



Neutral Citation Number: [2019] EWCA Civ 498

Case No: A2/2018/1194

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**HHJ SHANKS**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26/03/2019

**Before:**

**LORD JUSTICE DAVIS**  
**LORD JUSTICE SINGH**  
and  
**SIR JACK BEATSON**

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**Between:**

**OBIUKWU IWUCHUKWU** **Appellant**  
**- and -**  
**CITY HOSPITALS SUNDERLAND NHS FOUNDATION** **Respondent**  
**TRUST**

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**Daniel Matovu** (instructed under the Direct Access Scheme) for the **Appellant**  
**David Reade QC and Seamus Sweeney** (instructed by **DAC Beachcroft LLP**) for the  
**Respondent**

Hearing date: 5 March 2019  
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**Approved Judgment**

## **Lord Justice Singh:**

### Introduction

1. This is an appeal from a decision of the Employment Appeal Tribunal (“EAT”), which allowed the Respondent’s appeal against those aspects of claims for direct race discrimination, victimisation and unfair dismissal which were upheld against it by the Employment Tribunal sitting at North Shields (“ET”). The ET comprised EJ Buchanan, sitting with two lay members, Mrs A Tarn and Mrs S Mee.
2. The Appellant was a Consultant General Surgeon at the Respondent NHS Foundation Trust, working at Sunderland Royal Hospital from February 2007, where he was the only consultant of black African ethnic origins. In 2013 concerns about the Appellant’s performance led to the initiation of formal investigations into his capability and conduct. Those investigations involved the Appellant being restricted (from September 2013) to non-clinical practice with no contact with patients for a period of some 20 months. In June and October 2014, the Appellant lodged formal grievances regarding the way he had been treated, which were not formally addressed in line with the Grievance Procedure. Eventually, in March 2015, a capability panel met to discuss the Appellant, and he was dismissed in May 2015.
3. The Appellant brought a claim to the ET, where he succeeded in part, in respect of his claims for direct race discrimination, victimisation and unfair dismissal. The Appellant’s other claims (for automatic unfair dismissal and for other claims of direct race discrimination) were dismissed by the ET. This appeal is not concerned with those latter claims.
4. On appeal by the Respondent against the Appellant’s successful claims, the EAT (HHJ Shanks sitting alone) allowed the appeals, substituting a decision that the claims for direct racial discrimination and victimisation were to be dismissed. The finding of unfair dismissal was vacated but that aspect of the claim was remitted to a differently constituted ET. The Appellant appeals against those decisions to this Court with the permission of Henderson LJ, granted in an order sealed on 10 September 2018.
5. There was, at the ET stage, a second Respondent, Ian Martin, who was the medical director of the Respondent at certain material times. The claims against him did not succeed before the ET and were not the subject of an appeal, so little more will be said about them here. Although Mr Martin is referred to as “R2” in the skeleton arguments of the parties, I will refer to him as IM for ease of exposition, given that there is only one Respondent to this appeal.

### Factual and Procedural Background

6. The Appellant was born on 13 January 1964. He qualified as a doctor at the University of Benin in Nigeria in 1987. In 1993, he became a Fellow of the Royal College of Surgeons. From December 1995, he held a variety of posts at hospitals in the United Kingdom as a Registrar and as a Senior Registrar. He worked as a general surgeon but developed an interest in breast surgery. In 2006 he acquired the degree of Doctor of Medicine from the University of Hull. In that same year, he applied to the Respondent

Trust to become a Consultant General Surgeon and took up that post on 12 February 2007. At all material times, the Appellant worked at Sunderland Royal Hospital, where, as I have noted, he was the only black African consultant employed by the Respondent.

7. From 2010 onwards the work of the Appellant increasingly came under review by the Respondent, which had concerns about his capability in performing breast reconstructive surgery, among other issues surrounding his practice and conduct in other aspects of his work. In the years from 2010 to 2012, there were a number of background incidents that raised these concerns.
8. In 2011/2012, a proposal was drawn up for Gateshead Healthcare NHS Foundation Trust to provide the hub of the breast care service for the South of Tyne area, and was due to be implemented in 2013. It was intended that the Appellant and other breast care employees at the Respondent Trust would transfer there. However, the proposal was held off when concerns were raised about the Appellant's performance in 2013.
9. Between September 2012 and 25 April 2013, concerns were raised about the Appellant under four headings. First, there appeared (from audit information of the Appellant's practice) to be a high complication rate arising from the breast reconstruction procedures he had undertaken. Secondly, treatment plans agreed at Multi-Disciplinary Team Meetings ("MDTs") were allegedly not adhered to by the Appellant. Thirdly, he appeared often to be disengaged during MDTs, taking telephone calls and not readily accepting the opinions of other team members. Fourthly, he was believed to leave clinics early to undertake private practice. Stephen Holtham ("SH"), the Clinical Director for General Surgery, investigated these matters. In relation to the last matter, criminal proceedings were considered, but it was ultimately decided that these should not be pursued.
10. Three more investigations took place in relation to the Appellant between June and August 2013. The first concerned the Appellant's failure to report his non-attendance at a training course and conference in Milan due to his ill-health, towards which the Respondent Trust had paid £3000. The second concerned his failure to notify the Trust of a speeding violation and his accumulation of 12 penalty points on his driving licence (although he successfully applied not to be disqualified from driving). The third concerned an allegation that the Appellant had been shouting at and abusing one of his staff grade doctors.
11. SH undertook investigations into all of these above matters in August 2013 and concluded that none of the three latter investigations warranted any further action. However, based on the audit provided by the Appellant and by his registrar, he concluded that there were serious concerns about the "significant complication rate" of the Appellant's reconstructive work, which "may be better assessed by external review".
12. A serious incident took place on 13 August 2013. The Appellant was operating on a patient who was a nurse employed at the Trust, known both to the Appellant and the theatre staff. During the operation the Appellant was handed antiseptic solution which was alcohol-based rather than aqueous-based, and which he applied to the patient. The Appellant then used a diathermy pencil on the patient to seal a wound. As a result, the patient was set on fire. This resulted in a major burn to the patient and permanent damage, and to the cancellation of the operation lists for that day. It was described in

the subsequent investigation as though a flash of lightning had entered the operating theatre and all the staff, including the Appellant in particular, were subject to counselling. Whilst present in the theatre observing the Appellant for other reasons on 23 August 2013, SH concluded that best practice was not being followed, and on 17 September 2013 SH wrote to IM informing him of this view.

