Neutral Citation Number: [2025] EWCA Civ 952

Case No: CA-2024-001387

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
His Honour Judge James Tayler
[2024] EAT 85

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2025

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ELISABETH LAING
and
LADY JUSTICE WHIPPLE

- -

Between:

LEICESTER CITY COUNCIL	**Appellant**
- and -	
BINDU PARMAR	**Respondent**

- -
- -

Andrew Allen KC and Paul Livingston (instructed by **Leicester City Council**) for the **Appellant**
Deshpal Panesar KC and Serena Crawshay-Williams (instructed by **UNISON**) for the **Respondent**

Hearing date: 10 July 2025

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Approved Judgment

This judgment was handed down remotely at 11.00 am on 22 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant ('the Council') is a local authority. The Respondent ('Mrs Parmar') is a former employee of the Council. She was dismissed on 26 April 2022. While she was still employed, she brought a discrimination claim against the Council in the Employment Tribunal ('the ET'). Her claim succeeded. The Council then appealed to the Employment Appeal Tribunal ('the EAT'). The EAT dismissed the Council's appeal. The Council now appeals to this court, with the permission of Bean LJ. Appeals from the ET to the EAT and from the EAT to this court are on a point of law only. The ET heard the evidence and found the facts, so the primary focus of this appeal is the question whether the ET erred in law.

2. On this appeal the Council was represented by Mr Allen KC and Mr Livingston. Mr Panesar KC and Ms Crawshay-Williams represented Mrs Parmar. The same counsel represented the parties in the EAT. The same junior counsel represented the parties in the ET. I thank counsel for their written and oral submissions.

3. In this judgment I will summarise the proceedings in the EAT, including the ET's judgment, and, more briefly, the proceedings in the EAT. I will then summarise the grounds of appeal and the submissions. I will then explain why the Council's arguments do not show that the ET (or, for that matter, the EAT) erred in law in their decisions in this case. I would therefore dismiss this appeal.

The proceedings in the ET

Mrs Parmar's claim

4. On 7 May 2021, Mrs Parmar presented a claim form ('ET1') to the ET. In paragraph 2 of the particulars of claim, Mrs Parmar alleged that Ms Lake's agenda was to protect her employment and that of 'her white colleagues/friends. She has also shown a clear racially motivated pattern of discriminatory behaviour towards BAME staff…Examples include more BAME managers in Ruth Lake's division being disciplined as opposed to white managers even where serious concerns have been raised against these white managers and/or behaviours which are contrary to [the Council's] code of conduct. For example, between 2015 and 2021, three BAME senior managers in Ruth Lake's division have been taken through a disciplinary process, in the same period no white senior manager has been disciplined. This shows a disproportionately higher number of BAME senior managers being disciplined in comparison to the total number of BAME managers in Ruth Lake's division which averages (over the last three years) at 38%'.

5. Mrs Parmar's claim was that the Council had discriminated against her on the grounds of her race. In paragraph 8 of the particulars of claim she complained that Ms Lake had not taken 'any steps to investigate the legal Safeguarding failures by [AE] and [HM], both white Heads of Service…even though the evidence was copied to [Ms] Lake in an email on 7th January 2021…'

6. In paragraph 13 of her particulars of her claim, she listed five acts by which, she said, the Council had unlawfully discriminated against her because of her race. She added

that she believed that two white heads of service, AE and HM, 'were and would not have been treated' in the same way by the Council.

i. The Council made false allegations against Mrs Parmar on or around 12 January 2012.
ii. The Council transferred her from her role as Head of Service.
iii. The Council started a disciplinary investigation against her on or around that date.
iv. The Council required her to go to several disciplinary investigation meetings only to tell her that there was no case to answer.
v. The Council did not consider lesser and more proportionate ways of dealing with the allegations against her, such as mediation.

7. In its response, or ET3, the Council rejected Mrs Parmar's claim. It said, among other things, that in 2015, a head of service in Ms Lake's division had been disciplined for 'their' conduct during a redundancy process, and had 'fully accepted their wrongdoing from the outset of the investigation'. That person still works for the Council and that person and Ms Lake have a good relationship. Ms Lake could not identify which other staff Mrs Parmar was referring to in paragraph 2 of her ET1. A team manager was disciplined in 2018, but the process was not instigated by Ms Lake. The race of these managers had 'nothing whatsoever to do with the decision to discipline them'. In paragraph 16, the Council denied that it had taken no steps to investigate the conduct of HM and AE. It asserted that Ms Lake took such steps, but 'just not in the way [Mrs Parmar] wanted then to be addressed, as [Mrs Parmar] wanted a disciplinary process to be instigated against [AE] and [HM]'.

The judgment of the ET

8. The hearing in the ET took five days between 23 and 27 January 2023. The ET consisted of an Employment Judge and two lay members. The ET had the benefit of 14 pages of very detailed closing submissions from junior counsel for the Council. They were 80 paragraphs long and typed in a small font. I will return to those submissions later on in this judgment, at paragraphs 71-77, below. The ET's judgment was sent to the parties on 22 March 2023. The ET heard evidence from Mrs Parmar, and three witnesses from the Council (Ms Lake, Ms Tote and Mr Samuels). Its unanimous decision was that the Council had discriminated against Mrs Parmar 'by reason of her race'. The ET adjourned the issue of remedy.

The ET's reasons

9. In paragraph 6 of its reasons, the ET listed the acronyms by which it referred to the Council's various employees. The ET described the relevant 'internal hierarchy' in paragraphs 7 and 8. The elected City Mayor was the Council's leader. Below him was the Council's chief operating officer. There were several 'strategic directors' below her, including Mr Samuels, the director of adult social care and safeguarding. Ms Lake, who was director of adult social care and safeguarding, reported to Mr Samuels. Ms Tote was director of children and social care and community safety. Ms Lake was responsible for eight service areas in her division. Each service area is headed by a head of service or a principal professional. Mrs Parmar was head of locality west. There is also a section called contact and response ('C&R') which provides a 'community front door service' for new inquiries about adult social care.

10. Mrs Parmar is a British National. She describes herself as of Indian origin. She was born in Kenya. She came to the United Kingdom in 1976 and finished her secondary schooling here. She received an MA degree in social work. She started work with the Leicester County Council ('LCC') in 1989. After a gap when she was studying she returned to work in the Older Persons' Mental Health Team as a qualified social worker. When the LCC and the Council merged, her employment was transferred to the Council in 1997. She became a team manager in 1998. She was appointed head of service for locality west in 2015. The ET said that she was very experienced in social work and in management (reasons, paragraph 10). She had over 30 years of experience (paragraph 12). She was responsible for several teams. Each was managed by a team leader. The ET listed those in paragraph 11. She managed three white and two Indian team leaders, including JR. AE and HM were white British heads of service.

11. Until the events which were the subject of the claim, Mrs Parmar had never been the subject of disciplinary proceedings or performance measures. She was dismissed on 26 April 2022. Her dismissal was the subject of a separate claim.

12. It was common ground that C&R and the locality west team had a poor relationship. 'This often extended to conflict between team leaders'(paragraph 8). Ms Lake was responsible for ensuring that the teams and heads of service co-operated.

