Appeal No. UKEAT/0208/07/DA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 24 October 2007

Before

HIS HONOUR JUDGE McMULLEN QC

MR A HARRIS

MR G LEWIS

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1) BIRMINGHAM CITY COUNCIL
2) DAVID TATLOW — APPELLANTS

MR P SAMUELS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR EDWARD PEPPERALL (of Counsel) Instructed by: Birmingham City Council Legal Services Department Ingleby House 11-14 Cannon Street Birmingham B2 5EN
For the Respondent	MS IJEOMA OMAMBALA (of Counsel) Instructed by: Messrs Thompsons Solicitors The McLaren Building 35 Dale End Birmingham B4 7LF

SUMMARY

Unfair dismissal – Procedural fairness/automatically unfair dismissal

Practice and Procedure – Appellate jurisdiction/Reasons/Burns-Barke

Race discrimination – Direct / Burden of proof / Victimisation

It being common ground that the Employment Tribunal directed itself correctly on the law, its application to the facts was not perverse. The Employment Tribunal approached the burden of proof correctly, except for holding contrary to the new case of **Oyarce** that s.54A **Race Relations Act 1976** applies to victimisation. However, the judgment was unarguably correct on **King v GBC-C** principles, as the Respondent had failed to give an acceptable explanation for its actions. The EAT refused permission to raise two new points on appeal **SoS v Rance** applied.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about unfair dismissal, race discrimination and victimisation and EAT procedure in dealing with new points on appeal. The judgment represents the views of all three members. We will refer to the parties as the Claimant, Mr Samuels and the Respondents as BCC or the council, and Mr Tatlow. We dismiss all former Respondents from the appeal.

Introduction

2. It is an appeal by the Respondents in those proceedings against a reserved judgment of an Employment Tribunal sitting over 28 days and 8 days in private at Birmingham, Chairman Mr J Van Gelder with Mrs N Chavda and Mr R J Owen, registered with reasons extending to 82 pages on 7 February 2007. The parties have been represented throughout by respectively Ms Ijeoma Omambala and Mr Edward Pepperall of Counsel.

3. The Claimant claimed unfair dismissal against BCC and made a very large number of claims of race discrimination and victimisation against it and its officers. The Respondents disputed all the allegations and BCC contended it dismissed the Claimant fairly for gross misconduct.

4. The Employment Tribunal decided in favour of the Claimant as follows: (1) victimisation by the council and Mr Tatlow when the Claimant was suspended, (2) unfair dismissal by the council, and (3) race discrimination by the council in the conduct of the Claimant's appeal. It thus dismissed 24 of the Claimant's 31 original claims before the Tribunal and dismissed claims against 4 of the 5 officers he brought into the proceedings.

5. The Respondents appeal and the live issues now on appeal are these,

(1) race discrimination in the appeal process: the burden of proof,

(2) victimisation by suspension: the burden of proof,

(3) victimisation by suspension: perversity,

(4) victimisation by suspension: the Claimant's good faith,

(5) procedural unfair dismissal: s.98A(2) of the **Employment Rights Act 1996**, the appeal process and perversity.

This is not a logical sequence it is anachronological and does not reflect the way the issues were laid before the Employment Tribunal in writing in advance or in its judgment. In deference to Mr Pepperall however we will keep that order but it must be borne in mind that we have decided all the issues in what we consider their proper sequence, that is chronological. Doing so sheds light on the first issue and is important for understanding the case on race discrimination.

6. Directions sending this appeal to a full hearing were given in chambers by HHJ Reid QC. His notes show consideration of only the burden of proof issue relevant to the first two grounds and not to the other five grounds. A false hope may have been aroused in the breast of BCC that all seven points had reasonable prospects of success.

The legislation

7. The relevant provisions of the legislation are set out by the Employment Tribunal and its self directions have not been criticised, indeed they have been supported. We can gratefully adopt them:

> **"5. THE LAW**
>
> **Unfair Dismissal**
>
> **5.1 The relevant law is contained in the Employment Rights Act 1996 ("the 1996 Act"). Section 94 of the 1996 Act gives the right to an employee not to be unfairly dismissed. Dismissal includes termination by the employer with or without notice (Section 95(1)(a)).**
>
> **5.2 The fairness of a dismissal is to be determined in accordance with the provisions of Section 98 which state:**
>
> > **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**

(a) the reason (or, if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection

(2)……

(2) A reason falls within this subsection if it-

(b) relates to the conduct of the employee."