13. IM met with the Appellant in light of the SH investigation, and advised him of the concerns, and sought advice from the National Clinical Advisory Service (“NCAS”). IM commissioned a formal Royal College of Surgeons (“RCS”) investigation under ‘Maintaining High Professional Standards in a Modern NHS’ (“MHPS”) procedures (albeit without a “case investigator” as required under MHPS), and, while this was occurring, informed the Appellant on 2 September 2013 that he would be restricted to non-clinical practice involving no contact with patients. The ET concluded that these restrictions, which remained in place until the Appellant was dismissed some 20 months later, were not kept under any proper or adequate review.
14. The RCS review took place in the period from November 2013 to February 2014. First, it concluded that there were sufficient concerns about the Appellant’s practice for the restrictions on it to continue. Secondly, it concluded that there was evidence to suggest that the outcome complication rate in some areas of his work (the ET concluded that work undertaken in around 80% of the Appellant’s practice areas was not to be criticised) was below expected standards, as was his attention to patient selection and recording and analysis of complications. Outcomes for immediate reconstruction work suggested operative management was below par. Thirdly, the workload and support of the Appellant was broadly adequate, but in some ways was “not appropriate”, and overall the workload was at the upper limit of what was manageable for a single surgeon. Fourthly, in respect of behaviour and inter-professional relationships, there were sufficient numbers of individuals expressing concerns as to indicate that the Appellant’s conduct did not meet expected standards of professional practice, and there was an element intrinsic to the Appellant’s behavioural attitudes that made different opinions hard to accept. There had been an effective breakdown of trust between the Appellant and many members of the MDT.
15. The report recommended that the Appellant should remain restricted from clinical practice until other recommendations had been addressed. The opinion of the reviewers was that he should not be allowed to undertake any breast reconstructive work. He should have an experienced mentor, and, given the length of time he had been out of independent surgical practice, should not be able to return to such work without direct clinical oversight.
16. On the recommendation of the GMC adviser, IM then referred the matter to the GMC Fitness to Practise Directorate, which investigated in May and June 2014. The Directorate issued an interim order, and imposed conditions on the Appellant’s practice requiring him to be supervised at the level of a foundation level 1 trainee doctor. This amounted to his not practising at all since there was no other doctor at the Trust who could provide such supervision. IM at this stage came to the view that the way to proceed was with a formal capability hearing.
17. On 3 June 2014, the Appellant sent to the Chief Executive of the Respondent a document headed “Formal Grievance”, dated 31 May 2014, which extended to 25 paragraphs. He referenced several matters, including his having worked as a sole breast

surgeon for a long period, his being suspended from duty for eight months without review, the wrongful referral of matters to the NCAS, and his harassment by reason of wrongful accusations in respect of leaving clinics early, leading him to observe a “discriminatory and vindictive policy” against him. On 8 July 2014, in a meeting with Andrew Loughney, the Surgical Medical Director, and others, the Appellant asserted that he had been the victim of race discrimination and that he wanted an investigation into this from someone outside the Respondent Trust.

18. There was a meeting on 7 August 2014 to consider remediation options for the Appellant, including the possibility of this taking place at other NHS Trusts in Glasgow, Manchester, Gateshead, Newcastle and Northumbria, although these Trusts were not prepared to assist. The ET concluded that such consideration was “late, perfunctory and little more than a tick box exercise”, given that it came 11 months into the Appellant’s effective suspension. A capability hearing date was set for 23 December 2014, and this was confirmed to the Appellant on 10 September 2014.
19. At this stage, the Appellant’s representative (Robert Quick) sought to continue with the grievance procedure, but was told by Bill Holliday (Divisional HR Manager) in an email dated 30 September 2014 that this was “outside of the one month time limit set within the policy and therefore cannot be taken forward”. Upon Mr Quick’s alleging that this was an attempt to prevent a legitimate grievance being heard, the reply from Mr Holliday, in an email dated 1 October 2014, was as follows:

“I know you were sent a copy of the Grievance Policy from the outset and that the time limit is clearly defined within the Policy. Following the grievance meeting with Andrew Loughney, Obi [the Appellant] and yourself we wrote and gave you a number of options should you have wished to progress the matter further. In the absence of any response the time limit applies.

...

I could understand if you wished to raise a Grievance if we do not apply the Policy but not when we do follow the Policy. The Policy only allows for further consideration if there are exceptional circumstances that would have prevented you raising further issues within the month. Should you wish there to be further consideration I would be grateful for you to send the grounds on which you wish this to be considered and I will pass this to the Director of Human Resources as per the Policy.”

I note that Mr Holliday was not one of the witnesses called by the Respondent at the hearing in the ET. However, the head of Human Resources, Kathleen Griffin (“KG”), was called and gave evidence.

20. On 7 October 2014, the Appellant wrote to the Chief Executive of the Respondent, raising the same concerns as previously expressed. This was the second grievance raised by the Appellant.
21. The Trust decided that a case investigator should be appointed, and that the Deputy Medical Director, Shaun Fenwick (“SF”), should conduct the investigation and

interview witnesses in relation to the process to date, including in relation to the grievances that the Appellant had raised. The ET concluded that this was no more than a belated attempt to correct a glaring flaw in the procedure to date. The report, noting that there was sufficient conflicting evidence as to the “seriousness and reasons for [the Appellant’s] complication rates to warrant consideration”, identified four options for going forward, but did not go further than that. The options included: first, to recruit an additional consultant to support the Appellant; secondly, to seek remediation for the Appellant at another location; thirdly, to support the Appellant in finding alternative employment; or fourthly, to put the case before a capability panel.

22. IM then decided to press ahead with arranging for a capability panel to consider the Appellant’s case. The ET found that IM viewed the Appellant’s raising of the grievances as “an attempt to further derail the capability process on which he was then intent on making”. (ET judgment, para. 7.121)
23. The Appellant submitted a case before the capability panel, arguing that he disagreed with the RCS report, considering it to be based on incorrect facts, and he asserted that IM had concocted evidence against him. The Appellant’s reconstructive work only accounted for 20% of his workload, and his high complication rate coincided with other factors which skewed his figures.
24. The capability panel met on 24 March 2015. The Appellant was represented by James Rowley, who made a detailed presentation, and the whole hearing took six hours. Another date, 24 April 2015, was set aside for deliberation.
25. The decision of the panel was that the Appellant should be dismissed with notice. The letter of dismissal, issued on 7 May 2015, gave several reasons for the decision. First, it relied on the RCS report to substantiate the allegations that the Appellant had a high post-surgical complication rate. Secondly, he did not adhere to the treatment plans agreed by the Sunderland MDT. Thirdly, he appeared disengaged in MDT meetings. The letter then rejected some of the Appellant’s arguments put to the panel, such as his criticisms of the RCS report.
26. The Appellant sought to appeal against the decision to dismiss him. He sent a letter setting out his grounds of appeal on 15 May 2015, noting that the panel had made no finding in relation to his grievance as to race discrimination and victimisation, and raising other issues also ventilated at the panel hearing. Various delays ensued. On 18 June 2015, the Appellant was advised that a suitable external medical representative would hopefully be secured by the following week. On 14 August 2015, he was advised that the appeal hearing would take place on 13 October 2015. On 17 September 2015, the Appellant’s representative, Mr Echendu (a non-practising barrister), stated that this delay in organising the appeal was an act of intimidation, bullying and harassment. The appeal was cancelled and no hearing in fact took place.
27. After his dismissal, the Appellant moved to Cornwall to work at Treliske hospital, working with Phillip Drew, with whom the Appellant had worked and published several articles during his doctoral studies. The Appellant’s work there has caused no difficulty, and there is every reason to think that he will be successfully remediated to his previous level in due course.