13. The background to the claim was an incident in May 2018 involving HM, who was then head of C&R. Ms Lake was in an open-plan office, having a routine phone call with HM. At the end of the call, HM swore so loudly that several people heard her. Ms Lake went to see HM about this. HM accepted that she had acted inappropriately and unprofessionally. Ms Lake did nothing further.

14. On 16 November 2018, about ten minutes before the end of the working week, and the day before Mrs Parmar was due to take two weeks' annual leave, HM sent an email to several recipients. She raised some issues about staffing. The ET observed, somewhat tartly, that 'The email could conceivably have been sent earlier'(paragraph 15). HM felt that her team could not cope and that some of their work should be transferred, in particular, to locality west. The ET said that she did not have the power to do this, but she nevertheless signed off with the sentence 'I am sorry for the inconvenience, but we will have to direct callers to the West Locality from Tuesday' (paragraph 15).

15. The ET said, with perhaps some understatement, 'Unsurprisingly the email did not go down well with the recipients'(paragraph 16). One response was that HM's suggestion was 'completely unfeasible'(paragraph 16). In paragraph 16, the ET added a quotation from a recipient who wrote in 'more trenchant terms'. The author of that email said that proposal would put service users at risk, and asked HM not to issue any more 'command/demand or confrontational emails' and to respect her professional colleagues. Mrs Parmar saw the email exchange on 24 November 2018. Her response was to send an email of complaint to Ms Lake. She said that she was not happy having to write an email while she was on a two-week holiday. She found it appalling that HM 'took the opportunity of me being away for two weeks to harass and bully my TLs. This has now become a bit of a pattern as you will remember from earlier this year when I

was on leave. The tone of [HM's] email was totally unacceptable and I need her to afford the same respect as I do to her TLs'(paragraph 17).

16. On 5 December 2018, Ms Lake told Mrs Parmar that the extra work would move to locality west. Ms Lake had decided not to take any action against HM for the way in which she had first raised this issue. On 8 January 2019, Mrs Parmar had a routine supervision meeting with Ms Lake. Mrs Parmar said she had been concerned about the tone of HM's emails. She said that it was not acceptable for a head of service to 'kick' the locality west team leaders. She then accused Ms Lake of unconscious bias against black and ethnic minority heads of service. She said that when Ms Lake came to the office where the heads of service were based, she always sat with her white colleagues. Ms Lake then asked if she was being accused of being a racist. Mrs Parmar said that Ms Lake would have to reflect about that, but that that was how she felt.

17. Ms Lake decided to speak to the team leaders to try to mend fences. She found out that many of the locality west team leaders were already in the process of lodging a collective grievance against HM. When lodged, the grievance complained, among other things, about the 'oppressive and inequitable treatment' to which they felt they had been subjected.

18. On 14 February 2020, JR was on a training course led by a principal social worker, JD. JR felt that JD had humiliated her by publicly singling her out from a group of people. She emailed JD and complained. JD's response was to complain to Ms Lake about 'the content and tone' of JR's email (paragraph 22). Ms Lake decided that mediation between JD and JR was the best way of dealing with this exchange (paragraphs 21-23).

19. In October 2020, SR, an agency worker with the Council, had a difficult supervision session with his line manager, who was concerned that SR had left a vulnerable service user in an unsafe situation. The service user had later died. The police asked for a report on the team's contact with the service user. SR saw an email about the service user when he was off sick. He then ended his agency assignment with the Council. The employment agency then contacted Mrs Parmar, and told her that SR had complained about his line manager. SR and his line manager, AE, were, according to Mrs Parmar, good friends. In November AE went to SR's home to pick up SR's badge, laptop and locker key, which a line manager would not normally do. Then, in November 2020, SR apparently re-joined the Council as an agency worker, with AE as his line manager. Some people were still concerned about the quality of his work.

20. Another incident related to SCC, who is white British and was, at the relevant time, acting head of service. Mrs Parmar was allocated to her as her buddy/mentor. On 13 December 2020, M SCC emailed Ms Lake to say that she no longer wanted Mrs Parmar as her mentor and that she had concerns about locality west. Ms Lake asked M SCC to put her concerns in writing. She did so. The ET said of those concerns: 'These were it has to be said all at fairly low level'(paragraph 26). The ET further described them in paragraph 26. The ET's assessment of their gravity was one which was open to the ET.

21. On 16 December 2020 AE wrote to Ms Lake, raising concerns about the working relationship between C&R and locality west. This was not a complaint about Mrs Parmar, but about some things for which she was responsible (paragraph 27). On 20

December 2020, Ms Lake contacted a manager in the HR team to discuss her concerns about Mrs Parmar. Ms Joseph from HR was allocated to support Ms Lake.

22. There was an 'angry' exchange of emails on 4 January 2021 between JR (one of Mrs Parmar's team leaders) SR and AE about a case in which there had been safeguarding alerts on which, apparently, no action had been taken. The ET described the exchange in more detail in paragraph 29. AE emailed Mrs Parmar the next day because she was JR's line manager, complaining about JR's 'accusatory' emails and saying that it would lead to a formal complaint if it continued.

23. Mrs Parmar was copied in because she was head of service; she only saw the exchange on her return from annual leave on 5 January 2021. Mrs Parmar's view was that there was a difference of opinion about the point at which alerts should have been entered in the relevant system. She asked a principal social worker for advice. AE emailed Ms Lake on 7 January 2021. AE accused Mrs Parmar and locality west of having 'escalated matters beyond all reason'(paragraph 31), and of targeting SR and herself by association. Locality west had 'a long reputation of intimidating and unhelpful behaviour'(paragraph 31) and she could not understand whether they were allowed to behave in that way.

24. Mrs Parmar sent AE an email about SR's supervision on 8 January 2021. AE emailed Ms Lake shortly after that. She did not copy in Mrs Parmar. She said 'I am absolutely disgusted with what [Mrs Parmar] is implying here. I will be raising this through the appropriate channels and will be making a formal complaint as this is victimisation'(paragraph 33). She would ask HR for advice. On the same day AE 'resigned', but did not leave. She sent another email to Ms Lake. She accused team leaders and heads of service of being 'vindictive and unprofessional' and gave Mrs Parmar as an example. She said that SR intended to leave 'as a result of this victimisation'(paragraph 34).

25. Ms Lake said that she had a meeting with a person from HR in early January 2021 and they agreed that a disciplinary investigation was appropriate. She also decided temporarily to transfer Mrs Parmar from her post. She told Mr Samuels. As the ET noted in paragraph 35, 'No such decision was made to suspend any other Head of Service'. Ms Lake told Mrs Parmar of this on 12 January 2021, and told the other heads of service. Ms Lake then interviewed nine witnesses. They did not include SR.

26. On 9 February 2021, Ms Lake invited Mrs Parmar to a disciplinary investigation meeting. The ET quoted the allegations in paragraph 39. Two general failures were alleged against her; but no details were given, such as dates, conduct, people, or the provisions or standards which she was said to have breached. These matters were said to have 'created an environment that is detrimental to individuals and to the delivery of core functions…' On 19 February 2021, Ms Lake had a remote investigation meeting with Mrs Parmar. It was recorded. The meeting did not finish. A further meeting was arranged for 24 February 2021.