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

5.3 The issue of procedural fairness arises in this case. The relevant provision is found at Section 98A which states:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if -

(a) one of the procedures set out in Part 1 of Schedule 2 to the Employment Act 2002 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

(2) Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

(3) For the purposes of this section, any question as to the application of a procedure set out in Part 1 of Schedule 2 to the Employment Act 2002, completion of such a procedure or failure to comply with the requirements of such a procedure shall be determined by reference to regulations under section 31 of that Act."

5.4 The claimant alleges breach of regulation 7(1) of the Employment Act 2002 (Dispute Resolution) Regulations 2004 which provides:

"(1) Where the grievance is that the employer has taken or is contemplating taking relevant disciplinary action against the employee and one of the reasons for the grievance is -

(a) that the relevant disciplinary action amounted to or, if it took place, would amount to unlawful discrimination, or

(b) that the grounds on which the employer took the action or is contemplating taking it were or are unrelated to the grounds on which he asserted that he took the action or is asserting that he is contemplating taking it,

the standard grievance procedure or, as the case may be, modified grievance procedure shall apply but the parties shall be treated as having complied with the applicable procedure if the employee complies with the requirement in paragraph (2).

(2) The requirement is that the employee must set out the grievance in a written statement

and send the statement or a copy of it to the employer -

(a) where either of the dismissal and disciplinary procedures is being following, before the meeting referred to in paragraph 3 or 5 (appeals under the dismissal and disciplinary procedures) of Schedule 2, or

(b) where neither of these procedures is being followed, before presenting any complaint arising out of the grievance to an employment tribunal.

(3) In paragraph (1)(a) "unlawful discrimination" means an act or omission in respect of which a right of complaint lies to an employment tribunal under any of the following tribunal jurisdictions Section 54 of the Race Relations Act 1976."

5.5 The allegations of direct discrimination and victimisation arise under the Race Relations Act 1976 ("the 1976 Act"). Racial discrimination is defined in Section 1 as follows:

"(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons."

5.6 Discrimination by way of victimisation is defined in Section 2 as follows:

"(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has -

(a) brought proceedings against the discriminator or any other person under this Act; or

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or

(c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them."

5.7 Section 3 defines "racial grounds" as any of the following: colour, race, nationality or ethnic or national origins.

5.8 Discrimination in employment is dealt with in Part II of the 1976 Act. The relevant alleged discrimination is defined in Section 4(2) as follows:

"(2) 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

(a) in the terms of employment which he affords him; or

(b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or service~, or by refusing or deliberately omitting to afford him access to them; or

(c) by dismissing him, or subjecting him to any other detriment."

5.10 The period within which proceedings are to be brought is prescribed in Section 68 as follows:

> **"(1) An employment tribunal shall not consider a complaint under section 54 unless it is presented to the tribunal before the end of -**
>
> > **(a) the period of three months beginning when the act complained of was done...**
>
> **(6) A tribunal may nevertheless consider any such complaint which is out of time if; in all the circumstances of the case, it considers that it is just and equitable to do so."**

5.11 The burden of proof in employment tribunals is dealt with in Section 54A of the 1976 Act as follows:

> **"(1) This section applies where a complaint is presented under section 54 and the complaint is that the respondent -**
>
> > **(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in section 1(1B) (a), (e) or (f) or Part P1 in its application to those provisions; or**
> >
> > **(b) has committed an act of harassment.**
>
> **(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent -**
>
> > **(a) has committed such an act of discrimination or harassment against the complainant, or**
> >
> > **(b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant,**
>
> **the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."**

5.12 In considering the evidence on the issues of direct race discrimination, victimisation the tribunal directed itself in accordance with the revised *Barton* guidance and annex set out at paragraph 73 in the case of Igen Ltd -v- Wong [2005] IRLR 258."

To add to those legislative provisions it is also necessary to consider the authorities.

8. The Tribunal cited **Igen v Wong** in which there are the **Barton** guidelines. The **Barton** guidelines are annexed to the judgment in **Igen v Wong** and provide as follow:

> **"(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

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

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

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

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

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

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

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

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

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

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

Although not intending to change those guidelines, the Court of Appeal descended upon the issue of the shifting burden of proof in **Madarassy v Nomora International Plc** [2007] ICR 867, where Mummery LJ, giving the judgment with which Laws and Maurice Kay LJJ agreed, said this:

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

57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a

difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of Like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

58 The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.

60 I do not accept these submissions. The amendments changed the law. They did so by stating the circumstances in which the burden of proof moves from the complainant to the respondent. If and when this happens, the tribunal has to decide whether or not the respondent has proved that he has not committed an unlawful act of discrimination. If the tribunal accepts the respondent's evidence of a non-discriminatory reason for his treatment of the complainant as an adequate explanation, the respondent will have discharged the burden of proof. If the respondent does not discharge the burden of proof, the complainant 'shall' succeed. This was not the law as laid down in *Great Britain-China Centre* and *Zafar* and applied by the tribunals before 12 October 2001, according to which the tribunals 'may', not 'must', infer unlawful discrimination from the absence of an adequate explanation for discriminatory treatment."

