Appeal No. UKEAT/0107/11/ZT

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 2 May 2012
Judgment handed down on 18 July 2012

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR B BEYNON

DR B V FITZGERALD MBE LLD FRSA

THE LEARNING TRUST & OTHERS — APPELLANTS

MRS D MARSHALL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS REBECCA TUCK (of Counsel) Instructed by: The Learning Trust (Legal Services) Technology & Learning Centre (TLC) 1, Reading Lane London E8 1GQ
For the Respondent	MR AYOADE ELESINNLA (of Counsel) Instructed by: Messrs Blavo & Co Solicitors 19 John Street London WC1N 2DL

SUMMARY

SEX DISCRIMINATION – Direct

RACE DISCRIMINATION – Direct

VICTIMISATION DISCRIMINATION

Whistleblowing

Dismissal

DISABILITY DISCRIMINATION

Appeal withdrawn in respect of "ordinary" unfair dismissal; wrongful dismissal and holiday pay.

Appeal allowed in respect of allegations of race and sex discrimination. In particular the Tribunal erred in law in holding that that failure to investigate an allegation of race discrimination in a thorough and reasonable manner was an act of race discrimination: see, for example, **Royal Bank of Scotland v Morris** [2012] Eq LR 412. The Tribunal also failed to resolve a key issue of fact underlying the question whether there was discrimination concerning the KS1 post; at one point applied the burden of proof provisions incorrectly; and had no sound basis in its reasoning for reaching other findings.

Appeal allowed in part in respect of issues concerning public interest disclosure. The Tribunal was entitled to find that there were 3 protected disclosures in 2007; but it failed to make findings as to other alleged protected disclosures and failed to relate the 3 protected disclosures in 2007 to the dismissal in 2008.

Appeal allowed in part in respect of issues concerning disability discrimination (reasonable adjustments).

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This appeal concerns claims by Mrs Delphine Marshall arising out of her employment as a teacher at the Benthal Primary School ("the School"), a state school in Stoke Newington. Her employment at the School commenced on 1 September 1996 and terminated with her dismissal in July 2008.

2. There were four respondents to her claims. The First Respondent was the Learning Trust - a not-for-profit company to which the London Borough of Hackney has delegated education services, including the running of the School. The Second Respondent was Mr Tim Hunter-Whitehouse, who became head teacher of the School in September 2006. The Third Respondent was the Governing Body of the School. The Fourth Respondent was the London Borough of Hackney ("Hackney"), the employer of Mrs Marshall.

3. Mrs Marshall brought five separate sets of proceedings. They were listed together and heard over 20 days in January and February 2010 by an Employment Tribunal in London South (Employment Judge Laidler presiding). Mrs Marshall was represented by counsel; so were the four respondents. No less than 53 issues were identified and agreed. Nine witnesses, including Mrs Marshall, gave evidence. The Tribunal reserved its decision and deliberated in chambers over some 13 days. It delivered its judgment on 6 September 2010 with written reasons. The written reasons extend to 549 paragraphs over 135 pages.

4. The Tribunal upheld the following claims: (1) a claim of sex and race discrimination related to the KS1 co-ordinator role; (2) a claim that Mrs Marshall was subjected to detriment by suspension for making protected disclosures, contrary to section 47B(1) of the **Employment Rights Act 1996**, commonly known as a "whistleblowing" claim; (3) a claim of unfair

dismissal, held to be unfair both under section 98 of the **Employment Rights Act 1996** (the statutory provision which generally governs unfair dismissal) and under section 103A (a special provision applicable in "whistleblowing" cases); (4) claims of race discrimination concerning (a) the investigation of grievances and the conduct of grievance hearings, (b) dismissal, and (c) payment of holiday pay; (5) a claim of disability discrimination relating to a failure to make reasonable adjustments; (6) a claim for holiday pay; (7) a claim for wrongful dismissal.

5. The Tribunal's judgment does not identify against which respondent or respondents each claim succeeded, and whether fully or in part against each respondent. In some cases (such as unfair and wrongful dismissal) the judgment must be against Mrs Marshall's employer, Hackney. In other respects, particularly the findings of discrimination, the answer is far from clear. However this is not in itself a ground of appeal; the respondents are jointly represented and have taken the pragmatic course of challenging aspects of the Tribunal's reasoning as it presently stands.

6. Originally the Notice of Appeal challenged virtually the whole range of the Tribunal's conclusions. The challenge remains substantial: the Tribunal's conclusions on the questions of sex and race discrimination, "whistleblowing" and disability discrimination remain in issue. There is however no challenge to the Tribunal's conclusions as regards (1) unfair dismissal in the ordinary, non "whistleblowing" sense; (2) wrongful dismissal; and (3) payment of holiday pay. Mrs Marshall has received her outstanding holiday pay.

7. In this judgment we will first provide an overview of the facts (emphasising that this is not intended to do more than provide a summary, for which purpose a degree of simplification is unavoidable). We will then summarise (1) the issues which the Tribunal had to determine, (2) the overall conclusions of the Tribunal and (3) the approach which the Appeal Tribunal

takes to an appeal on a question of law arising out of a decision of this kind. Against that background we will turn to the grounds of appeal.

Overview

8. Until September 2006 there were two separate schools in Benthal Road – an infants school and a junior school.

9. Mrs Marshall was first employed at the infants school with effect from 1 September 1996 as Humanities Co-ordinator. On 3 October 1997 she became Co-ordinator of the Science and Technology Department. She continued to hold this role until September 2007. At all material times she was also a classroom teacher: those who were co-ordinators held additional responsibility for which they received additional payment.

10. Mrs Marshall described herself in her witness statement to the Tribunal as a black woman of Nigerian national origin, Edo and Nembe ethnicity and British nationality. The Tribunal made no express findings about her national origin, ethnicity or nationality.

11. In the years between 2003 and 2005 Mrs Marshall was absent from work, with pregnancy-related illness, maternity leave, bereavement and then depression. She returned to work in September 2005.

12. Until July 2006 Mrs Marshall's head teacher was Mrs Whipp. She wrote to Mrs Marshall in May 2005 to say that the personnel committee of the Governing Body had decided not to award her Performance Management Point 3 ("PMP3") (which would have meant a pay increase) because she had not had two consecutive successful management reviews since her previous award, due to her extended absences. In May 2006 (a year later) Mrs Marshall

complained about this, saying that it constituted direct sex discrimination. On 12 July 2006 Ms Whipp wrote to her, adhering to the decision.

13. On 7 April 2006 Mrs Marshall was convicted in the Crown Court on a count of perverting the course of justice (for which she was conditionally discharged). She did not disclose this conviction to Hackney or to anyone at school. On learning of it, the School called her to a meeting on 19 July 2006. She told the meeting that she was appealing the conviction. It was decided to wait until the outcome of the appeal.

14. In September 2006 the infant and junior schools merged. Mr Tim Hunter-Whitehouse became head teacher. In January 2007 Mrs Marshall asked him to address the PMP issue, but he declined to do so, saying that the matter was closed for the period in question.

