Trinity Term
[2012] UKSC 37
On appeal from: [2011] CSIH 4

JUDGMENT

Hewage (Respondent) *v* Grampian Health Board (Appellant) (Scotland)

before

Lord Hope, Deputy President
Lady Hale
Lord Mance
Lord Kerr
Lord Reed

JUDGMENT GIVEN ON

25 July 2012

Heard on 26 June 2012

Appellant
Ian Truscott QC

(Instructed by NHS National Services Scotland Central Legal Office)

Respondent
Brian Napier QC
Christine McCrossan
(Instructed by Lefevre Litigation)

LORD HOPE (WITH WHOM LADY HALE, LORD MANCE, LORD KERR AND LORD REED AGREE)

1. The respondent, Mrs Sumithra Hewage, was born in Sri Lanka. She has been a British citizen since 1998. She has devoted her professional career to the practice of dentistry. Her speciality is orthodontics. 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 Orthodontics 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.

2. Mrs Hewage's claims came before an employment tribunal sitting in Aberdeen. On the penultimate day of the hearing, which took place on various dates between January and June 2007, it was conceded by counsel for the Board that Mrs Hewage had been constructively and unfairly dismissed. In a judgment which was delivered on 4 December 2007 the employment tribunal held that she had been unlawfully discriminated against on a number of grounds of both sex and race. By a majority decision issued on 15 April 2009 the Employment Appeal Tribunal upheld an appeal by the Board against the decision of the employment tribunal and dismissed Mrs Hewage's claims of discrimination. She appealed against that decision to the Inner House of the Court of Session. On 14 January 2011 the Second Division (Lord Justice Clerk Gill, Lord Bonomy and Lord Nimmo Smith) allowed her appeal and quashed the decision of the Employment Appeal Tribunal: [2011] CSIH 4, 2011 SLT 319. 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 has now appealed against the decision of the Inner House of the Court of Session to this Court. In the meantime the employment tribunal, having considered the matter that was remitted to it by the Inner House, has affirmed its decision to uphold Mrs Hewage's claims of discrimination.

The facts

3. The complaints have their source in allegations by Mrs Hewage that she was bullied and harassed by employees of the Board. When she held the position of Head of Service of the Orthodontics Department Mrs Hewage attended regular monthly management meetings to discuss how her department was functioning. These meetings were normally attended by Mrs Helen Strachan, who was the service manager for surgical specialities, and Mrs Edith Munro, who was the clinical nurse manager. One of these meetings took place in Mrs Strachan's office on 9 September 2003. Mrs Hewage alleged that Mrs Strachan and Mrs Munro were verbally abusive, hostile and aggressive towards her. She was very upset by their conduct and could not bring herself to talk to anyone about the way she had been treated. So she decided to consult an occupational health doctor, who wrote on her behalf to the Board's Chief Executive, Mr Alex Cumming. Mrs Hewage met Mr Cumming on 7 October 2003. She told him about the difficulties that she had been having with Mrs Strachan and Mrs Munro. She said that it would be very difficult for her to continue to work with them and that she would be considering her position. His response did not satisfy her, so she resigned from her position as Head of the Department.

4. Mrs Hewage's complaint about Mrs Strachan's conduct was not the first to have been brought to the attention of the Board's senior management. Professor John Forrester had experienced difficulty with Mrs Strachan when he was Head of Service for the Department of Ophthalmology. On 4 April 2002 she accused him of having deliberately manipulated his waiting list the previous morning to engineer the cancellation of day case cataracts booked for that day and told him that she would never allow that to happen again. When asked to explain herself, she said that her accusation was based on remarks by one of his consultant colleagues. Professor Forrester was taken aback by her challenge to his clinical judgment that the operations should be cancelled, and by the fact that one of his consultant colleagues had apparently spoken to her in those terms. He decided that he could no longer work with her and that his position as Head of Service for his department was untenable.