28. The Appellant brought various claims to the ET against the Respondent on 15 August 2015. He claimed direct race discrimination, harassment, victimisation, automatic unfair dismissal and ordinary unfair dismissal, as well as a claim that he had been subjected to a detriment on the ground of having made a protected disclosure, which was later withdrawn. The Appellant also brought claims of race discrimination against the second Respondent, IM. The ET found that these latter claims were not well-founded and there was no appeal in relation to IM.
29. In a judgment dated 2 November 2016 the ET upheld a number of the Appellant's claims against the Respondent, namely one aspect of his direct race discrimination, victimisation and unfair dismissal. The Appellant's other claims were dismissed by the ET.
30. On 27 April 2018 the EAT (HHJ Shanks sitting alone) allowed the Respondent's appeal.

### The ET's determination

#### *Direct race discrimination and victimisation*

31. The ET held that a great many of the claims made by the Appellant were not made out. There were no background discriminatory acts which assisted in the drawing of inferences in relation to the substantive alleged matters of discrimination from 2013 onwards: para. 11.10. Nor was there any race discrimination or harassment in relation to, *inter alia*, the Appellant's exclusion from duties, the leaving of the Appellant as the sole breast surgeon, and the treatment of the Appellant after the 13 August 2013 incident: paras. 11.12-11.44. The allegations of criminal conspiracy, breach of the Data Protection Act 1998 and automatic unfair dismissal were without foundation: paras. 11.59-11.63, and 11.67-11.76. None of those conclusions is the subject of this appeal.
32. However, the ET held that the failure to investigate the Appellant's grievances against IM did constitute direct race discrimination: paras. 11.36-11.38. Moreover, an extension of time to bring this challenge would be just and equitable (this latter finding is not the subject of appeal): para. 11.41.
33. Further, because the grievances of both June and October 2014 referred to allegations of race discrimination, they were "protected acts" within the meaning of section 27 of the 2010 Act. Therefore the failure to investigate them constituted acts of victimisation: paras. 11.46-11.49.
34. I will set out the relevant passages in the ET's judgment in more detail when I address the grounds of appeal which relate to them.

#### *The allegation of ordinary unfair dismissal*

35. The reason for the dismissal was found to be the (potentially fair) reason of capability. There were reasonable grounds to believe that the Appellant lacked capability, but the ET found that the Respondent did not follow a reasonable procedure, for several

reasons: paras. 11.77-11.81, which I summarise in this and the next paragraph. The MHPS Policy, which required consideration of alternatives to blanket exclusion from all clinical duties, was not followed in September 2013, yet any reasonable employer would have undertaken this. A reasonable employer would also have analysed whether complication concerns did only affect 20% of his work, would have investigated other issues such as his patient selection, and would have appointed a case investigator. Having decided to suspend, a reasonable employer would keep such under regular review. Moreover, the Respondent unreasonably allowed conduct concerns (such as the Milan training course and conference issue) to interfere with the investigation into legitimate concerns about the Appellant's capability: paras. 11.82-11.86.

36. The failure to explore adequately remediation and retraining for someone as skilled and as experienced as the Appellant was unreasonable, as was the 20 month procedure leading to his dismissal, and the failure to abide by a reasonable time scale for an appeal. The documentation and evidence consulted at the capability panel, involving allegations of a "below par" practice, was insufficient, and greater consideration of this was required. Accordingly, the dismissal of the Appellant was unfair: paras. 11.86-11.90.
37. Again, I will set out the relevant passages in the ET's judgment in more detail later, when I address the grounds of appeal which relate to them.

#### The EAT's judgment

38. In summarising the facts, HHJ Shanks referred to the two grievances which had been raised by the Appellant at paras. 15-19. In the course of that summary, at para. 17, he said:

"... Mr Holliday from HR wrote to [the Appellant] on 30 September 2014 to the effect that the grievance could not be taken forward because it was outside the one-month time limit for raising grievances set by the formal grievance policy. This position was clearly unsustainable and the ET found that it was a blatant attempt to close down the grievance procedure which had started but stalled in August and September 2014 while discussions on remediation took place."
39. At para. 19, HHJ Shanks said that the ET found that the Appellant's grievances of May/June and October 2014 were never formally investigated under the grievance procedure and this amounted to "less favourable treatment" for the purposes of section 13 of the 2010 Act.
40. HHJ Shanks addressed the issue relating to the failure to investigate the grievances at paras. 26-31 of his judgment.
41. At para. 27 he said:



“I agree with the submission of Mr Sweeney for the Trust that on the face of it this was an unjustified leap of reasoning. Further, in the light of their finding that the Trust through Ms Griffin (see paragraph 11.48) and indeed Mr Martin personally (see paragraph 7.121) saw the grievances as a method of attempting to delay, if not derail, the capability proceedings which were then on-going, it seems to me that it is unsupportable: the view of the Trust about what the Claimant was trying to do clearly provided a complete (albeit perhaps unsatisfactory) explanation for the Trust’s behaviour which was unrelated to his race. The ET also reasoned that race discrimination was established by reference to a hypothetical comparator of a different race referred to at paragraphs 11.37 and 11.40, who they said would not have been treated in the same way and would have had his grievance properly investigated under the grievance policy; the problem with the hypothetical comparator which the ET constructed was that they forgot to include when considering the characteristics of the comparator that the Trust would also have formed the view that his grievance was an attempt to derail a capability procedure.”

42. At para. 28 he said:

“When specifically considering the victimisation claim the ET said that they concluded that the decision not to allow the grievances to be investigated under the policy was ‘... *materially influenced by the content of the grievances*’ (see paragraph 11.48). It is not clear on what basis the ET decided that the *content* of the grievances was relevant and, again, in the light of their finding that the Trust saw the grievances as an attempt by the Claimant to derail the capability proceedings, I do not think this reasoning can stand.”

43. At para. 31 he said:

“I am of the clear view that the ET made an error of law in drawing the inference of race discrimination and victimisation and I therefore allow the appeal in relation to those findings against the Trust. Since I have concluded that the inferences were simply unsupportable on the basis of the ET’s other findings of fact I consider that it is open to me to substitute my own decision for that of the ET and to dismiss the claims of race discrimination and victimisation which were upheld by the ET.”