27. On 22 February 2021, Mrs Parmar sent an email entitled 'whistleblowing' to 60 people in the Council, including the City Mayor and all the councillors. She copied in the Care

Quality Commission. She made a number of 'allegations of whistleblowing and racially discriminatory behaviour against BAME staff by Ms Lake'(paragraph 41). That email was the subject of separate proceedings, so the ET said no more about it.

28. Mrs Parmar was absent with work-related stress from 23 February 2021 until 25 March 2021. The second investigation meeting was cancelled. At some point Mr Samuels decided that another director, Ms Tote, should take over the investigation. She was given recordings of the remote interviews and watched them. They were not given to Mrs Parmar. The ET commented, correctly, in paragraph 44, that 'None of the recorded interviews have been supplied to [Mrs Parmar] in the process of disclosure nor have the transcripts been included in the otherwise voluminous bundle of 680 pages. The reason given is that they were deemed not relevant'.

29. SR was not interviewed by Ms Lake, but Ms Tote did want to speak to him, and she wrote to him to ask him for an interview. He had left his job by then, and was recovering from an illness. No statement was taken from him. On 23 March 2021 Ms Tote interviewed OC, an agency worker, about his interactions with Mrs Parmar, which he had raised with an agency. Ms Tote invited Mrs Parmar to a further investigation interview on 26 March, the day after her return to work.

30. The Council instructed an outside expert to look into the allegations which Mrs Parmar had made. 'It appears that his decision was based on the papers only'. He concluded, in a report dated 31 March 2021, that there was no credible evidence to support Mrs Parmar's allegations of safeguarding failures or of race discrimination (paragraph 48).

31. The re-arranged investigation meeting between Mrs Parmar and Ms Tote was on 22 April 2021. It was a remote meeting. The notes of that meeting were disclosed in the ET proceedings. Mrs Parmar said that she did not understand, and had never understood, what she had done wrong. The ET quoted what she said in paragraph 49. She said that she had, by then, been interviewed for three hours and still did not know what specific provision she was alleged to have breached. 'There is no substantive reply from Ms Tote to that question. We note that at this point Ms Tote had listened to all the earlier recordings of interviews' (paragraph 50).

32. Ms Tote arranged a further meeting on 7 May 2021, 'which although described as a "re-convened investigation meeting" was to all intents and purposes arranged to inform [Mrs Parmar] that there was no case to answer and the process was being brought to an end' (paragraph 51). On 7 May 2021, that is, on the very same day, Mrs Parmar presented an ET1 to the ET.

33. In paragraph 53, the ET referred to a data subject access request ('DSAR') which Mrs Parmar had made before the ET hearing. The Council's answer to the DSAR was that it did not hold information on the number of white and BAME employees from grade 10 and above in adult social care who had been the subject of disciplinary action started before 2017. There had been two such cases since 2017. Both were against BAME employees. There was no record of any comparable white employees being disciplined.

34. That answer was supplemented by evidence at the hearing. The only other head of service who was subject to disciplinary action was JSB who was of Asian origin. The only other person who was in a comparable grade to Mrs Parmar who was the subject of a disciplinary investigation commissioned by Ms Lake was KR, who is of Asian origin. Ms Lake had not commissioned any disciplinary investigations against white employees of a comparable status (paragraph 54).

35. The ET listed the agreed issues in paragraphs 55-57. The particulars of the treatment of which Mrs Parmar complained correspond with the allegations in Mrs Parmar's ET1 (see paragraph 4, above). The issue in relation to each was whether the Council had treated Mrs Parmar less favourably than it treated or would treat a comparator. The ET recorded, correctly, that Mrs Parmar relied on a hypothetical comparator.

36. The final issue was whether Mrs Parmar could 'prove primary facts from which [the ET] could properly conclude, in the absence of any other explanation, that the difference in treatment was because of [Mrs Parmar's] race… If so, what is [the Council's] explanation? Can it prove a non-discriminatory reason for any proven treatment?' (paragraph 57).

37. In paragraphs 58-63 the ET summarised the law. Mr Allen was asked during his oral submissions whether he criticised that summary. He said that he did not. The ET recorded in paragraph 64 that there was no dispute about the law and no significant dispute about the material facts. The dispute was about how the law should be applied. In paragraph 65, it said that there was no suggestion that this case was so straightforward that it was not necessary for the ET to go through 'the two-stage process'.

38. The ET did not think much of the Council's argument that an allegation of direct discrimination had only been put to Ms Lake at the end of her cross-examination, 'as almost an after-thought'. Nor was it impressed by the argument that Mrs Parmar had not 'provided evidence of discrimination. There is rarely direct evidence of discrimination' (paragraphs 66 and 67).

39. In paragraph 68, the ET said that there could be 'no real argument that [Mrs Parmar] was subject to treatment which could potentially amount to less favourable treatment'. A disciplinary investigation and suspension from her role 'are clearly potential acts of less favourable treatment'. The real dispute in the case was about 'appropriate comparison, whether the burden of proof passes to [the Council] to show a non-discriminatory reason for the treatment and if so whether that burden has been discharged' (paragraph 68).

40. The ET, 'having considered the evidence' was 'satisfied' that Mrs Parmar had 'established a prima facie case, that is to say [Mrs Parmar] has proved facts from which an inference of discrimination could be drawn and thus facts from which an inference of discrimination *might be drawn* and the burden thus shifts to [the Council] to establish a non-discriminatory reason for the treatment' (paragraph 69) (my emphasis).

41. The ET's summary was 'in essence it is because in a number of comparable situations where a disciplinary investigation might reasonably have been instigated, Ms Lake chose not to do so when it involved employees of a different race to that of [Mrs Parmar]. Instead her normal approach was to offer mediation or deal with it informally by discussion. In the case of Mrs Parmar, however, she decided to take much more drastic action and she did so *after she had been accused of unconscious racial bias'* (paragraph 70) (my emphasis).

42. The ET then explained, in paragraphs 70-78, the things which 'in particular' it had taken into account.

    1. HM had admitted swearing. That was inappropriate conduct. Ms Lake thought so, as she had taken the time to go and see HM personally.
    2. HM had sent an email which caused such consternation that it led to a collective grievance. Ms Lake agreed the outcome about the distribution of work, 'the manner in which it was done clearly offended others to the extent that they felt a collective grievance was necessary. There was nothing equally serious against [Mrs Parmar].'
    3. JR made 'strong allegations' against JD 'that were designed to cause humiliation and to denigrate'. Ms Lake offered mediation rather than an investigation.
    4. AE's claim that Mrs Parmar had victimised SR was a central allegation by AE against Mrs Parmar, yet Ms Lake did not interview SR, 'which suggests she could not have thought that there was any substance in the allegation'. The ET did not think that the explanation for this was that Ms Lake 'had simply not got round to it', as she had done all of the nine proposed interviews by 5 February 2001. SR was never on the list of interviewees. Mrs Parmar was interviewed after the others, which suggested that Mrs Parmar was the last of the list of planned interviewees. It would make 'no sense' to interview SR after Mrs Parmar.
    5. The issue involving AE and the matter which HM thought was 'escalated beyond all reason' was about JR, not Mrs Parmar. Mrs Parmar was right to ask JD for advice.
    6. The only employees Ms Lake had ever disciplined were 'of Asian ethnicity'.