15. Mrs Marshall made other serious complaints to Mr Hunter-Whitehouse. In particular by letter dated 15 January 2007 she made a series of criticisms relating to matters which she regarded as unequal treatment on the grounds of race. By letter dated 26 February Mr Hunter Whitehouse replied that it would be wrong for him to investigate the complaints, and said that the matter would be dealt with under the grievance framework by the Learning Trust. The Tribunal termed this "the first grievance". On 27 April a grievance meeting took place at which Mrs Maxwell was represented by her trade union. An investigating officer was appointed – a head teacher at another school – who met Mrs Marshall and interviewed others concerned. She produced a report at a grievance hearing on 4 July 2007. By letter dated 16 July the grievance was rejected. The grievance panel was critical of Mrs Marshall for bringing what it regarded as extremely serious unsubstantiated claims against the head teacher. On 23 July Mrs Marshall gave notice to appeal.

16. It will be recalled that in July 2006 the question of Mrs Marshall's conviction had been left to await the outcome of her appeal to the Crown Court. That appeal was dismissed on 17 April 2007. Mr Hunter-Whitehouse raised the matter with Mrs Marshall on 24 April 2007. A meeting was arranged for 8 May 2007, chaired by the deputy head, Mary Vince. She decided that, in view of the lapse of time, it would be unfair to discipline Mrs Marshall for non disclosure of the conviction. She confirmed as much in a letter dated 11 May 2007. She was later to say that Mrs Marshall told her in the meeting on 8 May that the appeal was still outstanding; this, if it had been said, would have been a lie – but Mrs Marshall denied saying it.

17. In the meantime, following the amalgamation of the two schools, a re-organisation of staff was taking place. There were, in total, nine co-ordinators including Mrs Marshall – seven of whom were appointed at TLR2B, and two at TLR2A (a lower grade). Mrs Marshall, it will be recalled, had been Co-ordinator of the Science and Technology Department; as a result of the re-organisation she was appointed Science and Health School Co-ordinator on the same grade.

18. However, Mrs Marshall had expressed a preference for the Key Stage 1 ("KS1") Co-ordinator post. On 10 July 2007 she was interviewed for this along with Mr Tim Welch, who had been Co-ordinator of Creative Arts, a TLR2A grade. Mr Welch was appointed. By letter dated 10 July she immediately complained about various aspects of the advertising and selection process for the job. She followed this up with a further letter dated 13 July, specifically alleging that her non-appointment amounted to discrimination on grounds of race and sex. The Tribunal referred to this correspondence as the second grievance.

19. Following Mrs Marshall's letter dated 10 July, Mr Hunter-Whitehouse sent an email to the chair and vice chair of the Governing Body and to a staff member of the Learning Trust. He said: –

> **"Just to let you know that I have had another letter from [Mrs Marshall], this time complaining about not getting the KS1 Co-ordinator's job yesterday. I am copying it to Ludi, but we have to come together as school, HR and LT to come up with strategy for managing her exit as she is impossible to manage and the pressure of dealing with her is just beginning to get to me…"**

20. Internal discussions began on the question of suspending Mrs Marshall; and she was suspended (with full pay) on 3 September 2007. She was told that the disciplinary procedure was being invoked because of the following concerns: –

> - **"That you have made vexatious and malicious allegations against the head teacher with no evidence to substantiate your claims;**
> - **That you have repeatedly refused to carry out reasonable instructions given to you by members of the Senior Management Team at the school;**
> - **That, by your behaviour, you have caused the breakdown of the trust and confidence between you and the school with the consequence that your continued employment is untenable.**
> - **That you failed to notify the school of a criminal conviction that may be relevant to your acceptability/ability to remain in your current role at the school.**
>
> **The school regards these matters as amounting to gross misconduct and if they were to be proven, this could lead to your dismissal."**

21. In the following months Mrs Marshall continued to pursue the first grievance and second grievances through the procedure. She brought a further grievance arising out of her suspension. There were hearings of one kind or another concerning these grievances on 3 September, 14 September, 9 October, 11 December and 24 January. At no stage was any grievance upheld. It is sufficient for the purposes of this summary to say that, by the Spring of 2008 Mrs Marshall was still pursuing grievances, appealing when she was unsuccessful; and that disciplinary proceedings against her were not yet under way.

22. By the Spring of 2008 Mrs Marshall was again unwell with depression. Dr Susan Smith wrote to the Trust that she was: –

> **"clearly not fit to return to work in any capacity… Her concentration is badly affected and she is clearly quite readily distressed, particularly about the circumstances of her work."**
>
> **If required to attend any further meetings:**
>
> **"I would be grateful if consideration could be given to her husband attending with her… I do think he could usefully contribute to such a meeting, particularly if Mrs Marshall herself is not able to present her point of view sufficiently well."**

23. A grievance appeal hearing took place on 7 May 2008. Mrs Marshall asked for her husband to present her case; but her request was refused. She and her husband came to the meeting. They were told he could only attend in a supportive capacity; they left a letter and did not stay. The appeal was rejected. Mrs Marshall lodged a further grievance against the refusal of her request.

24. On 15 May 2008 disciplinary proceedings were commenced against Mrs Marshall, essentially in respect of the concerns identified at the time of her suspension in September 2007. At a disciplinary investigation meeting on 16 June she was visibly unwell; the hearing had to be postponed. A medical report from her GP dated 23 June said: –

> **"I do think it is important now that she does not attend any further meetings with her employers as I believe the pressure is causing her serious problems for her mental health and physical well-being"**

25. The investigation proceeded. Mrs Marshall provided typewritten answers to the investigator's questions. An investigation report was written on 4 July. A disciplinary hearing was convened for 21 July at a time when Mrs Marshall was still unwell. Her union attended to apply for an adjournment; it was refused, the panel considering that occupational health advice was that Mrs Marshall's stress and anxiety was predominantly related to work issues and that

the only way to resolve them was to address them. The disciplinary charges were upheld; Mrs Marshall was summarily dismissed.

26. Since she was not at the hearing Mrs Marshall learned of the outcome by letter dated 23 July which stated that her employment terminated with effect from 21 July. She received this letter on 26 July, after the end of term. She did not receive holiday pay because it was considered that her employment had terminated before the start of the school holiday.

27. On 13 November 2008 Mrs Marshall's appeal against dismissal was heard. She was represented by her union and her husband was permitted to attend to support her. The appeal was dismissed.

The issues

28. The Tribunal faced a daunting list of 53 agreed issues. They related to (1) direct race discrimination, (2) racial harassment, (3) direct sex discrimination, (4) sexual harassment, (5) unauthorised deductions from wages (a claim relating to progression to UPS3), (6) unlawful race victimisation, (7) detrimental treatment due to "whistleblowing" (8) unfair dismissal, ordinary and "whistleblowing", (9) unlawful deductions from wages (a claim relating to holiday pay), (10) wrongful dismissal, (11) post-employment detriments, (12) working time regulations, (13) disability discrimination – failure to make reasonable adjustments (relating to attendance of Mrs Marshall's husband), (14) a counterclaim for breach of contract and overpayment of salary. Some issues involved consideration of time points and jurisdictional points concerning compliance with the requirements of the **Employment Act 2002**, now repealed.

29. It is not necessary to say anything in this judgment about most of the issues, but it is necessary to say a word about the scope of the discrimination and public interest disclosure issues.

30. It is important to keep separately in mind claims of direct discrimination and victimisation. Direct discrimination is concerned with less favourable treatment on the grounds of a protected characteristic. Victimisation is concerned with protection for those who make allegations of discrimination – a protection which extends to a wide range of allegations, unless the allegations are both false and made in bad faith.

