Neutral Citation Number: [2023] EAT 10

Case No: EA-2020-000298-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 February 2023

Before :

HIS HONOUR JUDGE AUERBACH
MR NICK AZIZ
MR ANDREW HAMMOND

- -

Between :

MRS HENNA JALEEL **Appellant**
- and -
SOUTHEND UNIVERSITY HOSPITAL NHS FOUNDATION TRUST **Respondent**

- -
- -

Oluwaseyi Ojo (of Taylor Wood Solicitors) for the **Appellant**
Alex Shellum (instructed by Capsticks LLP) for the **Respondent**

Hearing date: 9 November 2022

- -

JUDGMENT

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SUMMARY

Race Discrimination; Harassment; Practice and Procedure – Burden of Proof

The claimant in the employment tribunal was employed by the respondent as a consultant. From 2015 she was appointed to an additional role as a Director of Medical Education (DME). Her contract in that role was for a three-year fixed term. Her predecessor, who was not of her race, had held the role for some nine years without it being readvertised.

Following a number of episodes of conflict at work the claimant went off sick, indicating work-related stress. During her absence a colleague was appointed as Associate DME to cover her responsibilities. Following her return to work she declined at that point to resume the duties of the DME role. She raised an internal grievance, including against her line manager as DME. He decided to readvertise the DME post at the end of the three-year term. The claimant was invited to apply, which she did. When she attended for interview she discovered that her line manager was on the panel and asked that he be recused. He refused to step down. In this he was supported by an HR manager.

Among other complaints considered by the tribunal were complaints that the line manager's decision to readvertise the DME post was an act of direct race discrimination, and that the conduct of the line manager, and HR manager, in the exchanges about the recusal application made at the interview, amounted to unlawful harassment related to race. In relation to both of those complaints the tribunal decided that the burden of proof did not shift to the respondent. The basis of the appeal was that the tribunal had erred in law in deciding that the burden did not shift.

Held: The tribunal had correctly directed itself as to the law relating to the complaints and the burden of proof, and applied it to the facts found. The EAT could therefore only interfere in its conclusions as to whether the burden shifted if they were in the legal sense perverse, which is a very high threshold. The EAT could not say that the tribunal's decisions on the burden of proof were perverse and the appeal was therefore dismissed.

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HIS HONOUR JUDGE AUERBACH:

Introduction

1. We will refer to the parties as they were in the employment tribunal, as claimant and respondent. The claimant was employed by the respondent from 2002. She was a Consultant in Sexual Health Medicine. Following her resignation in 2018 she brought an employment tribunal claim containing complaints relating to various events in the last two or three years of her employment, of unfair constructive dismissal, and direct discrimination, harassment and victimisation under the **Equality Act 2010** by reference to race, the claimant identifying as Asian and Pakistani.

2. The matter was heard by EJ Massarella, Mr G Twomey, and Mr Wood at East London Hearing Centre. The tribunal upheld the complaint of unfair dismissal, but dismissed all the other complaints.

3. This appeal relates to the dismissal of complaints relating to the claimant's additional role from 2015 of Director of Medical Education. In January 2018 that role was re-advertised. In April the claimant attended an interview for it. The complaints in question were that the decision to readvertise the role was an act of direct race discrimination and that the refusal of her request, at the start of the interview, for a member of the panel to be recused, amounted to harassment related to race. The grounds of appeal before us challenge the tribunal's dismissal of those complaints.

4. The claimant also sought a reconsideration by the tribunal in respect of those two complaints. That led to a further hearing and decision, in which the tribunal confirmed its original decision.

5. At the hearing before us the claimant was represented by a solicitor, Mr Ojo, who had appeared for her in the employment tribunal. Mr Shellum of counsel appeared before us for the respondent, Mr Gil of counsel having appeared for it before the tribunal.

The Facts

6. We will start by setting out the relevant facts, drawing on the decision of the tribunal.

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7. The claimant's employment began in 2002. The tribunal said that she was a highly valued member of the department, with a strong track record of excellence.

8. In January 2015 Professor John Kinnear announced that he was standing down from the role of Director of Medical Education (DME). It had never been advertised during his nine-year tenure although there were three-year break-points in his contract which were not exercised. He had never had a separate review as DME, but a review of the post was carried out as part of his general annual appraisal. The DME role, and remuneration, were additional to the substantive role and salary of Consultant. The claimant was interviewed for, and appointed to, the DME role in March 2015. The interview panel included Mr Neil Rothnie, a breast surgeon, Head of Breast Cancer Services, and Medical Director since 2012, and he became her line manager in respect of that role.

9. At [18] – [19] the tribunal said this:

> "**18. The Claimant was paid an additional £8733 per annum in respect of the DME role. The role was a fixed-term appointment for three years, subject to extension following review; it was described as a temporary role with an end date of 31 March 2018; it came with 1 PA responsibility payment ('PA' stands for Programmed Activity, which equates to 4 hours per week).**
>
> **19. Although the Claimant initially had an Associate DME working with her, Dr Simpson, she resigned from the Trust towards the end of 2015. At the time Mr Rothnie did not support the Claimant's suggestion that the post of Associate should be advertised. The Claimant felt that this was a deliberate decision taken by him to disadvantage her. Mr Rothnie explained that he did not appoint an Associate because at the time there was no separate funding for the post, and we accept that evidence. However, he planned to put an Associate in place in due course. He later did so, in circumstances which we set out below.**"

10. Shortly after assuming the DME role, in late May 2015, the claimant was diagnosed with breast cancer and underwent surgery, performed by Mr Rothnie. She had some sickness absence post-operatively and again during treatment, returning to full-time working in September 2015.

11. The tribunal made detailed findings relating to complaints made by certain trainees raising allegations of bullying, harassment and undermining by consultants, and about a complaint made in

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2016 by a consultant referred to as Dr K, and the claimant's involvement in relation to these. There were a number of **Equality Act** complaints before the tribunal in relation to her alleged treatment relating to these matters, including by Mr Rothnie, and the Associate Director, Traci Maton. The claimant had raised an internal grievance about certain conduct of Ms Maton which was partially upheld. The grievance officer found that Ms Maton had not acted with malice, but that there was a lack of understanding of aspects of sexual health work. The tribunal came to a similar view, and rejected the claimant's assertion that Ms Maton's actions were wilful and targeted her.

