Appeal No. UKEAT/0866/04/MAA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 13 April 2005

Before

THE HONOURABLE MR JUSTICE BURTON (PRESIDENT)

MR D J JENKINS OBE

MR J C SHRIGLEY

MS R PARMAR — APPELLANT

McDONALD RESTAURANTS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROY KUKU (Representative) Hounslow Law Centre Ltd 51 Lampton Road Hounslow Middlesex TW3 1LY
For the Respondent	MR D PANESAR (of Counsel) Instructed by: Messrs Eversheds LLP Solicitors Senator House 85 Queen Victoria Street London EC4V 4JL

SUMMARY

Practice and Procedure

Alleged perversity by Employment Tribunal in the findings of fact rejecting claims of disability and sex discrimination. No basis for such appeal at all; nor for the suggestion that by cross-referring to the findings of fact on disability discrimination the Employment Tribunal in any way failed to consider the similar allegations of sex discrimination.

THE HONOURABLE MR JUSTICE BURTON (PRESIDENT)

1. This has been the full hearing of an appeal by the Claimant, Ms Parmar, against the dismissal by the unanimous Decision of the Employment Tribunal at London Central, after a hearing between 2 and 10 August 2004, by a judgment sent to the parties on 20 September 2004, of the Claimant's claims for disability and sex discrimination. The Claimant was, and still is, employed by the Respondent, McDonald Restaurant Ltd.

2. It is not disputed by the Respondent that the Claimant suffers from a disability, namely asthma. She has been employed since 1993, and from 2001 as the First Assistant Manager at Oxford Street. She has not worked for the Respondent, due to her asthmatic condition, since February 2002.

3. The issues relating to her claims for disability and sex discrimination were addressed at a directions hearing before the same Chairman, Mr Carstairs, who eventually heard the full hearing, at a hearing on 15 April 2004, and are contained in a Decision, sent to the parties on 27 April 2004. It happens that those issues were contained in paragraphs 9 and 10 of that Decision, and so they have consequently been dignified, thereafter, by cross-reference with numbering which begins with the digits 9 and 10. Paragraph 8 of the Decision recites as follows:

> **"Agreement was reached in respect of the issues, that is to say the matters to be considered by the Tribunal in deciding whether or not those matters were made out and, if so, whether they amounted to the discrimination alleged."**

4. At that stage, not only had there been served an Originating Application, which was a lengthy document, but there had been served two sets of Further and Better Particulars on the Claimant's behalf; and the agreed issues were a distillation of the contents of all three of those

documents. The disability discrimination issues are set out under paragraph 9 of that Decision; and in that Decision there is a cross-reference, in relation to all those issues, to where they can be found, either in the Originating Application or, in the case of 9.8, the second Further Particulars. The sex discrimination issues were set out under the rubric of paragraph 10; and once again there are cross-references to where each issue can be found.

5. There was no challenge to that Decision of the Tribunal in relation to the accurate recording, either of what occurred at that hearing, at which the Claimant was represented by a Mr Martins, a legal executive, or, in particular, as to the recording of the agreed issues. When the full hearing of the Tribunal occurred on 2 to 10 August 2004, we understand that the Chairman himself had typed up a further copy of those agreed issues, put into slightly more elegant form, and those remained the agreed issues for the purposes of the hearing, at which, once again, the Claimant was represented by Mr Martins, and on this occasion the Respondent was represented by Mr Panesar, of Counsel, who has also appeared before us. In paragraph 1 of the judgment eventually handed down on 20 September 2004, to which we have referred, the issues are recited.

6. By that time, issue 9.5 was no longer pursued. The recital of issues 9.7 and 9.8 is unnecessary, because there is no appeal in respect of the conclusions of the Tribunal in relation to the findings on those issues. We propose to set out in this judgment, therefore, only those issues as recited in paragraph 1 in relation to which any relevance applies to today's appeal. They read as follows:

> **"9.1 25/2/02 verbal warning.** [This, we interpose, is a cross-reference to the case made in (vii) of the Originating Application, as is clear from the way in which this issue is recited in the Directions Hearing of April, which read as follows:
>
> > "On 25th February 2002, the Applicant was issued with a verbal warning by [Mr Hussain] (an employee of the Respondent) on grounds that she, the Applicant, closed the store early on 29th January 2002."

