeal to the Court of Appeal

60. At the appeal, Ms Aziz appeared in person. She submitted a skeleton argument on arrival. We have now read it. Her very brief oral submission was to the effect that the ET's findings of fact had been justified. They had not misconstrued the disciplinary code. The EAT should not have interfered with the ET's decision and this court should now reinstate it.

61. Mr Lynch QC for the CPS had submitted a full written argument in advance. His submissions were that the meaning of the disciplinary code is a question of law. The ET had misconstrued it. The effect of this error was that the ET was dismissive of the CPS witnesses' claims that they had acted in accordance with the code and resulted in the ET being unjustifiably critical of the CPS. He submitted that the supposed breaches of the code were the very detriments which the ET found Ms Aziz had suffered. They were the conduct which the ET had been racially discriminatory. Given that the ET misconstrued the code, their findings cannot stand and the matter should (as the EAT

directed) be remitted to a differently constituted tribunal.

62. Plainly these submissions depended upon Mr Lynch being able to make good his primary submission that the ET had misconstrued the code. He submitted that for cases thought to involved gross misconduct, the code fell into seven stages. First, management received a report which gave rise to suspicion of possible serious or gross misconduct, which were referred to ABM/Personnel. Second, ABM/Personnel decided whether to initiate the disciplinary process. Third, if Personnel decided to initiate the process, it directed the holding of a formal investigation (by an investigating officer) into the alleged misconduct. Fourth, depending on the outcome of that formal investigation, a disciplinary charge could be laid. Fifth, if charges are laid, there is then a hearing. Sixth, the disciplinary authority makes decisions on liability and, if necessary, penalty. The seventh stage is an appeal.

63. Mr Lynch submitted that, in Ms Aziz's case, it was the first and second stages of the process which came under scrutiny. At those stages, which preceded the decision to initiate a formal investigation, it was, he submitted sufficient for the CPS to have suspicion of misconduct; they did not need to have proof. That suspicion might be based on enquiries made by the CPS or it might be based on any other form of information. Hence, he submitted, there was no need to conduct enquiries into the facts. That would come at a later stage. Any enquires that might be made would be limited and would not usually involve the suspected employee. He submitted that the duty under paragraph 3.3(b) to 'make every reasonable attempt in the circumstances to establish the facts of the alleged misconduct before any disciplinary action is taken' does not arise until stage 3 (the formal investigation) has been reached. That duty does not apply at the stage of initiating the procedure. The vocabulary of the code distinguishes between 'taking disciplinary action' and 'initiating disciplinary action'. The former, he submitted, relates to the advanced stages of the process; the latter to the earlier stages. A decision to suspend an employee can be taken as soon as Personnel decide to 'initiate' the disciplinary action in the light of the employer's suspicion of misconduct. Hence the code envisages that suspension can take place before any duty arises on the CPS to make enquiries into the possible misconduct.

64. I for my part cannot accept this submission; indeed it seems to me to be plainly wrong. I would accept Mr Lynch's submission that, at the early stages of the processes covered by the code, the employer will be entitled to take action (by referring the matter to Personnel and by Personnel deciding to initiate formal disciplinary action) if he suspects the employee of serious or gross misconduct. However, that suspicion must be based on reasonable grounds. That must be so, not only as a matter of common sense but is made clear by three express provisions of the code. First, in a case of what appears to be serious or gross misconduct, paragraph 3.27 requires the line manager to make preliminary enquiries, if necessary, to establish whether misconduct has taken place. Of course, there will be cases where such preliminary enquiries are not necessary, for example because the line manager himself has direct knowledge of the conduct under consideration. In those circumstances, he will pass the case to Personnel and give them his account of what has occurred. But in most cases, some preliminary enquiries will be necessary in order to provide the reasonable grounds for the suspicion upon which the decision to initiate action will be based.

65. The second provision which in my view makes the position clear is paragraph 3.3(b) which places a duty on line managers to 'make every reasonable attempt in the circumstances to establish the facts of the alleged misconduct before any disciplinary action is taken'. Mr Lynch's submission that this does not apply until the formal investigation stage is, in my view, untenable. The words are plain. They require such preliminary enquiries as are reasonable in the circumstances to be made before any disciplinary action is taken. This is obviously intended to ensure that the machinery of disciplinary action (which is time-consuming and potentially disruptive of the business and also distressing and potentially damaging to the employee) is not initiated on flimsy grounds.