43. The ET recorded, in paragraph 71, counsel's argument that the allegations against Mrs Parmar were serious and that an investigation was appropriate. He argued that it was irrelevant that nothing had come of the investigation, because that conclusion could only be reached after the investigation. He relied on Mrs Parmar's concession in cross-examination that they were 'serious concerns' and 'serious allegation'. Mrs Parmar's actual concession, the ET explained, was that the allegations were serious if correct, but she did not believe that they were.

44. Mrs Parmar 'clearly' did not accept that they were serious at the time because she consistently complained that they were without substance, and she did not understand what she was supposed to have done wrong. Ms Lake never told Mrs Parmar about the

allegations by AE and by SCC. Mrs Parmar only found out about them during disclosure. 'She was therefore hardly in a position to admit they were serious if she did not know anything about them'(paragraph 73).

45. The ET's summary, in paragraph 74, was that 'The reality is that there was nothing of substance to start a disciplinary investigation'. Nor was there any suggestion that senior managers 'routinely' started such investigations. Ms Lake must have known that there was 'nothing of substance because the wording of the allegations …did not set out any identifiable acts of misconduct'. That is a significant finding of fact. Ms Tote 'decided quite properly' to discontinue the investigation once she had considered the evidence. 'There is nothing to suggest Ms Lake would have discontinued the investigation if she had not been removed from the process by Mr Samuels' (paragraph 74).

46. AE's email of 16 December did not raise any concerns about Mrs Parmar. The two specific complaints were about the conduct of a particular employee who was not Mrs Parmar.

47. The ET's conclusion on the evidence was that 'when it came to assessing the merits of …allegations against white employees such as HM, AE and JR, Ms Lake was slow to move to formal measures. In the case of [Mrs Parmar] she moved fairly speedily to investigation and suspension for something which was either at the same or lower level of alleged misconduct. We are satisfied that race played a part in her decisions. There is no other credible explanation' (paragraph 76).

48. The ET 'also' drew adverse inferences from the Council's failure to disclose relevant evidence. There had been a conscious decision by the Council or by its legal team not to disclose 'highly relevant evidence'. This evidence was 'clearly relevant' because it was the evidence which led Ms Tote to decide that there was no substance in the allegations and therefore to end the investigation (paragraph 77). This evidence was not just the recordings of the interviews. Ms Lake had said that she made notes of witness interviews which she 'may have shared' with HR. She might have typed them and saved them in a file. No notes or files had been disclosed. Ms Tote took notes from investigation meetings which she kept for six months. As Mrs Parmar presented her claim on 7 May, 'the need to preserve such notes would have been obvious from the outset'. Ms Tote also interviewed OC 'and at least some interviews were recorded. Those recordings have not been disclosed' (paragraph 78).

49. In paragraph 79 the ET considered whether the Council had shown that there was a non-discriminatory explanation for what had happened. The ET considered and rejected seven explanations.

    1. The disciplinary procedure was appropriate to speak to witnesses and to gather evidence. That argument was 'without substance'. There was nothing to stop Ms Lake from making 'informal inquiries as she often did'.
    2. Ms Lake took advice from HR and was told that the investigation was appropriate. The ET said that she could not hide behind HR's actions or advice. The investigation was her management decision.

3. The disciplinary procedure was preferable to the grievance procedure which relied on complainants to raise grievances. The ET observed that this explanation was new, and had no merit. 'It is somewhat bizarre to suggest that because no-one had lodged a grievance that this somehow made a disciplinary process appropriate'.
4. Ms Lake had raised issues with Mrs Parmar in the past to no avail. The ET's comment was that this explanation appeared to have been developed 'in the course of Ms Lake's evidence'. In cross-examination she could only give three examples 'where [Mrs Parmar] had failed to acknowledge past issues'.
    a. She had asked Mrs Parmar in October 2020 not to use a 'curt and dismissive' tone in emails; but the relevant email was not in the bundle, so the ET could not 'assess it fully'. The ET further commented that the email could not have been thought to be important, because it would otherwise have been in the bundle of documents. Mrs Parmar had in any event said she was happy to discuss this at her next one-to-one meeting; and Ms Lake had conceded that they might not 'see eye to eye on the tone thing'. The question had not then been discussed at their next meeting.
    b. Ms Lake had told Mrs Parmar at a meeting on 8 January that she had seen emails from locality west managers, including Mrs Parmar, which Ms Lake thought were 'rude and aggressive'. The ET's comment was 'Those emails have not been included in the bundle either so the same observation applies'.
    c. At a third supervision meeting on 3 March 2020, it was noted that 'wider concerns' had been expressed by people who did not wish to formalise their concerns about how working with some colleagues in West makes them feel – anxious, berated, attacked…'. Those concerns were about ten months before Mrs Parmar was investigated. 'It was therefore largely historical. Ms Lake could 'scarcely have been thinking of this in January 2021 when she was deciding whether to start a disciplinary investigation'.
5. Given the potential misconduct, an investigation was appropriate. The ET commented, succinctly, 'There was no potential misconduct in reality. The allegations have never been particularised'. This is another significant finding of fact.
6. When Ms Lake got the statements and emails from SCC, AE had told SCC that he/she intended to resign. The suggestion that AE would resign 'was clearly not serious nor do we find that Ms Lake treated it as such'. These things could not have been serious because Mrs Parmar was never told about them. This is also a significant finding of fact.
7. There was, it was said, potential targeting of SR and allegations of victimisation. If Ms Lake had genuinely thought that she

would have interviewed SR. SR had not complained that he was being victimised. This is a further significant finding of fact.

50. The ET's first conclusion, in paragraph 80, was that it was satisfied 'in all of the circumstances that [the Council] has not established, on the balance of probabilities, a non-discriminatory explanation for the treatment of' Mrs Parmar. Its second conclusion, in paragraph 81, was that it was 'satisfied that (in the same or similar circumstances involving a white employee or at any rate one who was not Asian) Ms Lake would not have initiated a disciplinary investigation or suspended an employee from their role as Head of Service'. The ET was satisfied that the Council had treated Mrs Parmar 'less favourably because of her race'.

51. The ET listed its conclusions on the specific issues in paragraphs 82-88.

1. The ET dismissed the claim ('as framed') that false allegations had been made against Mrs Parmar on or around 12 January 2021. The allegations were not 'false' in the sense that they were 'manufactured or fabricated'.
2. The ET upheld Mrs Parmar's claim on issues 2 and 3 (transferring Mrs Parmar from her role and carrying out a disciplinary investigation). It was 'satisfied that [Mrs Parmar] was treated less favourably than a hypothetical white comparator would have been (that is to say someone who was white British) in the same or similar circumstances would have been for the reasons given above'.
3. Issue 4 concerned the disciplinary procedure investigatory meetings by Ms Lake on 19 February 2021 and by Ms Tote on 22 April and 7 May 2021. The ET upheld the first two allegations 'for the reasons given above'. Although Ms Tote held the second meeting and no allegations were made against her, the real decision was made by Ms Lake (the meeting had been postponed when Mrs Parmar became ill). The second meeting was effectively a continuation of the first. The ET did not uphold the allegation about the third meeting, as all that happened was that Ms Tote told Mrs Parmar that the investigation had been dropped. Mrs Parmar might have been told sooner, but 'there is nothing discriminatory about that'. In any event it was not a disciplinary investigation meeting.
4. The fifth allegation succeeded 'for the reasons given above'.