9.2 Mr Hussain retaining the Applicant on night shifts when she had been put on day shifts.

9.3 Mr Calas varying the Applicant's employment terms to part-time work.

9.4 The Applicant filing a second grievance on 14 June 2002 because the first grievance was unanswered, which the Tribunal understood really to mean a complaint that the first grievance which at the start of the hearing the Tribunal understood to have been made on 27 February 2002 had not been responded to.

…

9.6.1 Scheduling the Applicant to do eight nights in the work schedule dated 5 March 2002 when another female manager was only selected for five nights.

9.6.2 Not giving the Applicant a weekend off during the month of March 2002.

9.6.3 In February 2002 scheduling the Applicant to work two nights without a manager."

And then by reference to sex discrimination:

"10.1 25/2/02 Verbal Warning.

10.2 Mr Hussain retaining the Applicant on night shifts when she had been put on day shifts.

10.3 Mr Calas varying the Applicant's employment terms to part-time work.

10.4 The Applicant filing a second grievance on 14 June 2002 because the first grievance was unanswered, which the Tribunal understood really to mean a complaint that the first grievance which at the start of the hearing the Tribunal understood to have been made on 27 February 2002 had not been responded to."

7. This appeal has related to the challenge by the Claimant, who today has been ably represented by her representative, Mr Roy Kuku, to the findings which the Tribunal made in relation to those issues which we have set out above. Although there was some mention by Mr Kuku, in the course of his submissions, of alleged inconsistency in the Tribunal's findings, he did not in the end pursue such a case, which in any event would only be an exemplar of a general case of perversity, if it arose; and Mr Kuku has accepted that in essence his complaint on the Claimant's behalf, in relation to the Tribunal's findings on each of those grounds, is one of perversity – save that, with regard to the sex discrimination findings, he complains that inadequate reasons were given, and that because the Tribunal cross-referred to the findings it had already made when dealing with the identical issues, under the heading of disability

discrimination, that in some way it did not adequately consider the issue of sex discrimination by reference to them.

8. As Mr Kuku accepts, a case of perversity is a very difficult one to level and make out. The Employment Tribunal, as has been so often emphasised, is the master of the facts, has an enormous amount of industrial experience and is treated, colloquially, as the industrial jury, and has the benefit of oral evidence, and, indeed on this occasion, expressly said so, making very clear findings of credibility as to the witnesses for the Respondent which it heard. It recites in paragraph 3 that it heard from the Claimant and her brother and one other witness, and then it recites the fact that it heard from Mr Hussain, Mr Calas, a Mr Read and a Mr Radcliffe. The findings of fact it made include certain findings, not entirely favourable towards the witnesses of the Claimant, although less so in relation to the Claimant herself; and so far as the Respondent's witnesses are concerned, it makes very clear favourable findings in relation to their credibility.

9. But of course the Tribunal's Decision on fact is not sacrosanct. It can be attacked if the challenge surmounts the very high hurdle of perversity, as has been reiterated on many occasions, and the level of that hurdle does not lower (if anything it is raised) as the years go by; and such authorities as **Melon v Hector Powe Ltd** [1981] ICR 43, **Piggott Brothers & Co Ltd v Jackson** [1991] IRLR 309, **Stewart v Cleveland Guest (Engineering) Ltd** [1994] IRLR 440 and most recently **Yeboah v Crofton** [2002] IRLR 634 have been referred to in their skeleton arguments and list of authorities by the advocates before us. In those circumstances there is recognised by Mr Kuku to be an extreme difficulty in his being able to establish his case. We have had the benefit of written submissions of some length, both from him and Mr Panesar, and he has taken the opportunity, courteously and fully, to expand, in relation to some parts of his case, what he has said in those submissions. It has therefore meant our

looking again at the conclusions by the Tribunal in respect of each of the issues, and doing that which we are discouraged from doing, namely looking at the precise facts which were before the Tribunal: but looking of course simply from the point of view of seeing whether there was evidence before the Tribunal on the basis of which it could reach the conclusion it did. As will be seen, we are entirely satisfied that, in relation to each issue, there was evidence before the Tribunal upon which it could reach the conclusion it did.