12. At [61] to [63] the tribunal said this.

> **"61. The Claimant stated that, at a regular one-to-one meeting in November 2016, Ms Maton suggested that, if the Claimant was feeling under pressure, she might wish to step down from the position of DME and that there may be someone ready to take up the post in her place. Ms Maton accepted in cross-examination that she may have suggested this. We find that she did.**
>
> **62. On 6 February 2017, the Claimant had a meeting with Professor Kinnear. She told him about the suggestion that she might wish to stand out from the DME role and the pressure she felt she was under. Professor Kinnear replied: 'well Lucy [Coward] should be ready by now if you want to give up'.**
>
> **63. The Claimant took these conversations as an indicator that there was a wish to replace her in the DME role with Dr Coward. The fact that these observations had been made also fuelled her later mistrust of the process which the Respondent initiated in 2018 to re-advertise the DME role."**

13. In February 2017 Caroline Howard was appointed as interim Clinical Director of Medicine and the claimant thereafter reported to her. The tribunal made findings in relation to communications between the claimant and Dr Howard in relation to a professional leave application made by the claimant, in which Mr Rothnie also became involved.

14. The claimant alleged that in May 2017 Dr Lucy Coward was appointed DME while the claimant was in post, without advertisement or warning that she was being replaced, and despite the post not being vacant. The tribunal's findings about this matter were as follows.

> **"78. On 28 March 2017, the Claimant collapsed while at work. She suffered a head injury and was taken to A&E, where she was admitted and treated for a suspected stroke. She was later diagnosed with work-related stress. On 31 March 2017 the Claimant's GP signed her off until 13 April 2017.**

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79. On 20 April 2017, Mr Rothnie learnt from OH that the Claimant would be away for at least two months. On 2 May 2017 the Claimant was invited to a sickness absence meeting but the next day OH wrote that the Claimant was not fit to attend such a meeting and specified that any communication should only be in writing. There is a psychiatric report from around this time, which summarises the reasons for her work-related stress. There is no reference to race discrimination in that document.

80. The Tribunal accepted Mr Rothnie's evidence that the Respondent needed someone to take responsibility for Medical Education on a day-to-day basis during the Claimant's absence, especially in circumstances when it was unclear when she would be returning. There was a requirement to attend meetings, to prepare for HEE visits and to deal with practical matters such as signing cheques etc. This led to the appointment of Dr Lucy Coward as Associate DME.

81. However, we found the timing of that appointment somewhat surprising: it was made on 1 April 2017, only three days after the Claimant started her sick leave and the day after the GP fit note on 31 March 2017, which signed her off for a relatively short period. Mr Rothnie's evidence was that the Respondent had been seeking to identify funding for some time and that this became all the more urgent in her absence.

82. The Claimant's pleaded allegation is that Dr Coward had been appointed as Director of Medical Education in her absence. That was incorrect: Dr Coward had been appointed Associate Director of Medical Education. The Claimant accepted that this was not her post; it was a different post. Dr Coward was subsequently made Interim DME when it became clear that the Claimant was going to be absent for some time. The Claimant remained in post and continued to be paid in respect of her DME duties throughout her period of sickness absence and beyond. She was not replaced; arrangements were simply made to cover the DME role. For those reason, this allegation must fail.

83. On 23 May 2017, the Respondent received further advice from OH confirming that contact with the Claimant should only be in writing. Further advice on 14 June 2017 was that 'clinically she is not yet well enough to engage in discussions in relation to work'. OH proposed to review her in two months' time at which point they anticipated that she would be able to engage with the Trust. On 14 July 2017 the advice was that 'clinically it would be detrimental and delay her recovery if contact was made at this stage'. In the circumstances, we find that the Respondent cannot be criticised for not keeping the Claimant updated about arrangements made to cover her DME duties in her absence."

15. In August 2017 the claimant wrote to Mr Rothnie indicating that she had now been diagnosed with work-related stress and complaining in general terms of lack of support in her substantive and DME roles. Her BMA representative became involved and a detailed grievance followed. The complaints were against Ms Maton and Dr Howard. The grievance did not mention discrimination or race. Mr Rothnie was designated as case manager. In September 2017 the claimant, in line with OH advice, put forward her proposals for a phased return to work. As Ms Howard was a subject of

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her grievance, James Currell was assigned to line manage her. He agreed her proposals.

16. At [90] – [91] the tribunal said this.

> **"90. The Claimant returned to work on 2 October 2017. She was offered the opportunity to resume the DME role but told Mr Currell that she would not be performing any DME duties until her grievance was resolved.**
>
> **91. She had a meeting with Mr Rothnie on 16 October 2017, at which there was another discussion about whether the Claimant would resume her DME role. The Claimant gave no undertaking to do so, pending advice from the BMA. They discussed Dr Coward's role and the Claimant asked Mr Rothnie whether Dr Coward would now step down. He replied that she would not, as she had been appointed to the Associate role, which was different from the Claimant's. This reinforced the Claimant's suspicion that it was Mr Rothnie's long-term aim to replace her in the DME role. It is plain that she felt vulnerable in that role."**

17. In November 2017 the claimant raised concerns relating to Ms Maton and Dr Howard with the respondent's Chief Executive, stating that these had been brought to the attention of Mr Rothnie, but nothing had been done. Also in November her BMA representative made a number of allegations against Mr Rothnie on her behalf, a number of them complaining of lack of support in various ways for her in her role as DME. The tribunal observed that there was no allegation of race discrimination. Following this, Mr Rothnie was replaced by James Fisher as case manager of her (earlier) grievance. The tribunal observed that this showed a due regard to the potential for a conflict of interest.

18. The tribunal then came to the first of the two matters to which this appeal relates, being the decision to readvertise the DME post in 2018.

> **"96. On 23 January 2018, Mr Rothnie wrote to the Claimant informing her that the DME post was to be advertised as her tenure would end on 31 March 2018. He wrote: 'I am writing to inform you that the Trust will be advertising the post shortly to ensure the post is filled from 1 April 2018. I would usually arrange to meet with you to review your performance for the year however I understand that you have not returned to the Director of Medical Education role since her return to work and feel this wouldn't be appropriate with your outstanding grievance. I would therefore like to take this opportunity to thank you for the work you have done since you were appointed to the post of Director of Medical Education in April 2015 and would welcome an application from you should you wish to reapply for the post.'**
>
> **97. The Tribunal notes Mr Rothnie's observation that it would not be appropriate for him to review the Claimant's performance in the DME role, given that she had an outstanding grievance which included allegations about his management of the DME role. The Tribunal understands why he might have considered it inappropriate for**

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him to conduct that review; it was less clear why it would not have been possible for another senior manager to conduct the review on the Respondent's behalf.

98. The post was advertised on 31 January 2018. The Claimant was extremely unhappy with the decision to do so. She considered that it was further evidence of a plan by Mr Rothnie to replace her with Dr Coward. She was particularly struck by the fact that Dr Coward had been appointed as Associate while she was on sick leave and in circumstances where Mr Rothnie had previously insisted that there was no funding for an Associate to support her.

