Appeal No. **UKEAT/0330/06/DA**

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On **23 November 2006**

Before
HIS HONOUR JUDGE RICHARDSON
MR A E R MANNERS
MR D NORMAN

LEVENES SOLICITORS APPELLANT

MS J DALLEY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the AppellantMs Ijeoma Omambala
(of Counsel)
Instructed by:
Levenes Solicitors
Ashley Houses
235−239 High Road
Wood Green
London
N22 8HF
For the Respondent
Mr Mark Afeeva
(of Counsel)
Instructed by:
Messrs Colemans−CTTS Solicitors
1−3 Union Street
Kingston−Upon−Thames
Surrey
KT1 1RP

Summary
Unfair dismissal - Reasonableness of dismissal

The Tribunal erred in law by holding that the Claimant's dismissal was unfair on grounds of disparity notwithstanding its findings that the decision to dismiss was reasonable substantively and procedurally and that dismissal was within the band of reasonable responses.

Race discrimination - Direct/ Burden of proof
The Tribunal erred in law by holding that the Claimant's dismissal was tainted by unlawful discrimination because it was not satisfied with the Respondent's explanation about disparity. On the Tribunal's earlier findings, the dismissal was not on racial grounds.

HIS HONOUR JUDGE RICHARDSON

1. This is an appeal by Levenes a firm of Solicitors against a judgment of the Employment Tribunal sitting in London (Central) dated 19 April 2006 following a 10 day hearing in July and December 2005. By its judgment the Tribunal held that Ms Julieth Dalley had been unfairly dismissed by Levenes and that they discriminated against her on racial grounds.

The Facts
2. The Tribunal had to grapple with lengthy pleadings, more than 1300 pages of written material and evidence on a wealth of issues. For the purposes of this appeal however, it is possible to summarise the salient facts quite briefly.

3. Ms Dalley was employed by Levenes from 14 August 2000 until her dismissal on 21 October 2004. She was a solicitor working in the personal injury department of the firm. The Tribunal recorded that she described herself as black, Afro Caribbean, West Indian, Jamaican. She was admitted to the roll as a practicing solicitor in 1990 and is an experienced practitioner.

4. During her employment Ms Dalley expressed a variety of concerns to her employers over such matters as workload and case allocation, clients who made complaints, partnership prospects and salary and other rewards for her work. There were various approaches to and discussions with Mr Levene the senior partner of the firm.

5. Following a meeting in February 2004 and further lengthy letters by Ms Dalley in April and May 2004, Mr Levene asked her to raise any grievance she had by following the firms grievance procedure. On 24 May 2004 Ms Dalley set out her grievance in summary form. Among the complaints she made were race discrimination and sex discrimination. At the same time Mr Levene suggested to her that since she seemed to be unhappy working for the firm she might leave on the basis of a compromised agreement. There were discussions about possible turns, Ms Sophie Morrison the firm's Human Resources Manager was involved in those discussions; turns could not be agreed. Thereafter the grievance procedure was operated. At the first stage Mr Clingman dealt with the grievance and rejected it by letter dated 2 July 2004. Ms Dalley appealed. The appeal was rejected by letter dated 1 September 2004.

6. In October 2004 two events happened which led to disciplinary proceedings against Ms Dalley. Firstly, following a period of vacation she did not return to work on 4 October when she was due to do so and failed to report to the Human Resources Department. After repeated attempts to obtain an explanation she eventually e−mailed on 7 October to say that she had been unable to return to work on 4 October because following her long haul flight she had been too exhausted to return. This was, according to Levenes, not the first such instance of its kind. But the second event was to have much greater significance before the Tribunal. It came to the attention of Levenes that Ms Dalley had missed a time limit in proceedings for which she was responsible. Ms Dalley was later to accept that she had failed to serve proceedings in time and that what she had done constituted serious professional negligence.