The appeal to the EAT

52. The Council appealed to the EAT on 11 grounds. The parties were represented as they were in this court. The hearing lasted a day before HHJ James Tayler ('the Judge'). The Judge summarised the relevant parts of the ET's judgment in paragraphs 2-46, with extensive quotations where appropriate. In paragraph 47 of the EAT's judgment, the Judge described the ground of appeal as including many 'perversity and reasons challenges'. He then quoted paragraph 3.8.1 of the EAT's Practice Direction: 'An error of law should be easy to identify in a few words. The experience of the Judges of the EAT over many years is that short and focussed grounds of appeal are usually more

persuasive than a long one and, in general, the more grounds raised the more it suggests that none is a good one'.

53. The Judge cited four decisions of this court which emphasise the EAT's limited powers on an appeal on a point of law, and the dangers, when an appellate court disagrees with a decision, of substituting its subjective preference for the conclusions of the fact-finder, and of being too ready to detect errors of law by being 'pernickety' or over-analysing the ET's reasoning in a 'hypercritical' way. The authorities also encourage appellate courts to read the decisions of ET 'fairly and as a whole, without focussing merely on individual phrases or passages in isolation…'. Those four decisions, in chronological order, are *UCATT v Brain* [1981] ICR 542; *British Telecommunications Plc v Sheridan* [1990] IRLR 27; *Brent London Borough Council v Fuller* [2011] EWCA Civ 267; [2011] ICR 806; and *DPP Law Limited v Greenberg* [2021] EWCA Civ 672; [2021] IRLR 1016. The Judge also cited a summary of authorities about the ET's duty to give reasons given by Cavanagh J in *Frame v Governing Body of Llanwgiwg Primary School* UKEAT/0320/19/EAT.

54. The Judge commented in paragraph 55 that many grounds of appeal 'inevitably with a myriad of sub-grounds, are an invitation not to see the wood for the trees'. He stood back for a moment and looked at the wood. 'The primary reason for the burden of proof shifting to [the Council] was the disparity finding; that Ms Lake had not disciplined employees of other ethnicity than that of [Mrs Parmar] in similar circumstances. That was linked to the unfairness finding; the [Mrs Parmar] had been treated unfairly while those of a different race with who she compared her treatment had not; and the treatment of Asian employees finding: that the comparable employees Ms Lake had previously subject to disciplinary action were Asian. A further minor factor was the disclosure finding… The burden having shifted to [the Council] the explanations were rejected as proving that discrimination had not occurred. On the face of it, this was a paradigm application of the principles in *Igen*, although [the Council] would have us believe otherwise' (paragraph 55). '*Igen*' is a reference to *Igen Limited v Wong* [2005] EWCA Civ 142; [2005] ICR 931.

55. The Judge then considered, and dismissed, all 11 grounds of appeal. I will refer in due course to the Judge's reasons for dismissing the grounds of appeal which have been resuscitated for the purposes of this appeal (that is, EAT grounds 4, 7, 8-9, and 11). I will start, however, with the Judge's discussion of comparators, as it is useful background to the Council's arguments on ground 1.

56. In his consideration of the earlier grounds of appeal, the Judge had cited the relevant authorities on the difference between a 'statutory comparator', a 'hypothetical comparator' and an 'evidential comparator'. He referred to the judgment of Cavanagh J in *Martin v St Francis Xavier Sixth Form College Board* [2024] EAT 22; [2024] IRLR 472. In paragraph 54 of his judgment, Cavanagh J summarised the effect of section 13 of the Equality Act 2010 ('the 2010 Act') (see paragraph 85, below). There are two elements in section 13. First, a claimant must show that less favourable treatment. Second, the claimant must show (in a case like this) that that treatment was because of his race.

57. In paragraph 55, Cavanagh J said that there are three possible comparators for this purpose: an actual, a hypothetical, and an 'evidential' comparator. He explained that there is an actual comparator when 'there are no material differences between the circumstances relating to the claimant's case and the comparator's case' (see section 23(1) of the 2010 Act). An actual comparator is also sometimes called 'a statutory comparator'. Cavanagh J then pointed out that even if there were material differences between the circumstances of the claimant and of another person, an ET can take into account the way in which a respondent treats that person, if there are relevant similarities between the claimant's circumstances and those of that person. He referred to *Chief Constable of West Yorkshire Police v Vento* [2001] IRLR 124 (EAT: Lindsay J) as an example of such a case.

58. He also quoted paragraphs 107-110 of the speech of Lord Scott in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] ICR 337. Lord Scott explained in paragraph 107 that comparators come 'into play in two distinct and separate respects'. The first class of comparator is the statutory comparator, actual or hypothetical. In most cases there will not be a suitable actual comparator, and a claimant will have to rely on a hypothetical comparator (paragraph 108).

59. Comparators also have a 'quite separate evidential role to play', however. A claimant can satisfy a tribunal that she has been discriminated against by 'placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class'. Actual comparators can constitute such evidential material. They are 'no more than tools which may or may not justify an inference of discrimination… The usefulness of the tool will, in any particular case, depend on the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences, the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator…by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that that victim was treated less favourably than she would have been treated if she had been the …comparator' (paragraph 109).

60. Cavanagh J also quoted paragraph 37 of Lord Hoffmann's leading speech in *Watt (formerly Carter) v Ahsan* [2007] UKHL 51; [2008] 1 AC 296. Lord Hoffmann explained that whether or not there is a sufficient material similarity between the circumstances of a claimant and an actual comparator may sometimes be disputed, but that it may be unnecessary to resolve such disputes because the ET 'should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator'.

61. In paragraph 66, the Judge said that he had quoted extensively from the authorities 'to emphasise that comparing the treatment of a claimant with that of another person is a subtle business'. The analysis is 'highly context specific. Where such a comparison is made, as part of an analysis of a range of relevant factors it is not valid to pick apart

small components of the comparative analysis, and to trot out the well-known phrase that there is nothing more than a mere difference of status and treatment, while ignoring all of the other relevant findings of the [ET] that contributed to the overall analysis' (paragraph 66).

62. He rejected the criticism that this case was only about 'unfair treatment' (paragraphs 67-71). He explained cogently in paragraph 73 why there was more than a 'mere difference of treatment and status'. A number of white employees had not been the subject of a disciplinary procedure in circumstances which were similar to those of Mrs Parmar. 'It was the totality of the evidence which shifted the burden of proof'.

63. He referred, in paragraphs 76 and 77, to criticisms of 'just one component of a multi-faceted decision' and of 'one minor component in the overall analysis'. He commented wryly, on ground 3 (a reasons challenge) that if the ET's reasons were 'so lacking it is hard to understand how [the Council] managed to find 11 grounds of appeal to challenge them' (paragraph 83).