99. Nonetheless, albeit reluctantly, she applied for the role; she had been expressly invited to do so by Mr Rothnie himself. The closing date for applications for the DME post was 19 February 2018. The Claimant was invited to an interview on 16 April 2018."

19. In February 2018 the claimant produced a statement in support of her grievance. This included references to being treated differently and to the **Equality Act**, although not to race. The tribunal accepted Mr Rothnie's evidence that he had not seen this statement before the claimant attended for the DME-post interview on 16 April and he was not aware that she had made an allegation of differential treatment. Nothing in the documents suggested it had been sent to him by that date.

20. We need to set out in full the tribunal's findings concerning the second of the two matters to which this appeal relates, being the response of Mr Rothnie and Ms Bridge of HR to her request that Mr Rothnie be recused from the interview panel.

"103. When the Claimant arrived for her interview for the DME role, and shortly before the interview was about to begin, she was informed that Mr Rothnie was on the panel.

104. Mr Rothnie's evidence in his statement was that there were two applicants for the role, the Claimant and Dr Coward, both of whom were shortlisted and invited to interview. He stated that no decision had been taken as to who would be appointed; that would be a panel decision.

105. Mr Rothnie accepted that at the point when the Claimant was invited for an interview he was aware that the Claimant had an outstanding grievance against him. He accepted that he had probably seen the email from the Claimant's BMA representative of 24 November 2017, which set out the Claimant's allegations against him, or at least had had its substance communicated to him. One of those allegations, of course, related to the appointment of Dr Coward (now the Claimant's competitor for the substantive role of DME) as Associate DME the previous year.

106. His oral evidence was that the organisation of the interviews for the DME post was conducted by the Postgraduate Medical Education Department and that he was not party to it. He said that he had assumed the candidates would be aware who was going to be on the interview panel; he thought there was nothing inappropriate in his

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being on the panel.

107. The Tribunal considers that it ought to have been obvious to Mr Rothnie that it was profoundly inappropriate for him to sit on a selection panel in circumstances where one of the candidates had raised a grievance against him personally, which had yet to be resolved. It was all the more inappropriate in circumstances where the majority of the complaints in that grievance related to the very role being recruited for. The inappropriateness was compounded by the fact that one of those allegations expressly related to the only other candidate in the selection process, Dr Coward. There was an obvious conflict of interest.

108. We reject the Respondent's suggestion that the Claimant ought to have known that Mr Rothnie would be on the panel. The only document referred to which supported this was the Job Description, which stated that the panel would include 'Medical Director (or representative)'. On any ordinary reading that left open the possibility that Mr Rothnie could be replaced by someone else. There is no reference in the correspondence inviting the Claimant to the interview to Mr Rothnie's being on the panel.

109. The Claimant made a contemporaneous note of the events of 16 April 2018. We find that her note is accurate and is consistent with her account elsewhere of the events of that day. When she arrived, she was met by Ms Parton, a manager in Medical Education. The Claimant asked her who was on the panel; Ms Parton said that the panel was composed of Mr Bill Irish (Postgraduate Dean), Ms Sue Bridge from HR and Mr Rothnie. The Claimant was shocked by this information.

110. She was shown into the interview room and was told that Mr Rothnie would be chairing the panel. He began to make his introductions, at which point the Claimant interrupted to say that in her view there was a clear conflict of interest because she had raised a grievance against him with regard to the very role for which she was being interviewed. Ms Bridge asked her how long she had known about the composition of the panel. The Claimant explained that she had only just discovered it.

111. The Claimant's note records the following exchange [original format retained]:

> **'Then I addressed to Neil and told him that I am surprised he is sitting in the panel. I am sorry. In a deep and low-pitched voice, leaning forward, Neil asked me, "OK, so you do not want to proceed?" I replied: No, because the panel is biased. I explained again that there is a conflict of interest as I have just mentioned. Neal asked again: "I will ask you again, do you want to proceed?" I said: No. Neal asked me again: "OK so you do not want to proceed"? I found this repeated question very intimidating and overwhelming. However, I replied again, "No, I do not want to proceed unless the panel is changed". Neil replied, "OK we can't change the panel at a short notice".**

112. Mr Rothnie was taken to this note by the Tribunal and asked for his comment. He denied that he had been intimidating; he stated that the phrases in quotation marks did not sound like him; he observed that the Claimant's account as to what he said about the panel not changing 'does not accord with my memory'.

113. The Tribunal finds, on the balance of probabilities, that Mr Rothnie did question the Claimant repeatedly, and in a challenging manner, as to whether she was refusing to continue with the interview if he remained on the panel.

114. The Claimant's note then records that Ms Bridge asked her to step outside, while

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the panel discussed the position. She was kept waiting for around 10 minutes. Ms Bridge then emerged and informed her that the interview would not go ahead on that day, solely because the Claimant had not been forewarned of the presence of Mr Rothnie on the panel. However, as the DME would involve reporting to Mr Rothnie, he would remain on the panel when it reconvened but he would not be the sole decision maker as there would be a representative from HR and another person on the panel. Ms Bridge said that she would consider how they could give the Claimant reassurance about the fairness of the process and would revert to her about this.

115. Ms Bridge accepted in cross-examination that she told the Claimant that Mr Rothnie would remain on the panel, that it would be 'normal practice' for him to do so. Again, the Tribunal finds that that was wholly inappropriate in the circumstances. The Claimant had raised a legitimate (indeed obvious) conflict of interest. The only reasonable course of action was to reassure the Claimant that an alternative panel member would be found, as was clearly provided for by the job description referred to above.

116. According to the Claimant's note, she then left the building. We accept her evidence and reject Ms Bridge's account in her statement that she (Ms Bridge) went back into the room, agreed with the panel that Mr Rothnie would be replaced by Dr Celia Skinner, Chief Medical Officer, and then went out to inform the Claimant of this before the Claimant left. We consider it implausible that Ms Bridge would have committed to telling the Claimant that Dr Skinner would be on the panel without first consulting the latter as to her willingness, and availability, to do so. We note Mr Rothnie's oral evidence that they did not have dates or availability to be able to reschedule on the day.