10. We turn then to deal with each of the issues now sought to be reconsidered. Before we do so, we should point out that in the Notice of Appeal, not settled by Mr Kuku but settled by advisers on the Claimant's behalf, there was a case alleged under each of the issues which we have recited above, as to alleged perversity; and the Notice of Appeal added, under the subparagraphs (h), (i), (j)and (k), four further matters by way of purported challenge to the Tribunal's Decision. So far as (k) is concerned, that was simply a general challenge to the finding of sex discrimination which adds nothing to the general ground which the Claimant was seeking to make, and which we have described above by reference to her criticism of the Tribunal's findings on sex discrimination, and which is perfectly properly included in a Notice of Appeal. So far as subparagraph (j) is concerned, that was a particular, as Mr Panesar accepted, of the complaint of the findings under issue 9.6.1.

11. But there was also an elaboration of alleged failure by the Tribunal to address matters, set out in (h) and (i) in the Notice of Appeal, which, had the Tribunal addressed them, would have been separate issues from any of the issues specified in the list of agreed issues, to which we have referred. There was no allegation in the Notice of Appeal that the elaboration of the agreed issues, either in and after the April 2004 hearing, or at, during and after the August hearing, was incorrect. In our judgment it is quite clear that there can be no criticism of a Tribunal for failing to address issues if they were not part of the agreed issues put before them

by the parties, not simply at one hearing, but at two hearings, and ratified by the conduct of the hearing itself. There would need to have been a specific allegation in the Notice of Appeal that the Tribunal erred in recording what the agreed issues were. There was no such allegation. Had there been such, then the opportunity would unquestionably have been taken for recourse to the Tribunal, either by way of **Burns v Consignia plc** [2004] IRLR 425 or otherwise, to explore whether in some way there had been an inaccurate recording of the agreed issues; and in any event, it would appear that that criticism would have had to have been made not simply of the August hearing, but of the April hearing, for which of course the time to challenge was long past, even before the August hearing started. We did not permit the application by Mr Kuku to amend the Notice of Appeal to pursue such a ground, and in those circumstances the inclusion in the Notice of Appeal of criticism of the Employment Tribunal under (h) and (i) fell away.

12. We turn then to the issues which were before the Tribunal, and to the criticism of the Tribunal in relation to them. So far as the warning is concerned, relating to the closure of the branch, the Tribunal makes critical comment in this regard, even if not specifically in any other, in relation to the Claimant, in paragraph 7 of the Tribunal's judgment. This was with regard to the three apparent different explanations given by the Claimant to the Respondent as to why the branch was closed early on the relevant night, and records that:

> **"The Tribunal did not find it credible that when Mr Hussain was complaining to the Applicant about having closed the store early she did not say that she had done so because of asthma, if that was the case, only because he had not asked, nor that she did not give any explanation at all."**

The findings by the Tribunal are set out in paragraphs 42 to 44 of the Tribunal's Decision, and are primarily based upon the fact that first of all there appears to have been no justification for closing the restaurant early, at a time when there were customers still waiting to be served, and at a time when food would be wasted, but primarily with regard to the fact that apparently three

inconsistent explanations were given by the Claimant, only the last of which was by reference to her having needed to have closed the branch because of her asthmatic condition, and even then there was no suggestion of her having given that explanation at the time to her fellow employees.

13. In the light of those findings of fact, the Tribunal records, under paragraph 88 (in what we shall call its conclusory paragraph in which it deals, in turn, with each of the issues, enumerated either under the digit 9 or 10) with regard to the warning issue, that:

> **"Mr Hussain was entitled to give the warning which he gave to the Applicant."**

It explained why, and it concludes:

> **"The Tribunal was therefore of the view that the warning would have been given to a person in similar circumstances who was not suffering from the Applicant's disability."**

14. We shall take the opportunity at this stage to deal with the complaint by Mr Kuku that there was inadequate dealing with the case on sex discrimination, because, as we have indicated, in relation to this issue, as with regard to the other three listed under the digit 10, it is identical, both by way of sex and disability discrimination. It is clearly quite unnecessary for a Tribunal to repeat findings of fact if they relate to more than one issue, and so cross-reference is quite adequate. The Tribunal said in the conclusory paragraph dealing with issue 10.1:

> **"The Tribunal repeats what it said in respect of 9.1. There was no evidence that the warning was given for a reason that had anything to do with the Applicant's sex…"**

and it makes an additional point which we need not repeat. It is quite plain that, in the light of its findings that the complaint was justified because of the conduct of the Claimant, the

Tribunal was also entitled to be satisfied that it had nothing whatever to do either with the admitted disability of the Claimant, or her sex.