7. On 8 October 2004 Levenes set in motion their disciplinary procedure citing the two matters to which we have referred. On 13 October a disciplinary meeting took place between Ms Morrison, who was

responsible for that procedure, and Ms Dalley. Both before and after that meeting Ms Morrison explored with Ms Dalley the possibility that Ms Dalley might enter into a compromise agreement to leave. On 21 October Ms Morrison wrote to Ms Dalley dismissing her for gross misconduct. Ms Dalley appealed against that decision; the appeal was heard by the firm's Chief Operating Officer and dismissed on 8 December 2004. The reasons for the dismissal as set out in Ms Morrison's letter and confirmed by Mr Sharples on appeal were the failure to ensure that court proceedings in relation to a particular matter were served within the 4 month time limit and failure to report absence and thereafter respond promptly to requests for confirmation of the reason for her absence.

Comparators

8. Before the Tribunal there was considerable evidence as to the manner in which Levenes had dealt with other fee earners involved in cases where time limits had been missed. By the time of final submissions Ms Dalley was relying on 6 comparators in relation to her sex discrimination claim and 11 comparators, the same 6 and a further 5, in relation to her race discrimination claim. She also relied on a hypothetical comparator in each case.

9. As regards to the 6 male comparators on which Ms Dalley relied for both discrimination claims, the Tribunal found that Ms Dalley had not established that she was less favourably treated on an appropriate comparative basis compared to any of the individuals listed in her group of specific comparators. As regard to the 5 female comparators on which Ms Dalley relied for the race discrimination claim alone, the Tribunal found insufficient basis to hold that there was less favourable treatment in respect of 2. This left 3 employees for further consideration. One was white female, one was white Jewish female and the third, Ms Onwukwe, was black African.

10. We shall return later to the way in which the Tribunal dealt with these potential comparators. It is sufficient for the moment to say that the Tribunal found the only clear indication of a member of the firm who had missed court deadlines and who had not been either disciplined or offered an opportunity to leave the firm on agreed terms was Ms Onwukwe. The Tribunal found that Ms Onwukwe was recorded as having experienced 3 occasions when she missed court deadlines. In none of those cases had she been disciplined or subjected to any procedure. The Tribunal did not make findings as to the nature of the proceedings or the dates of default, but it appears from a statement in our papers that the cases were employment proceedings with tight deadlines some years prior to 2004.

11. The Tribunal recorded Mr Levene's explanatory evidence on this matter. In summary Mr Levene said that Ms Onwukwe had been a co−founder of the employment department. The firm had been inundated with new instructions from one particular large legal insurance client and for a while the department seriously struggled to cope. There was great difficulty in recruitment; 2 of the 3 cases were as a result of intense pressure of work. He considered it difficult to blame Ms Onwukwe for what had occurred and if she had left the firm it would probably have meant the loss of referrals from that large client; he had considered it inappropriate to take any disciplinary action.

Statutory Provisions

12. On the question of unfair dismissal the key statutory provisions are found in sections 98(1) and (4) of the Employment Rights Act 1996:−

"98 General

(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) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(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 unreasonable 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."
13. On the question of race discrimination the key statutory provisions are found in sections 1(1)(a) section 3(4) section 4(2) and section 54A of the Race Relations Act 1976:−

"1 Racial discrimination
(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.

3 Meaning of "racial grounds", "racial group" etc
(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) [or(1A)] must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

4 ×Applicants and employees
(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 services, or by refusing or deliberately omitting to afford him access to them; or
(c) by dismissing him, or subjecting him to any other detriment.

54A Burden of proof: employment tribunals
(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 IV 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 form 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."

The Tribunal's Reasons
14. The Tribunal had established at the outset that there were 3 live claims before the Tribunal; an allegation of unfair dismissal, an allegation that the termination of Ms Dalley's employment was tainted by unlawful sex discrimination and a similar allegation that the termination was tainted by unlawful race discrimination. There seems to have been some doubt the extent to which there remained allegations that Ms Dalley was victimised, either in the special statutory sense or in a broader sense, by her dismissal. The Tribunal therefore, also made findings concerning tainting by any kind of victimisation.