117. Moreover, the Claimant's account is consistent with the account that she gave at the grievance investigation meeting on 20 April 2018 with Clare Burns, in which she said:

> **'Sue Bridge (SB) stated that the interview would not proceed as HJ [the Claimant] was not notified of the panel in advance and hence would be rearranged. HJ would be advised of the new date. SB further advised HJ that NR has to remain on the panel as the line manager of the DME post. When HJ suggested NR could be deputised, SB did not comment on this but replied that she would come back to HJ as to how the bias could be mitigated. HJ said that she has not heard anything from SB to date'.**

118. A decision was eventually taken to replace Mr Rothnie with Dr Skinner, but we find that it was taken at a later point and was not communicated to the Claimant on the day of the interview. We consider that the best evidence as to when that decision was communicated to her is the email of 10 May 2018, in which Ms Barton wrote to the Claimant inviting her to a new interview on 25 June 2018 and notifying her that the interview panel would consist of Dr Skinner, Prof Irish and Ms Bridge. By that point the Claimant had already resigned."

21. On 20 April 2018 the claimant attended the grievance meeting referred to in that passage. The claimant raised further matters relating to the DME appointment, which the tribunal found were not disregarded and were addressed in the later grievance report and outcome letter. On 1 May 2018 the claimant resigned. Following her resignation Dr Coward was appointed as DME.

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The Tribunal's Decision

22. The tribunal directed itself as to the law relating to time limits and the burden of proof under the **Equality Act** and as to the substantive **Equality Act** and constructive unfair dismissal complaints. Its self-direction in relation to the burden of proof was as follows.

> **"127. The burden of proof provisions are contained in s.136(1)-(3) EqA:**
>
> > **(1) This section applies to any proceedings relating to a contravention of this Act.**
> >
> > **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> >
> > **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **128. The effect of these provisions was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 (at para 18):**
>
> > **'18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:**
> >
> > **(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
> >
> > > **"56. … 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 section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
> >
> > **(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
> >
> > > **"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."**
> >
> > **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

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> **129. In *Hewage v Grampian Health Board* [2012] ICR 1054 the Supreme Court held (at para 32) that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."**

23. In setting out its conclusions the tribunal first found that the claimant had not done any protected acts as claimed, in summary because the communications relied on did not in fact involve her raising the topic of race. For this reason all the complaints of victimisation failed. The tribunal went on to dismiss the **Equality Act** complaints relating to matters occurring in 2016 and 2017 as out of time. It did not, however, dismiss the complaint relating to the DME advertisement as out of time, as it considered that decision, and what happened at the interview, related to conduct extending over a period or it would be just and equitable to extend time in relation to it. The tribunal's substantive conclusions in relation to the **Equality Act** complaints relating to those matters were as follows.

> **"163. The remaining allegations of race discrimination, in respect of which the Tribunal has accepted jurisdiction are as follows. 163.1. Issue 3(H)(ii), direct race discrimination - The decision to re-advertise the Claimant's DME role on 31 January 2018. 163.2. Issue 3(I), harassment related to race - The conduct of the interview on 16 April 2018. Is there evidence from which the Tribunal could reasonably conclude that the treatment was because of/related to race?**
>
> **164. With regard to the re-advertising of the DME, the Claimant can plainly point to a difference of treatment and a difference of race as between her and Professor Kinnear: he held the role for some nine years without the role being re-advertised; he is white. Arguably, there was a significant difference in the material circumstances between the two of them: Professor Kinnear continued to perform the role throughout the whole of his tenure, whereas the Claimant had declined to do so since her return from sickness absence. However, we will set that aside for the time being.**
>
> **165. As for the conduct of the interview on 16 April 2018, the Tribunal has no doubt that the presence of Mr Rothnie on the panel, his behaviour when the Claimant questioned it, his refusal to recuse himself and Ms Bridge's handling of the Claimant's objection were all 'unwanted conduct': we accept the Claimant's evidence that she was shocked by these events. As this allegation was advanced as a claim of harassment related to race, there was no requirement on her to point to an actual or hypothetical comparator.**
>
> **166. The Tribunal went on to consider whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the decision to re-advertise the role was 'because of' race; and that Mr Rothnie's decision not to recuse himself from the interview panel was 'related to' race.**
>
> **167. The only evidence which the Claimant led in her statement was her account of conversations she had had with other BAME colleagues who considered was that there was a culture of race discrimination in the organisation and, specifically, that**

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race might be a factor in Mr Rothnie's treatment of her and other colleagues. That was opinion evidence which, by its nature is of very limited probative value. Moreover, it was hearsay opinion evidence: we heard no direct evidence from the individuals concerned. We concluded that this evidence was not sufficient to discharge the burden on the Claimant to provide evidence from which we could reasonably conclude that her race played any part in the treatment complained of.

168. As for Mr Ojo's further submissions (at paragraph 26 of his closing submission), far from pointing us to 'overwhelming evidence' that race played a part in the treatment of the Claimant, they did not begin to raise a prima facie case of race discrimination. In the Tribunal's view they fell into the trap of assuming that pointing to less favourable, or adverse, treatment and a difference of race is in itself sufficient to discharge the burden, which the authorities are clear it is not. We could discern nothing in those submissions which was sufficient to provide the 'something more' from which we could reasonably conclude that race was a factor in respect of the two surviving complaints of race discrimination.

169. Those two claims accordingly fail because the Claimant has not discharged the initial burden on her to show that race was a factor in the alleged treatment."

24. Turning to the contention that there was a cumulative breach of the implied duty of trust and confidence, the tribunal rejected a number of the alleged matters relied upon because it had found that they did not in fact occur, or, if they did, there was reasonable and proper cause for the conduct. This included conclusions that there was nothing improper in Dr Howard's exchanges with the claimant and that Mr Rothnie's intervention in those exchanges was a measured and reasonable response, and that certain other matters relied on did not factually occur as alleged. It also concluded that the conduct of Ms Maton which was the subject of a grievance was in certain respects inappropriate, but it was not likely seriously to damage the relationship. It then continued:

"174. We take a different view of the Respondent's conduct in relation to the DME interview (Issue 3(1)). It is clear from the Claimant's witness statement that the events of 16 April 2018 had a very considerable impact, subjectively, on her trust in the organisation. She wrote in her statement: 'the turn of event[s] at the interview left me with lost hope'. The Tribunal must, however, consider whether the Respondent's conduct (effectively, that of Mr Rothnie and Ms Bridge) on that occasion, viewed objectively, was likely seriously to damage the relationship of trust and confidence between employer and employee. We conclude that it was.

175. Mr Rothnie acted improperly in agreeing to sit on the panel. He knew that the fact of the Claimant's grievance against him gave rise to a potential conflict: it was in part for that reason that he had decided not to conduct a review of the Claimant's performance in the DME role; it was for that reason that he had been replaced as case manager of the grievance. He knew that much of the substance of the grievance related to his conduct in relation to the DME role; the Claimant had alleged that he had been unsupportive of her in the role. He knew that the Claimant was unhappy with the appointment of Dr Coward as Associate Director of Medical Education and

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that Dr Coward was the only other candidate for the DME role in April. Against that background, his decision to sit on the DME recruitment panel was, in the Tribunal's view, perverse.