31. There were "mirror-image" issues of direct race and sex discrimination relating to the period up to July 2007. These included the failure to appoint Mrs Marshall to the KS1 post. There were no allegations of direct sex discrimination relating to later periods of Mrs Marshall's employment. There were, however, important allegations of direct race discrimination relating to the later period: these challenged the whole process of investigating, hearing and rejecting her grievances and dismissing her. There was also a distinct allegation that failing to pay her holiday pay for the summer of 2008 was an act of race discrimination.

32. Although there was a claim of race victimisation, it was on a narrow basis and concerned only the question whether suspension was imposed in consequence of the first claim brought in August 2007. The Tribunal found that the suspension was not imposed in consequence of this claim – the decision to suspend was taken before the issue of proceedings.

33. There was no wider claim of sex or race victimisation before the Tribunal. The Tribunal was not concerned to find whether the process of investigating, hearing and rejecting grievances and then dismissing Mrs Marshall was wholly or in part sex or race victimisation.

34. There were, however, two claims relating to protected disclosure – "whistleblowing" claims.

35. The first of these was concerned with Mrs Marshall's suspension in September 2007. It was said that three specific letters – 6 June 2007, 10 July 2007 and 13 July 2007 – amounted to protected disclosures for the purposes of the **Employment Rights Act 1996**; and that as a consequence Mrs Marshall was subjected to detriment, namely suspension: (issues 24 and 25).

36. The second of these was concerned with Mrs Marshall's dismissal. It was said that the principal reason for dismissal was the making of protected disclosures. Here, however, the list of protected disclosures relied on was much wider, encompassing not only the 3 letters in the summer of 2007 but also 15 other documents (issue 31). Moreover the Tribunal was concerned with a different date, nearly a year later than the date of suspension, with different personalities involved in the decision and (we shall see) a different test.

The Tribunal's reasons - overview

37. Before we turn to the issues which are subject to appeal, we observe that in its lengthy review of the facts – which occupied 59 pages and 334 paragraphs –the Tribunal made numerous criticisms of the respondents and a significant number of adverse findings on issues of fact and credibility.

38. The Tribunal was critical of the lack of equal opportunity training which witnesses had received. It criticised in numerous respects the investigation of grievances, the conduct of grievance hearings and the conclusions reached. It found that the email dated 11 July, which we have quoted, showed that Mr Hunter-Whitehouse and leading governors wanted Mrs

Marshall out, and that contentions to the contrary were not credible. It was particularly critical of those who ran the grievance procedure for not grasping the implications of the disability discrimination legislation when Mrs Marshall requested an adjustment. It found, based upon a striking email which Mr Hunter-Whitehouse sent in February 2008, that when Mrs Marshall became ill he considered it would be good to press on without her participation in the grievance process. These general criticisms form the backdrop to its decision on particular issues.

39. The Tribunal dismissed a number of the claims which Mrs Marshall brought – some on the merits, others on time or jurisdictional points.

40. On the question of direct race and sex discrimination it upheld her claim in part, finding such discrimination in respect of the KS1 appointment. This is the first ground with which we shall deal on appeal. It held that there was direct race discrimination in respect of the grievances (including investigation, hearing and conclusions) and dismissal; this is the second ground with which we will deal. It held that she was entitled to holiday pay for the summer of 2008 on the basis that her employment did not terminate until after the school holiday had begun (against which there is no appeal); but it went on to hold that the failure to pay holiday pay was an act of race discrimination, and this is the third ground of appeal with which we must deal. It held that her suspension was in contravention of the "whistleblowing" legislation: this is the fourth ground of appeal. It held that her dismissal was wrongful as a matter of contract and unfair on conventional section 98 grounds (against which there is no appeal); but went on to find that it was unfair under section 103A: this is the fifth ground of appeal. Finally there is a ground of appeal relating to the Tribunal's finding of a failure to make reasonable adjustments.

Appellate approach

41. As we turn to consider the various grounds of appeal, we emphasise that the Appeal Tribunal hears appeals only on points of law: see section 21(1) of the **Employment Tribunals Act 1996**. In a case such as this, the Appeal Tribunal is concerned to see whether the Tribunal has applied correct legal principles and reached findings and conclusions which are supportable, that is to say not perverse, if the correct legal principles are applied. A finding or conclusion is perverse if and only if it is one which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. The Appeal Tribunal's role is limited. Parliament has made Employment Tribunals the arbiters of all questions of fact.

42. In his submissions on behalf of Mrs Marshall Mr Ayoade Elesinnla referred us to **HM Land Registry v Grant** [2010] IRLR 583 (EAT) and [2011] IRLR 748 for recent statements of the way an appellate court should approach the reasons given by a Tribunal.

43. In the Appeal Tribunal Langstaff J said:

> **"57. It is trite law that a Tribunal has to set out with sufficient reason why it decides that one party should lose and the other party succeed. This is both an elementary requirement of justice so far as the parties are concerned, but secondly acts as a necessary discipline for the decision maker, who can double check that his conclusion is justified by his reasoning; and, thirdly, it enables a court of appeal with a review jurisdiction, such as this Tribunal, to see if the conclusion is in error. But this principle does mean that a Tribunal is required to dot every "i" and cross every "t" in relation to every act and submission before it. It would be a pity if the inclination of the parties in many cases to cite a plethora of authorities for points which are not in contention, or which are illustrative rather than declarative of principle, were to have the result that each and every case had to be referred to in the judgment of the court to whom they are cited. Selectivity is not only desirable, but a necessary quality of proper decision making. Focus is all - on the principles that matter, the central material disputes of fact, and those matters critical to the analysis by which the principles are applied to the facts.**
>
> **58. A Tribunal reaching a factual evaluation, and applying legislation to it, is not engaged in quite the same process as a decision maker exercising a discretion, or reaching a judgment which might be amenable to Judicial Review if it failed to take into account relevant considerations. However, where a Tribunal fails to take into account, in its analysis, a matter of central significance, so that the parties do not know why (on that point) the decision has gone against one, and in favour of the other, or simply are left in ignorance whether the point has ever been considered at all as it should have been, there is an error of law. This is true only of matters of central importance: it is well accepted that a Tribunal does not have to deal with the effect of the evidence of every witness. An example here is that of Mr. Smith, who gave important (but not centrally important) evidence about the way in which Sharron Kay used expressive hand gestures capable of misinterpretation. No reference was made to that evidence by the Tribunal. But that would be an insufficient basis in this case to suggest that its findings as to the limp wrist incident had not taken it into account.**

> **59. That said, it is very easy for appeal hearings to focus upon matters which were given no significance in either the conduct of the proceedings or the arguments of the parties below. Therefore any appeal based upon a suggestion that a Tribunal has ignored a central fact, the implications of which it was required to address before it could properly draw its conclusion, is not one lightly to be reached."**

44. In the Court of Appeal Elias LJ said:

> **"32. The EAT (Mr Justice Langstaff presiding) correctly recognised that in general a challenge to the reasoning of the Tribunal, particularly where there is as here a conscientious and detailed analysis of all the facts, is difficult to sustain. A tribunal is not obliged to refer to each and every matter in dispute before it but only such matters as are necessary to tell the parties why they have won or lost: *Meek v City of Birmingham District Council* [1987] IRLR 250. However, the EAT held that it was necessary for a tribunal to analyse any issue of central significance which goes to the heart of its conclusions, whilst recognising that a finding that a tribunal had ignored a central fact was not one which the EAT would reach lightly."**

The KS1 appointment

The issues

45. It will be recalled that in 2007 a re-organisation of staff was taking place. There were, in total, nine co-ordinators including Mrs Marshall – seven of whom were appointed at TLR2B, and two at TLR2A (a lower grade). Mrs Marshall, it will be recalled, had been Co-ordinator of the Science and Technology Department; as a result of the re-organisation she was appointed Science and Health School Co-ordinator on the same grade. Mrs Marshall had, however, expressed a preference for the Key Stage 1 ("KS1") Co-ordinator post. On 10 July 2007 she was interviewed for this along with Mr Tim Walsh, who had been Co-ordinator of Creative Arts, a TLR2A grade. Mr Walsh was appointed.