5. Professor Forrester wrote to the Chief Executive, Mr Cumming, on 5 April 2002 making it clear that he would not be willing to return to the position of Head of Service if Mrs Strachan continued to have responsibilities in his department. His resignation led to a review of the department. It was reorganised so as to provide its Head of Service with a deputy who would be responsible for its day to day running rather than having Mrs Strachan as its service manager. The position of Head of Service was advertised, and Professor Forrester was the only applicant. He was re-appointed, and the plan for the department's reorganisation was implemented.

6. When Mrs Hewage resigned as Head of Service in the Orthodontics Department Mr Colin Larmour, a consultant orthodontist, took over from her in November 2003, initially on a temporary basis. Prior to his appointment Mrs Hewage had made it known repeatedly that she was of the view that there should be a consultant on the interview panel for the appointment of dental nurses. This was a matter about which she felt very strongly. But her requests that she should sit on this panel, which were made over a period of about two years to Mrs Edith Munro and Sister Moira Munro, always met with resistance and they refused to agree to them. Within days of Mr Larmour's appointment, however, a meeting took place on 12 December 2003 at Sister Munro's suggestion to discuss the issue. Mr Larmour then spoke to a consultant in the Restorative Dentistry Department, who agreed with Mr Larmour that a consultant should be on the interview panel. He reported this conversation to Mrs Munro and Sister Munro, who agreed immediately that a consultant should be present. Their recommendation was then put in place.

7. When Mr Larmour was appointed as Head of Service in the Orthodontics Department in April 2004, both Mr Alisdair Chisholm, the Board's General Manager, and Mr Kenneth McLay, its Associate Medical Director, assured him of their support. He told Mrs Hewage that Mr Chisholm told him that if he had any problems with Mrs Strachan he should let him know immediately. He also told her that Mr McLay had advised him to "be friends with the service manager and you'll get anything signed."

8. In December 2003 Mrs Hewage wrote to Mr McLay to complain about the way she had been treated by Mrs Strachan and Mrs Munro at the meeting on 9 September 2003. Her complaint was referred to Dr Dijkhuizen, the Board's Medical Director. In March 2004 Dr Dijkhuizen wrote to Mrs Hewage advising her that he had decided to proceed with a formal investigation by a panel under the Board's Dignity at Work Policy. On 15 June 2004 a copy of the main body of the report of the investigation was sent to Mrs Hewage. She considered it to be full of inaccuracies and omissions, and it did not reach any conclusions or make any recommendations. It contained an allegation by Mrs Strachan that Mrs Hewage's conduct had led to Mrs Gillian Cartwright having to go on sick leave suffering from work-related stress caused by Mrs Hewage's conduct. This was later shown to be a false allegation. In her evidence to the employment tribunal Miss Cartwright called it a blatant lie, the truth being that her stress had been caused by Mrs Strachan herself.

9. On 24 June 2004 Mrs Hewage, who was distressed by the report, met Mr Chisholm and asked him to relieve Mrs Strachan of any responsibilities that she had in her department. He did not do this. The Dignity at Work panel issued its final report on 6 August 2004. It contained some recommendations, but for the most part it simply repeated the stated positions of Mrs Hewage, Mrs Strachan and

Mrs Munro. On 20 August 2004 Mrs Hewage met Dr Dijkhuizen to discuss it. She again asked him to remove Mrs Strachan from duty as service manager for her department. He replied that there was no basis for doing this in the report, which both Mrs Strachan and Mrs Munro considered to be totally unsatisfactory. They had told him that they were seeking an apology from Mrs Hewage for making the complaint.

10. On 26 August 2004 Dr Dijkhuizen wrote to Mrs Hewage, Mrs Strachan and Mrs Munro saying that he would write to them again in September to indicate how the report would be taken forward. But when he wrote to them again on 15 September 2004 he told them that he had decided to not to recommend that any action should be taken. On 25 November 2004 he wrote to the appellant to inform her that no action would be taken against Mrs Strachan regarding her false accusation about Miss Cartwright. On 30 November 2004 Mrs Hewage wrote to Mr Chisholm applying for a review of the outcome of the report. On 24 December 2004, having still not received a reply to her application, she submitted her resignation from her employment with the Board with effect from 31 March 2005.