At the same time as **Madarassy**, the Court of Appeal decided **Brown v London Borough of Croydon** [2007] ICR 909 on appeal from the EAT, Elias P and members. Here it was indicated on an appeal by the unsuccessful Claimant that the burden of proof had been incorrectly applied. The Court of Appeal said the following:

"37 Far from prejudicing Mr Brown this approach relieved him of the obligation to establish a prima facie case based on the facts from which the tribunal could infer, without regard to the council's explanation for the treatment, an act of discrimination on the part of the council.

40 ... I agree with the reasoning of the Employment Appeal Tribunal that it was not necessary in this case for the employment tribunal expressly to address sequentially the two-stage test in Igen… ."

It will be seen that in **Madarassy** approval was given to the judgment also of Elias P and members in **Laing v Manchester City Council** [2006] IRLR 748 indicating that there can be resort to the evidence given by Respondent when considering the first stage of the burden of proof.

9. Since the Employment Tribunal hearing and the Notice of Appeal, the EAT Wilkie J and

members has decided **Oyarce v Cheshire CC** (UKEAT/0557/06). Following full legal argument it was decided that s.54A of the **Race Relations Act 1976** shifting the burden of proof does not apply in a victimisation case for reasons relating to a textual analysis of the statute and of the burden of proof directive. That case will be heard at the Court of Appeal on 13 December 2007. As a matter of practice, the EAT will follow a recently fully argued and fully reasoned judgment of another division unless it appears to it to be entirely wrong. Thus we would follow it without descending into the merits.

10. Where the burden of proof is not shifted by statute, as on this footing in a victimisation claim, the old law relating to the drawing of inferences and the requirement for a Respondent to produce an explanation is maintained: see **King v Great Britain China Centre** [1991] IRLR 513 CA.

11. As a matter of procedure at the EAT, new points will be entertained on appeal only in exceptional circumstances. The EAT's practice is set out in **Secretary of State v Rance** [2007] IRLR 665. The guiding principle is that it would be most unlikely for the EAT to give permission for a new point to be raised for the first time at the EAT if additional findings needed to be made by an Employment Tribunal. In cases where a question of perversity arises the EAT requires a high threshold to be surmounted by a successful Appellant; see **Yeboah v Crofton** [2002] IRLR 634. An overwhelming case must be made.

12. In the consideration of material which may form the basis for a finding of unlawful discrimination, it is possible to use not only allegations of race discrimination which are proved under the statute but also matters which are described as evidentiary facts, in order to come to such a conclusion without there being the necessity for a full finding under the statute. Typically these matters would arise in respect of out of time issues; see **Qureshi v Victoria University of Manchester** [2001] ICR 863 cited with approval by the Court of Appeal in **Anya v University of**

Oxford & Another [2001] ICR 847.

13. Finally in this analysis of the authorities, it is necessary to recall that submissions by an Appellant taking an Employment Tribunal to task for failing to give sufficient weight to a particular fact do not give rise to a question of law in **Eclipse Blinds Ltd v Wright** [1992] IRLR 133 at 135.

The facts

14. The Respondent is the major local authority in the West Midlands. Apart from the Claimant, the actors in this drama are Mr David Tatlow, Assistant Director; Ms Wendy Taylor, Principal Solicitor; Mr Mirza Ahmad, Chief Legal Officer and David Tatlow's line manager; Kal Kumari, Senior Legal Assistant; Mr Christopher Quinn, Senior Solicitor; and Councillor Michael Ward, who chaired a three councillor panel which heard the Claimant's appeal.