15. The Tribunal began its conclusions by considering the reason for Ms Dalley's dismissal. It had been submitted on her behalf that the reason given was not the true reason, that the true reason lay rather in the history of Ms Dalley's relationship with the firm, her various complaints including those of sex and race discrimination, discrimination itself and influence exerted upon Ms Morrison by Mr Levene, Ms

Onwukwe and Mr Clingman. The Tribunal found that the true reason was as stated by Ms Morrison. In two important paragraphs the Tribunal stated the following conclusions:−

"57 . In the light of her responses, the Tribunal is unanimously of the view that in making her decision Ms Morrison was very much ‘her own woman', and that the decision reached and communicated in her letter of 21 October 2004 was truly her own. Having regard to the matters with which she was concerned and to which she clearly had regard, and to the treatment of these same matters which Mr Sharples considered during the appeal procedure at a subsequent stage, the Tribunal is satisfied that the sole reason for terminating the employment of the Claimant was her conduct in relation to the issue of the Seye file and the missing of the court deadline, and the Claimant's failure to notify her absence in the appropriate manner on 4 October 2004. For the avoidance of doubt, any suggestion that the dismissal reason was tainted by either considerations of race or sex is rejected.
58. Similarly, albeit that the apparent allegations have not been clarified as completely as might have been desirable, the Tribunal has asked itself whether there is any suspicion that the decision of Ms Morrison was or could have been tainted by a sense of ‘victimisation', or as a response to the grievances or procedures triggered by the Claimant (loosely described as "whist1e−blowing). The Tribunal have considered all of the circumstances in the light of the evidence before them - and, in particular, once again, the responses of Ms Morrison to questions put both by the Tribunal and by counsel for the Claimant during cross−examination. We are unanimously satisfied that there is no suspicion of Ms Morrison's decision having been tainted by ‘whistle−blowing' considerations, or by some desire to ‘victimise' the Claimant, any more than we are concerned that there might have been any tainting on the basis of sex or race."
16. The Tribunal then went on to consider procedural and substantive aspects of the dismissal. Its findings were as follows:−

"62. Having regard to all the circumstances, the Tribunal is unanimously of the view that the substantive treatment of the Claimant's termination was reasonable on the part of the Respondent. Having regard to the procedural treatment of her termination, the Tribunal is similarly satisfied that Ms Morrison, at the dismissal stage, and Mr Sharples, at the appeal stage, adhered loyally to the provisions of the Respondents' disciplinary and grievance procedures, and that those procedures were reasonable and were reasonably handled.
63. That having been said, the question of the appropriate sanction in the Claimant's case has been challenged on her behalf as a matter of ‘consistency' when compared to the treatment of other employees of the Respondent."

17. The Tribunal then proceeded to consider the apparent disparity of treatment between Ms Dalley and Ms Onwukwe. It said that it was concerned of the disparity since Ms Onwukwe was not disciplined when there were three missed dates and Ms Dalley was dismissed when there was only one. The Tribunal set out its conclusions in four passages:−

"71. Having regard to equity and the substantial merits of the case, and taking into account all of the evidence which is before them, the Tribunal is not satisfied that the Respondent acted reasonably in this case in dealing with the Claimant as they did and imposing a sanction of dismissal.
72. It is important to note that the Tribunal is not replacing the decision made by the Respondents with their own view of what should have been done. The Tribunal is clearly of the view that dismissal was amongst the ‘band of reasonable responses' open to the Respondent, as indicated by the observations of the Employment Appeal Tribunal in the case of Iceland Frozen Foods −v− Jones. There is no question that a potential outcome could nave been termination of the employment of the Claimant. However, the Tribunal is not satisfied that this Claimant was being treated consistently with at least one other member of staff of the Respondent's staff (Ms Onwukwe) in comparable circumstances − and, it may be, by comparison with other members of the firm in respect of whom sufficient evidence is not currently available.
73. It therefore follows that the Tribunal is of the view that the Respondent has not acted consistently as between different members of its staff caught in this unfortunate dilemma of having committed an act of serious professional, negligence. Without some clear explanation or justification for the differential (and none was forthcoming), the Tribunal finds that to treat the Claimant by way of dismissal while not having