66. Third, as Richards LJ pointed out in the course of argument, it is clear from paragraph 3.16 that the manager must make some preliminary enquiries so that he can decide whether the matter can properly be dealt with by counselling. That must take place before the decision is made to refer the matter to ABM/Personnel 2.

67. In my view, the meaning of these three provisions is clear and I share the ET's surprise that the CPS should contend that they mean something else. In any event, the application of paragraph 3.3(b) is put beyond argument by the flow chart. It is apparent from that that it was the duty of the line manager (in this case Mr Cowgill) to 'investigate as necessary' at an early stage and certainly before deciding that he should refer the matter to Personnel. I observed in the course of argument that it appeared to me that a code such as this should be applied flexibly so that, if, for example, Mr Cowgill were to report a matter to Mrs Ashton without carrying out any preliminary investigations, that would not necessarily be a breach of the code provided that he made it plain that he had not done so and either he or she then made such enquiries as were necessary to provide a reasonable basis for the decision which was to be taken, namely whether formal disciplinary action was to be initiated.

68. In my view, it is important (both under the code and as a requirement of fairness and good employment practice) that disciplinary proceedings should not be initiated unless the suspicion of misconduct is based on reasonable grounds. This was plainly a case in which such preliminary enquiries were necessary. The only information available to Mr Cowgill and Mrs Ashton was a hearsay report that offensive words had been spoken and that a racial disturbance had taken place. It was plainly incumbent on either Mr Cowgill or Mrs Ashton to make preliminary enquiries to ascertain what offensive words had allegedly been spoken to whom and whether a disturbance had in fact taken place, apparently as a result. It must have been easy enough to find out whether there had been a disturbance. In fact there had not. A wholly hearsay and unparticularised account emanating from unnamed complainants and alleging unspecified offensive words allegedly giving rise to a disturbance (the time and place of which are not known) could not be said to give rise to a reasonable suspicion of gross misconduct. That is particularly so when the allegedly offensive words were said to relate to sensitive political issues, to have been uttered by a Muslim woman at a time (shortly after 11th September 2001) and in a place (Bradford) of high racial tension. I share the view of the ET that such an allegation cried out for preliminary enquiries to be made. They were required as a matter of fairness and reasonableness, good employment practice and also by the CPS disciplinary code.

69. In my judgment, this first and main plank of Mr Lynch's submission fails. In my view, the ET was entirely justified in holding that Ms Aziz was subjected to a detriment as the result of being suspended (following the decision to initiate formal disciplinary action) without there having been any adequate preliminary investigation of the reliability of the complaint against her. I mention, as an additional reason for supporting the construction which the ET put on the relevant provisions of the code, that it was only Mrs Ashton and Mr Cowgill who advanced these untenable alternative constructions. Mr Franklin, who had to make the decision whether or not to suspend Ms Aziz, acknowledged that the code required preliminary enquiries before suspension could occur. Indeed, he asked Mrs Ashton about the evidence and she misled him by saying that everything alleged could be proved. She had no idea whether the allegations could be proved. The clear inference is that, if Mr Franklin had realised how little was known about what Ms Aziz had said, he would never have agreed to the suspension.

70. Mr Lynch's next point was that the ET had been wrong to hold that the code provided that, before she was suspended, Ms Aziz was entitled to have advice, to make representations and to be represented or accompanied at the interview at which she was to be suspended. He submitted that it was clear that paragraph 3.4(g), which provides for those rights, applied only to the later stages of the process. For my part, I cannot see how that submission can be reconciled with the clear words of the paragraph which states that 'any member of staff subject to formal disciplinary action has the right to receive advice and representation **throughout** (*my emphasis)* from a trade union representative or a colleague of their choice'. It is clear from paragraph 3.29 that suspension cannot take place until the decision has been made to initiate formal disciplinary action. Mr Lynch submitted that suspension could (and did in this case) come after the decision to initiate formal disciplinary action but before the employee was subject to such action. In my view that is argument is semantic and, in any event, wrong. In my view it is clear from the code that, once the decision has been taken to initiate formal disciplinary action, any subsequent action which involves the employee attracts the right to representation.