15. The Tribunal introduced the parties in this way:

> **1.1 The claimant is a qualified legal executive. The claimant was appointed to a post as Legal Assistant in the Legal Services Department of Birmingham City Council ("BCC") on 8 July 2002. Following the introduction of a career scheme the claimant raised concerns about the point at which it was proposed he would be assimilated into the scheme. Whilst protracted discussions continued the claimant was appointed to the post of Principal Legal Assistant in September 2004. Following a dispute with a work colleague in March 2005, the claimant raised a complaint against his manager, Wendy Taylor, under the Council's Anti-Harassment Procedure. After an initial investigation the Assistant Director of Legal Services, David Tatlow, decided to instigate an investigation to determine which of BCC's procedures would be most appropriate to deal with the claimant's allegations and the counter-allegations brought by the claimant's fellow employee, Kal Kumari, and his manager, Wendy Taylor. In due Mr Tatlow course decided to pursue the process under BCC's disciplinary procedure. At that point the claimant was suspended and did not return to work although the suspension was lifted in June 2005 on specific terms.**
>
> **1.2 The claimant raised a series of grievances regarding the treatment that he was receiving at the hands of various employees of BCC during the disciplinary process which resulted in the summary termination of his employment in October 2005. He presented his first claim of race discrimination in July 2005. The claimant pursued an appeal against his dismissal and in relation to the grievances. The claimant also presented his second claim alleging unfair dismissal and race discrimination in November 2005 and a third claim also alleging unfair dismissal and race discrimination in December 2005. The claimant's appeals were all unsuccessful. The appeal process concluded in February 2006. Shortly afterwards the claimant issued the fourth of the claims alleging unfair dismissal and/or race discrimination and/or victimisation which are before the tribunal.**
>
> **3. The agreed list of those thirty issues is not set out in the judgment at this stage. The procedure adopted by the tribunal, which was explained to the parties on more than one occasion and to which no objection was taken, was that initially the tribunal would make findings of fact in relation to each of the issues separately. Following that preliminary exercise**

they would then engage in the exercise of standing back from the evidence, viewing it as a whole, in order to determine whether the claimant succeeded in his allegations of race discrimination, victimisation and unfair dismissal. The findings of fact will be grouped in relation to each of the specific issues in the following paragraphs. The groupings sometimes result in the strict numerical order in which the agreed issues were set out not being followed.

16. Two things need to be said. Missing from this otherwise exhaustive analysis of the facts is the central basis upon which a finding of discrimination is to be made which is the racial group of the Claimant where he claims that he has been discriminated against on the ground of race. So by agreement of the parties we will insert, by our powers under s.35 of the **Employment Tribunals Act 1996**, the following as the first line: "The Claimant is self-described as black afro Caribbean".

17. The second thing to note is that the Tribunal there set out a way to navigate the waters round this dense set of Tribunal claims. The parties raised no objection to the way in which it was proposed to organise the case, as to findings on each issue and then standing back. Not only was that an agreed position it was sensible and pragmatic and in our judgment the Tribunal has done just what it said it would do. It is also worth noting that all of the Respondents were represented by Mr Pepperall and the Claimant by Ms Omambala who between them have considerable experience in this field and who assisted the Tribunal over the 28 days of hearing by making closing submissions in writing which extend to over 100 pages in Mr Pepperall's case together with oral submissions. Parties were clearly well advised and counsel set about helping the Tribunal in an exemplary fashion.

18. The Claimant began his employment on 8 July 2002. The abbreviated chronology available to us understates some of the difficulties which the Claimant encountered during the course of his employment. So far as is relevant, the Claimant was appointed as Principal Legal Assistant on 24 September 2004, a promotion. He was a Legal Executive and had, by the end of his career with the Respondent, become a Fellow of the Institute of Legal Executives.

19. In March 2005 there was an exchange of email between the Claimant and Kal Kumari and a meeting during which the Claimant contended that offensive words were used by Kal Kumari. Wendy Taylor became involved and was engaged in what became mutual complaints involving her, Mr Kumari and the Claimant. The Claimant lodged complaints against them both.

20. Mr Quinn overheard inappropriate telephone conversation between them. There is no doubt that it was vile and offensive and it stemmed from the Claimant. The Tribunal noted that the Claimant was literally the author of his own misfortune because he committed to paper some of the vile utterances recorded in the judgment. Chris Quinn informed Wendy Taylor of the telephone conversation. The Claimant lodged a further complaint against Wendy Taylor. On 14 April 2006 Mr Tatlow instigated an investigation by Ms Safia Khan in order to determine what procedure to follow. The Claimant formally registered complaints pursuant to the grievance procedure on 18 April 2005 relating to his assimilation in the career scheme. Further matters relating to the Claimant's conduct were referred by Wendy Taylor to Mr Tatlow.

21. Safia Khan reported to David Tatlow on 21 April, and on 22 April 2005 he suspended the Claimant and informed him of his decision to go through the disciplinary procedure. The procedure, as one would expect in such a prominent local authority, is sophisticated and contains important safeguards for all employees. The Claimant lodged a formal grievance on the ground of bullying and victimisation. He also wrote to Mr Ahmad.