46. The agreed issues concerning the KS1 appointment included the following:

1. Whether the Claimant contacted [Mr Hunter Whitehouse] to express an interest in KS1 Co-ordinator role. Whether [he] told the Claimant that he would invite her for a meeting when he was ready to do so. If so, did this amount to less favourable treatment compared to the treatment received by Mr Tim Welch or the treatment that would have

been received by a hypothetical comparator? If it was less favourable treatment, was it on the grounds of her race?

3. Whether the Claimant's non-selection for the position of KS1 Co-ordinator on 10 July 2008 amounted to less favourable treatment compared to the treatment that Mr Tim Welch received and/or would have been received by a hypothetical comparator. If so, was it on the grounds of her race?

There were mirror issues of sex discrimination: issues 10 and 12. These were the issues the Tribunal found in the Claimant's favour.

The Tribunal's findings and reasons

47. The Tribunal's findings of fact concerning the KS1 Co-ordinator are found in paragraphs 210 to 220 of its reasons.

48. In paragraph 210 the Tribunal said:

> **"On the 22 March 2007 a staff meeting was convened to discuss a proposed staffing structure. There is no dispute that the document entitled 'Proposed staffing structure' was given to staff on that day. The matter was discussed again at an INSET day on 16 April 2007 when it was agreed that the new TLR2B positions would be ring-fenced for existing co-ordinators within the school which meant that the Claimant was guaranteed security of responsibility and salary, the Claimant already being at that grade. Tim Welch was a TLR2A. The Tribunal saw an undated letter to all co-ordinators to that effect."**

49. The Tribunal was critical of certain aspects of the appointment process. It found that Mr Hunter-Whitehouse had sent an email indicative of his being unsure that Mrs Marshall had the requisite skills and experience to be appointed to one of the posts (but it must be borne in mind that she was appointed to one of the posts, as we have explained). It was critical of Mr Hunter-Whitehouse for sitting on the interview along with an independent person, Ms Thomson, the

Trust's School Improvement Partner. It was critical of the fact that they produced a single joint score for each applicant rather than marking them individually and comparing notes.

50. On the question of meeting with Mrs Marshall, the Tribunal said:

> **"215. In a Request for Further Information at Question 4 the Claimant referred to meeting Mr Hunter-Whitehouse about this role on 19 June and asked what he had told her, whether she had to write to him to request a meeting and whether he met with Tim Welch. These specific questions were not responded to. In cross-examination Tim Hunter-Whitehouse disputed that the Claimant had come to see him on 19 June to discuss this. He did accept that he had seen Tim Welch, the other candidate, who discussed his preference with him. It was not dispute that he had contacted Sarah Biss who was on leave at the time to offer her the lower KS2 position. It does seem to the Tribunal that Tim Hunter-Whitehouse was actively engaging with others in connection with new roles but not the Claimant. The Tribunal accepts the Claimant's evidence that she tried to arrange to meet Tim Hunter-Whitehouse but that he was too busy. He was not too busy to speak to others."**

51. The Tribunal built upon its findings of fact in its reasons concerning this issue, which are at paragraphs 434 to 450.

52. On the question of meetings, the Tribunal said:

> **"439. The Tribunal is satisfied that the Claimant indicated to Tim Hunter-Whitehouse that she was interested in the role and he acknowledged her interest in an undated letter to her. The Tribunal accepts that the Claimant was not invited by Tim Hunter-Whitehouse to a meeting to discuss the role but that he did speak to others about the restructuring.**
>
> **443. The Claimant was treated less favourably in not being invited to a meeting to discuss the role. No explanation for that has been offered. Applying the burden of proof provisions the Tribunal must come to the conclusion that she was therefore in that respect treated less favourably on the grounds of both her race and sex."**

53. On the question of appointment, the Tribunal said:

> **"445. For the non-selection of the Claimant for the KS1 Co-ordinator role the Claimant has an actual comparator Tim Welch. It is not clear why Tim Welch was being considered as he was not at TLR2B level and therefore not ring fenced. For him the position was a promotion whereas the Claimant was already at that level and had been told it had been ring fenced for those already at TLR2B level."**

54. The Tribunal went on to hold that there was no objective justification for the fact that Mr Welch scored higher than Mrs Marshall. It then concluded as follows:

> **"450. The Tribunal has concluded that the Claimant was treated less favourably than Tim Welch in that he was appointed and she wasn't. The burden of proof passes to Respondent. The Respondent has not provided an adequate explanation for the marking and appointment that had nothing to do with the race or sex of the Claimant. There is not even any explanation as to why Tim Welch was even being considered if the Claimant was at that level and should have been ring fenced. Her non appointment was thus both race and sex discrimination."**

Submissions

55. On behalf of the respondents Ms Rebecca Tuck makes the following submissions.

(1) The Tribunal conflated the issues of sex and race discrimination, made no adequate findings to support its conclusions on either, and mis-stated the burden of proof. She referred to **Bahl v Law Society** [2004] IRLR 800, especially at paras 135-137 (on the question of conflation of issues) and **Madarassay v Nomura International** [2007] IRLR 246 at paras 54-57 (on the burden of proof). She points out that other members of staff with whom Mr Hunter-Whitehouse had meetings were women; that Mr Welch was himself said to be black African, and there is no finding as to his race.

(2) The Tribunal found that Mr Welch was "not at TLR2B level and therefore not ring fenced". This finding was perverse. She took us to Mr Hunter-Whitehouse's statement and to contemporaneous documents indicating that he was ring-fenced. At the very least she submitted that there was an issue for the Tribunal to decide, and that it had not done so or had not given adequate reasons for doing so.

(3) The Tribunal did not acknowledge or address in its judgment that Mr Hunter-Whitehouse did appoint Mrs Marshall to a ring fenced role – the one of Science and Health School Co-ordinator – at TLR2B level. Nor did it acknowledge or address the reasons given for appointment of Mr Welch.

(4) The Tribunal did not deal with issue 1 in accordance with its terms. The question was whether Mr Hunter-Whitehouse rebuffed a request by Mrs Marshall for a meeting, and if so whether that was discriminatory, not whether he failed to have a meeting with her. Moreover its findings of fact appear to assume, perversely, that the respondents were required to answer certain parts of Question 4 of the Request for Further Information. This particular request was not included among those which the respondents were required to answer by the Tribunal after a Case Management Discussion in November 2007.

56. Mr Elesinnla in response made the following submissions.

(1) The Tribunal's reasons must be taken as a whole. When the findings of fact and reasons were considered in this way, it is plain that there was sufficient material to justify its conclusion as to the burden of proof. Given the transfer of the burden of proof and the rejection of any explanation given, no further analysis was required. The first sentence of paragraph 50 might be indicative of a legal error concerning the burden of proof it taken in isolation – but it must not be taken in isolation.