15. The challenge by Mr Kuku, leaving aside the suggestion that there was an inadequate dealing with sex discrimination, on grounds of perversity, was made only in writing and not expanded upon orally, and is one which is extremely difficult to support. It is wholly plain that there was more than sufficient evidence before the Tribunal to reach the conclusion it did. The only point which is raised by way of counter is that one of the matters which the Tribunal relied upon was that there was "nothing on the CCTV videos to indicate that the Applicant was in any discomfort at all"; and the point made on the Claimant's behalf before us in writing was that an asthmatic condition does not necessarily show up on the CCTV video, and therefore that that was a conclusion or an inference which the Tribunal was perverse in reaching. Whether or not that is so we need not concern ourselves with. It is apparent that both sides had able argument submitted to the Tribunal, and the video was viewed by the Tribunal. But the significant factor here is that there was plainly other evidence on which the Tribunal did and was entitled to rely, quite apart from the video.

16. We turn to 9.2. So far as that is concerned, this relates to the assertion in the Originating Application, which underlies this complaint, as follows in subparagraph 11(ix):

> **"The Applicant requested that her shifts be changed to days, rather than nights from** [Mr Hussain] **but he deliberately placed her on six night shifts in a row without managerial support."**

There was a letter produced from a Dr Adler, dated 17 March 2002, which was of course considerably after the Claimant had ceased to attend any further for employment at the Respondent's premises, in the course of investigations which had been initiated as a result of a meeting between the Claimant and a Mr Calas in February, in which Dr Adler explains the

asthmatic condition of the Claimant; and Dr Adler, towards the end of that letter, has a somewhat unusual sentence, as follows:

> **"I understand from my patient that I wrote to you last year concerning this…"**

There was no sign of such a letter. It is apparent that even Dr Adler himself had no record or recollection of it, and a Mr Read was called by the Respondent specifically to deal with the question as to whether he had ever received (it being suggested that he was the recipient of the letter) such a letter; and his evidence was (at paragraph 16) accepted by the Tribunal. In those circumstances it is plain that there was no basis upon which the Respondent had been pre-notified by the Claimant's doctor of the existence of her asthmatic condition or of any need not to work nightshifts.

17. Absent, therefore, any letter from Dr Adler, the findings of fact by the Tribunal were that it was the Claimant who raised her problem in working nightshifts with Mr Calas at a meeting on 14 February and/or at a subsequent discussion on 8 March. The Tribunal found, in its conclusions under paragraph 9.2:

> **"The Tribunal did not accept that the Applicant had ever asked to be put onto day shifts. The Tribunal noted that the Applicant in her own letter of around 15 March 2002 expressly said that it had never been her objective to withdraw her availability from nightshifts. Accordingly, this complaint is not made out on the facts."**

18. Mr Kuku, in the course of his oral submissions, in which he addressed this point, began by submitting that that finding was inconsistent with the finding of the Tribunal that the Claimant had indeed revealed the position to Mr Calas in February and/or March. But he accepted, very speedily in the course of submission in response to a question from the bench, and an intervention by Mr Panesar, that there was no such inconsistency. The case that was made by the Claimant, by reference to her Originating Application and the very wording of the