22. On 3 May 2005 a meeting was arranged between Mr Tatlow and the Claimant; it did not proceed. Another meeting was set up; the Claimant did not attend. There has been a number of these. A number of other complaints were made.

23. On 1 June 2005 the Claimant was provided with the allegations he would face at an upcoming disciplinary hearing. The suspension was partially lifted on 14 June 2005 which

allowed him to return to work at the premises where he had been employed. The disciplinary hearing which had been set up for the end of June was adjourned at the Claimant's request and was subsequently re-fixed on a number of occasions during which time further grievances were lodged by the Claimant and questionnaires issued under the **Race Relations Act**.

24. On 22 September 2005 a preliminary hearing was convened by Mr Ahmad to consider the grievances. Further grievances followed.

25. On 4 and 5 of October a disciplinary hearing was conducted by Mr Ahmad in the Claimant's absence. On 6 October he was dismissed by letter. He appealed.

26. An appeal hearing was conducted on 31 January 2006 by Councillor Ward and two others where the Claimant was there represented by his union officer, called witnesses and so on. The appeal was dismissed on 3 February, the second day of the hearing.

27. The Tribunal considered in its lengthy judgment all 31 allegations which were marshalled by the Claimant's representative and which form the script for this Employment Tribunal hearing. As we have indicated, a large number of them was dismissed, sometimes with pejorative findings against the Claimant. Seven of them survived. It is sufficient for the purposes of this appeal for us to concentrate only on those, while bearing in mind that, when it comes to drawing inferences, those claims which fail may well be considered by an Employment Tribunal in deciding whether or not he has shifted the burden of proof to the Respondent and in looking at what inferences to draw, if any, at either stage 1 or stage 2, following explanations by the Respondent.

28. We will concentrate on the issues which were found by the Employment Tribunal. In doing so we will record the submissions of counsel and record our findings:

Ground (1) Race discrimination in the appeal process: the burden of proof

29. This is the very last event in the Claimant's career with the Respondent and yet it is taken first by the Appellants. The central contention is that the Tribunal failed to recognise that the Claimant had failed to discharge the burden of proof in accordance with **Igen v Wong**. The Tribunal did address the question and it dismissed five specific complaints weighed against the council for its conduct of the appeal process. All specific complaints against the appeal panel, or against BCC acting through its panel, were dismissed. On that basis it is contended that the Tribunal should not have found that an explanation was to be sought from the Respondent with the burden of proof shifting to it. It is contended that following **Madarassy** all the Tribunal had, once those five specific allegations were disposed of, were the bare findings that the Claimant is black afro Caribbean and his appeal by the counsellors was dismissed. That in **Madarassy** terms is a difference in status and a difference in treatment and so the Claimant had not proved any fact from which the Tribunal could conclude that the appeal panel had committed any act of discrimination.

30. On behalf of the Claimant, it is contended that the Tribunal was required by its initial indication to the parties to look analytically at each point and then to stand back and look at matters as a whole. When that is done, the evidence, even shorn of the five allegations which were dismissed, indicated that the Claimant had been suspended for reasons which were unsatisfactorily articulated at the time and subsequently. This is a matter which is posited on our finding that this ground of appeal is to be dismissed. We will turn to that in due course.

31. We do not consider that it is relevant to note, when applying the burden of proof, that the Claimant has made allegations of less favourable treatment on the ground of race or that he has threatened to pursue matters in an Employment Tribunal. Those are simply self-serving and do not illuminate the issue. However, what is important to note is whether or not the Respondent acted in accordance with its ordinary procedures. That will be capable of providing an inference

for a Tribunal to draw at stage one. In this case it is contended, rightly we hold, that an inference can be drawn by BCC's treatment of the Claimant in relation to its own established procedures which had been operated inflexibly and hastily.

32. Secondly, Ms Omambala is correct when she points to the fact that the hearing before the appeal panel, which this ground relates to, was procedurally and substantively unfair. Since we uphold that submission and dismiss the ground of appeal to which it is attached, it becomes relevant in the proper chronological analysis of this ground. It was open to the Tribunal to find from those matters and the treatment of the Claimant during his antecedent disciplinary grievance processes, that there was more than simply the difference of race and the difference of treatment to be weighed. The Tribunal correctly passed the burden of proof to the Respondent to provide an explanation. If we are right about that the second stage is easy.