176. His response to the Claimant's objection to his presence compounded the matter. When the Claimant suggested that he recuse himself, he challenged her repeatedly and inappropriately. Even after private discussion, Ms Bridge communicated to the Claimant that Mr Rothnie would not recuse himself from the panel. The Tribunal considered that his conduct was wilful.

177. Viewed objectively, his conduct would suggest to a reasonable observer that he was indifferent to the risk of actual or perceived bias in the conduct of an important recruitment exercise, which would affect the Claimant both professionally and financially. Given his seniority in the organisation, and the fact that he was the Claimant's direct line manager in relation to that very role, this was likely seriously to damage the relationship of trust and confidence between employer and employee. It is fundamental to a sound employment relationship that important matters of recruitment are, and are seen to be, conducted fairly and without the appearance of bias.

178. We asked ourselves whether there was reasonable and proper cause for Mr Rothnie's conduct. The only explanation advanced for it was that it was important for him to be on the panel because he would be the line manager of the successful candidate. However, we have already found that there was provision within the recruitment material for someone else to sit on the panel in his place. Indeed, that was eventually proposed, albeit after the Claimant's resignation. There was no reasonable and proper cause for his conduct.

179. As for Ms Bridge's conduct on the day, whether she agreed or disagreed with the position that she communicated to the Claimant, the fact that a senior HR manager within the Respondent company appeared to be condoning the inappropriate conduct of a recruitment exercise would, in the Tribunal's view, be likely further to damage a reasonable employee's trust in the organisation, viewed objectively.

180. We find that the Respondent's conduct of the interview on 16 April 2018 was, in itself, a breach of the implied term of trust and confidence and it was, accordingly, a repudiatory breach of contract, in response to which the Claimant was entitled to resign and claim constructive dismissal.

181. If we are wrong about that, we conclude that the Respondent's conduct of the interview, taken together with Ms Maton's inappropriate imposition of duties on the Claimant in 2016/2017, was likely seriously to damage the relationship of trust and confidence and was a repudiatory breach of contract, in response to which the Claimant was entitled to resign and claim constructive dismissal."

25. The tribunal then went on to uphold the unfair dismissal complaint.

26. We turn to the reconsideration decision. In the section relating to the law, the tribunal reproduced its self-direction on the burden of proof in the original decision in the same terms. The substantive part of its decision was as follows:

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"20. In relation to the first disputed allegation (Issue 3(H)(ii)), the Tribunal concluded (at para 164) that the Claimant could point to a difference of treatment and a difference of race, although an issue remained as to whether she could point to a comparator whose circumstances were materially the same as hers. The Tribunal put that issue to one side, a step which both representatives accepted could only be in the Claimant's favour at that stage of the analysis, since it removed a potential obstacle in her path.

21. In relation to the second disputed allegation (Issue 3(I)), the Tribunal found that the Claimant was subjected to unwanted conduct, which is the first necessary element of a successful claim of harassment related to race. Self-evidently, the mere existence of conduct that is unwanted does not, in itself, prove that the conduct was tainted by considerations of race.

22. The Tribunal then went on to consider whether the Claimant had discharged the burden, which the authorities are clear falls on her at the first stage, to prove facts from which a reasonable Tribunal could properly conclude, absent an adequate explanation from the Respondent, that there was unlawful discrimination. To use the phrase which appears in the authorities, had she proved the 'something more' sufficient to shift the burden to the Respondent, requiring it to provide an adequate non-discriminatory explanation for the treatment, failing which the claim must be upheld?

23. The Tribunal found (at paras 167 and 168) that she had not. For the reasons we gave there, we were not satisfied that she had provided any evidence that race was a factor; alternatively, having regard to the evidence which she did adduce, we concluded that it was not such that a reasonable Tribunal could properly conclude that there was unlawful discrimination.

24. Since the burden of proof did not shift the Respondent, there was no requirement on it to prove an adequate, non-discriminatory reason for the treatment.

25. Mr Ojo criticises that conclusion (at paragraph 7 of the application) on the basis that no express or implied finding was made by the Tribunal as to whether it accepted or rejected the Claimant's allegation of direct race discrimination/harassment related to race. We reject that criticism: the Tribunal made an express finding that both claims failed, because the Claimant had not discharged the initial burden on her. For the avoidance of doubt, this was not a case where the Tribunal felt able to move directly to the 'reason why' question; it was for that reason that we had regard to the burden of proof provisions.

26. The Tribunal accepts Mr Gil's submission that the real question is whether, having made that finding, it was sustainable. The authorities are clear that the bare facts of a difference in status and a difference in treatment only point to the possibility of discrimination. Those two factors, without more, do not amount to facts from which a Tribunal could conclude that the Respondent had committed an unlawful act of discrimination (Madarassy). It was for that reason that we rejected the matters relied on by Mr Ojo in his written closing submissions at the liability hearing: because they fell into the trap of assuming that that those differences were enough in themselves. The Tribunal agrees with Mr Gill submission that Mr Ojo has fallen into the same trap again in making this reconsideration application.

27. Mr Ojo refers to the fact that the Tribunal heard evidence of other employees whose roles were not readvertised, and submitted that this could amount to the 'something more' required to shift the burden of proof. We do not accept that submission. The existence of other potential comparators merely provides further

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> **possible evidence (subject to the Tribunal being satisfied that they were in materially the same circumstances) of difference of treatment/difference of race. It does not provide the 'something more' required.**
>
> **28. Mr Ojo then submitted that the Tribunal reversed the burden of proof, arguing that once it had found that the conduct alleged had occurred, it was for the Respondent to show that the reason for it was not as a result of the Claimant's race, and that it was not for the Claimant to explain the Respondent's conduct. That is to misunderstand the operation of the burden of proof: the burden only shifts to the Respondent to show that the reason for the treatment was in no sense whatsoever because of the Claimant's race, if the Claimant has discharged the initial burden, which she had not.**
>
> **29. Mr Ojo then points to paragraph 161 of the judgment, in a passage dealing with 'conduct extending over a period' in the context of limitation, in which the Tribunal found that 'there is a strongly arguable connection between the decision to advertise the DME role in January 2018 and the later conduct of the interview in April 2018'.**
> **30. All that the Tribunal was finding there was that there was a factual nexus (almost too obvious to be stated) between the advertising of a role and the interview for it. There is nothing in that finding which could be probative of race being a factor in either decision."**

Summary of the Grounds of Appeal and the Respondent's Defence

27. There were two amended grounds of appeal that were live before us. They are lengthy and in places discursive, including a lengthy preamble. The respondent's answer and the written skeleton arguments on both sides were also lengthy and in places discursive. However, from all of these materials, and the oral argument on both sides, the key planks of the appeal, and the key contentions relied upon on each side, emerge. We do not need to reproduce the full text of the grounds of appeal, but at this stage will summarise the key planks of each side's case. Further points which appeared to us to be particularly significant will be addressed in the discussion which follows.