44. At paras. 42-48 of his judgment HHJ Shanks addressed the appeal before him relating to the finding of unfair dismissal.
45. At para. 42 he summarised the four issues which were raised by the Respondent's appeal before him as follows:

“(1) The ET's findings that the Trust acted as no reasonable employer would have acted between September 2013 and the panel's decision to dismiss involved substituting the ET's judgment for that of the Trust's Medical Director and/or were perverse;

(2) Their conclusion that those actions ‘... are sufficient ... to taint the decision of [the] panel and render the decision to dismiss itself unfair’ involved an error of law and approach similar to that made by the ET in the case of **McAdie v Royal Bank of Scotland** [2007] EWCA Civ 806 [this case is reported at [2008] ICR 1087];

(3) The ET failed to focus (as they should have) on the panel's decision to dismiss and its reasonableness in the circumstances applying at the time;

(4) The conclusion that the failure to arrange an appeal within the MHPS timetable deprived the Claimant of the opportunity to have a review of the dismissal decision and rendered it unfair was also perverse.”

46. On issue (1) HHJ Shanks considered that the ET's findings about the Respondent's actions between September 2013 and the capability panel's decision were “somewhat surprising.” However, in the light of his conclusions on the other points raised by the Respondent, he preferred not to reach a final view as to whether they were “perverse” or involved a “substitution mind-set” by the ET, as the Respondent suggested.

47. On issue (2) HHJ Shanks referred to the decision in *McAdie*. In summarising what the ET in that case had found, HHJ Shanks correctly observed that the ET had found the dismissal to be unfair “notwithstanding that the Claimant was incapable of doing the job and a proper procedure had been followed in making the decision to dismiss.” He noted that the EAT had allowed an appeal by the employer and the Court of Appeal had upheld the EAT. He said:

“The fact that the employer was entirely responsible for the employee's incapacity by its unfair treatment of her before the decision to dismiss did not by itself make the dismissal unfair.”

48. At para. 45 of his judgment HHJ Shanks said:

“It seems to me that the ET in this case have made the same error in their conclusion in the first part of paragraph 11.88 as the ET in the McAdie case did. The relevant statutory question was whether the decision to dismiss was reasonable in all the circumstances applying at the time of the decision. The ET’s conclusion that the decision was rendered unfair solely by the unreasonable conduct of the Trust before the decision was made, without any reference to the decision itself and the circumstances applying at the time it was made, clearly focussed on the wrong question. The fact that the MHPS is, as the ET put it, ‘*one procedure*’ for dealing with capability issues relating to doctors in the NHS cannot change the statutory question relating to unfair dismissal into another different question, namely whether the employer complied with that procedure in the run up to the decision to dismiss.”

49. Turning to issue (3) before him HHJ Shanks said the following at para. 46:

“On (3), it is fair to say that in the second half of paragraph 11.88 (starting with the words ‘*In any event ...*’) and the first paragraph 11.89 the ET do appear to address their minds to the reasonableness of the decision itself and reached the view that the capability panel should have given more detailed thought and consideration to ‘remediation’ than they did and that their decision was therefore unfair. However, the ET entirely failed in these paragraphs to engage with the panel’s detailed reasons for rejecting the alternatives to dismissal (‘*Remediation in Trust*’, ‘*Third Party Remediation*’ and ‘*Redeployment*’ to general surgery) which are set out in the dismissal letter of 24 April 2015 (see pages 352 to 354 of the EAT bundle). In my view that failure makes it clear that the ET did not properly focus on the reasonableness of the decision: that is an error of law by the ET which means that the conclusion of unfair dismissal cannot stand. It does not, however, mean that the ET’s conclusion that the panel’s decision was unfair was a perverse one and I therefore refuse the Trust’s application for leave to amend the Notice of Appeal to raise a perversity challenge in this context.”

50. At para. 47 HHJ Shanks addressed issue (4) before him. This related to the second para. 11.89 in the ET’s determination, which concerned the appeal procedure. HHJ Shanks said:

“... I unhesitatingly agree with Mr Sweeney’s submission that this conclusion was perverse. It failed to take account of the very short timetable envisaged by the MHPS and the obvious complications involved in assembling an appeal panel and failed

to take account of the perfectly plausible explanation for the delay which was put forward by Ms Griffin (in her statement at page 373 of the EAT bundle), which the ET had expressly accepted in the context of a discrimination claim at paragraph 11.57 of the Judgment. Further, it was not right to say that the Claimant was denied the opportunity to appeal; it would have been perfectly open to him to pursue the appeal already set for 13 October 2015 while pursuing his claims in the Employment Tribunal. Mr Echendu in his submissions suggested that the fact that the Trust failed to comply with the time limit for the hearing of the appeal in the MHPS policy was really the end of the question and meant that unfairness was established: that is simply not correct.”

### Grounds of Appeal

51. On behalf of the Appellant Mr Echendu, when applying for permission to appeal, advanced the following five grounds of appeal.
52. Ground 1: the EAT erred in law by its perfunctory approach in reviewing the ET’s findings of facts; it was wrong to hold that the ET’s finding of race discrimination was unsupported by evidence when it had not considered the totality of the ET’s findings of fact at paras. 7.110-7.118.
53. Ground 2: the EAT misstated the facts and considered the case on the wrong factual basis.
54. Ground 3: the EAT misinterpreted section 27 of the Equality Act 2010 (“the 2010 Act”) relating to the victimisation claim allowed by the ET and/or dismissed the victimisation claim without consideration of section 27.
55. Ground 4: the EAT misdirected itself in relying upon *McAdie* as authority on the reasonableness of a decision to dismiss.
56. Ground 5: the EAT misconstrued and misunderstood the relevance and binding nature of the Ministry of Health’s framework for dealing with Doctors and Consultants known as MHPS.
57. At the hearing before us Mr Daniel Matovu appeared on behalf of the Appellant and focussed his submissions on the following three main points.
58. First, in relation to the claim for race discrimination, Mr Matovu submits that the EAT failed to appreciate that the ET had relied upon the statutory provisions reversing the burden of proof in race discrimination cases and that the ET had been entitled to do so.
59. Secondly, in relation to the claim for victimisation, he submits that the ET had been entitled to conclude that there was a material link between the content of the two grievances (that in part they raised issues of race discrimination) and the failure by the Respondent to investigate them. The EAT was therefore wrong in law to interfere with that conclusion.

60. Thirdly, in relation to the claim for unfair dismissal, he submits that the EAT misunderstood the effect of the decision in *McAdie* and failed to appreciate that it was not on all fours with the present case. The ET had been entitled to reach the view it did that the dismissal in this case was unfair.