(2) It was the case for Mrs Marshall that Mr Welch was indeed not ring-fenced for the job in question. The Tribunal made numerous findings of fact in favour of Mrs Marshall where there were disputed issues. It is plain, from a reading of the reasons as a whole, that the Tribunal found in her favour on the question whether Mr Welch was ring fenced for the job in issue.

(3) The Tribunal was not required to mention in its reasons every factor which might conceivably bear on its decision: see **HM Land Registry v Grant**. Its reasons were sufficient.

(4) In substance, the Tribunal addressed the correct matter as regards issue 1 – the question in essence was whether Mr Hunter-Whitehouse provided Mrs Marshall with a meeting. Its reference to a failure to answer a request of details was not in any way central to its reasoning.

Conclusions

57. The statutory provisions which the Tribunal had to apply were found in the **Sex Discrimination Act 1975** and the **Race Relations Act 1976** – see in particular sections 1(1)(a) and 6(2) of the 1975 Act and sections 1(1)(a) and 4(2) of the 1976 Act - now repealed and replaced by the **Equality Act 2010**. It is not necessary for the purpose of this appeal to set out those provisions extensively.

58. The general principles of law applicable to direct discrimination are now well settled and well known; this case does not call for any extended statement of them. A person discriminates against another if on prohibited grounds (such as race or sex) he treats that other less favourably than he treats or would treat other persons. The two aspects of this definition (the "less favourable treatment question" and "the reason why question") are in most circumstances closely interlinked. There are provisions for what is generally called a "reverse burden of proof"; guidance has been given on the application of this reverse burden in **Madarassay v Nomura International plc** [2007] ICR 867.

59. It is convenient first to deal with Ms Tuck's argument concerning Mr Welch.

60. In our judgment it is plain that there was an issue between the parties as to whether Mr Welch, who on the one hand was a co-ordinator but on the other hand was paid at TLR2A level,

was ring fenced in such a way that he was on a level playing field with Mrs Marshall in applying for the KS1 job.

61. Mr Hunter-Whitehouse's witness statement expressly dealt with the point. He said:

> **"29. At the School's INSET day on 16 April 2007, there was further consultation about the restructuring. Mrs Marshall was present at this meeting. At this meeting:**
>
> **[a.]**
>
> **b. It was agreed by staff that the new TLR2B positions would be ring-fenced for existing co-ordinators within the school, whether they were on a TLR2A or a TLR2B. This meant that all existing co-ordinators such as Mrs Marshall were guaranteed security of responsibility and salary.**
>
> **c. I informed staff that I would be starting with co-ordinators holding TLR2Bs before dealing with those holding lower positions (Vol 2, page 11, para 7). Mrs Marshall is therefore mistaken when she states that I said staff members on TLR2B would be allocated new jobs before staff members on TLR2A. What was agreed was that the TLR2B positions in the new structure would be dealt with before new positions with TLR2A would be.**
>
> **d. I explained that I wanted to avoid holding unnecessary interviews or requiring staff members to submit job applications because there were an equal number of new posts as existing co-ordinators. Interviews would only be necessary if two or more co-ordinators went for the same position.**
>
> **30. The proposed restructuring was also discussed with the school's NUT representative, who was happy with the procedure and the outcome.**
>
> **31. At all times throughout the restructuring process I consulted with staff, included them in discussions and was receptive to their input and ideas.**
>
> **32. At no stage during the consultation process did Mrs Marshall object to anything that was proposed.**
>
> **33. After the meeting I wrote to all existing co-ordinators to confirm the new posts, confirm that they were ring fenced and asked co-ordinators to indicate their preference for their role in the new structure. I stated that I would like to meet with them individually to discuss their preferences in the new structure (Vol 2, p 461)."**

62. This account derived some force from a document prepared by Mr Hunter-Whitehouse to give an account of a staff meeting on 22 March. He said:

> **"At this meeting it was agreed that the new co-ordinator positions would be ring-fenced for the existing co-ordinators in the school."**

63. This would suggest that the determining question was whether a person was a co-ordinator, not whether they were paid at TLR2A or TLR2B.

64. Nothing in the Tribunal's reasons suggests that the Tribunal understood this issue or determined whether Mr Hunter-Whitehouse was telling the truth in respect of it. Paragraph 210 of its reasons is consistent with Mr Hunter-Whitehouse's case.

65. Contrary to the submission of Mr Elesinnla, we do not think the Tribunal can be taken to have decided the issue in favour of Mrs Marshall. The Tribunal simply did not address the issue. Even if the Tribunal had formed an adverse view of Mr Hunter-Whitehouse's credibility, it still had to grapple with the contemporaneous documentation. Moreover, it might have wished to bear in mind that Mrs Marshall's initial complaint, in her letter dated 10 July, did not suggest that she was entitled to preferential treatment over Mr Welch.

66. In our judgment this was an issue which the Tribunal was required to address specifically. It was a key component of the Tribunal's reasoning in paragraphs 445 and 450. The Tribunal's failure to do so vitiates its reasoning. In the context of the KS1 discrimination claim it was the kind of central matter (see **HM Land Registry v Grant**) which it was essential to resolve.

67. We turn next to the first sentence in paragraph 450 of the Tribunal's reasons. This, taken at face value, contains a basic error of law. The mere fact that a person of one race was appointed after interview and a person of another race was not does not mean that the burden of proof passes: see **Madarassay v Nomura International** [2007] IRLR 246 at paras 54-57.

68. We have considered with care Mr Elesinnla's submission that the reasons should be read as a whole, and that it can be seen that the Tribunal did not rely only on a difference of race and a difference of treatment. We are not confident that the Tribunal reasoned in the way he

suggests; and our confidence in the Tribunal's reasoning is not increased by other conclusions of the Tribunal, to which we will come later in this judgment. We have reached the conclusion that the Tribunal has applied the burden of proof provisions incorrectly.

69. We would add that we find it surprising, even allowing for the mass of detail which the Tribunal had to assimilate, that there is no finding about Mr Welch's colour, race or ethnicity. We are told that this was an issue at the Tribunal; and we can see that the statement of Mr Hunter-Whitehouse describes him as black, North African. Since the Tribunal evidently regarded him as an actual comparator, findings about whether there was a difference of colour and race, and if so what, were plainly important.

70. We turn next to the Tribunal's conclusion concerning the failure to invite Mrs Marshall to a meeting to discuss the role.

71. The Tribunal's conclusion does not exactly match the agreed issue – which was whether Mr Hunter-Whitehouse told her that he would invite her for a meeting when he was ready to do so. But, having regard to the claim form, which referred to Mr Hunter-Whitehouse having "met with all the Co-ordinators except the Claimant", we think the Tribunal was entitled to conclude that the agreed issue was in essence about Mr Hunter-Whitehouse being asked to and failing to have a meeting with Mrs Marshall. We would not criticise the Tribunal on that ground. Nor would we have allowed the appeal merely because the Tribunal referred, inappositely, to a failure by the respondent to answer a request for information: that factor was, in our judgment, not of any real importance to the Tribunal's reasoning.