28. In summary, the overarching basis of the appeal is that the tribunal erred in relation to the complaints in question, by failing to conclude that the burden of proof shifted to the respondent, and hence failing to make specific findings as to the reason why Mr Rothnie decided to readvertise the DME post in 2018 and the reason why he (and/or also Ms Bridge) responded in the manner found by the tribunal, to the claimant's request that he stand down from the interview panel. It is the claimant's case that, in light of the facts found, it was at least an error not to conclude that the burden shifted to the respondent, if not to infer that the conduct was, respectively, because of, or related to, race.

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29. In relation to the advertisement decision the grounds of appeal refer in particular to two matters. First, they refer to the tribunal's approach to Professor Kinnear as a comparator. However, the main basis of this part of the challenge related in fact to what was said to have been the absence of evidence of any other person in a similar time-limited role, and not of the claimant's race, having had their post readvertised. The tribunal is said to have erred by failing in its decision to consider and analyse the evidence in that regard. The grounds assert that, had it carried out the necessary analysis, it "would have uncovered that there is no other time-limited role which was advertised in the same way as the DME role, making every holder a of a time-limited role a comparator." It is contended that that conclusion should have led, in turn, to a shifting of the burden to the respondent.

30. The second strand is that the tribunal is said to have failed to analyse critically the reasons given by the respondent for the decision, and to determine whether they were accepted or not. More specifically, the ground asserts that "'the more' required by the Claimant to establish discrimination was provided in the reason(s) given by the Respondent which the tribunal would have found to be untruthful, unconvincing and inconsistent with the evidence." Once again, the tribunal is said to have erred by not concluding that, for that reason, the burden shifted to the respondent.

31. In relation to the harassment complaint relating to what happened at the interview, the grounds of appeal contend that, having found that Mr Rothnie's presence on the panel, his behaviour, and the behaviour of Ms Bridge, were unwanted conduct, and that Mr Rothnie knew of the claimant's grievance, and that the grievance was part of the reason why he had decided not to conduct a review of the claimant's performance in the DME role, and in light of its conclusions generally about that conduct, the tribunal was wrong not to have treated these features as meaning that the burden of proof shifted to the respondent in respect of this complaint.

32. In brief summary the main planks of the respondent's defence were as follows. Firstly, if the burden of proof has not shifted to the employer, then it is not necessary for the tribunal to make a

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specific finding as to the explanation for the conduct in question. Secondly, it is well-established that the mere fact of a difference in treatment and a difference in characteristic are not sufficient, alone, to shift the burden of proof. Thirdly, the evaluation of whether, in the given case, the primary facts are sufficient to shift the burden of proof is a task for the tribunal, not the EAT. The tribunal's decision must be read fairly as a whole, and it must be kept in mind that it is not obliged to refer to all of the evidence and submissions that it received. In this case the tribunal correctly stated and applied the law, and its conclusions that the burden did not shift were not perverse.

The Law; Arguments and Discussion; Conclusions

33. The tribunal's self-direction as to the law was correct as such, and, by its citation from two of the authorities, captured the key points of the general guidance in the authorities on the burden of proof. We note also that, at various points in the course of describing its conclusions on these complaints in both the original and reconsideration decisions, the tribunal uses language which is directly lifted from the authorities. We have no doubt that the tribunal correctly understood the law.

34. There have been numerous authorities on the burden of proof, and many of these were referred to in argument on both sides, particularly in relation to the statutory provisions embodied in what is now section 136 **Equality Act**. What the tribunal must always do is apply the words of the statute to the particular specific circumstances of the case before it; and the guidance in the authorities has been repeated many times. It is not necessary for us to add extensively to the tribunal's own self-direction. But in light of the arguments on both sides we note the following points, though they are not new.

35. First, one general theme of Mr Shellum's submissions was that the statutory test has replaced the common law approach adumbrated in **King v Great Britain China Centre** [1992] ICR 516. As to that, it needs always to be kept in mind that the statutory provisions were intended, in recognition of the difficulties commonly faced by claimants alleging discrimination, to lower the bar of the legal test for a shifting of the burden, not to raise it; and that the statutory test does *not* replace the general

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principles and guidance relating to the process of the drawing by the tribunal of secondary inferences from primary findings of fact. Rather, it builds on their foundation.

36. The position was captured some time ago now by Elias P for the EAT in the following passage in **Network Rail Infrastructure v Griffiths-Henry** [2006] IRLR 865.

> **"19. We accept Ms Cunningham's submission that nothing in the new statutory burden of proof alters the evidence needed to establish a *prima facie* case as that concept was used in the well known authority of King v Great Britain-China Centre [1992] ICR 516. Nor does it affect, in our view, the analysis of how evidence is to be assessed when determining at the second stage whether the employers have provided an adequate (in the sense of non-discriminatory) explanation as laid down by the Court of Appeal in Bahl v The Law Society [2004] EWCA Civ 1070; [2004] IRLR 799. The significant legal change is that whereas formerly under the analysis in King the Tribunal could but was not obliged to draw an inference of discrimination if there was a *prima facie* case and no adequate or satisfactory answer, now the Tribunal must draw such an inference in those circumstances. Whether in practice Tribunals did frequently take advantage of their discretion not to find discrimination where the conditions referred to in King were established, is a moot point."**

37. In so far as Mr Shellum suggested that this is no longer good law, we do not agree.

38. Secondly, and again this is an oft-iterated point, the *dictum* of Mummery LJ in **Madarassy**, referred to in **Otshudi** and many other authorities, is not a rule of law. It was also by way of a response to a submission that the burden automatically, in all cases, is shifted *merely* by a difference in status and in treatment. But in no case do these features, if present, occur in a factual vacuum. The process of considering whether, or what, inference to draw, and whether the burden shifts, is situation and fact-specific. The task of the tribunal is always to apply the law to the particular pertinent facts and features of the case before it.

39. Thirdly, that said, in a decision arising from a trial at which all the evidence has been heard and facts found, there does need to be some fact or feature which the tribunal identifies as potentially capable of supporting an inference of discrimination, though, as the authorities have again long since confirmed, that must be considered by reference to all of the facts, from whichever party the evidence originated. In that general sense, however, the initial burden to prove facts sufficient to shift the

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burden does rest on the claimant. See **Royal Mail Group Limited v Efobi** [2021] ICR 1263 at [30].