treated Ms Onwukwe to either dismissal or indeed to being made subject to the Respondent disciplinary procedure at all, was unreasonable in the circumstances.
76. Suffice it to say that the Tribunal wishes to place on record their unanimous finding that they are of the view that the dismissal of this Claimant was unfair by reason of the inconsistent treatment of her in circumstances arising in previous other cases, and was not in any sense, in the view of this Tribunal tainted by 'victimisation' or as an incident responding to the series of historical grievances, complaints and other procedures and grievances raised by the Claimant during the course of her employment with the Respondent."

18. The Tribunal then turned to deal with the claim of sex discrimination which it determined in favour of Levenes. Two points should be noted about its reasoning. First, it accepted the evidence of Mr Levene about the comparators, finding him to be doing his best to furnish explanations of the treatment afforded to each individual and the underlying reasons for that treatment: see paragraphs 84 and 85. Second, it found that the hypothetical male comparator would most probably have been subjected to the firms disciplinary procedures and would also probably have been offered an opportunity to leave on terms. In other words the Tribunal found he would have been treated in precisely the manner in which Ms Dalley was treated.

19. The Tribunal then turned to deal with the claim of race discrimination. It found that there were 3 proposed comparators (to whom we have referred already) who required particular consideration. It said, in relation to this aspect of the case:−

"106. This leaves the comparisons to be drawn with Stewart, Davidoff and Onwukwe. In relation to each of these three comparators, the Tribunal finds that there is sufficient evidence to show that there was a difference in treatment as between these three and the Claimant. The Tribunal further finds that the difference amounted to a less favourable treatment within the meaning of section 1 of the Race Relations Act 1976.
107. Turning to the racial characteristics of this group of comparators, the agreed evidence is that Linda Stewart is a white female, Kareen Davidoff is a white Jewish female, and Audrey Onwukwe is a black African female. There is therefore a difference as between each of these and the Claimant, who is a black Afro−Caribbean West Indian Jamaican female.
108. On the basis of these findings, the Tribunal is of the view that the Claimant has proved 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 Complainant.
109. It therefore falls to the Respondent, by virtue of section 54A(2), to prove that they did not commit that act.

20. As regards, two of the three proposed comparators, the Tribunal accepted an explanation given by Mr Levene. The Tribunal then went on to consider the position of Ms Onwukwe. It found that there was a difference of racial characteristics; one being black Afro−Caribbean West Indian Jamaican and the other black African. The Tribunal then set out Mr Levene's explanation which we have already summarised. The Tribunal explained that it had considered the evidence of Mr Levene carefully and said for the first time in its considerable experience it considered that the approach yielded by section 54A(2) appeared to give rise to a result different to that which would probably have been reached under the preceding law. Now, once the burden of proof provisions were engaged the Respondent had to prove that it did not commit the act of unlawful race discrimination. In paragraphs 121 to 125 the Tribunal set out its conclusions on that aspect of the case:−

"121. The unanimous view of the Tribunal is that the Respondent has not proved that they did not commit the act of unlawful race discrimination.
122. Such evidence as has been given, which has been accepted by the Tribunal as truthful, and which, in any event, is largely unchallenged in relation to the underlying factual situation, falls a long way short of the necessary proof to achieve this end.
123. In relation to the cases of Goodchild and Applegarth, the evidence is primarily contextual, and explains the background to the difficulty in which the respondent firm might have found itself had it dispensed with the services of Ms Onwukwe. Those circumstances are taken as the basis for Mr Levenes

evidence that he "considered it was difficult to blame Audrey for what had occurred" - even though it was accepted by Ms Onwukwe, during the course of questions put to her while giving evidence, that what had occurred in each of the three cases where ,she had missed a deadline I amounted to "gross misconduct" on her part, regarding which dismissal was a sanction provided for in the Respondent's procedures. They were also taken (without any further elaboration) as the basis for Mr Levene's statement that he "considered it inappropriate to take any disciplinary action" against Ms Onwukwe.
124. Meanwhile, in relation to Ms Onwukwe's failure concerning the case of Blunden, there is no explanation offered at all.
125. In the light of this unanimous view of the Tribunal, it follows that the Claimant's complaint of unlawful race discrimination must be upheld, and the Tribunal finds accordingly."