The proceedings

11. Mrs Hewage intimated her intention to raise a grievance by a letter to the Board's human resources manager, Miss Ashley Catto, dated 10 April 2005. She gave details of her grievance in a letter dated 18 May 2005, and by letters dated 30 June 2005 and 22 August 2005 the British Medical Association amplified her grievance on her behalf. Her allegation at this stage was based on one specific comparison, which was the case of Professor Forrester. The Board appointed a panel to consider her grievance, and an investigation was carried out. When the panel reported on 22 March 2006 it held that Mrs Hewage's grievance was partly justified in relation to the Board's delay in dealing with it. But it rejected her allegations of bullying and harassment and of discrimination on grounds of sex and race.

12. In her application form ET/1, in which she alleged that she had been unfairly dismissed, Mrs Hewage gave details of her complaint of bullying and harassment at the hands of Mrs Strachan. It also contained this statement:

> "The claimant submits that *other white male consultants* were not subjected 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. Accordingly, she submits that she was subjected to less favourable treatment on the

> grounds of her sex and race contrary to the Sex Discrimination Act 1975 and the Race Relations Act 1976." [Emphasis added.]

In its reply form ET/3 the Board denied that Mrs Hewage had been constructively dismissed. It did not respond to the allegation of discrimination, nor did it call for further particulars as it could have done under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861), Schedule 1. During the hearing before the employment tribunal Mrs Hewage's evidence of discrimination was led without objection. Moreover, as the Lord Justice Clerk observed in para 30 of his opinion, the Board chose not to call Mr McLay, Mr Chisholm or Miss Catto to give evidence on its behalf.

13. As it was conceded that Mrs Hewage had been constructively and unfairly dismissed, the employment tribunal concentrated on her complaints of discrimination. It considered the Board's treatment of Professor Forrester, the change of attitude as to the presence of a consultant on the interview panel and its treatment of Mr Larmour. It found that there was both sex and race discrimination in each of these three respects. It also dealt with a number of other matters that had been referred to in evidence, for which counsel for Mrs Hewage conceded in the Inner House no foundation had been laid in the form ET/1. It held that the cumulative effect of this less favourable discriminatory treatment was the reason for her resignation and her constructive unfair dismissal: para 132. The criticism that was advanced in the Inner House that it erred in basing this conclusion on the cumulative effect of all the matters referred to in evidence has been met by its determination on the remit that it would have come to the same conclusion if it had had regard only to the three respects mentioned above.

14. The Employment Appeal Tribunal held by a majority (Lady Smith and Miss Ayre, Mr Thomson dissenting) that Mrs Hewage had not given fair notice of a claim of discriminatory dismissal, and that she had not given fair notice of any allegation of discrimination beyond that which involved comparing her with Professor Forrester: paras 37 and 38. It was not for the tribunal to extend the range of complaints of its own motion, which was what it appeared to have done. The EAT also held that the employment tribunal had misapplied the test laid down by the Court of Appeal in *Igen Ltd (formerly Leeds Career Guidance) v Wong* [2005] ICR 931 as to how to apply section 63A of the Sex Discrimination Act 1975 (inserted by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660)) and section 54A of the Race Relations Act 1976 (inserted by the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626)). Giving the judgment of the Court of Appeal in that case, Peter Gibson LJ said in para 17:

> "The statutory amendments clearly require the employment tribunal to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."