40. Next, while the authorities indicate that the employer's substantive explanation for conduct generally does not fall to be considered at the first stage of deciding whether the burden shifts, if the tribunal considers that it has put forward inconsistent explanations, or an untrue or problematic explanation, that *may* be taken into account by it as something that could support an adverse inference and causes the burden to shift. **Otshudi** was an example of that. Once again, however, this is not a rule of law or automatic consequence, but a fact and context-sensitive matter, for the appreciation of the tribunal, a point recently reiterated by the EAT in **Raj v Capita Business Services Limited** [2019] IRLR 1057.

41. Further, as the EAT put it in **Laing v Manchester City Council** [2006] ICR 1519 at [77] if there were "damning evidence" from the employer as to the explanation for its conduct, a tribunal could not ignore it simply because the employee had not raised a sufficiently strong case at the first stage. We do not accept Mr Shellum's submission that this observation has been superseded by an absolute rule that the employer's explanation must always be disregarded *whatever its nature*. What section 136(2) refers to is the absence of *any other* explanation, being an explanation, *per* section 136(3), which shows that the respondent did *not* discriminate as alleged.

42. Finally, in light of all the foregoing, Mr Shellum correctly submitted that the exercise of reviewing and evaluating the particular facts and circumstances of the case, in order to decide whether the burden shifts, is one for the appreciation of the employment tribunal. Accordingly the EAT can and will only intervene if the tribunal has wrongly stated, or plainly wrongly applied, the law, or reached a conclusion on that question which is in the legal sense perverse.

43. In the present case, as we have already indicated, the tribunal correctly directed itself as to the law, and, on the face of it, followed the correct legal principles when deciding whether the burden shifted in relation to each of the two complaints with which this appeal is concerned. In particular,

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in relation to the readvertisement, in so far as it was argued before the tribunal, and before us at points, that the *mere* fact that the conduct alleged occurred as such – in the case of the first complaint in particular, the fact that the post *was* readvertised – coupled with the fact of the claimant's race, should have led to a shifting of the burden of proof, that would not have been a correct application of the law. The tribunal was right to reject that, for example in the reconsideration decision at [28].

44. We therefore agree with Mr Shellum that in this case we can only interfere with the tribunal's decisions on this question on what amount to perversity grounds. We turn, then, to consider the particular features relied upon by the claimant, and whether it can be said in light of these not merely that they supported a contention that the burden shifted, but that it was perverse not to so conclude. We take first the complaint of direct discrimination in relation to the readvertisement decision.

45. As we have seen, the claimant specifically relied, as an actual comparator, on Professor Kinnear, who was white and whose tenure as DME had continued for some nine years without the post being readvertised. The tribunal noted this at [164] of its original decision. It also noted that there was a significant difference in the material circumstances of each, being that the claimant had declined to perform the role since her return from sickness absence, although it, as it put it, "put that to one side", which it observed in the reconsideration decision at [20] was in the claimant's favour.

46. Given those differences, and that Professor Kinnear's tenure was on different contractual terms, and during an earlier period, we do not think it can be said that the material circumstances relating to him were so closely similar to those of the claimant, that the tribunal should have concluded that, in the absence of some other explanation, a comparison of the claimant's case with his could have supported an inference that the decision to readvertise her position was influenced by her race.

47. That is subject, however, to consideration of the two other principal planks of the claimant's challenge in relation to the decision on this complaint.

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48. The first of these, as we have noted, is that the tribunal is said to have erred by failing to engage with the claimant's case that in fact hers was the only fixed-term position at this level to be readvertised. In particular, Mr Ojo submitted that, in spite of there being significant evidence presented on this issue, there was no mention of it in the original decision. His case was that there was evidence, supporting the claimant's case, of comparable colleagues not of the claimant's race not having their positions readvertised, and, conversely, no evidence from the respondent of what we would call evidential comparators, supporting the respondents' case, that is, material colleagues not of her race whose positions *were* readvertised.

49. In argument before us both counsel referred in some detail to the evidence and argument that had been presented to the tribunal on this aspect. In summary the main features were as follows.

50. The respondent relied on Mr Rothnie's evidence that, during the period of Professor Kinnear's tenure as DME, such posts were not properly periodically reviewed; but he (Mr Rothnie) had then reviewed the process and sought to ensure that such roles were reviewed annually and tenures were re-advertised when due to expire. The respondent's case was that contrary examples of which the claimant gave evidence that she was aware, pre-dated that change of approach. There was also a dispute about the case of Dr Howard, who had held more than one such post. Mr Ojo told us that Mr Rothnie had acknowledged in cross-examination that she had not had to re-apply. Mr Shellum noted that we had no note of his evidence; and he referred to a note of Dr Howard's own evidence that she *had* had to reapply more than once, in one case unsuccessfully. Finally Mr Ojo argued that evidence that the respondent had presented, of other readvertisements, was not of valid evidential comparators, either because it related to more junior posts, or because it post-dated the claimant's readvertisement.

51. Mr Shellum also stressed in submissions the point that the tribunal was not obliged to refer in its decision to every feature or detail of the evidence that was presented to it. In any event it was clear that the tribunal had not overlooked to consider all this evidence, when deciding whether there

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was sufficient material to shift the burden. The part of Mr Ojo's closing submission to the tribunal, to which it referred at [168] of its original decision, specifically raised the contention that no other comparable role with limited tenure was readvertised; and this aspect was canvassed again in the reconsideration application and addressed again in the reconsideration decision.

52. Mr Shellum is correct on that last point. Although the tribunal did not set out the evidence to which it was referred, it was not obliged to, and it is clear that it did consider the point in reaching both its original and reconsideration decisions. We also reiterate that we could only interfere in the tribunal's conclusion that it did not shift the burden, if we were sure that that conclusion was perverse. We bore in mind that we did not have the whole of the evidence before us that the tribunal had. Given the various features of the evidence we *were* shown, and the points made to us on each side, as we have summarised them, we are not in a position to say that the evidence presented to the tribunal painted such a compelling picture to the effect that the decision to readvertise the claimant's post in 2018 was so starkly anomalous, that it would have been perverse not to treat that evidence as supporting a shifting of the burden on this issue.

53. The final main plank of Mr Ojo's case in relation to this issue was that Mr Rothnie had given inconsistent evidence on the question of why he had decided to readvertise the DME post, such that it was perverse not to treat that as supporting a shifting of the burden. On the one hand he had said that the post had been readvertised because the fixed term had come to an end. On the other he had said that, because he had been named in the grievance, he felt it would be inappropriate for him to review her performance in the role.