issue which we have read above, was not that the Respondent never knew of her difficulty with nightshifts, but that knowing of it, while she was still working with them, Mr Hussain had nevertheless insisted upon and required her to work consecutive nightshifts, notwithstanding her request not to do so. It was that which the Tribunal firmly rejected in its finding under paragraph 9.3. Insofar as Mr Kuku has sought to turn the complaint round, and allege that there was an inadequate dealing by the Respondent once they did find out about her requirement or wish, if possible, not to work on nightshifts, it is plain that that was not the way in which the issue was addressed; and in any event, even if it had been so addressed, it is apparent from the findings of fact by the Tribunal in relation to what happened thereafter, subject always to the complaint of delay by the Respondent, that they were at all times receptive to the possibility of her not working nightshifts as before, even though they pointed out problems that might arise. But in any event, as we have indicated, that would not be a matter that could possibly be raised by way of perversity with regard to the finding by the Tribunal with regard to the issue that was actually before it. As a matter of fact, it found that the Claimant never asked Mr Hussain to be put on dayshifts, and consequently that Mr Hussain did not discriminate against her by insisting that she did nightshifts.

19. That issue is raised by way of disability discrimination complaint and sex discrimination complaint, and in dealing with the sex discrimination aspect, the Tribunal simply repeats what it had said with regard to its findings and conclusions so far as disability discrimination is concerned. Mr Kuku attacks that, both on the general basis, to which we have referred, and also on the basis that the Tribunal made no mention of the allegation which formed the subject matter of the attempted separate issue, which we have rejected, in subparagraph (h), to which we have referred, but which he said would be relevant background and ought to have been addressed by the Tribunal in its consideration of sex discrimination; namely a suggestion that Mr Hussain on one occasion or more harassed the Claimant. If that were so, and it is apparent to

us that there was evidence given by Mr Hussain, in that regard, to the contrary, it was not an issue which was part of the agreed issues, as we have previously mentioned, and therefore no specific findings needed to be made in respect of it for that reason. But, insofar as it is sought to be said that it might have been relevant in relation to the conclusion on 9.2, and consequently 10.2, as Mr Kuku himself very frankly accepted in the course of argument, if the finding was that there never was a request not to work nightshifts, and that there never was therefore a refusal by Mr Hussain, as indeed was the case so far as this Tribunal is concerned, then any suggestion that on one occasion or more, in other circumstances, there was some alleged harassment of the Claimant would be entirely immaterial, and clearly would not have needed to have been addressed or even mentioned by the Tribunal in this regard.

20. We then turn to the issue 9.3, which related to an alleged variation of her employment terms to part-time work. Suffice it to say (and we have been shown not only a letter from Mr Calas, but also his witness statement) that the Tribunal concluded in its conclusory paragraph with regard to issue 9.3 that this never happened; and it is quite plain that there was evidence, both by reference to the letter of 27 February 2002, after effectively the Claimant had ceased to work with the Respondent, and the terms of it, but also by reference to the evidence given by Mr Calas and by Mr Radcliffe, upon which it could reach the conclusion that this did not occur, such that it could not possibly be said that the Tribunal's decision was perverse. It continued:

> **"The Part Time Manager's Scheme was raised as a possible way forward, but it was never imposed on the Applicant and the matter still remained to be discussed when the Applicant was fit enough to contemplate returning to work."**

This is not an issue that was developed in oral submissions by Mr Kuku, who left the matter to his skeleton argument, and we do not begin to see any basis upon which it could be suggested that this conclusion by the Tribunal was perverse. The same goes, consequently, for the concomitant finding in relation to sex discrimination, where, with regard to 10.3, the Tribunal

simply repeated what it had said at 9.3. If it never happened, then it never happened non-discriminatorily on either disability or sex grounds.

21. We turn to 9.4, which was a complaint, which we have described, of delay in dealing with the Claimant's grievances. The findings of fact in this regard by the Tribunal are set out in detail at paragraphs 46 to 68 of its Decision; and it concluded that there was delay in dealing with the grievance, at any rate that there was a passage of time which required to be justified. It concluded, in the conclusory paragraph under 9.4, having referred back to those findings of fact and analysed them, that:

> **"…the Applicant was treated differently from a hypothetical comparator who was not suffering from a disability and who would therefore have been at work. It was therefore for the Respondent to justify the difference in treatment."**

It thus found that there was, *prima facie*, disability discrimination, which required to be justified. So far as sex discrimination is concerned, as to issue 10.4, it concluded that the reason for the delays for which the Respondent was responsible was that the Respondent wanted to discuss the matters raised by the Applicant face to face, and then wanted to discuss how to proceed. There was no evidence to suggest that this had anything to do with the Applicant's sex; there was no background evidence at all which might have implicated Mr Calas and Mr Radcliffe in any form of discrimination; and so there was not even a *prima facie* case of sex discrimination, whereas there was a finding, to which we have referred, which required justification so far as disability discrimination is concerned. The very careful treatment of the two different discriminatory claims emphasises that the reverse of what Mr Kuku has suggested, namely that in some way the Tribunal addressed the two matters as the same, cannot be supported.