#### Submissions for the Respondent

61. On behalf of the Respondent Mr David Reade QC (who appeared before us with Mr Seamus Sweeney) submits that the EAT was justified in interfering with the relevant conclusions reached by the ET because the ET had indeed erred in law.
62. In relation to the claims for direct race discrimination and victimisation, Mr Reade submits, relying on *Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425, that, where there is a complete, non-discriminatory explanation for an action, such as a failure to investigate the grievance, that necessarily excludes the possibility of the act being motivated by discriminatory purposes. The ET found that KG's action was explained by her seeing the grievances as an attempt to derail or delay the capability process. That, submits Mr Reade, precludes the inference of discrimination, which was too readily inferred by the ET: see *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] ICR 931.
63. Further, submits Mr Reade, the EAT's treatment of the ET's hypothetical comparator was correct.
64. Lastly, he submits that the EAT's approach to section 27 of the 2010 Act was sound.
65. On the claim for unfair dismissal, Mr Reade submits that the ET's error was in finding that the Trust's actions prior to the capability hearing "tainted" all that followed. The statutory test under section 98(4) of the Employment Rights Act 1996 ("the 1996 Act") requires the Tribunal to assess the reasonableness of the decision at the time of the dismissal, as held by this Court in *McAdie*. The ET further erred by stepping into the shoes of the employer and making a decision it was ill-equipped to undertake and one it was not entitled to make. The procedure adopted at the capability hearing was not criticised by the ET, nor could it have been, and the ET unduly relied on its misinterpretation of the requirements of the MHPS procedure to come to its conclusions.
66. In order to assess the merits of the rival contentions, I will now need to set out in more detail relevant passages in the ET's judgment as I address the grounds of appeal relating, first, to the claim for direct race discrimination; then the claim for victimisation; and, finally, the claim for unfair dismissal.

#### The claim for direct race discrimination

67. At para. 7.103 the ET said that on 3 June 2014 the Appellant sent a grievance (dated 31 May 2014), extending to 25 paragraphs, to the Chief Executive of the Respondent Trust.
68. The ET then set out the facts relating to the two grievances (the second one being dated 7 October 2014) at paras. 7.110-7.121.

69. At para. 7.121 the ET concluded that Mr Martin “saw the renewed grievance from the [Appellant] as an attempt to further derail the capability process on which he was then intent on embarking.”
70. Two things should be noted at this stage about that finding of fact. First, it only relates to the second grievance (hence the reference to “the renewed grievance”). Secondly, when the first grievance was raised on 3 June 2014, the decision had not yet been taken or notified to the Appellant that there was to be a capability process. It follows therefore that the purpose of the first grievance could not have been to delay or derail the capability process, since there was no such process at that time. I discuss the significance of this below.
71. At Part 10 of its determination the ET set out what it considered to be the relevant law. This included reference to material provisions of the 2010 Act, including section 13, which defines direct race discrimination; section 27, which relates to victimisation; and section 136, which sets out the provisions on the reversal of the burden of proof. In the context of that reversal, the ET also reminded itself of the detailed guidance given by this Court in *Igen Ltd v Wong*: see para. 10.3 of its determination. It also set out citations from other well-known authorities at paras. 10.4-10.6, including the decision of this Court in *Madarassy v Nomura International plc* [2007] EWCA Civ 33; [2007] ICR 867.
72. I should at this juncture set out the material provisions of the 2010 Act.
73. Section 13, which defines “direct discrimination”, provides, so far as relevant:
- “(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”
74. It is clear from section 4 that race is one of the protected characteristics. Further, section 9 provides that “race” includes “ethnic or national origins”: see subsection (1)(c).
75. Section 39 deals with discrimination in the employment context. Subsection (2)(d) provides that an employer must not discriminate against an employee by subjecting him “to any other detriment.”
76. Section 27 deals with victimisation. So far as material, it provides:
- “(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act –
- ...

(d) making an allegation (whether or not expressed) that A or another person has contravened this Act.”

77. Section 136 sets out the provisions on the reversal of the burden of proof. So far as material, it provides:

“(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.

...”

78. At para. 11.11, the ET set out some “general comments”, to which it is necessary to refer when considering later parts of its reasoning:

“In dealing with these allegations, we must identify whether the claimant has been treated less favourably than an appropriate comparator pursuant to section 23 of the 2010 Act. If that is our conclusion, then that is not sufficient in itself to move the burden of proof to the respondents to explain: there must be an additional factor – **Madarassey** [*sic*]. The allegations we now consider span the period from 2012 up to the date of the claimant’s dismissal in 2015 and indeed beyond. Throughout that period, there were many allegations raised against the claimant and investigated by the respondents sometimes without the claimant even being made aware. The claimant remained excluded from clinical duties for a very long time without proper review, issues of conduct were elided with capability concerns and the relationship between the claimant and R2 patently deteriorated to breaking point. All those factors persuade us that the additional factor required by **Madarassey** is potentially present. We make that general point at this point at this stage and if, as we consider each allegation of direct discrimination, we do not specifically refer to that additional factor, we rely on the matters set out in this paragraph to fulfil that requirement. In addition we find that the claimant was the only black African consultant employed at the material time by R1 and the required difference in race is generally satisfied in that context.”

79. The ET addressed the allegation that the Respondent had failed to investigate the Appellant's grievances at paras. 11.36-11.41. Of particular importance are paras. 11.37-11.38, which it is necessary to set out in full:

“11.37 We deal first with the grievance dated 31 May 2014 which was discussed at the meeting on 8 July 2014 but subsequently not progressed when R1 refused to deal further with it through BH by letter dated 30 September 2014. We construct a hypothetical comparator of a different race to the claimant to test for less favourable treatment. We note the Grievance Policy (‘the Policy’) requires matters to be raised informally in the first instance and within one month from the date the matter occurred. That condition was accepted as fulfilled by R1 as it convened a meeting with the claimant and RQ on 8 July 2014. Thus the matter was raised in a timely fashion. A letter was sent to the claimant on 4 August 2014 requesting further information but making no reference to any consequence of a delayed or failure to reply. The claimant did not reply until after remedial enquiries failed and then he was met with a refusal to progress the matter on the basis that it was ‘*outside of the one month time limit*’. That position was inexplicable and contrary to the terms of the Policy. The grievance had been raised properly and the refusal to continue with it was contrary to the terms of the Policy. How would a hypothetical comparator have been treated? We construct a comparator at consultant level who had raised a grievance and who had had a preliminary meeting and then delayed in responding to R1 whilst other matters were investigated. We conclude that such a comparator would have been allowed to proceed with the grievance given that failing to do so would amount to a breach of the Policy. Thus we conclude the claimant was less favourably treated. There are additional factors to allow us to conclude that the burden of proof should move to R1.