Submissions
21. On behalf of Levenes, Ms Omambala's principle submissions may briefly be summarised as follows. In respect of both unfair dismissal and race discrimination claims, she submitted that the Tribunal failed to make sufficient findings of fact to establish that the cases of Ms Onwukwe and Ms Dalley were truly similar and their treatment truly disparate. Thus in the race discrimination claim she submitted that the Tribunal did not have regard to and did not make findings sufficient to meet the requirements of section 3(4) of the Race Relations Act 1976.
22. In respect of the unfair dismissal claim she submitted that the Tribunal failed to apply the correct statutory test when it considered the question of disparate treatment. She referred to and relied on Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, Securicor v Smith [1989] IRLR 356, Paul v East Surrey District Council [1995] IRLR 305 and United Distillers v Conlin [1992] IRLR 503.

23. In respect of the race discrimination claim she submitted that the Tribunal, before finding a prima facie case and applying the burden of proof provision, ought to have considered whether the less favourable treatment was on racial grounds but did not do so. If inferences were drawn she submitted that they should specifically be drawn at that stage. She sought to draw support for this proposition from Madden v Preferred Technical Group CHA Ltd [2005] IRLR 46. Further she submitted that the Tribunal did not apply its mind sufficiently to whether a prima facie case had been established. Not every case of differential treatment will support a prima facie case of discrimination: see Network Rail Infrastructure Ltd v Griffiths Henry [2006] IRLR 865 at paragraph 17.

24. Further Ms Omambala submitted that the Tribunal in concentrating on Mr Levene's explanation concerning the comparable cases, failed to have regard to its own emphatic findings about Ms Morrison's reason for dismissing Ms Dalley. The focus of the Tribunal she submits should not have been on Mr Levene but on Ms Morrison since Ms Morrison was the person who took the decision to dismiss. If it had taken Ms Morrison's evidence into account the only conclusion open to the Tribunal would have been that the dismissal was not tainted by discrimination on the grounds of race. Likewise if the Tribunal had taken into account its own conclusions as to the evidence of Mr Sharples who dealt with the appeal.

25. In response to these arguments Mr Afeeva's principal submissions may be summarised as follows. As regards to the Tribunal's findings of fact relating to comparison and disparity he submitted that these were sufficient to support the conclusion that the circumstances of Ms Dalley and Ms Onwukwe were comparable. He submitted that the reasoning did not require to be detailed or technical; the reasons were Meek compliant: see Meek v City of Birmingham District Council [1987] IRLR 250. He referred to and relied on paragraphs 112 to 125 of the Tribunal's reasons and argued that this reasoning can be read back in effect as part of the Tribunal's reasoning in respect of the unfair dismissal claim. A holistic approach should be taken he submitted, to the Tribunal's reasons. He pointed out that the Tribunal's conclusions on this question were not challenged on grounds of perversity.

26. As regards to the unfair dismissal claim, he submitted that the Tribunal did apply the correct test set out in Paul v East Surrey District Council Health Authority [1995] IRLR 305. He accepted that there was some apparent confusion in the reasoning of the Tribunal on the question of the reasonableness of dismissal but argued that on analysis the Tribunal's reasoning could be sustained. In saying that the decision to dismiss was procedurally and substantively reasonable, the Tribunal was, he said, excluding the

question of disparate treatment to which it then turned. The Tribunal found that there was no "clear" explanation for disparate treatment. It was entitled to act on this and hold the dismissal unreasonable. Nothing in Paul v East Surrey District Health Authority or United Distillers v Conlin took away from the Tribunal its right to evaluate for itself whether it was reasonable to dismiss.