33. Since Mr Pepperall very fairly accepted that if this stage was reached the Tribunal's finding that the explanation given by the Respondent was unsatisfactory could not be challenged. Thus we uphold the Tribunal's finding that there was an inadequate explanation, and as Mr Pepperall himself says, that would indicate a plain case of race discrimination if it were correct to get to stage two which we hold it was. We also accept that the Tribunal in standing back should look at the whole picture. We disagree with him in focusing wholly upon the appeal, for the appeal is the last stage in the career of this Claimant and his sorry advance through disciplinary and grievance procedures. They are all relevant when looking at whether to draw an inference and whether the burden of proof should shift.

34. Ms Omambala is right when she says that the Tribunal is not restricted in what it must look at. We bear in mind that this is an allegation against BCC obviously acting through its human agents, this time the panel of councillors. It is still a claim against the council and different forms of discrimination, different forms of unfair treatment not necessarily discriminatory and

committed by different people, either officers or councillors, are all relevant in deciding overall whether the burden of proof has shifted and whether there has been discrimination. If we were in favour of this submission by Mr Pepperall he might have asked to set the matter aside ourselves. We are against him so that does not arise.

Ground (2) Victimisation by suspension: the burden of proof

35. We agree with Mr Pepperall that the Tribunal here considered **Igen v Wong** (above). We also agree with him that the Tribunal must have had the same legal approach to the burden of proof by reference to the act of suspension and the act of dismissing the Claimant's appeal. This was, it is accepted, a potentially gross misconduct allegation against the Claimant. It fitted within the disciplinary procedure of BCC which provided for suspension, it not being disputed that this aspect of the procedure is incorporated as a matter of contract.

36. The Tribunal rejected Mr Tallow's explanation for suspending the Claimant. Again, it is contended that there were two bare facts - the difference of status and difference of treatment - and the Tribunal should not have moved to the second stage. In our judgment, this ground would fail on the basis on which it has been argued before us. To some extent this is affected by our finding in relation to the third ground (perversity), but for the purposes solely of the allegation that the burden of proof was wrongly allocated, we cannot fault the Tribunal in drawing the inference that the material available to it showed that it could be race discrimination and thus an explanation was called for. However, a difficulty arose during the course of Mr Pepperall's reply, for we raised with him the judgment in **Oyarce** (above). This was a point not taken by either advocate. As we have indicated, we would generally follow the judgment of the EAT so recently enunciated. Both advocates did the best they could thinking on their feet and they have done justice to the point which had not occurred to them. Mr Pepperall's point is that if **Oyarce** is

correct, or at least is to be followed by us, then there has been a misdirection by the Employment Tribunal because it has imposed on the Respondent a burden of proof which does not exist under s.54A. So, this issue must either be remitted or must somehow be dealt with.

37. Ms Omambala contends that this is a misdirection since we should follow **Oyarce**. The correct question then is: was the judgment nevertheless unarguably right? She argues that the appeal should be decided on the grounds set out in the Notice of Appeal for which permission was given by Judge Reid for it to be heard, although **Oyarce** was not decided at the time the Judge looked at this matter.

38. We have decided that the expedient and fair way to resolve this problem is as follows. We first look at the grounds which were argued before us and to which an Answer and Reply were given. We hold that the Tribunal correctly applied the burden of proof as it thought it to be. However, since we follow **Oyarce,** that indicates a misdirection. It would then be necessary to default to the pre-burden of proof days and to apply the judgment in **King v Great Britain China Centre** (above). The hallmark of that regime is that an explanation is called for by a Respondent where a question arises relating to an allegation of discrimination. Our case turns on the explanations given by the Respondent and that evidence feeds into whatever stage of analysis is appropriate. We take the view that it is correct, following **Laing** (above), for material to be adduced as part of the Respondent's case which can affect consideration of whether or not there is a *prima facie* case. We also take the view, following **Brown** (above), that the central question is *why did the Respondent treat the Claimant in this way,* a single question. That can be adequately answered by reference to the findings in this case.

39. Putting back our thinking to pre-burden of proof days and applying **King** we hold that the Tribunal has provided sufficient reasons for us to uphold the Judgment as unarguably correct. Having rejected as inadequate the explanations of Mr Tatlow, it was correct to hold that, in

suspending him, he victimised the Claimant for doing an protected by **Race Relations Act 1976** s2(1).