11.38 We have considered the respondent's explanation which was that the grievance was not allowed to progress because it was out of time. That explanation is rejected. The grievance was not out of time in accordance with the Policy. It had been accepted for a preliminary meeting and further information had been requested by R1 in a letter which made no reference to any time limit or consequence of not replying in a timely fashion. We infer that the decision of R1 was a blatant attempt to close down the grievance without having to deal with it further. We infer that R1 saw the grievance as a method of attempting to delay the capability proceedings then ongoing and sought to do so on the premise that the grievance was out of time. The explanation is not accepted and it follows that the claim of direct discrimination is made out.”



80. In my view, the ET correctly directed itself as to the relevant legal principles relating to the reversal of the burden of proof. It is notable that, in the EAT, HHJ Shanks did not expressly deal with the issue of reversal of burden of proof at all.
81. At para. 27 of his judgment HHJ Shanks essentially gave two reasons for reaching a different view from the ET:
- (1) That the ET had engaged in “an unjustified leap of reasoning”;
  - (2) That the hypothetical comparator which the ET constructed was defective because they had forgotten to include in his characteristics that the Respondent would also have formed the view that his grievance was an attempt to derail a capability procedure.
82. In my view, the first aspect of that reasoning is faulty, because the EAT failed to appreciate that the ET had been applying the law on reversal of burden of proof. The ET, at para. 11.37 of its judgment, carefully set out the factual findings which led it to conclude that the burden of proof “should move to R1.” At para. 11.38 it then carefully considered the Respondent’s explanation, which was that the grievance was not allowed to progress because it was out of time. That explanation was rejected because it was not out of time in accordance with the Policy. It was for that reason that the ET said in its concluding sentence in para. 11.38 that:
- “The explanation is not accepted and it follows that the claim of direct discrimination is made out.”
- In my view, that was a perfectly acceptable application of the reversal of burden provisions. Far from being “an unjustified leap of reasoning”, it was a carefully reasoned application of the reversal of burden provisions and the conclusion was one which was reasonably open to the ET.
83. As to the second aspect of the EAT’s reasoning, as to the characteristics which the hypothetical comparator would have, this did not feature large in the submissions before this Court. In any event, I have come to the view that the point is a bad one.
84. HHJ Shanks appears to have thought that the hypothetical comparator needed to have the characteristic that the Trust considered that he also was attempting to derail the capability process. There are at least two difficulties, in my view, with that approach. The first difficulty is that the findings as to whether the Trust considered that the Appellant was attempting to derail the process, on proper analysis, only applied to the second grievance, in October 2014. I have already set out the relevant passages in the ET’s judgment above. That consideration simply did not apply to the first grievance, dated 31 May and raised on 3 June 2014. This is because, at that time, nothing had been intimated to the Appellant to the effect that there was to be a capability process.
85. The second difficulty is that the ET was not saying that the fact that the Respondent saw the grievance as a method of attempting to further delay the capability proceedings was an entirely neutral factor. Far from it. When the only explanation which the Respondent had given for not dealing with the grievances was on any view unsustainable (as indeed the EAT concluded), it could not necessarily be said with safety that the Respondent’s view, that the Appellant was attempting to delay the

capability proceedings, was completely untainted by considerations of race. It is precisely because, in cases such as this, it is often difficult for the employee to know what was in the mind of the employer that Parliament has thought fit to enact the reversal of burden provisions.

86. It is for this reason that I am not persuaded by the submissions of Mr Reade QC, based on the decision of this Court in *Bailey*. Each case must turn on its own facts. There may be cases, as this Court considered *Bailey* to be, where the Employment Tribunal finds a “complete explanation” for the acts complained of which are innocent in the sense that they are untainted by racial considerations. In my view, that is not what the ET was saying in the present case.
87. I would therefore allow the appeal in relation to the claim for direct race discrimination.

#### The complaint about victimisation

88. The ET addressed the allegation of victimisation so far as it concerned the failure to investigate the grievances at paras. 11.46-11.52.
89. The ET considered that there was clearly a failure to investigate the grievances. It was satisfied that the grievances did refer to allegations of race discrimination and therefore to alleged breaches of the 2010 Act. Accordingly, the grievances were protected acts within the meaning of that Act.
90. Of particular importance is para. 11.48:

“We have considered whether the failure to investigate the Grievances was materially influenced by the fact that the Grievances raised allegations of discrimination. We refer to our findings of fact at paragraphs 7.110-7.121. We infer that R1 through KG [Kathleen Griffin] saw the Grievances as an attempt to delay, if not derail, the capability proceedings and a lengthy delay at that. We conclude that the decision not to allow the Grievances to be investigated when the Policy clearly required that they should be investigated was materially influenced by the content of the Grievances. The decisions not to investigate the Grievances of both June and October 2014 were acts of victimisation.”
91. At para. 11.49 the ET took account of the fact that the October Grievance was to some extent investigated by the Fenwick review. However, the ET considered that the October Grievance was not investigated in accordance with the Respondent’s Grievance Policy as it should have been in accordance with the terms of that Policy. At para. 11.50, the ET said that the fact that the Fenwick review dealt in some way with the October Grievance was a matter for consideration at the remedy stage but it did not provide a defence to the failure to deal with the October Grievance in accordance with

the Grievance Policy. The Fenwick review did not allow the Claimant an appeal against any finding in respect of the October Grievance as the Policy itself did.

92. In the circumstances the ET extended time for the claims of victimisation to be made.
93. At para. 11.52 the ET concluded that the decision not to investigate the grievances was taken in the HR department of the Respondent and did not involve Mr Martin. For that reason no liability attached to Mr Martin in relation to the findings either of race discrimination or victimisation in relation to the grievances.
94. It is clear from para. 28 of his judgment that HHJ Shanks considered that the victimisation issue was closely related to the finding by the ET that there had been direct race discrimination in the failure to investigate the Appellant's grievances. It was principally for that reason that he concluded that the ET's decision on victimisation also could not stand. He did also mention another feature of the case: he said that it was not clear on what basis the ET decided that the content of the grievances was relevant.
95. In my view, when the ET's reasons are read fairly and as a whole, at paras. 11.46-11.48, it is quite clear what they were saying. At para. 11.46, the ET said that there was clearly a failure to investigate the grievances. It correctly directed itself that it then had to consider whether those grievances amounted to a protected act within section 27 of the 2010 Act. At para. 11.47 the ET was satisfied that the grievances did refer to allegations of race discrimination and did therefore refer to alleged breaches of the 2010 Act. For that reason the grievances were protected acts. That is what the ET meant when later, at para. 11.48, it referred to the "content" of the grievances. The ET correctly directed itself that this did not have to be the only reason why the Respondent acted as it did. It was sufficient, as a matter of law, that the failure to investigate the grievances was "materially influenced by the fact that the Grievances raised allegations of discrimination." The ET was clearly concerned that the Respondent, through KG, saw the grievances as an attempt to delay, if not derail, the capability proceedings. It concluded that the decision not to allow the grievances to be investigated even though the Policy clearly required that they should be investigated was materially influenced by the content of the Grievances.
96. In my view, the ET's conclusion and its reasoning in support of that conclusion were both correct as a matter of law. Its conclusion was one to which it was reasonably entitled to come on the facts before it. Accordingly, the EAT was not entitled to interfere with the ET's decision.
97. I would therefore allow the appeal in relation to the complaint about victimisation.