22. So far as the justification is concerned, that has been referred to briefly by our simply quoting the passage in which the Tribunal reaches its conclusion with regard to sex discrimination. But it is more fully addressed in that part of the conclusory paragraph dealing with 9.4, in relation to justifying the discrimination, when it says:

> **"The Tribunal has to consider whether the Respondent can show that the reason for the delay was justified, that is to say in accordance with section 5(3) both material to the circumstances of the case and substantial. The Tribunal has concluded that the inability to meet with the Applicant was material in deciding how to go forward since there** [was] **clearly a number of options. The Tribunal has also concluded that as the discussion of those options would be necessary in order to decide the work to be done by the Applicant, it was also substantial."**

and it referred back to its findings of fact, to which we have referred, which concluded by the indication that it found that Mr Radcliffe was keen to have the Claimant back at work, and to look at a workable solution to fit around her asthmatic conditions, as recited in the final letter of 16 October 2002.

23. Mr Kuku, in the course of submissions, suggested that even the letter of 16 October was not a sufficient final response. But that was not the way in which the case was put at the Tribunal, nor did it form the basis of the agreed issue, as Mr Kuku frankly then accepted in submissions. The complaint was not a failure to deal with the grievance at all, but a delay in the grievance; and in his written submissions, and in the Notice of Appeal, that is the way that the case was addressed. The perversity in the Notice of Appeal was suggested to be the finding by the Tribunal that it was justified to seek to resolve the problems of the Claimant informally and face to face, and by way of exploration of options, because of the existence, in the grievance procedure, of a separate mechanism for problems that cannot be resolved through informal discussions with an employee's manager; and effectively the suggestion was, and no doubt was made at the Tribunal, that that is a course that could, or indeed should, have been followed as an alternative by the Respondent. But that is not an argument which can be said to be anything more than an argument. This Tribunal, having carefully assessed all the facts, reached the conclusion

that the Respondent was acting fairly and reasonably in seeking a face to face meeting, and genuinely in attempting to resolve the problems; and that the issue, in any event, was not a question of unfairness or unreasonableness, but one of, for this purpose, disability discrimination, and it was found that the disability discrimination was justified. We can see no basis upon which that Decision can be found to have been perverse.

24. We turn to 9.6.1, the nature of which issue we have recited above. The Tribunal commenced its consideration in the conclusory paragraph by saying:

> **"No evidence was led by the Applicant on the female manager referred to and this claim has therefore not been made out in the terms of the issues as agreed at the start of the hearing."**

Mr Kuku agreed that that was the case, and that there was indeed no evidence led in relation to any alleged comparator female manager. The Tribunal, however, did not leave it at that, and made very careful findings of fact, not only by reference to the work schedule of the Claimant and her fellow employees, but in relation to other evidence that was given explanatorily of that schedule, by witnesses for the Respondent, whose credibility the Tribunal accepted. The Tribunal said as follows:

> **"…the Tribunal has considered the schedule prepared on behalf of the Applicant for the hearing… in which she refers to Mr Bates, Anthony and Mr Choudury for the month of March. The Tribunal noted that Mr Bates was only scheduled for four nights but he had to cover for a week during Mr Hussain's absence. Anthony was only scheduled for six nights but was also required to conduct a health and safety class. Mr Choudury was scheduled for eight nights. The Tribunal also considered the other months, but having regard to the matters which affected her colleagues, such as covering for Mr Hussain and having responsibility for training, and the fact that the Applicant had more 'off requests' which would adversely affect the number of night duties for which she was scheduled and more weekends off than any other managers, overall. The Tribunal has concluded that there was no detriment to the Applicant in the number of nightshifts scheduled and that if there was any detriment at any time it was not for a reason related to her disability."**