27. As regard to the race discrimination claim, Mr Afeeva submitted that at the first stage before applying the burden of proof provisions, it was only necessary for the Tribunal to find facts from which it could conclude that the Respondent had treated the Claimant less favourably on the grounds of race. It did not have to find, at that stage, that she had done so. Nor did it have to draw conclusive inferences. He relied on the wording of section 54(a) itself and upon the well known Barton guidelines approved in Igen v Wong and others [2005] IRLR 258.

28. As regards Ms Morrison's evidence, Mr Afeeva submitted that there is a simple explanation for the Tribunal's approach. In making its findings at paragraphs 57 to 62 he submitted that the Tribunal was considering the question of conscious discrimination. This still left for consideration the question of unconscious discrimination to which the Tribunal was entitled to apply the burden of proof provisions. Alternatively he submitted that the findings concerning Ms Morrison and Mr Sharples should be restricted to the unfair dismissal issue and were of no relevance to the discrimination issue. In any event he submitted that the Tribunal was entitled to focus on the evidence of Mr Levene. The question was whether the firm of Levenes had unlawfully discriminated against Ms Dalley.

Our Conclusions

29. It is convenient to begin with the question whether the Tribunal erred in law in its approach to the question whether it was reasonable for Levenes to dismiss Ms Dalley. In our judgment, it is important for a Tribunal always to bear in mind that the focus of section 98(4) is on the question whether it is reasonable for the employer to dismiss the employee in question. As the authorities establish, a Tribunal must take care not to allow questions of disparity with earlier treatment to supplant the statutory test.

30. Thus in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 the Tribunal accepted an argument put forward by counsel that arguments put on the basis of disparity were of limited significance when determining the fairness of a dismissal. It is true that evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employees conduct with a penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances, but Mr Waterhouse J giving the judgment of the Appeal Tribunal said:−

"The emphasis in now section 98 subsection 4 is upon the particular circumstances of the individual employees case. It would be most regrettable if Tribunals or employers were to be encouraged to adopt rules of fun or codes for dealing with industrial relation problems and in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained and we hope that nothing that we say in the course of our judgment will encourage employers or Tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spears of the law to realise how inappropriate it would be to import it into this particular legislation."

31. The approach of the Appeal Tribunal in Hadjioannou was expressly approved by the Court of Appeal in Paul v East Surrey District Health Authority [1995] IRLR 305. See in particular the judgment of Beldam LJ at paragraph 35, where he said that Tribunals would be "wise to heed the warning" given in Hadjioannou.

32. In our judgment, the Tribunal fell into error in the way in which it dealt with the question of disparity. The Tribunal made three findings on the question of reasonableness. Firstly, it found that the substantive treatment of Ms Dalley's termination was reasonable: paragraph 62. Secondly, it found that Levenes' procedures were reasonable and reasonably handled: paragraph 62 again. Thirdly, crucially, it found the dismissal was amongst the band of reasonable responses open to Levenes: paragraph 72 of its reasons. In

then concentrating on an inconsistency as it found it to be, between the treatment of Ms Dalley in 2004 and the treatment of Ms Onwukwe some years earlier the Tribunal, in our judgment, lost sight of the true question posed by the statute.

33. It is convenient then to turn to the question which is common to both the unfair dismissal appeal and the discrimination appeal, namely, whether the Tribunal has properly considered and made proper findings of fact as to whether these circumstances of Ms Onwukwe and Ms Dalley were truly comparable. We do not think the Tribunal has given proper reasons on this question. In the context of a race discrimination claim in particular, the question whether a proposed comparator is truly comparable is a matter which requires careful consideration. In this case it is by no means self evident that the two were comparable. It is worth stating what potential differences there were for the Tribunal to consider. First, Ms Onwukwe had been involved in the building up and running of a department of particular value to Levenes. Second, Ms Onwukwe was said to be working under great pressure in an under staffed department. Third, Ms Onwukwe was dealing with employment cases where time limits are very short where as Ms Dalley was dealing with a personal injury claim where the time limit is three years and there may then be a further four months to serve the claim form. Fourth, Ms Onwukwe had no other disciplinary matter to face where as Ms Dalley faced another disciplinary matter as well. These were all potential differences.