15. The majority held that, to discharge the burden of proof that the provisions of the statutes placed on her, Mrs Hewage was required to establish facts from which the employment tribunal could properly infer that she had been the victim of discrimination. If it did not do this, there could be no question of its going on to ask whether the Board had proved that it did not commit an act of discrimination. That question did not arise if there was no prima facie case of discrimination to answer. The employment tribunal had fallen into error because it said in para 107 of its decision that it was required at the first stage to make an assumption in order to shift the burden of proof at the second stage, and because it looked at only limited aspects of the evidence where Mrs Hewage and the comparators had received different treatment. It had closed its mind to the evidence relied on by the Board as showing that Professor Forrester and Mr Larmour were not appropriate like for like comparators: paras 73 and 74. Mrs Hewage had confined herself to a case that she should be compared to actual comparators, but the actual comparators that she had chosen did not suffice for the purpose of discharging the burden of proof that lay on her: para 82. Mr Thomson disagreed with the majority. In his opinion the employment tribunal were entitled to treat the comparators that Mrs Hewage had chosen as valid comparators and, as the decision of the employment tribunal could not be said to be perverse, it should not be interfered with.

16. In the Inner House, giving the opinion of the court, the Lord Justice Clerk said on the issue of fair notice that on a fair and reasonable reading of the ET/1 it was clear that Mrs Hewage had given notice that she sought a remedy in respect of a dismissal that was both unfair and discriminatory. She had also given notice that the comparators on which she relied were white male consultants. She had specifically mentioned Professor Forrester, and it was obvious that the only other white male consultant who could be a relevant comparator was Mr Larmour: para 38 and 39.

17. On the issue of onus of proof, the Lord Justice Clerk said that the approach of the employment tribunal was correct. It was plain, reading its decision as a whole, that it had decided that a conclusion was there to be drawn that the Board

had treated Mrs Hewage differently from the two comparators and to her detriment and that, in light of its handling of the appellant's complaints, the difference of treatment justified a prima facie inference of discrimination which it was for the Board to rebut. In his view, in considering what inferences or conclusions could be drawn from the primary facts, the employment tribunal had to assume that there was no adequate explanation for them. It was sufficient for it to decide whether, on the primary facts, it could conclude in the absence of an adequate explanation that the Board had committed an act of discrimination. If it so decided, the burden of proof shifted to the Board: para 41. As for the choice of comparators, the EAT had simply substituted its own judgment on the point on a consideration of the findings of fact. Unless the employment tribunal's judgment on a question of that kind was absurd or perverse, it was not for the EAT to impose its own judgment on the point. It was entitled to conclude that Professor Forrester and Mr Larmour were appropriate comparators: para 43.

The issues in this appeal

18. Mr Truscott QC for the Board directed his argument to the process of legal reasoning which the employment tribunal adopted in determining that Mrs Hewage had been discriminated against on grounds of both sex and race. He accepted that both Professor Forrester and Mr Larmour were properly before the employment tribunal as comparators. I think that he was not only right but bound to do so, in view of the wording of Mrs Hewage's ET/1 and the fact that her evidence about the treatment which Mr Larmour received was led without objection. The key issue, therefore, was the question of comparison. He submitted that the employment tribunal could only conclude that there was a prima facie case of discrimination if there was a like for like comparison. In this case it was not comparing like with like. It had misconstrued the approach that was to be taken. It had left out of account material parts of the evidence that would have shown that the situations in the cases of Professor Forrester and Mr Larmour that Mrs Hewage was relying on were entirely different. There were so many differences between these situations that it was not open to the tribunal to draw the conclusion that it did. It determined the issue of discriminatory dismissal without any reasoning at all. These were errors of law which the EAT was entitled to correct.

19. Mr Truscott also submitted that the way the employment tribunal had approached the issues in this case showed that further guidance was needed as to the process of reasoning that should be adopted. In every case the tribunal should approach the issue of discrimination by asking the question why: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337, per Lord Nicholls at para 7. The mental process of the alleged discriminator must be examined in every case. That had not been done here. He accepted that it was open to a tribunal to draw inferences. But the burden of proof was on the claimant

to show that there had been treatment which was discriminatory. The Inner House had been wrong to reverse the EAT on this point.