72. In our judgment, however, the Tribunal's reasoning in paragraph 435 is inadequate to deal with this issue. It has made a finding of "less favourable treatment" without making

findings which are essential in order to see whether the less favourable treatment could be on the ground of sex or race or both. The "others" to whom the Tribunal referred in paragraph 439 were presumably the other co-ordinators. However, there are virtually no findings about the race or sex of the other co-ordinators. The only specific reference (in paragraph 215) is to a woman; and we understand that most of the co-ordinators were women. If others, including other women, were invited to a meeting, it is difficult to see why the Tribunal thought this might be indicative of the Claimant being excluded on the grounds of her sex. Nor are there any findings relating to race discrimination, such as whether others with whom Mr Hunter-Whitehouse met were white, black or mixed race. As we have said, there was an issue about Mr Welch's characteristics which was not resolved; and there are no findings as to the characteristics of other co-ordinators. We note that in his witness statement Mr Hunter-Whitehouse identified another co-ordinator as being black African; we do not know whether that was in dispute, but the Tribunal has made no finding about it.

73. For these reasons we consider that the Tribunal's findings of race and sex discrimination relating to the KS1 issue are flawed and cannot stand.

Grievances and dismissal

The issues

74. So far as relevant, the issues relating to investigation into grievances and dismissal were as follows.

> **"(32) Was the process of investigation undertaken by the Respondents into the Claimant's grievance reasonable? If it was not reasonable, did this amount to less favourable treatment? If it did amount to less favourable treatment, was it on the grounds of the Claimant's race?...**
>
> **(33) Were the grievance hearings conducted in an unfair and unreasonable manner? If they were conducted in unfair and unreasonable manner, did this amount to less favourable treatment? If it did amount to less favourable treatment, was it on the grounds of the Claimant's race?...**

(34) Were the conclusions were unreasonable and unfair? If they were unreasonable and unfair, did this amount to less favourable treatment? If it did amount to less favourable treatment, was it on the grounds of the Claimant's race?...

(35) Was the Claimant's dismissal an act of race discrimination?..."

The Tribunal's reasons

75. We have already noted that the Tribunal, in its findings of fact, made numerous adverse criticisms of the handling of the grievances (including investigation, hearing and conclusions) and dismissal. On the question whether there was race discrimination, however, its conclusions are quite brief.

"520. The Tribunal has concluded that the Respondents failed to conduct thorough or reasonable investigations into the Claimant's grievances. As her complaints included allegations that she had been treated less favourably on the grounds of her race it must follow that the failure to investigate that allegation in a thorough and reasonable manner was an act of race discrimination. Ms Tilbury did not even seek to clarify the issues with the Claimant who was claiming race discrimination.

521. There were no terms of reference and no definitions that were worked to. The Tribunal accepts the submissions on behalf of the Claimant (paragraph 45) that it has been doubtful whether any of those involved in these matters had any or any adequate equal opportunities training.

522. Anything that the Claimant said was doubted and it asserted there was no evidence despite the evidence of Jenny Norton and actual examples given by the Claimant. On the contrary anything said by Tim Hunter-Whitehouse or the school was accepted as a given or a fact. The Claimant has thus established facts from which the Tribunal could conclude less favourable treatment on the grounds of her race. The burden of proof passed to the Respondents. They have failed to provide any explanation for why the Claimant was treated in the way that she was throughout the grievance processes. The only person the Tribunal has heard from who was on any panel is Ms Zaman. For the same reasons the Tribunal finds that the dismissal was an act of race discrimination."

Submissions

76. Ms Tuck's submissions were the following.

(1) It was an error of law to hold that failure to investigate an allegation of race discrimination in a thorough and reasonable manner was an act of race discrimination. She referred us to **Royal Bank of Scotland v Morris** [2012] Eq LR 412 and the cases there cited.

(2) The Tribunal in truth had a great deal of evidence on the question why Mrs Marshall was treated as she was. It was essential for the Tribunal to analyse that evidence and say why it could draw the conclusion that the various different persons involved had acted on racial grounds; and if it could, to evaluate their explanations. It was not correct to say that they had "failed to provide any explanation" – they had, and it was for the Tribunal to evaluate their evidence.

(3) The Tribunal was quite wrong to say that the only person from whom it heard who was on any panel was Ms Zaman. It had also heard from Mr Kimble and Mr Oswold, both of whom had chaired panels.

77. Mr Elesinnla accepted that the Tribunal had not stated the law correctly in paragraph 520 of its reasons; but he submitted that its overall approach was correct, given its detailed adverse findings of fact earlier in its reasons and its general statement of the law of discrimination, also to be found earlier in its reasons. He drew our attention to the scale of the Tribunal's findings; they were, as he put it, "all one way". He accepted that the Tribunal was incorrect to say that the only person from whom it heard who was on any panel was Ms Zaman; but he said that this was no more than an oversight in the reasons, because the Tribunal had already made findings critical of Mr Kimble.

Conclusions

78. There is no doubt that paragraph 520 contains an error of discrimination law. Contrary to the Tribunal's opinion, it does not follow that a failure to investigate an allegation of discrimination thoroughly (or at all) is necessarily itself discriminatory. Whether failure to investigate an allegation of discrimination is itself discriminatory will depend on why the failure took place.

79. If authority be needed for this proposition it is to be found in **Royal Bank of Scotland v Morris** at paragraph 36:

> **"As framed at paragraph 3.2 of the Reasons, the issue in relation to the history of the Claimant's complaints about Mr Tighe is whether the assessments made by the various decision-takers at successive stages of the process were "perverse": see paragraph 21 above. We should observe by way of preliminary that that is a dangerous way of formulating the issue. It is trite law that the fact that a person may have acted unreasonably is not, without more, evidence that he or she was acting on a proscribed ground. In the present case the facts that the Claimant's complaints – even to the extent (which is limited) that they were complaints of racial discrimination – were incompetently investigated and that unreasonable conclusions were reached is irrelevant except to the extent that the managers responsible for those failures were significantly influenced by the fact that he was black. It is easy for tribunals to slip into thinking that the incompetent or inadequate investigation of a claim of discrimination is itself an act of discrimination; but that does not follow (cf. Prison Service v Johnson [2007] IRLR 951, at paras. 63-64, 69 and 121 (pp. 962-3, 964-5 and 973) and Wilcox v Birmingham CAB Services Ltd (UKEAT/0182/10), at para. 52)."**

80. Contrary to the submissions of Mr Elesinnla, we do not think the Tribunal's lengthy criticisms of the respondents' handling of the grievances earlier in its reasons can save this part of its decision. The Tribunal's reasons do not contain the analysis which discrimination law requires before a conclusion of unlawful direct discrimination is reached. The Tribunal's conclusions, if correct, involve findings that the mental processes of a number of people were influenced, consciously or unconsciously, to a significant extent by considerations of race. These are serious findings to make, requiring careful consideration at the first stage of the evidence upon which such a conclusion could be reached, and (if the second stage is reached) careful consideration of the person's explanation. Paragraph 522 is lacking in any such consideration. This, we think, must be by reason of the basic error of law in paragraph 520.

81. The Tribunal's further error in saying that it had only heard from one person on any panel (when in fact it had heard from three) would not in itself be fatal; but it tends to show that the Tribunal was not focussed upon the questions which it had to determine before it concluded that investigators and panel members had acted on racial grounds.

82. The Tribunal's reasoning in paragraphs 520 to 522 does not fully apply to dismissal, where the respondents were not considering complaints by her but rather bringing disciplinary proceedings against her. But the Tribunal applied its reasoning to dismissal, stating laconically that "for the same reasons" it found that the dismissal was an act of race discrimination. This will not suffice.

83. It follows that these findings of unlawful discrimination also are flawed and cannot stand.

Holiday pay

The issue

84. The Tribunal determined that Mrs Marshall was entitled to holiday pay for the summer of 2008. The issues then were (issue 36): did the respondents' failure to pay her holiday pay amount to less favourable treatment? If it did amount to less favourable treatment, was it on the grounds of Mrs Marshall's race.