#### The claim for unfair dismissal

98. The ET addressed the issue of ordinary unfair dismissal at paras. 11.77-11.90.
99. The ET first considered whether the Respondent had proved the reason for the Appellant's dismissal. It concluded that the reason for dismissal was established as

being related to the capability of the Appellant: see para. 11.78. Accordingly the ET went on to consider the questions posed by section 98(4) of the 1996 Act.

100. At para. 11.79 the ET considered whether the Respondent acted reasonably in treating its reason as sufficient to dismiss the Appellant. In that regard it reminded itself that it must not substitute its own view but must consider all questions arising for consideration objectively from the viewpoint of the reasonable employer. It further directed itself that there is no burden of proof on either party on this issue of reasonableness.
101. At para. 11.80 the ET was satisfied that there were reasonable grounds for the capability panel to reach the view that they believed the Appellant lacked capability.
102. At para. 11.81 the ET went on to consider whether the Respondent had followed a reasonable procedure.
103. At para. 11.82 the ET said:

“We conclude that [the Respondent] did not consider alternatives to excluding the [Appellant] from all clinical duties when he was excluded in September 2013. We conclude that no analysis was carried out at that time as to the extent of the complication concerns arising with the [Appellant’s] work across all areas – did they, for example only affect 20% of the [Appellant’s] work? Any reasonable employer at that time would, following the letter and spirit of MHPS, have considered if the [Appellant’s] practice could have been restricted in some less draconian way than imposing a blanket exclusion from clinical duty. No consideration was given to having the [Appellant] work under supervision with colleagues in the general surgery department and so retain his basic surgical skills whilst matters were investigated. In moving to a blanket exclusion without consideration of an alternative, [the Respondent] acted as no reasonable employer would act. ... In our Judgment that failure to act as any reasonable employer would have acted taints all which follows.”

104. At para. 11.83 the ET said that:

“Having imposed that full restriction on clinical duties, any reasonable employer would then keep that exclusion under regular and genuine review. [The Respondent] did not do so.  
...”

105. The whole of paras. 11.87-11.88 need to be set out here:

“11.87 MHPS requires capability concerns to be handled quickly and fairly. The procedure which led to the claimant’s

dismissal lasted 20 months during which period he could not practice [*sic*] as a surgeon. That delay was unreasonable and led to the capability panel into [*sic*] dismissing the claimant. The procedure was also tainted with a very poor working relationship between the claimant and R2 which, whilst free from any taint of race discrimination, was sufficiently bad in our judgment to lead to unreasonable decisions being taken and the process of remediation being considered without any rigour or genuine intention to achieve a successful outcome. Those are not the actions of any reasonable employer.

11.88 MHPS is one procedure and the matters which occur prior to a capability panel being convened cannot be divorced from the decision of that panel. The unreasonable actions of R1, which we identify before the panel decided to dismiss, are sufficient in our judgment to taint the decision of that panel and render the decision to dismiss itself unfair. In any event the matters we identify as unreasonable were known to (or should reasonably have been known to) the capability panel. We conclude that any reasonable panel would have addressed those issues by giving particularly detailed and careful consideration to remediation or redeployment of the claimant. We conclude that the matters considered by the panel in this regard were not at the level of detail which any reasonable employer would have applied in the circumstances of this case given the size and administrative resources of R1 and the length of service of the claimant and responsibility previously placed on the claimant by R1 in allowing the claimant to head up the Unit.”

106. At para. 11.89 the ET considered the Respondent’s remediation policy and said:

“R1 has a Remediation Policy. The chair of the capability panel which dismissed the claimant did not know of the existence of such a policy within R1 when she decided to dismiss. We refer to our finding of fact at paragraph 7.141 above. The document produced by Mr McKirdy at page 3007 is brief and identifies the claimant’s practice as ‘*below par especially with regard to breast reconstruction*’. The document produced by Professor Kumar (page 3113) was a short email. These are the documents which formed the basis of the discussions of the Panel which took place without involving the claimant on 24 April 2015, with Mr McKirdy joining the discussion by telephone, on the central and crucial questions of remediation of a ‘*below par*’ practice. Given all that had gone before and given the importance of the question of remediation, those matters were reasonably deserving of greater and more detailed consideration than was given to them. The fact that a process of ongoing remediation has been achieved since the dismissal of the claimant is some evidence that R1 did not act reasonably in this regard. Any

reasonable employer faced with an experienced surgeon of long service as the claimant was and a practice described only as being ‘*below par*’ and certainly not ‘*fundamentally flawed*’ (which is the level MHPS identifies as demonstrating a standard of practice where remediation is not likely to succeed) would have given more detailed thought and consideration to these matters than was given to them by the capability panel. Those are not the actions of any reasonable employer.”

107. Unfortunately there was then a typographical error and there then appeared a second para. 11.89, which relates to the appeal procedure. That also needs to be set out in full here:

“MHPS requires a robust appeal procedure to be in place in case of dismissal with a strict timescale. That timescale was not complied with by R1 in this case. We note the reasons given for the delay but conclude that KG and the HR department evinced a failure to appreciate the significance and importance of a timely appeal process and did not give the appeal panel constitution the priority it reasonably merited. As a result of that unreasonable approach, the time limit for the appeal was missed and no reasonable attempt was made to agree (as opposed to dictate) a change in timetable as MHPS requires. As a result the claimant withdrew his appeal and was denied an opportunity to have his case reviewed on appeal. In failing to comply with the timescale for appeal, the respondent acted as no reasonable employer would act and effectively denied the claimant the opportunity to have his case reviewed on appeal which is a central element of MHPS and of any reasonable procedure.”

