

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 10 November 2011
Judgment handed down on 31 January 2012

Before

HIS HONOUR JUDGE BIRTLES

MR D BLEIMAN

MRS A GALLICO

(1) BIVONAS LLP
(2) MR A BROWN
(3) MR J BECHELET

APPELLANTS

MR L BENNETT

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

SEXUAL ORIENTATION DISCRIMINATION

The Employment Tribunal correctly applied the law relating to detriment in a case of sexual orientation discrimination; see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337. The Tribunal also made adequate findings of fact before reversing the burden of proof; see **Igen v Wong** [2005] IRLR 258.

Appeal dismissed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment and Reasons of an Employment Tribunal sitting at London Central in December 2010 and January 2011.

2. The Employment Tribunal decided that the Claimant had suffered unlawful discrimination on grounds of sexual orientation contrary to Regulation 6(2)(g) of the **Employment Equality (Sexual Orientation) Regulations 2003**, in respect of (a) an *aide-memoire* or note written by the Third Appellant in or about May 2008; and (b) the conduct of the grievance investigation carried out by the Second Appellant.

3. The Appellants were represented by Mr Brian Lacy of counsel. The Respondent was represented by Mr David Massarella of counsel. We are grateful to both counsel for their written and oral submissions.

The material facts

4. The material facts appear in the Employment Tribunal's Reasons at paragraphs 7-21.

5. In summary, the First Appellant is a limited liability partnership solicitors' practice, regulated by the Solicitor's Regulatory Authority. It is a small niche litigation practice, specialising in criminal and civil fraud cases, and employing approximately seven people.

6. The Respondent, who is a barrister (non-practising) joined the First Respondent, having been headhunted by a recruitment agency for that purpose, on 8 January 2007, as a barrister, at a salary of £82,500. His contract of employment provides that the First Appellant will review his salary annually, on or about the anniversary of the commencement date of his employment,

UKEAT/0254/11/JOJ

and at its entire discretion will decide whether or not to increase his salary. Clause 9 of the contract provided for the increase of the Respondent's salary to £100,000 per annum, at the entire discretion of the First Appellant, but dependent upon the Respondent's performance, including the bringing in of new business, to the value of at least £300,000 worth of gross recoverable fees within the first year. The Respondent's appointment was partly with a view to the work which he was able to bring in from his previous firm, and he was given a brief by the First Appellant with particular emphasis on business development.

7. The Respondent was gay. The Tribunal found as a fact that his sexual orientation as a gay man was known to the Appellants, during the months following the commencement of his employment and certainly by the end of 2007. The Tribunal concluded that there were approximately six social occasions attended by most of the staff, and the Tribunal accepted the Appellants' evidence that at these social occasions, at which considerable amounts of alcohol could at times be consumed, the Respondent became increasingly comfortable in openly discussing sexual matters in an explicit way, after which it had been openly acknowledged that he was a gay man, from approximately mid-2008 onwards.

8. On or about 22 October 2009, the Respondent was at a one-to-one meeting with Mr Brown at a coffee shop outside the office, which the Respondent covertly tape recorded. The Employment Tribunal had before it a transcript of the tape recording and also listened in open hearing to the material parts of the tape with the transcript in front of it. During a discussion on business development, Mr Brown said at one stage "if your strategy was to hang outside lavatories, if it develops work I would say it was the best strategy in the world". The tape recording indicated that the Respondent burst out laughing spontaneously immediately after the word "lavatories" and that he made no further reference to that word, but continued the discussion of business development as if it had developed up to that point, without missing a

UKEAT/0254/11/JOJ

beat. There was no complaint about this comment in the Respondent's ET1. Mr Brown told the Tribunal in evidence that it had been a conscious joke in which no offence had been intended and at which the Respondent had shown that none had been taken.

9. On 28 April 2010 the Respondent, together with Mark Rainsford QC, who also worked for the First Appellant, attended the Recall Archives Centre in Kidbrook for the purpose of reviewing a client file of the First Appellant. Whilst leafing through the file, the Respondent found a handwritten note running to some three pages in which a Mr Sharp and himself were discussed. The comments about neither one were particularly complimentary. The memorandum appears at appeal bundle pages 45-47. The material parts to us seem to be as follows:

- “4. Lee - I have already given up on him - hides and disappears. Says he is a producer when he is not.
5. We have 2 people on pay roll for a job that could be done by one competent person and we are getting dragged into the management of the cases.
6. Lee should be sacked.
[...]
8. Attitude of each SRS and Lee wrong.
[...]
Lee - takes our cases to his batty boy mate + Desmond Da Silva - whilst Bowles disses us. Fisher *et al.*
9. Lee completely wrong for VR within 6 months case could be with Gez Owen Desmond da Silva + the batty boy.”

10. In paragraph 16 of its Reasons, the Tribunal say this:

“16. The Claimant in evidence stated that he was very shocked and immediately showed the document to Mark Rainsford QC. Mr Rainsford was also shocked and advised the Claimant to photograph the file and the box in which it was contained and the document itself.”

11. Mr Bechelet admitted writing the document in about May 2008. It appeared that the file had been archived at some point after the end of July 2008.