25. Mr Kuku referred us to that same schedule and to the assessment of that schedule, again very carefully carried out by the Tribunal earlier in its judgment, between paragraphs 29 and 40. But, as he very quickly accepted, it is plain that the Tribunal did not limit itself to that

schedule, but took into account the evidence it heard, and Mr Kuku was not in a position to challenge the correctness of the summary by the Tribunal of its findings of fact in relation to the other employees, in paragraph 68. We put to Mr Kuku that effectively what the Tribunal found was that there was a question of 'swings and roundabouts', and, very frankly, he accepted that proposition. There is nothing in this head either.

26. We turn then to issue 9.6.2, which was the complaint, to which we have referred by summarising the issue, that the Respondent did not give the Claimant a weekend off during the month of March 2002. In the event, of course, the Claimant was not working during the month of March 2002, and so the evidence related not to what did happen, but to what was scheduled to happen. There was, before the Tribunal, a document which contained the schedules for the various employees; and one of those schedules, which began in computerised form, had handwriting written all over it. It is now page 145 in our bundle. It is apparent that handwritten alterations were made to the schedules of many of the employees – Mr Hussain, Andy and Anthony, among others. One of the handwritten alterations was to the weekend of 2 and 3 March, so far as concerned this Claimant. She was always scheduled to be off on Sunday 3 March, but her original requirement to attend on Saturday 2 March was marked in handwriting, overwriting the original print with the word "OFF". It would appear that there was some exploration before the Tribunal as to whether that was a handwritten alteration that was made at the time, ie a genuine alteration, or made subsequently in order to mislead the Tribunal and answer the issue raised. The Tribunal found as a fact that the Claimant was scheduled for a weekend off, accepting the genuineness of the handwritten alteration. Mr Kuku again frankly accepted, in the course of submission, that that was plainly a conclusion to which the Tribunal was entitled to come, having heard the evidence and concluded that the Respondent's witnesses were credible and not, therefore, the kind of people who would descend to that kind of dishonesty.

27. The final issue that was raised before us was in relation to 9.6.3, and this too was a matter upon which Mr Kuku did not elaborate orally, but relied simply on his written submissions. The complaint was that the Tribunal, in reaching its conclusions at 9.6.3, only addressed the suggestion that on Mondays and Tuesdays no manager was assigned to support the person in charge of the nightshift, when in fact the complaint was that there was no manager available on other days as well.

28. It is plain, and the Respondent has made reference, not only to the findings of fact by the Tribunal, but also to the witness statement of Mr Hussain, at paragraph 10, upon which those findings were based, that the Tribunal in fact only addressed Monday and Tuesday because there was undoubted evidence that on all other days there was another manager, and that therefore the issue, they were satisfied, only arose in relation to giving an explanation so far as Monday and Tuesday is concerned; and the explanation that was given was that there was no manager assigned to support the person in charge of the nightshift on a Monday and Tuesday because Mondays and Tuesdays were not very busy. The findings of fact by the Tribunal were that the February shift had been prepared in January, before the Claimant raised concerns about working the nightshift, and then when she was off sick there was no point in changing the schedule. While the Claimant was off sick there was no requirement for the Respondent to make any adjustment. In any event, before making any adjustments, the Respondent was entitled to investigate whether the Claimant was disabled, by obtaining a report from the Claimant's doctor. The Tribunal disagreed with suggestions made by Mr Martins during cross-examination of the Respondent's witnesses that the Respondent had to take the Claimant's word for it that she was, in effect, disabled.

29. It is plain that there is no specific attack on the finding by the Tribunal that the Respondent discriminated against the Claimant by reference to Mondays and Tuesdays. The only complaint is that there was no addressing of the complaint that there was no manager available on other days as well. That point is quite simply answered by the fact that the Tribunal made a finding of fact, on the basis of the evidence, that there was a manager available on the other days; and insofar as there was evidence upon which it could reach that conclusion, plainly no suggestion that can be made of perversity.

30. In those circumstances, this appeal has no substance and must be dismissed.