108. At para. 11.90 the ET expressed its conclusion that the dismissal of the Appellant was unfair and he was entitled to a remedy.
109. In setting out its final comments, at para. 12.3, the ET said that its decision on unfair dismissal meant that at the remedy hearing it would have to give consideration to what would have happened if the Respondent had followed a reasonable procedure under MHPS. That would require the ET to consider embarking on a “*Polkey* exercise.” That was a reference to the well-known decision of the House of Lords in *Polkey v A E Dayton Ltd* [1988] AC 344.
110. The EAT’s reasoning in allowing the appeal from the ET’s finding that there had been unfair dismissal was based on the decision of this Court in *McAdie*. In that case the only substantive judgment was given by Wall LJ, with whom Buxton and Rix LJ agreed.
111. At para. 34 of his judgment Wall LJ set out in full the conclusions of the ET in that case relating to unfair dismissal, at paras. 81-88 of its determination. In essence the ET

concluded that the reason for dismissal was capability and this was a potentially fair reason for dismissal. However, the ET considered that this would be “to oversimplify the circumstances”. The ET concluded that the claimant’s health condition had been caused by the bank, her employer, and the way in which they had dealt with her grievance. Accordingly, at para. 87 of its determination, the ET said:

“Having reminded itself that the Tribunal must not substitute its own view of what should have occurred, the Tribunal were satisfied that no reasonable employer would have dismissed in these circumstances because no reasonable employer would have found themselves in these circumstances. A reasonable employer would have investigated the matter properly at an early stage. If, despite such an investigation, the outcome was not satisfactory to the claimant the employer would have been on firm ground to consider termination of employment in due course.”

112. The EAT (comprising Underhill J and two lay members) allowed the employer’s appeal.
113. At para. 37 of his judgment Wall LJ quoted from para. 4 of the judgment of Underhill J in the EAT. There Underhill J had said:

“... It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee’s incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to ‘go the extra mile’ in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable. ... However, we accept ... that ... it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him forever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: Tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree ... in sounding a note of caution about how often it will be necessary or appropriate for a Tribunal to undertake an inquiry into the employer’s responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the

reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary."

114. At para. 38 Wall LJ quoted para. 5 of the judgment of Underhill J:

"... It is important to focus not, as such, on the question of that responsibility but on the statutory question of whether it was reasonable for the bank, 'in the circumstances' (which of course include the bank's responsibility for her illness), to dismiss her for that reason. On ordinary principles, the question falls to be answered by reference to the situation as it was at the date that the decision was taken. Thus the question which the Tribunal should have asked itself was 'was it reasonable for the bank to dismiss Mrs McAdie on 22 December 2004, in the circumstances as they then were, including the fact that their mishandling of the situation had led to her illness?'"

115. At para. 6 Underhill J said that that was not the approach which the ET had taken, in particular at para. 87 of its determination. He said that it had misdirected itself in law because its reasoning "would apply in any case where the employer has negligently injured an employee and would have the result, which as we have said above is not the law, that the employer in such circumstances could never fairly dismiss."

116. At para. 40 Wall LJ expressed "complete agreement" with the judgment of Underhill J in that case.

117. At para. 42 Wall LJ said that:

"... Given that the reason for the dismissal in the instant case – an indefinite incapability on the part of the claimant to do her job – and given that the manner in which the claimant was dismissed was procedurally fair – Mr Over [counsel for the employee] was quite unable to provide a rationale which distinguished the claimant's case from the case of the employee who had been dismissed following an industrial accident which had rendered that employee incapable of continuing in his employment."

118. At para. 48 Wall LJ confirmed that he agreed with the EAT's analysis in *McAdie*. Accordingly this Court dismissed the appeal by the employee in that case.

119. In my view, the decision of this Court in *McAdie* is plainly distinguishable from the present case for two reasons.



120. First, there had been in that case a fair procedure adopted by the employer. That was not the finding of the ET in the present case.
121. Secondly, in *McAdie* the employee was incapable of doing the job at all by the time of the dismissal. That is not the factual position in the present case.
122. In the EAT HHJ Shanks appears to have thought that *McAdie* is authority for the proposition that the fact that an employer has caused, or materially contributed to, the capability concerns that arise in relation to an employee can never be taken into account, since all that matters is what the circumstances are at the date of the decision to dismiss. In my view, that is a misunderstanding of what this Court (approving what Underhill J had said in the EAT) held in *McAdie*. Indeed, what Underhill J said in that case is inconsistent with the general proposition that appears to have found favour with HHJ Shanks. What he said was that the previous history was potentially relevant, as one of the “circumstances” to which regard must be had when considering the reasonableness of the dismissal but it could not be dispositive. It certainly could not lead to the conclusion that an employer could never fairly dismiss an employee on grounds of capability because the employer itself had contributed to the lack of capability (for example because of an injury at work caused by the employer’s negligence).
123. For those reasons, I have come to the conclusion that the EAT was wrong to consider that the decision of this Court in *McAdie* led to the same conclusion in this case. Accordingly, I would allow the appeal on this ground also and restore the finding of unfair dismissal which was made by the ET.

### Conclusion

124. For the above reasons I would allow this appeal and restore the order made by the ET.
125. Finally, I would like to thank all counsel for the quality of their submissions.

### **Sir Jack Beatson:**

126. I agree.

### **Lord Justice Davis:**

127. In my opinion, the refusal of the Respondent (by its letter of 30 September 2014) to entertain further the first grievance was wholly unjustified. To conclude that the grievance was outside the one month time limit involved an arbitrary and unwarranted departure from the Grievance Procedure. Further, that grievance cannot fairly or rationally be considered to have been an attempt to derail the capability proceedings: because that grievance was first lodged before the appellant could even have known that there were to be capability proceedings. Overall, the ET was eminently justified in deciding (as it did in para. 11.37) that in all circumstances the burden of proof had

shifted on to the Respondent. It was unfortunate that the EAT did not expressly address this point.

128. Nevertheless, I had all the same initially wondered whether the rejection by the ET of the explanation advanced on behalf of the Respondent (see para. 11.38: “that explanation is rejected”) had sufficiently confronted the point that, even though the proffered explanation was legally a bad one and to be rejected as such, still it was the Respondent’s explanation; and thus, that being the explanation (bad though it was), that precluded direct discrimination as being the reason for this conduct: see, for example, the approach taken in the case of *Bailey* (cited above by Singh LJ). That, indeed, was the core submission of Mr Reade. The wording of the ET in this respect is perhaps not of the clearest. But having reflected further, and taking into account the shift in the burden of proof and the other findings of the ET at paragraph 11.38, I agree that it could not necessarily be said that the stated reasoning, such as it was, of the Respondent in refusing to entertain the grievances was a complete explanation for the Respondent’s conduct so as to preclude direct race discrimination. Nor did the ET so find. Thus the Respondent had failed to discharge the burden of proof resting on it.
129. That is also consistent with the ET’s further conclusion on victimisation and in particular with its express finding (at para. 11.48) that the decision not to allow the grievances to be investigated was “materially influenced by the contents” of the grievances. I do not consider that the EAT was entitled to go behind that finding.
130. I do not wish to add anything on the unfair dismissal aspect.
131. In the result, I agree with Singh LJ that the appeal should be allowed, for the reasons which he gives in his judgment. I emphasise that the outcome here has depended on the particular facts and circumstances of this particular case.