Ground (3) victimisation by suspension: perversity,

40. This also relates to Mr Tatlow's suspension of the Claimant. It is said the Tribunal reached a perverse conclusion. The argument advanced by Mr Pepperall was that the Tribunal found three reasons for rejecting Mr Tatlow's explanation. It will be recalled that the exercise to be done in any victimisation case is to find the mental process of the alleged discriminator by asking why did he do this? Was it on the ground the Claimant had done a protected act, or substantially due to it, or was it for some other reason? That is a highly fact-sensitive matter. It depends often on seeing how the alleged discriminator responded to questions put to him. In this case, the Tribunal found three separate reasons given by Mr Tatlow for the suspension. It found they were inconsistent, Mr Pepperall attacks that finding saying that they are not inconsistent - they are really all versions of the same stance, pursuant to the disciplinary procedure, to suspend by contract and in order to avoid difficulties in the workplace and to allow an investigation to carry on.

41. We disagree with that approach. The language is different in each of the three explanations given by Mr Tatlow. But if we were to take a generous approach to them, we would still come to the conclusion that the Tribunal's finding was correct, for it decided that on each of them the explanation was inadequate. The Tribunal said this, "the Tribunal was not satisfied on the balance of probabilities the explanation offered by Mr Tatlow was genuinely for any of the reasons alone or in combination which he had provided." So taking each one, and without rubbing one against the other to see if there is inconsistency, the Tribunal independently concluded that Mr Tatlow's explanation was not genuine. That cannot be faulted. It was not, as Mr Pepperall contends, tainted by its finding that there were inconsistencies, for the passage we have cited indicates a discrete analysis of each one, and each is found wanting, indeed each is

found not to be genuine. This ground of appeal is dismissed.

Ground (4) Victimisation by suspension: the Claimant's good faith.

42. Here Mr Pepperall is in very choppy waters. He contends that this is not a new point raised at the EAT for the first time contrary to Ms Omambala's argument. He has advanced arguments to us if we are wrong. Let us deal with it. There is no mention of s.2(2) of the **Race Relations Act** in the Tribunal's exemplary description of the legal provisions (para 7 above). It is a defence for an employer to argue that the protected act consisting of an allegation made by the Claimant was false and not made in good faith. It is contended on behalf of BCC that the findings by the Tribunal that the Claimant was untruthful in some of his allegations is sufficient to show that the allegation was not made in good faith.

43. There are some difficulties with that approach. The first is a judgment of the EAT in **Lucas v Chicester Diocesan Council** (UKEAT/0713/04) which requires an allegation of bad faith to be put squarely to a Claimant and to have been served in advance. Neither was done. Certainly there is nothing in, as they were never called in the Employment Tribunal nor after 1999 in the civil courts, pleadings. The fact that the Claimant was cross-examined as to lies takes the matter no further, as anyone who has addressed a jury will know. There may be all sorts of reasons for a lie, many of which do not indicate guilt. In this case, if the Claimant lied, it does not mean that the allegation was false and made in bad faith. That is an important charge. It must be made and put squarely and it was not in this case. The fact that there may have been cross examination is not sufficient. We reject the contention that this is not a new point. Mr Pepperall has reminded us of the ambit for raising new points in **Secretary of State v Rance** IRLR 665 and he argues that there is no need for this matter to be remitted even if it is a new point. We disagree. It would need to be found by the Employment Tribunal that an allegation constituting a protected act was made by the Claimant which was (a) false and (b) not made in good faith. There would have to be a further hearing on this or at least further submissions and for that reason we would not regard it as an exception to the rule that new points should not be raised.

44. We have already paid tribute to the experienced legal representation in this case. If it were a complete defence by BCC and Mr Tatlow to this claim, it was available to be deployed, it was not, nor will it be before us.

Ground (5) Procedural unfair dismissal: s.98A(2); the appeal process: and perversity.

45. There are three points in this ground. The Tribunal included **Employment Rights Act 1996** s.98A(2) as an issue when it analysed the legal provisions (para 7 above). However, there is no finding on s.98A(2), nor was a submission made on behalf of any of the parties. We take the same approach as we do to ground 4. This is a new point. Notwithstanding that it appears as an issue, it is quite possible for an issue to fall away. Certainly, at the end of a 28 day hearing extending over 6 months, points will come and go. It was available to be raised by BCC again as a complete defence to the claim of unfair dismissal. It was not so articulated. Mr Pepperall's submission is helpful for he acknowledges that this is a matter which cannot be resolved by the EAT and would have to be remitted to the Employment Tribunal. The simple question, if these were properly categorised as procedural failures, is what would the employer have done if it had got it right? The simple answer is: we do not know. We accept that the matters put against the Claimant were extremely serious and would amount to gross misconduct. Again for the same reason, now fortified by Mr Pepperall's acceptance that this could only be determined by the Employment Tribunal, we do not see it as an exceptional case for allowing the new point to be raised. A case which invokes the reversal of **Polkey**, turning a dismissal from unfair to fair, is one which must be raised by the Respondent; or, if the Employment Tribunal is alert to it, for example where neither party is represented, it may raise it itself. This was not done here. There is no error of law.