The Tribunal's reasons

85. The respondents' case had been that because Mrs Marshall's effective date of dismissal was prior to the end of term and for that reason she was not entitled to holiday pay. The Tribunal held that Mrs Marshall's effective date of dismissal was 26 July, after the end of term, and she was therefore entitled to holiday pay. There is no appeal against this conclusion, as to which we express no opinion.

86. On the question whether the failure to pay amounted to direct discrimination on the grounds of race, the Tribunal said:

> **"525. The Respondent gives no adequate explanation for why it argues that the effective date of termination was 21 July at a hearing when the Claimant was not present. It accepts that**

not only was the failure to pay an unauthorised deduction from wages but a further act of less favourable treatment on the grounds of race."

Submissions

87. Ms Tuck submits as follows. The words "it accepts" in the last sentence must refer to the Tribunal: at no point did any of the respondents accept that non-payment was an act of discrimination. This being so, there is a complete failure to set out any findings or reasons to support the finding of race discrimination. Mr Elesinnla made no concession on this aspect of the appeal, but advanced no submissions to the contrary.

Conclusions

88. We accept Ms Tuck's submissions. On the respondents' case, holiday pay was not paid because of a genuine belief that the date of dismissal was prior to the end of term; and this would have been the case whatever the race of Mrs Marshall. It is difficult to see how Mrs Marshall's race entered into the matter at all; but it is sufficient for the purposes of this appeal to say that it is impossible to see from the Tribunal's findings on what factual basis it concluded that any of the respondents treated or would have treated other persons differently, still less that it did so on racial grounds.

Protected disclosure and suspension

Issues

89. In relation to suspension, the issue was whether Mrs Marshall's grievances of 6 June 2007, 10 July 2007 and 13 July 2007 amounted to qualifying disclosures and if so whether she was subjected to the detriment of suspension because she had made the disclosures. The Tribunal was referred to and heard argument about the decision of the Appeal Tribunal in **Cavendish Munro Professional Risks Management Ltd v Gedud** [2010] IRLR 38.

The Tribunal's reasons

90. The Tribunal considered that Ms Banton, who then appeared for the respondents, had made a concession that the letters dated 6 June and 13 July were protected disclosures. It said:

> **"484. The Tribunal is however satisfied that in addition to those letters of 6 June and 13 July conceded by the Respondent, that the letter of 10 July 2007 to Tim Hunter-Whitehouse also amounted to a protected disclosure. Applying the rationale in *Cavendish* it did more than make allegations. It clearly provided information. The Claimant pointed out the ways in which the selection process for the KS1 post did not comply with Equal Opportunities Policies."**

91. The Tribunal went on to hold that Mrs Marshall was subjected to detriment by reason of suspension: see paragraphs 488 to 490.

Submissions

92. Ms Tuck submitted that the Tribunal erred in law in two respects. Firstly, it was wrong to find that the letters contained "any disclosure of information" within the meaning of section 43(1) – see **Cavendish Munro**. Secondly, it was wrong to find that any disclosure of information tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject, within the meaning of section 43(1)(b). She submitted, further, that the Tribunal was wrong to find that any concession had been made in respect of letters dated 6 June and 13 July. She took us to the written submissions of counsel, Ms Banton, which the Tribunal read as making the concession. Rather more faintly, she submitted that the Tribunal's finding that Mrs Marshall was subjected to detriment by reason of the protected disclosures was insufficiently reasoned.

93. Mr Elesinnla supported the conclusions of the Tribunal and submitted that, even if no concession had been made, the letters dated 6 June and 13 July were qualifying disclosures.

Conclusions

94. We have read the written submissions of Ms Banton. We think the Tribunal read them correctly. Ms Banton expressly conceded that the letters dated 6 June and 13 July were protected disclosures subject only to the Tribunal concluding that it was reasonable for Mrs Marshall to believe that the factual basis of what was disclosed was true, and subject to the question of good faith. Later in her submissions Ms Banton referred to **Cavendish Munro**, but this was in the context of the longer list of protected disclosures relied on by Mrs Marshall's counsel in respect of dismissal, not suspension.

95. In any event, we consider that the three letters amount to qualifying disclosures for the purposes of **Employment Rights Act 1996**. Ms Banton's concession was, in our judgment, correct.

96. The letter dated 6 June alleged that Mr Hunter-Whitehouse was acting in a discriminatory manner by reason of failing to deal with the issue of progression to UPS3. It said that the matter had been going on "for the longest time"; that she had raised the issue of a meeting with him; that he said he was busy; even when asked about next week said he no more than that he would "see to it"; and that the issue was causing her stress and anxiety.

97. The letter dated 10 July, written "recorded delivery" to Mr Hunter-Whitehouse, set out a series of respects in which it was said that the recruitment process for the KS1 post was, or was potentially, in breach of "equal opportunities policies". These included: failure to advertise the post internally; failure to provide a job description; failure to make known a candidate or person specification for the job; short notice for the interview; and lack of a clear selection process.

98. The letter dated 13 July appended a copy of the letter dated 10 July; and expressly alleged discrimination on the grounds of race and sex.

99. Section 43B(1) so far as relevant provides:

> **"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –**
>
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,"**

100. In **Cavendish Munro** the letter which was said to amount to a qualifying disclosure asserted unfair prejudice by the company of which the writer was a director and employee; but it gave no detail. The Appeal Tribunal held that there was a distinction between giving information, which meant conveying facts, and merely making an allegation. The Appeal Tribunal said:

> **"24. Further, the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information."**

101. Applying that approach, in our judgment each of the letters in question contains more than mere allegations. The letter dated 6 June conveys facts about delay in dealing with a pay progression claim. The letter dated 10 July conveys facts about a recruitment process. The letter dated 13 July appends the earlier letter and repeats those facts.

102. Equally in our judgment the information in each of those letters "tends to show" failure to comply with a legal obligation. The information conveyed is linked to and is capable of supporting complaints of discrimination. The letter dated 13 July contains explicit complaints of discrimination on the grounds of sex and race in the employment field, which would be

unlawful. The letter dated 6 June complains of discrimination; and the letter dated 10 July complains of breaches of equal opportunities policies; the letters "tend to show" discrimination on unlawful grounds in the employment field.

103. In our judgment there is no valid ground to challenge the Tribunal's conclusion that Mrs Marshall was subjected to the detriment of suspension by reason of these protected disclosures. The Tribunal's finding was a finding of fact plainly open to it in the light of Mr Hunter-Whitehouse's letter dated 11 July and the subsequent conduct of the respondents.

104. It follows that this part of the appeal fails and will be dismissed.

Protected disclosure and dismissal

The issues

105. The issue for the Tribunal was agreed to be:

> **"(31) What are the Claimant's protected disclosures? Did the Claimant make protected disclosures? Were they in good faith? If she did, was the reason or the principal reason for her dismissal the fact that she had made those protected disclosures?"**

106. The Tribunal rightly enquired at the start of the hearing what protected disclosures were alleged. Mr Elesinnla's response went far beyond the limited list of three disclosures which had been identified for the purposes of the issue concerning suspension. He identified 18 alleged protected disclosures. These started at 25 May 2006 and ran through to September 2008. Logically, only the first 15 of these, which predated dismissal, could be relevant to the issue in question; but the Tribunal evidently accepted all these as issues.