20. His primary submission was that Mrs Hewage's discrimination claim should be dismissed. If the appeal were to be dismissed, however, he said that the question which the Inner House had remitted to the employment tribunal should be remitted to a differently constituted tribunal because the original tribunal's jurisdiction was spent. The Board had appealed against its decision on the remit to keep this point open.

Discussion

(a) was there an error of law?

21. The submission that the Inner House erred in holding that the employment tribunal was entitled to hold that Professor Forrester and Mr Larmour were appropriate comparators is, I think, unsustainable. It is true that the situations which were being compared in each case were not precisely the same. Professor Forrester's circumstances were different. His was a much larger department. He resigned in anger immediately on hearing of Mrs Strachan's unfounded allegations against him, the decision to remove her from her position as service manager was taken by three people two of whom were not involved when Mrs Hewage complained, he made it clear that he would not return to his position unless she was removed and no-one else applied for it. The proposal that there should be a consultant on the interview panel was dealt with on an inter-departmental basis following a meeting with Mr Larmour that took place at Sister Munro's suggestion. As for the supportive comments that were made to Mr Larmour on his appointment, there was no evidence as to what was said to Mrs Hewage when she took up her position as Head of Service in the same department seven years earlier.

22. The question whether the situations were comparable is, however, a question of fact and degree, and there was a good deal of evidence the other way. In the case of Professor Forrester the employment tribunal summarised various reasons that had been put forward by counsel for the Board for holding that he was not an appropriate comparator. Its assessment, however, was that the manner in which the Board dealt with his complaint about his service manager was in marked contrast to the manner in which it dealt with Mrs Hewage's complaint: see paras 108-109. This was because Mrs Strachan was removed from her position as service manager not for any organisational reasons but solely because of the deterioration of her relationship with Professor Forrester. It had broken down due to her behaviour, as it had between her and Mrs Hewage. The Board addressed this

inter-personal problem by replacing Mrs Strachan in his case but not hers, despite her complaints.

23. When Mrs Hewage made her requests that she should be on the interview panel, Mrs Munro and Sister Munro appeared to the employment tribunal to regard it as a matter of principle that this was their role, not hers. Yet within a matter of days following her resignation Mr Larmour was able to reach agreement with them on this point without any apparent difficulty. In its view the change in attitude on their part was astounding and inexplicable: see paras 111-113. The treatment of Mr Larmour by senior officials on his appointment was quite different from the way Mrs Hewage had been treated by them over a prolonged period after she had told the Board that she could no longer work with Mrs Strachan and had sought their support. There was evidence, which the employment tribunal accepted, that Mr McLay was dismissive and sarcastic when Mrs Hewage discussed her problems with him, and she received nothing like the immediate support that was offered to Mr Larmour in the way her complaint was dealt with under the Dignity at Work Policy: para 114.

24. The majority in the EAT were of the opinion that the employment tribunal failed to work through stage one of the stages referred to in *Igen v Wong* adequately or sufficiently: paras 73-75. They criticised its reasoning as to what it was required to do at the first stage. In para 107 of its judgment the tribunal said that it was mindful that it was required to make an assumption at that stage, the purpose being to shift the burden of proof at the second stage so that, unless the respondent provided an adequate explanation, the claimant would succeed. The majority thought that the tribunal was wrong to say that it was required to make an assumption at the first stage for the purpose of shifting the burden of proof. They thought that this meant that it had decided to look only at limited aspects of the relevant evidence. So it failed to ask itself whether, bearing in mind all the evidence and the submissions of the parties on the like for like comparison, Mrs Hewage had discharged the initial burden of proof.

25. The Lord Justice Clerk said in para 41 of his opinion that the majority's strictures on this point were not well-founded, and I respectfully agree with that assessment. In the sentence which the majority criticised the employment tribunal was simply following the guidance in *Igen v Wong*, where the court said that, in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts: see paras 21 and 22 and para (6) of the Annex to the Court of Appeal's judgment. As these passages make clear, the purpose of that assumption is to shift the burden of proof 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. As Peter Gibson LJ said in para 17 of his judgment in that case, the first stage requires the complainant to *prove* the facts from which the tribunal

could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant.

