25 July 2012

PRESS SUMMARY

Hewage (Respondent) v Grampian Health Board (Appellant) (Scotland) [2012] UKSC 37
On appeal from the Second Division, Inner House of the Court of Session: [2011] CSIH 4

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Mance, Lord Kerr, Lord Reed

BACKGROUND TO THE APPEALS

Mrs Hewage was born in Sri Lanka, and has been a British citizen since 1998. On 1 December 1993 she commenced employment with Grampian Health Board ('the Board') at Aberdeen Royal Infirmary as a consultant orthodontist. In 1996 she became Head of Service for the Orthodontic Department. She resigned from that position on 30 November 2003. On 24 December 2004 she resigned from her employment with the Board with effect from 31 March 2005. In September 2005 she commenced proceedings against the Board in which she claimed under section 94(1) of the Employment Rights Act 1996 that she had been unfairly dismissed from that employment. She also claimed under the Sex Discrimination Act 1975 and the Race Relations Act 1976 that she had been discriminated against on the grounds of her sex and race.

At a hearing before an employment tribunal, the Board conceded that Mrs Hewage had been constructively and unfairly dismissed. The tribunal held on 4 December 2007 that she had been unlawfully discriminated against on a number of grounds of both sex and race. On 15 April 2009 the Employment Appeal Tribunal ('the EAT') upheld an appeal by the Board and dismissed Mrs Hewage's claims of discrimination. She appealed to the Inner House of the Court of Session, and on 14 January 2011 the Second Division allowed her appeal and quashed the decision of the EAT. It remitted the case to the employment tribunal to decide whether, if it had had regard to the only issues which the court considered to be relevant to the claims of discrimination, it would have come to the same or a different conclusion. The Board appeals against that decision.

The complaints have their source in allegations by Mrs Hewage that she was bullied and harassed by employees of the Board. In her position as Head of Service she attended monthly management meetings of the department. She claimed that at one of the meetings, two colleagues (Mrs Helen Strachan, the service manager for surgical specialities, and Mrs Edith Munro, the clinical nurse manager) were verbally abusive, hostile and aggressive towards her. An occupational health doctor wrote on her behalf to the Board's Chief Executive, and Mrs Hewage met with the Chief Executive to discuss the matter. But she was not satisfied by his response and resigned from her position as Head of the Department. The conduct of Mrs Strachan had previously been brought to the attention of the Board's senior management by Professor John Forrester, Head of Service for the Department of Opthalmology, who had resigned as a result of her behaviour towards him. In response to his resignation, the department was reorganised, Mrs Strachan was removed from the position of service manager, and Professor Forrester was re-appointed. When Mrs Hewage resigned as Head of Service in November 2009, Mr Colin Larmour, a consultant orthodontist, took over from her, initially on a temporary basis. On his appointment to a permanent role, the Board's General Manager and Associate Medical Director assured him of their support, especially in relation to Mrs Strachan. In meetings regarding the appointment of dental nurses, Mrs Edith Munro and Sister Moira Munro willingly agreed to a proposal by Mr Larmour which they had fiercely resisted when it was proposed by Mrs Hewage.

Mrs Hewage complained that the formal investigation undertaken by a panel under the Board's Dignity at Work Policy resulted in a report that was full of inaccuracies and omissions, and did not reach any conclusions or make any recommendations. She repeatedly explained her concerns about the inadequacy of the report to the Board's Medical Director, but he took no further action. So she raised discrimination proceedings against the Board on the basis that other white male consultants, such as Professor Forrester and Mr Larmour, were not subject to the same bullying and harassing treatment that she suffered and that she would not have been treated in the way in which she was were it not for her sex and race.

JUDGMENT
The Supreme Court unanimously dismisses the Board's appeal, and affirms that part of the Second Division's interlocutor in which it allowed the appeal to the Inner House and quashed the decision of the Employment Appeal Tribunal. The judgment is given by Lord Hope, with whom the other Justices agree.

REASONS FOR THE JUDGMENT
The employment tribunal was entitled to hold that Professor Forrester and Mr Larmour were appropriate comparators, despite the fact that the situations which were being compared in each case were not precisely the same. The question whether the situations were comparable is a question of fact and degree, and there was a good deal of evidence to indicate that they were indeed comparable **[21-22]**.

Previous case law is clear on how cases should be approached under section 63A(2) of the Sex Discrimination Act 1975 and section 54A(2) of the Race Relations Act 1976. The employment tribunal's approach to the two-stage test set out in those provisions was correct. At stage one, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be proved, and it is for the claimant to discharge that burden. In considering at that stage what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. The purpose of that assumption is to shift the burden of proof onto the respondent at the second stage. It does not diminish in any way the burden of proof at the first stage, when the tribunal is looking at the primary facts that must be established. But it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position in this case **[25 & 32]**.

It is clear that the tribunal addressed whether the situations of Professor Forrester and Mr Larmour were like for like comparisons. Having done that, it found that difference of treatment had been proved for which, in its judgment, there appeared to be no adequate explanation. It was entitled in these circumstances to draw a prima facie inference of sex and race discrimination in Mrs Hewage's favour, which it was for the Board to rebut and it failed to do. There is no substance in the suggestion that the tribunal misdirected itself or that it considered only part of the evidence that it was required to examine at the first stage **[26]**.

It was not necessary for the question remitted to the employment tribunal by the Inner House to be remitted to a differently constituted tribunal. There was an obvious advantage in remitting the matter to the original tribunal as it had already heard and been able to assess the evidence. This was pre-eminently a matter for the Inner House, and there are no grounds for thinking that it made the wrong choice **[33]**.

References in square brackets are to paragraphs in the judgment