64. The Judge dealt with ground 4 in paragraphs 84-89. He said that 'On a fair reading of the Judgment as a whole I consider that it is clear that [the ET] considered that there were evidential comparators who assisted in the process of drawing inferences' (paragraph 84). He rejected the argument that if there was no actual comparator, the ET is obliged 'expressly to construct a hypothetical comparator' (paragraph 85). The Judge pointed that, in any event, the ET had twice (in paragraphs 81 and 84) referred to a hypothetical white employee, and that the way in which it had expressed its conclusions on issues 4 and 5 did not undermine that point (paragraphs 87-89).

65. In the EAT the Council relied on a statement by Underhill J (as he then was) in *D'Silva v NATFHE* [2008] IRLR 412 in support of ground 7. The Judge pointed out, rightly, that, in that passage, Underhill J was warning against the dangers of automatically drawing an inference of discrimination from failures to disclose documents in ET proceedings. The Judge added, rightly, that 'That was not the case in this judgment. It was a minor factor, amongst many others, that resulted in the burden shifting. I do not consider that the [ET] erred in law in taking it into account, to the limited extent that it did so. The burden would have shifted absent this component of the analysis' (paragraph 94).

66. The EAT dealt succinctly with grounds 8, 9 and 11.

67. Ground 8 was 'a dressed up perversity ground'. On a 'fair reading of the judgment' the ET did consider whether there was a non-discriminatory explanation for the treatment of Mrs Parmar. The ET 'found as a fact that [the Council] had failed to establish that that was the case. [The Council] comes nowhere near surmounting the high threshold for establishing perversity' (paragraph 95).

68. The EAT's answer to ground 9 was that the ET 'clearly did consider [the Council's] explanation for the treatment of [Mrs Parmar], but rejected it. [The ET] did not accept that the real reason for the instigation of a formal disciplinary investigation was [Mrs Parmar's] conduct. The ET did not disregard the concerns that had been raised, but

concluded that if [Mrs Parmar] had been white they would have been dealt with informally' (paragraph 96).

69. Ground 11 was a challenge to the ET's conclusion that inviting 'Mrs Parmar to disciplinary investigatory meetings was an act of race discrimination. [The Council] comes nowhere near to establishing perversity. The reasoning of [the ET] was more than adequate to explain why the burden of proof shifted to [the Council] and why [the Council] failed to discharge the burden upon it' (paragraph 98).

The grounds of appeal

70. There are four grounds of appeal.

1. The EAT's conclusions about the council's treatment of the comparators were wrong and it was therefore wrong to hold that the burden of proving discrimination shifted from Mrs Parmar to the Council (ground 4 before the EAT).
2. The ET was wrong to draw adverse inferences from the Council's failures to disclose relevant documents (ground 7 before the EAT).
3. The ET's approach to the Council's non-discriminatory explanation for its treatment of Mrs Parmar was wrong (grounds 8-9 before the EAT).
4. The ET's approach to the Council's inviting Mrs Parmar to disciplinary meetings was wrong (ground 11 before the EAT).

Submissions

At the ET hearing

71. In his oral submissions, Mr Allen relied on some passages in the Council's closing written submissions. Those submissions are part of the context for the judgment, as they show (1) the way in which the Council tried to persuade the ET to apply the uncontroversial law to the facts, and (2) the evidence relied on by the Council at the end of the hearing. Junior counsel reminded the ET in paragraph 3 that this was not an unfair dismissal case and that whether there were reasonable grounds for an investigation into misconduct by Mrs Parmar was not the ET's concern. The question for the ET was whether Mrs Parmar was subject to a disciplinary investigation '**because of her race**' (original emphasis).

72. He cited, among other things, paragraph 37 of the judgment of Lord Hope in *Hewage v Grampian Health Board (Scotland)* [2012] UKSC 37; [2012] ICR 1054; 'It is important not to make too much 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'.

73. He pointed out that Mrs Parmar was not relying on an actual comparator. The issue, therefore, 'in relation to each of [Mrs Parmar's] claims is whether [Mrs Parmar] was treated less favourably than [the Council] would have treated a hypothetical comparator - ie someone who was White British – because of her race'. In paragraph 12, he said that the instigation of the disciplinary investigation was 'only one of five claims' but

immediately acknowledged that 'it appears that the crux of [Mrs Parmar's] case is this allegation and that the others are largely subsumed within this primary complaint'.

74. In paragraph 14 of his submissions, he said that the Council's primary position was that the ET was 'in a position to make positive findings on the evidence that the reasons given by [the Council] for commencing a disciplinary investigation (as set out…below) were genuine...and therefore the ET should conclude that the burden of proof provisions have no real relevance (as per *Hewage*)'. In paragraph 23, he noted that HM and JD were not actual comparators. Their only possible relevance was 'whether they provide evidence from which the ET could infer that Ms Lake commenced a disciplinary investigation into [Mrs Parmar] because of her race'. He submitted, in that context, that the ET should 'consider events relating to [them] solely through the lens of whether they provide any evidence to support [Mrs Parmar's] claims…rather than getting into the detail of the way in which they were treated …and seeking to compare it to the way in which [Mrs Parmar] was treated…'.

75. He warned the ET against making a direct comparison with HM in paragraph 24.b, because HM was not relied on as an actual comparator. He made a similar point about JD in paragraph 25. In paragraph 26.c he said that there was not enough evidence about the cases of the BAME managers who had been disciplined 'to enable any inferences to be drawn'. He described that evidence in paragraph 26.d. He repeated that point at paragraph 39. His primary submission was the ET did not need to make findings about how Ms Lake treated HM and JD. In the alternative, he invited the ET to make detailed findings about HM and JD in paragraphs 40-43.

76. In paragraph 31 he submitted that the only question for the ET if the burden of proof passed to the Council was whether or not the reasons given by Ms Lake were her 'actual reasons'.

77. He dealt with the Council's decision not to disclose the recording of Ms Lake's interviews with witnesses in paragraph 74. It appears that Mrs Parmar's counsel had invited the ET to draw adverse inferences from this at the start of the hearing. Mr Livingston gave detailed reasons why such an inference should not be drawn, including the assertion that 'It is inconceivable that these recordings could have contained anything which would have supported' Mrs Parmar's claim and that conclusion was supported by Mrs Parmar's evidence.

At the hearing of this appeal

78. The focus of the Council's skeleton argument shifted between the reasoning of the EAT, and that of the ET, rather than concentrating on the reasoning of the ET. As I have already indicated, the real question in an appeal from the EAT in a case like this is almost always whether the ET erred in law in reaching the decision which it reached, rather than whether the EAT independently or additionally erred in law. If the ET did not err in law, any errors of law by the EAT are usually irrelevant (unless, of course, the EAT has then wrongly overturned the decision of the ET).