71. Mr Lynch submitted that the code does not envisage any interview until the stage of the formal investigation is taking place. That may be so, but in this case an interview was arranged by the CPS for the purpose of asking a limited number of questions before announcing the suspension. If the replies to those questions had been unexpected, the suspension would not have taken place at that meeting and might not have taken place at all. So even though the code does not expressly envisage an interview at this stage, in this case there was an interview and the code is clear about the rights of any employee subject to formal disciplinary action. Ms Aziz was undoubtedly subject to formal disciplinary action at that interview. Mr Lynch's attempt to characterise the interview (at which Ms Aziz was unaccompanied) as an additional benefit to her over and above that which the code provided, has a hollow ring when one recalls that the opportunity was taken to ask her questions designed to discover whether an incident had taken place. That those questions had to be asked only serves to underline the fact that the CPS knew nothing about the reliability of the allegations. In my view, the ET were clearly entitled to hold that the decision not to allow Ms Aziz advice and representation at that interview was a breach of the code.

72. Mr Lynch submitted that, at the very least, the provisions of the code were ambiguous

and it was not at all incredible that the CPS staff should have believed that what they were doing was in accordance with its provisions. The ET did not regard the code as ambiguous. It may not be the most perfectly drafted code, but, at least on the issues which the ET had to decide, the meaning of the relevant provisions is clear.

73. I share the ET's surprise at Mrs Ashton's claimed understanding of the code. Quite apart from the clear meaning of the words, to which I have already referred, the code's express purpose is to help managers to deal fairly with employees against whom a disciplinary complaint is made. Any consideration of fairness would lead to the conclusion that someone in the position of Ms Aziz at the time when she was to be summoned for interview with a view to suspension should be entitled to be accompanied or represented. Furthermore, such a procedure is recognised as good employment practice, as Mrs Ashton might have been expected to know. Everything - fairness, good employment practice and the disciplinary code - pointed to Ms Aziz's right to be accompanied by a person of her choice.

74. Mr Lynch was critical of the vehemence of the ET's language. In my view he should not be. The ET regarded the breaches of the code as flagrant. The breaches were, in my view, serious and obvious. Given that Mrs Ashton was experienced in HR and personnel matters and had apparently received advice from more senior HR/Personnel officials, such as Mr Clark, the ET was entitled to conclude, as it did, that the CPS knew that it was not complying with its own code.

75. Mr Lynch accepted that, if the ET's findings were justified that the CPS had knowingly breached its own code, he could not seek to overturn the finding that the CPS had treated Ms Aziz differently from other employees on racial grounds. His complaint had been that the ET's assessment of the CPS witnesses was deeply unfair. It follows from what I have already said that I do not consider that they were. It is clear that the ET were most unimpressed by Mr Cowgill and Mrs Ashton. They were sceptical of the failure to call Mr Clark of Personnel 2 who had apparently provided important advice for Mrs Ashton. They were unimpressed by the absence of written notes of various events which ought, as a matter of good practice, to have been recorded. Not only had the ET formed an unfavourable view of those two witnesses, they positively rejected their evidence that they had regarded this case as simply a matter of misconduct by a solicitor and had not considered that there were any racial implications. They were entitled to reach that conclusion. The ET said that these 'studied denials' were revealing of what lay behind their actions. That is just the kind of material on which ETs can and do draw the inference that the less favourable treatment they have found was on racial grounds.

76. Accordingly for these reasons I would allow this appeal and reinstate the finding of racial discrimination in Ms Aziz's favour. At the hearing before the EAT, the CPS drew attention to the way in which the ET had identified several separate detriments suffered by Ms Aziz. The EAT expressed the view, with which I agree, that some of these were not separate detriments. For example, the ET had treated the distress which Ms Aziz suffered at and following the suspension interview as a separate detriment. The EAT considered that her distress was a consequence of the detriment and not a separate detriment. In the last ten lines of paragraph 41 of the judgment, the EAT said that, if there were to be remedies hearing, the tribunal should start from the basis that

Ms Aziz had suffered a detriment in being suspended from work and transferred to another office. They should then consider precisely what the detriment consisted of and go on to assess the compensation. I would direct that the case be remitted to the ET for assessment of compensation, which should be approached in the manner suggested by the EAT.

Lord Justice Richards : I agree.

Lord Justice Ward: I also agree.