26. It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis. But I do not think that it is necessary to rely on that principle in this case. It is perfectly clear from the reasoning which follows its preliminary observation that the tribunal then proceeded to examine the evidence in order to decide what, in the absence of an adequate explanation, it could hold had been proved. It was careful to explain, step by step in each case, what it saw as lying at the core of Mrs Hewage's complaint. It addressed the central issue, which was whether these were like for like comparisons. Having done that, it found that differences of treatment had been proved for which, in its judgment, there appeared to be no adequate explanation. It expressed its findings as to each case in a way that made it plain that it felt itself 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. I do not think that there is any 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.

27. For these reasons Mr Truscott's primary submission that the employment tribunal misdirected itself as to the onus of proof and failed to apply its mind properly to the evidence must be rejected.

(b) guidance

28. Mr Truscott submitted that there was a need for guidance to be given by this court as to how cases should be approached under section 63A(2) of the 1975 Act and section 54A(2) of the 1976 Act. Section 63A(2) provides:

> "Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –
>
> (a) has committed an act of discrimination… against the complainant which is unlawful by virtue of Part 2 ... or

> (b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination ...
>
> the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that Act.

Section 54A(2) is, mutatis mutandis, in the same terms.

29. In *Igen v Wong*, para 16, Peter Gibson LJ said that, while it was possible to offer practical help (as to which see para 17 of his judgment quoted in para 14, above), there was no substitute for the statutory language. And in *Madarassy v Nomura International plc* [2007] ICR 867, para 9 Mummery LJ emphasised that the Court of Appeal had gone out of its way in *Igen* to say that its guidance was not a substitute for statute. As he put it, "Courts do not supplant statutes. Judicial guidance is only guidance." In para 11 he said that there was really no need for another judgment giving general guidance: "Repetition is superfluous, qualification is unnecessary and contradiction is confusing." And in para 12:

> "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in *Igen Ltd v Wong* meets these criteria. It does not need to be amended to make it work better."

30. Nevertheless Mummery LJ went on in paras 56 and following of his judgment in *Madarassy* to offer his own comments as to how the guidance in *Igen v Wong* ought to be interpreted, which I would respectfully endorse. In para 70, having re-stated what the tribunal should and should not do at each stage in the two stage process, he pointed out that from a practical point of view, although the statute involved a two-stage analysis, the tribunal does not in practice hear the evidence and the argument in two stages:

> "The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof."

31. In para 77, in a passage which is particularly in point in this case in view of the employment tribunal's reference in para 107 to its being required to make an assumption, he said:

> "In my judgment, it is unhelpful to introduce words like 'presume' into the first stage of establishing a prima facie case. Section 63A(2) makes no mention of any presumption. In the relevant passage in *Igen Ltd v Wong* … the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination."

The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prima facie case has been established. The wording of sections 63A(2) and 54A(2) is quite explicit on this point. 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.

32. The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, 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. But 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 that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance.

(c) the remit

33. I cannot accept Mr Truscott's submission that the question which was remitted to the employment tribunal by the Inner House should have been remitted by it to a differently constituted tribunal. It remained open to the original tribunal to re-examine the issues that were before it if directed to do so by an appellate

court. There was an obvious advantage in remitting the matter to the original tribunal rather than a tribunal which was differently constituted 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. The matter was properly remitted, and happily it has now been dealt with promptly – thus eliminating the possibility of any further delay in the final resolution of Mrs Hewage's claim.

Conclusion

34. I would dismiss the appeal. I would affirm that part of the Second Division's interlocutor in which it allowed the appeal to the Inner House and quashed the decision of the EAT. The Board must pay the costs of the appeal to the Supreme Court.