54. Mr Shellum made the point, by reference to an extract from Mr Ojo's closing skeleton, and which Mr Ojo did not gainsay, that this particular argument – that an inference should be drawn from conflicting explanations having been given – was not run before the tribunal; and we agree that it cannot be criticised for not addressing a point that was not argued before it. In any event, the

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claimant's contract in this role specifically provided for a fixed term, but also for the *possibility* of that term being extended following review, so it might be said that these explanations were not mutually contradictory. Further, the tribunal plainly considered these aspects of the evidence with care, noting that it understood why Mr Rothnie felt unable to carry out the review, but that it was less clear why someone else could not have done so; but it said no more than that. The evidence was also that Mr Rothnie had also referred when writing to the claimant about the readvertisement, to the fact that she had not returned to the role following her return to work

55. Bearing in mind that whether the explanations given are so conflicting as to support a shifting of the burden is a matter for the appreciation of the tribunal, and the high threshold which a perversity challenge must mount, once again we did not think that this feature of the evidence was such that we could say that it was perverse for the tribunal not to treat it as having caused the burden to shift.

56. Before we come to a conclusion on the challenge to the tribunal's decision in relation to the readvertisement issue we note that, as we have set out, in the course of its decision the tribunal made findings about some earlier matters in relation to the claimant's DME role, including in relation to the provision in her contract for an Associate, that she was offered the opportunity to resume the role on her return to work in October 2017, but declined, the appointment of Dr Coward to the Associate role following her sickness absence, and how certain developments fuelled the claimant's sense of vulnerability and suspicions in relation to her DME role. The tribunal plainly made careful and reflective findings about all these matters; and it fell to the tribunal in light of the overall facts found, to consider whether they supported an inference that the burden passed.

57. Overall, we cannot say that the tribunal's finding that the burden did not shift in relation to this complaint was perverse. The challenge to that finding therefore fails. It therefore did not need to make an express finding as to the reasons for this decision.

58. For all of these reasons, the challenge by ground 1 (and the overlapping parts of ground 2) to

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the tribunal's decision to dismiss the complaint of direct race discrimination in relation to the readvertisement decision, fails.

59. We turn to the challenge to the tribunal's decision in relation to the complainant of harassment relating to race with respect to what happened at the interview.

60. What we had to decide was whether the tribunal erred by not holding that the burden shifted to the respondent under section 136 to show that the explanation for this conduct did not relate to race. The central theme of Mr Ojo's submission was that the tribunal plainly found Mr Rothnie's conduct in particular, in refusing to stand down from the interview panel, to be quite wrong, and indeed to be such as to undermine trust and confidence, or at least to contribute to that. He submitted that, in terms of the elements of the definition of harassment in section 26 of the **2010 Act**, it was plainly unwanted conduct, and also had the proscribed effect, if not purpose. He contended that, on the basis that *those* elements were satisfied, the tribunal should have concluded that the burden shifted to the respondent to show that it was not also related to race.

61. However, these are distinct elements of the section 26 definition, and, like the EAT in **Raj v Capita Business Services Limited** [2019] IRLR 1057 at [58], we do not agree that in this case these features could, still less should, have been regarded as sufficient by themselves to cause a shifting of the burden of proof.

62. We also agree with Mr Shellum's submission that it is pertinent that the tribunal's trenchant comments about Mr Rothnie's conduct were made specifically in the context of its consideration of a different legal test, namely that pertaining to breach of the implied duty of trust and confidence. Similarly, while the tribunal considered Mr Rothnie's explanation – that it was important for him to be on the panel because he would line manage the successful candidate – did not amount to reasonable and proper cause for the purposes of the claim of breach of the implied duty, we do not think it can be said that the tribunal was, on that account, required to conclude that an inference that this conduct

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was related to race should have been drawn, or that the burden shifted under section 136.

63. Mr Ojo highlighted the tribunal's discussion at [175] of the features of the grievance, of which Mr Rothnie was aware, which in its view made it so plain that he was conflicted and should have stood down. But we note that it also found that he was not, at this point, aware of the contents of the detailed statement in support, and that the appeal relates to the complaint of harassment related to race, not to the complaint of victimisation, which was dismissed because there was no protected act. Whether or not it might be said that the findings would have supported an inference that Mr Rothnie dug his heels in, in part because he was aware that the claimant had complained about him, and even though that would hardly reflect well on him, as Mr Shellum pointed out, that would not, as such, make good the complaint with which we are concerned. We agree, and conclude that it cannot be said that this possible way of reading the evidence made it perverse not to conclude that the burden shifted on the question of whether his conduct was *related to race*.

64. Once again, ultimately, we conclude that we cannot say that the tribunal's decision that the burden of proof in relation to this complaint did not shift was perverse. Hence it was not an error for the tribunal not to have made an express finding of fact as to his reasons for the conduct. It was also, in light of all the foregoing, not perverse for the tribunal not to find that the burden shifted in relation to Ms Bridge's conduct in backing Mr Rothnie up.

65. We will, finally, address two aspects of the arguments in general, relating to the tribunal's decision on these two complaints. First, a further theme of Mr Shellum's submissions was to highlight the trenchant remarks which the tribunal had made at points about the lack of credibility of a number of the overall factual allegations and claims made by the claimant which it considered. He suggested that the tribunal's conclusions on the complaints with which we were concerned needed to be seen in that overall context.

66. This was, however, not a feature on which either the tribunal, or we, relied. The fact that a

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witness may lack credibility on one issue does not necessarily mean that they should not be regarded as credible on a different issue, or generally; nor *vice versa*. The tribunal, rightly, did not take a generalised approach to credibility either in relation to the claimant, Mr Rothnie or anyone else. Throughout its decision, its approach to credibility issues was careful and nuanced, and, as its findings show, particularly in relation to the events at the interview, it plainly accepted the claimant's factual account of how matters unfolded on that occasion as compelling.

67. Finally, the tribunal, when considering time issues, recognised that the factual subject matter of the two complaints was related: they were about the decision to readvertise the DME job, and then what happened when she attended for interview for that job. Mr Ojo relied on this, it having been the claimant's overarching case that Mr Rothnie was determined to remove her from the role, and specifically for a reason related to race. So he relied upon the features supporting each of these challenges as supporting them both.

68. But reading the tribunal's decision as a whole, we do not think it can be said that the tribunal failed to appreciate the overall thrust of the claimant's case, nor that it failed to consider the bigger picture when determining, as it was bound to do, whether the burden shifted in relation to each complaint in turn. This point therefore did not serve to make good the challenges that were before us.

Outcome

69. For all of the foregoing reasons we conclude that the grounds of appeal in relation to both of the particular decisions impugned all fail. Accordingly this appeal is dismissed.

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