34. The Tribunal identifies only that there were time limit issues in both cases and does not address other factors upon which it heard evidence and argument. We emphasise that at this point our criticism of the Tribunal is essentially a criticism of its failure to reason through an issue and if it has reasoned it through to set its reasons out. The matters were ones for the Tribunal to consider. It was for the Tribunal to say whether these circumstances were truly comparable having considered and dealt with the particular points which the parties made to it on that issue. Essentially therefore this is a reasons point. We would not be able to say ourselves whether the circumstances of the two employees were truly comparable or not. If this had been the only issue in the appeal we would have remitted the matter to the Tribunal.

35. We turn next to Ms Omambala's submission that the Tribunal, before applying the burden of proof provisions, ought to have addressed the question whether any difference of treatment actually was on racial grounds and drawn inferences. We reject that submission. At the first stage the Tribunal is only concerned with whether on the fact it has found it could conclude that a difference of treatment was on racial grounds see the revised Barton guidance set out in Igen v Wong and Others [2005] IRLR 258 and see recently Network Rail [2006] IRLR 865 at paragraph 18.

36. We turn then to the question whether the Tribunal erred in law in focusing on the evidence of Mr Levene when it considered whether Levenes had discharged the burden of proof which it considered to lie upon it. Here, it is important to return to the question which the Tribunal had to decide. The issue was whether the dismissal was tainted by race discrimination. In context, of course this means the process of dismissal including appeal. The dismissal will have been tainted by race discrimination if the decision to dismiss was taken wholly or in part, consciously or unconsciously on the grounds of race. Whether treatment is on the grounds of race depends on the reason why the treatment occurred.

37. It follows that, whether or not the burden transferred to Levenes, the key question was whether the decision to dismiss taking the process as a whole was wholly in part on the grounds of race. In determining this question, the evidence of the person responsible up for the dismissal must be of key importance. What Levenes had to prove if the burden of proof transferred, was that the decision to dismiss was not taken wholly or in part, consciously or unconsciously on racial grounds. If it succeeded in proving that matter, then the fact that Levenes may earlier have treated another employee of another race leniently whether reasonably or otherwise was not to the point.

38. In this case the Tribunal made, to our mind, clear findings that the decision to dismiss including the decision not to allow the appeal was not tainted by race or sex. It made those findings on the basis of the evidence of Ms Morrison and Mr Sharples which it accepted: see paragraphs 57 and 58 of its reasons which we have already quoted. Mr Afeeva argued that those findings should be seen only in the context of the unfair dismissal claim. We do not agree. They were highly relevant to the claim of race discrimination. He

also argued that they dealt only with the question of conscious discrimination. Again we do not agree. We think the Tribunal chose the word tainted as wide enough to encompass conscious and unconscious discrimination. We think if the Tribunal intended to criticise Ms Morrison or Mr Sharples on any basis it would have made that clear having regard to paragraphs 57 and 58 of its reasons.

39. The Tribunal however, having made clear and cogent findings about the evidence of Ms Morrison and Mr Sharples, did not apply those findings when it came to consider the question of race discrimination. It concentrated on whether there was a good explanation for the treatment of Ms Onwukwe at some earlier time when the true question was whether the decision to dismiss Ms Dalley was taken on racial grounds.

40. In our judgment, the findings the Tribunal made concerning Ms Morrison and Mr Sharples are determinative of this case. The decision to dismiss was not taken on racial grounds. Likewise, the findings of the Tribunal on the question of unfair dismissal are determinative of the case. The Tribunal found that the decision to dismiss was substantively reasonable, procedureably reasonable and within the band of decisions reasonably open to the employer. There is, we think, therefore, nothing to remit.

41. The appeal will be allowed, the findings of unfair dismissal and race discrimination will be set aside and Ms Dalley's claims of unfair dismissal and race discrimination will be dismissed.

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