79. The Council argued, under ground 1, that a key question in relation to evidential comparators is the extent of the similarities and differences between their circumstances

and those of the claimant. The Council's main complaint was that the ET 'essentially' treated the comparators as actual comparators and did not pay attention to the extent to which their circumstances differed from those of Mrs Parmar. The Council then expanded on the differences between the circumstances of the comparators and those of Mrs Parmar. In his oral submissions Mr Allen emphasised that the Council's written submissions had invited the ET to consider the differences between the circumstances of HM and JD with those of Mrs Parmar. The ET had not mentioned any differences at all. An incorrect premise of the ET's view that nothing equally serious had been alleged against Mrs Parmar was that it should consider the position at the end of the disciplinary investigation, rather than at its outset.

80. The Council also complained that the ET and the EAT had made a factual mistake about the identities of the employees who might reasonably have been subjected to an investigation. The ET identified HM, AE and JR, when the only people against whom allegations had been made were HM and JD (see paragraphs 70, 76 and 70.1-70.3 of the ET's judgment).

81. The Council also complained that the ET made no findings about the circumstances in which the two Asian employees had been disciplined and no finding that their circumstances were comparable.

82. Ground 2 criticised the ET's reasoning in paragraphs 77 and 78 (see paragraph 48, above). The Council suggested that the ET erred in law by 'automatically' treating a failure to disclose relevant documents as 'raising a presumption of discrimination'. As the decision was, the Council asserts, made by its legal team, it cannot have shed light on Ms Lake's reasoning, and the ET did not engage with the Council's explanation for 'the alleged disclosure failure'. It is suggested, for example, that it is 'inexplicable', when there was no allegation of discrimination against Ms Tote, to draw any inference from the failure to disclose the notes of the interviews she had. It also criticises the EAT for the way in which it dealt with this ground of appeal. Mr Livingston made oral submissions in support of this ground of appeal. He emphasised that Mrs Parmar had not made a formal application to the ET for disclosure. He accepted that the ET was entitled to decide that the Council's failure to disclose the documents was unreasonable. He submitted that there was no evidence that Ms Lake had told Ms Tote to destroy documents, Ms Tote was following an internal policy, and the disclosure decision was made not by Ms Lake but by the Council's legal department.

83. The Council argued under ground 3 that instead of asking itself whether the Council's reasons for its actions were the reasons for those actions, the ET wrongly asked itself whether it agreed with the Council's reasons for its actions. It is also said to have erred by not considering the Council's explanations for each alleged act of discrimination when the explanations differed. It only considered the Council's reasons for the decision to start a disciplinary investigation against Mrs Parmar. The EAT compounded those errors. In his oral submissions Mr Allen was driven to accept that some at least of the ET's criticisms of R's justifications suggested that the ET had taken the right approach to this part of the case, in effect by considering which of the reasons were credible. He suggested that the ET had wrongly characterised a temporary transfer from Mrs Parmar's post as a suspension and that this somehow cast doubt on the ET's approach.

84. The main complaint under ground 4 was that the ET did not ask whether the decision to ask Mrs Parmar to three disciplinary meetings was less favourable treatment because of her race. Instead, it simply upheld the allegations 'for the reasons given above'. The EAT did not properly engage with this ground of appeal. The ET simply did not explain why the burden of proof shifted in relation to this allegation. One of the criticisms of the ET is that one of three disciplinary meetings was not held by Ms Lake, but by Ms Tote, who was not accused of discrimination. The ET is also criticised for supposedly concluding that 'Ms Tote's decision was actually a decision by Ms Lake…, however that decision was perverse. The EAT failed to engage with this argument'. The ET is also criticised for not examining the Council's non-discriminatory explanations for its conduct. In his oral submissions, Mr Allen suggested that inviting Mrs Parmar to investigation meetings could not be less favourable treatment because it is everyone's right in a disciplinary procedure to give an account of him or herself.

Discussion

85. It is not necessary for me to say much about the law. There is no dispute about it. I can summarise it in six stages.

1. A claimant who claims that she has been directly discriminated against because of her race has to show that
    a. the respondent has treated her less favourably
    b. because of her race
    c. than he treats or would treat others (section 13 of the 2010 Act).
2. Element 1.c. therefore requires the claimant to compare her case either with the case of an actual comparator, or with that of hypothetical comparator.
3. For that purpose, 'there must be no material difference between the circumstances relating to each case' (section 23 of the 2010 Act).
4. If there are facts from which a court could decide (in the absence of any other explanation) that R has contravened section 13, a court must hold that the contravention occurred, unless R shows that R did not contravene section 13 (section 136 of the 2010 Act).
5. *Igen v Wong* (see paragraph 54, above) gives practical guidance about the application of what is now section 136.
6. Paragraph 56 of the judgment of this court in *Madarassy v Nomura International plc* [2007] EWCA Civ 33; [2007] ICR 56, which makes clear that the burden of proof does not shift simply because a claimant proves a difference in protected characteristic and a difference in treatment. A claimant must prove facts from which an ET could properly draw an inference that the reason for the difference in treatment is discrimination.

86. This was relatively a simple case. Mrs Parmar's case was clear from her particulars of claim. At that stage, her comparators were AE and HM. Her case was that she had been treated more harshly than they had even though they were implicated in safeguarding failures. She also relied on the disparate treatment of Asian and white managers. Her

argument at the ET had two facets. First, she had been treated more harshly by Ms Lake than white managers whose conduct was broadly similar to hers, if not, perhaps, more serious (see paragraph 76 of the ET's judgment, quoted at paragraph 47, above). By that stage, the comparators, on the evidence, were HM, AE and JD. Further, the disciplinary procedure against her was baseless because the charges against her were never particularised, she was never told what complaints SCC and AE had made against her (she only found out as a result of the disclosure process in the ET), and when a second manager, Ms Tote, took over the investigation from Ms Lake, Ms Tote decided that there was no case to answer and discontinued it. Second, Ms Lake had disciplined at least two Asian managers, and no white managers, and that supported Mrs Parmar's claim. The ET heard the evidence, made detailed findings of fact, directed itself correctly in law, as Mr Allen accepts, and decided that her claims succeeded.

87. The EAT was right, in my judgment, to characterise the ET's reliance on comparators as a reliance on evidential, rather than statutory comparators; indeed, that is the approach which, in its closing submissions, the Council invited the ET to take. The ET made extensive findings of fact. The ET did not err in law in not itemising all the similarities and differences between the cases of the comparators and Mrs Parmar. Indeed, it might be thought that that approach had, to some extent, been endorsed and encouraged by the Council's written submissions to the ET. It was entitled to decide, on the basis of its findings of fact, that the circumstances of the evidential comparators were sufficiently similar to those of Mrs Parmar to mean that their different treatment by the Council supported an inference of discrimination. The making of a comparison is a matter of fact and degree for the ET, as Lewison LJ suggested to Mr Allen in the course of his oral submissions. The ET is not required laboriously to itemise the similarities and differences between each case; a factual description of each is sufficient, as the differences and similarities between the cases will be obvious from those descriptions. Nor is the ET required expressly to intone that the fewer the similarities between the cases, the less cogent a comparison is. That is self-evident (and see paragraph 37 of *Watt v Ahsan*, paragraph 60, above).