The Tribunal's conclusions

107. The Tribunal's reasoning for its conclusion that the dismissal was unfair under section 103A of the **Employment Rights Act 1996** is limited to a single paragraph:

> **"519. The Tribunal is further satisfied that it was the making of protected disclosures that led to the Claimant's dismissal. The very dismissal letter states that she was being dismissed for making unsubstantiated grievances. None of those grievances were investigated properly. There is no doubt that if the Claimant had not made the grievances she would not have been dismissed. The Tribunal accept the submissions made on behalf of the Claimant at paragraph 44."**

Submissions

108. Ms Tuck's made the following submissions. The Tribunal was required to make a finding as to whether the principal reason for dismissal was the making of protected disclosures: see section 103A and **Kuzel v Roche Products Limited** [2008] IRLR 530 at paragraphs 57-59. The only findings as to protected disclosures related to the letters dated 6 June, 10 July and 13 July. There are no findings about the remaining matters which Mrs Marshall relied on as protected disclosures; and no reason at all to suppose that the dismissal in July 2008 was principally by reason of the protected disclosures in the letters dated 6 June, 10 July and 13 July. There is therefore no proper or satisfactory basis for the conclusion that the principal reason for dismissal was the making of protected disclosures.

109. Mr Elesinnla was inclined to accept that this part of the Tribunal's reasoning was problematic. He submitted that the letters dated 6 June, 10 July and 13 July could be regarded as central to the case. Further or alternatively he submitted that the matter could and should be remitted to the same Tribunal for it to set out its findings.

Discussion and conclusions

110. We have no doubt that the Tribunal's reasoning on this question is flawed and incomplete.

111. The Tribunal's reasoning, in essence, was that because Mrs Marshall was being dismissed for making unsubstantiated grievances – and would not have been dismissed if she had not made the grievances – it followed that the principal reason for dismissal was the making of protected disclosures (the Tribunal in fact did not set out or apply the statutory test, but we will assume in its favour that it had this test in mind). But in order to reach this conclusion the Tribunal must find (1) that the grievances were protected disclosures and (2) that it was the making of one or more or all of these protected disclosures which was the principal reason for dismissal.

112. The only grievances which the Tribunal found to be protected disclosures were those dated 6 June, 10 July and 13 July. But Mrs Marshall lodged other grievances, identified also by her counsel as protected disclosures. In particular the grievance which first led a panel to conclude that she had made serious unsubstantiated allegations against the head teacher was made in January 2007. The Tribunal's reasoning does not deal with this, or indeed a number of other, grievances. It does not determine whether they met the statutory criteria and whether they were in good faith.

113. This part of the appeal therefore succeeds.

Reasonable adjustments

The issue

114. The issue for the Tribunal was as follows:

> **"(49) Did the Respondent's failure to allow Mr Ancell Marshall to attend any of the grievance hearings despite the advice given by Dr Susan Smith, Associate Specialist, on 12 March 2008 that:**

> **'…If any further meetings are to be held, I would be grateful if consideration could be given to her husband attending with her, if at all possible. I do think he could usefully contribute to such a meeting, particularly if Mrs Marshall herself is not able to present her own point of view sufficiently well'**
>
> **amount to disability related discrimination contrary to section 3A(1) of the DDA or a failure to make reasonable adjustments contrary to section 3A(2) of the DDA."**

The Tribunal's reasons

115. It is not necessary, given the grounds of appeal, to set out the whole of the Tribunal's reasoning on this point. The Tribunal found, in essence, that there was a "provision, criterion or practice" that Mrs Marshall could only be accompanied by a trade union representative or work colleague, and that this placed her at a substantial disadvantage in comparison with persons who are not disabled. It said:

> **"535. By the 11 March 2008 Dr Smith reported that 'her concentration is badly affected' and it was in that letter that she suggested consideration be given to Mr Marshall attending on the basis that he could 'usefully contribute' to meetings. The Tribunal is satisfied that it follows from those observations that the Claimant would have found it very difficult to instruct a trade union representative or work colleague and was thus placed at a substantial disadvantage by the provision."**

116. The Tribunal went on to find that it would have been a reasonable adjustment to allow Mr Marshall to attend. It is reasonably plain that the Tribunal meant that he should have been allowed to attend not merely as a silent witness but in order to assist his wife. The Tribunal said the failure to make reasonable adjustments was at the 7 May appeal hearing and all subsequent hearings.

Submissions

117. Ms Tuck submitted (1) that the Tribunal went beyond the agreed issue, which was concerned only with Mr Marshall's attendance, and (2) that on any view there could be no failure to make reasonable adjustments at the hearings after dismissal because at these meetings the union represented Mrs Marshall at her own request and her husband was allowed to attend. Mr Elesinnla submitted that the Tribunal understood the issue correctly; he accepted that the

union represented Mrs Marshall at her request with her husband's attendance at hearings after dismissal, but submitted that the Tribunal was focussed upon hearings up to dismissal.

Conclusions

118. We reject Ms Tuck's first submission. The issue as defined by the parties quoted the advice of Dr Smith. When the quotation from Dr Smith is taken into account, it is plain that the issue was not only concerned with Mr Marshall's attendance but also with assistance to Mrs Marshall.

119. We accept Ms Tuck's second submission. The Tribunal's reasoning does not apply to a hearing where (1) Mrs Marshall could be and was represented by her union at her request and (2) Mr Marshall was permitted to attend. This seems to have been the position in the autumn after Mrs Marshall had made a degree of recovery.

120. The Tribunal's reasoning applies, in our judgment, to the hearing on 7 May 2008. Whether it applies to any further hearings is a matter which can be addressed on remission. We think there may have been such a meeting on 16 June; but we are not confident on the papers we have whether this is the case, and whether there may be more such meetings.

Result

121. Mr Elesinnla submitted that justice could be done by remitting the case to the same Tribunal. We do not agree. Applying the criteria in **Sinclair Roche Temperley v Heard** [2004] IRLR 763, we consider that the case should be remitted to a freshly constituted tribunal. We do not underestimate the burden which the earlier Tribunal had, with some 53 issues to resolve, some of them complex; nor do we underestimate the cost and time involved if the matter is sent to a fresh tribunal; but the findings of discrimination have been overturned to

such an extent, and concern such a period and so many individuals, that we think entirely fresh consideration is required.

122. This Tribunal will have, essentially, two tasks.

123. Its first task will be to resolve the issues in respect of which the appeal has been pursued and allowed. For this purpose as regards the claims of sex and race discrimination and "whistleblowing" (including the section 103A claim) it will need to start afresh, hearing witnesses for itself and reaching its own conclusions untrammelled by the findings of the earlier tribunal. As regards the reasonable adjustments claim, its task is somewhat more limited: simply to see whether, in addition to the meeting on 7 May, there is any further meeting prior to dismissal to which the Tribunal's reasoning would apply.

124. Its second task will be to deal with remedy in respect of those claims which have not been the subject of appeal or which have been upheld on appeal: these are ordinary unfair dismissal (if it is not overtaken by the section 103A claim), wrongful dismissal, holiday pay, the "whistleblowing" claim relating to suspension, and the reasonable adjustment claim relating to 7 May 2008. The judgment in respect of all these claims must, we think, be against the employer, Hackney, and not against other parties.

125. It seems to us likely to be best for all outstanding issues to be heard together at one hearing. Inevitably that hearing will be of some length; and we think it is desirable for there to be a case management discussion in the first instance.