46. The points relating to the appeal process and to unfair dismissal are taken out of sequence. Whether a dismissal is unfair depends on the whole process including the appeal; see **OCS v Taylor** [2006] IRLR 613 (CA). The first point argued by Mr Pepperall is that, since the Tribunal

found that the dismissal was for discriminatory reasons, it affected its approach to the whole of unfair dismissal including the appeal process. We have already given our answer on the previous grounds.

47. The Tribunal came to a conclusion which was open to it as to the dismissal and it would be illogical to say that it was infected by a wrong decision. The two day hearing at the Councillors' appeal was a full account but, in our judgment, could not rectify the defects which had occurred including the problems which we have described above. The findings by the Employment Tribunal of the disciplinary process are fully borne out. These included the criticism of Mr Tatlow for refusing to allow the Claimant's wife to attend with him at the interview on 3 May. There has been some flexibility in this procedure in the past. The Claimant was certified unfit, depressed and under stress, and his wife is a nurse. This was condemned as totally harsh and inflexible. We agree. We reject the contention that there were other reasons for going ahead with the hearing.

48. Secondly, the Tribunal criticised BCC for failing to disclose Mr Quinn's report. We agree with Ms Omambala that this important document should have been available, and not disclosing it was an error. Thirdly, it is contended that the Tribunal was wrong to say that there was unexplained and unnecessary haste in advancing the process to a hearing without the benefit of an interview with the Claimant. That is a matter which was open to the Employment Tribunal. This Claimant was never interviewed, there was no material from him at the disciplinary hearing, the case was advanced by Mr Tatlow in the Claimant's absence due to sickness and so there never was a statement of the Claimant's side.

49. We acknowledged that in certain circumstances a delay in conducting a dismissal may be unfair; see **RSPCA v Cruden** [1986] IRLR 83 EAT. But that would not apply here where steps were undertaken and adjourned as a result of various problems faced by the Claimant himself. In our judgment, the Tribunal was correct to condemn Mr Ahmad for acting unreasonably in going

ahead while the Claimant was due for a medical examination just four weeks later. Again that was a matter for the Employment Tribunal to decide.

50. We reject the submission that the Tribunal has impermissibly substituted itself for the decision of the council in each of the steps which it has taken. The Tribunal is to be acquitted of that charge for on each occasion where it makes the criticism of the council it does so by reference to the standard of the reasonable employer and what an employer acting reasonably would do. That is not simply a matter of language; it is a matter of substance in this case.

51. Finally the Tribunal's finding that the failure by Mr Ahmad to consider the grievance procedure documentation jeopardised the fairness of the process is one which the Tribunal was fairly able to come to.

52. The three points under ground 5 have been categorised in our enumeration, courtesy of the skeleton arguments of counsel, as procedural unfair dismissal. They were not. Again, standing back from these matters there were so many failings in this case that it is hard to see this as simply a procedurally unfair dismissal. The findings that Mr Ahmad was charging on with undue haste and without the Claimant at the meetings go to the heart of this case, so do the findings of victimisation against BCC and Mr Tatlow.

53. This case cannot be written off simply as one of procedural unfairness, nor does the Tribunal so describe it. There are issues of unfairness throughout this case and the law on procedural unfairness is not there to deal with such a large number. It operates characteristically where single failings have occurred. But the failings here go to the heart of the decision making and make the decision unfair. We do not propose to make any changes to the language used by the Employment Tribunal, but that is a solution to the point on s.98A(2) as well, this not being a procedurally unfair dismissal as we see it.

Result

54. All grounds are dismissed. This case will go on to a hearing for remedy in February 2008. The Claimant can be in no doubt, as the Tribunal foreshadowed, that contribution will be a serious issue. We have not found it necessary to descend into the detail of what the Claimant said and wrote and the mutual recriminations, since that is not part of our appeal process. But as the Tribunal significantly noted, the Claimant was literally the author of a lot of his misfortune and he must face the prospect of a severe attack on his remedy when this case goes back.

55. We would like to thank both Ms Omambala and Mr Pepperall for the very concise way in which they have tailored their submissions today in constrained time, expressing their cases fully.