88. There is no substance in the Council's argument that the ET misidentified the comparators. It is another example of a 'pernickety' criticism. First, AE and HM were the two white managers specifically identified in Mrs Parmar's ET1 (see paragraph 5, above). In paragraphs 27, and 29-34 of its judgment, the ET made relevant findings about intemperate and disparaging emails sent by AE (see paragraphs 21-25, above), which the ET was entitled to view as conduct by AE which was similar to the conduct for which Mrs Parmar had, in unhelpfully vague terms, been criticised.

89. The Council is right to say that the reference to 'JR' in paragraph 76 is wrong. It is overwhelmingly likely that that reference to 'JR' is simply a typographical error, and that the ET intended to refer to 'JD'. Paragraphs 21-23 of the ET's judgment deal with an allegation of bullying behaviour made by JR against JD which Ms Lake dealt with by making an offer of mediation (see paragraph 18, above). That that is the correct interpretation of the ET's judgment is supported by the matters which, 'in particular' the ET took into account in paragraphs 71-76 of its judgment, and which I summarise at paragraphs 42-47, above. The white managers identified in those passages are HM, AE and JD.

90. Nor is there any substance in the complaint about the Asian employees who were disciplined. Information about this was extracted from the Council by Mrs Parmar by making a DSAR. The Council's evidence about this seems to have been from Ms Lake and not detailed. Mrs Parmar can scarcely be criticised for failing to adduce evidence about cases which were within the knowledge of the Council, and not hers. By the time of the ET hearing, two of Asian employees referred to in the DSAR had been identified (JSB and KR); in contrast with the position taken by the Council in its ET3 (see paragraph 7, above). The case advanced by Mrs Parmar on this part of the case was in paragraph 2 of her particulars of claim (paragraph 4, above). It does not matter that this was not a statistically significant sample. The two cases were part of the overall evidence and the ET was entitled to take them into account.

91. I would dismiss ground 1.

92. The ET did not treat the Council's failures of disclosure as 'automatically' shifting the burden of proof, which would have been an error of law. The evidence was clearly relevant, as, for example, it would have enabled the ET to assess what, if anything, had changed between the evidence which Ms Lake took into account and the evidence which Ms Tote considered. The ET's approach was to take those failures into account. It did not say, in paragraphs 77 and 78 (see paragraph 48, above) that those failures shifted the burden of proof. What it said, instead, was that it drew adverse inferences from those failures. It was entitled to do so, and also to take those inferences into account. The ET was alive to the possibility that the failures might have been the responsibility of the Council's legal team. In this context, the Council is one corporate entity. An ET is entitled to draw an inference from disclosure failures by the Council whether or not different individuals were directly or indirectly responsible for it.

93. There is nothing in the criticism that neither the ET nor the EAT quantified the effect of those failures. Such a requirement is exactly the kind of stricture which an appellate court should avoid when considering a judgment of the ET. Finally, it is not 'inexplicable' that the ET drew an adverse inference from the failure to disclose Ms Tote's notes of her interviews. I repeat the point I made in the previous paragraph. After all, Ms Tote had concluded that there was 'no substance in the allegations' which Ms Lake had initiated and pursued.

94. Like the EAT, I would dismiss ground 2.

95. In my judgment there was no error of law in the ET's consideration of the Council's explanations for its conduct. It considered those explanations in paragraph 79, in over a page and a half of detailed reasons, which I summarised in paragraph 49, above. On these facts, there is little more than a cigarette paper between asking whether the Council's reasons 'explained its actions' in the sense of being the Council's real reasons for acting as it did, and the question whether or not the ET agreed with those reasons. It is clear to me that the ET was not persuaded that the Council's evidence did 'explain' its actions. Moreover, it is also clear that the ET did not think that the explanations were credible (see paragraph 74 of the ET's judgment; paragraph 45, above; and see the last sentence of paragraph 76; paragraph 47, above). If the explanations were not credible, they could not displace an inference of discrimination. Finally, there is nothing in the complaint that the ET wrongly characterised the Council's decision to transfer Mrs

Parmar as a temporary suspension. The ET seems to have used those terms interchangeably: see paragraph 84 of the ET's judgment (paragraph 51.2, above).

96. Like the EAT, I would dismiss ground 3.

97. Mr Livingston had rightly accepted in his closing written submissions that the gist of Mrs Parmar's complaint was the instigation of the disciplinary investigation (see paragraph 73, above). It is clear from the ET's judgment as a whole that it considered that the decisions to invite Mrs Parmar to the first two of three disciplinary investigation meetings amounted to less favourable treatment and that that treatment was because of her race, because it was all part of a baseless investigation. To break down each aspect of her complaint on an appeal on a point of law and then criticise the ET for alleged missteps in relation to each item is another example of a 'pernickety approach'. But in any event, the ET was entitled to treat the invitation to the second meeting as Ms Lake's decision, because Ms Lake had decided to have a second meeting with Mrs Parmar. The only reason that the second meeting was conducted by Ms Tote was because, by then, Mr Samuels had replaced Ms Lake with Ms Tote.

98. Like the EAT, I would dismiss ground 4.

Postscript

99. I nevertheless consider that there are two passages in the ET's judgment which are potentially problematic, if they are read in isolation. Neither was identified by the Council in its grounds of appeal or in its skeleton argument.

100. The first and potentially more serious is the passage in paragraph 76 which I quoted in paragraph 47, above). That passage, read on its own, might suggest that the ET reached a conclusion that Ms Lake had discriminated against Mrs Parmar at the first of the two necessary stages of the analysis, without asking itself whether Mrs Parmar had proved facts from which an inference of discrimination might properly be drawn, and without asking whether the Council had proved that the reason for Mrs Parmar's treatment had nothing whatsoever to do with her race. To be fair to Mr Allen, he did refer to this paragraph in his oral submissions, but said that it was not 'an appeal point'.

101. The second is the italicised part of paragraph 69 (see paragraph 40, above), which might suggest that the ET did not appreciate that the question for it was whether an inference of discrimination 'could properly' be drawn, rather than 'might be drawn' (see paragraph 56 of the judgment of Mummery LJ in *Madarassy*).

102. The fact that neither of these passages was relied on by the Council as a ground of appeal suggests to me that, realistically, the Council recognised that, despite these apparent imperfections of expression, the ET did not in substance err in law in the ways in which a non-contextual reading of these passages might otherwise suggest. There are at least three reasons why.

103. First (in relation to paragraph 76), the apparent vice of this paragraph is that it is in the wrong place. But the process of writing a judgment is an iterative one, and if the necessary reasoning is in the judgment, it is pedantic to detect an error of law merely

because the structure of the judgment is not perfect. Moreover, the ET had expressly recognised that it was necessary to take an approach with two stages (in paragraphs 57, 65 and 69: see paragraphs 36, 37 and 38, above).

104. Second (in relation to paragraph 69), there are several correct directions about inferences in many other paragraphs of the ET's judgment (for example, paragraphs 62(1), (5), (8) and 63), which show that the use of 'might' in paragraph 69 is a mere slip.

105. Third, to criticise these passages in isolation and to treat them as evidence of errors of law would be to rely on the 'pernickety' approach to reading ET judgments which has been so deprecated in the many authorities to which the Judge referred in his judgment. For that reason, I say no more about either of those passages.

Lady Justice Whipple

106. I agree.

Lord Justice Lewison

107. I also agree.