12. On 29 April 2010, the Respondent visited his GP and was signed off work with insomnia due to work issues, and on the same day visited his solicitor who sent a letter on the same day to the first Appellant, complaining about homophobic remarks and describing the words “batty boy” as a pejorative sexual slur, used to describe gay, bisexual and effeminate men. The Tribunal accepted on the evidence before it that the term “batty boy” arose from a rap song in about 2007, in which violence against gay men was incited but that the term had passed, to some extent over the intervening period, into more common parlance. The Tribunal also accepted Mr Bechelet’s evidence that he had no knowledge of the origin of the words in the rap song context and that, for him, it was a term for describing overtly gay men.

13. On 5 May 2010, the Second Appellant wrote to the Respondent’s solicitors, stating that the letter of 29 April would be treated as a formal grievance and that an investigation would be carried out, after which a formal grievance hearing would be arranged. On 6 May, the Second Appellant wrote a further letter, stating “I have now carried out my internal investigation and I am in a position to hold a formal Grievance Hearing with Mr Bennett in accordance with our Grievance Policy” and attaching a summary of investigation findings: appeal bundle, page 56.

That says this:

- “1. The handwritten note that has been found by Mr Bennett was written by Mr Bechelet in or around April 2008.
2. It was a personal *aide-memoire* and was not shown or sent to any other person by Mr Bechelet. The note was never intended to be retained.
3. There is further information surrounding the note that puts it in context.
4. Mr Bechelet does not know how the note found its way into the archived papers that were being reviewed by Mr Bennett when he found the note. Bivonas do not store files at our office but at a secure storage facility. No other member of staff has had access to the files referred to.

5. I am satisfied that Mr Bechelet does not hold homophobic views and he deeply regrets any offence that may have been taken by Mr Bennett in relation to the personal note and is willing to apologise unreservedly to Mr Bennett for any offence caused.
6. I am entirely satisfied that this was an isolated incident.”

14. On 6 May, Mr Brown left a voicemail message for the Respondent saying “I have conducted an investigation [...]” and seeking a private discussion between himself and the Respondent, without prejudice. In correspondence with the Respondent’s solicitors, on 11 and 20 May, Mr Brown stated that he was “in the process of investigating” the Respondent’s grievance and they were “preliminary conclusions” which he had drawn from his “initial investigation”, but that no final decision had been reached until he had met with the Respondent, as this was an essential element of the investigation.

15. The Respondent remained signed off sick and presented his complaint to the Tribunal on 26 July 2010. A Sexual Orientation Questionnaire was served on 17 August 2010, which the Respondent accepts was out of time. The Appellants agreed to respond to a slimmed-down questionnaire, served on 10 December 2010, but did not do so. The Appellant’s witnesses (including Mr Brown and Mr Bechelet) told the Tribunal that they had never had any training in equality and diversity, save for a Mr Hill, who had done one element of a correspondence course requiring an essay. The First Appellant’s evidence to the Tribunal was that it had once, for a period of two to three years, employed a gay male receptionist/PA, who had been employed prior to Mr Bechelet joining and founding the partnership in 1997.

The Tribunal’s conclusions

16. Having directed itself on the law, the Employment Tribunal came to the following conclusions:

“23. The Tribunal found the following facts from which it could conclude, in the absence of an explanation, that the Claimant has been subjected to acts of discrimination on grounds of sexual orientation.

- a) The wording of the aide memoire, as set out in paragraph 16 of these Reasons, is, in the Tribunal’s unanimous view, inherently insulting to the Claimant as a gay man in two respects; (i) in the use of the possessive ‘his batty boy mate’ the Claimant’s own sexual orientation is implicit as is his inclusion with the umbrella of the offensive term itself, in Mr Bechelet’s understanding of it as a term applied to overtly gay men. It was well known to the Third Respondent at the time that the Claimant was gay and indeed the Respondents’ witnesses led evidence of the Claimant’s explicit conversations at the firm’s social events. (ii) reading the entire passage, what is being said is that the Claimant, as a gay man, is passing work to somebody else because they are gay and not therefore for other meritorious reasons. This is a professional slur of the utmost gravity. The Tribunal was therefore not persuaded by the Respondent’s contention that the offensive term itself was neither describing nor directed at the Claimant. The Tribunal was also not persuaded by the Respondent’s contention, based on *the De Souza case*, that the Claimant had not been “treated” less favourably because there had been no intention that the Claimant find the aide memoire. In the body of the Judgement in that case, the Court of Appeal states that the person cannot be said to have been treated less favourably by a person using an offensive term (in that case ‘the wog’) unless he intended her to overhear it, “or knew or ought reasonably to have anticipated that ... it would be passed on or that she would become aware of it in some other way”. Whatever Mr Bechelet’s intentions as to the privacy of his aide memoire, in committing such material to paper in plainly legible form in the office or amongst office files and paperwork, he ran the risk of it being lost and discovered by the Claimant, in whose work file it was in fact left, or of some other staff member finding it. The fact that this actually occurred in itself amply demonstrates the very real risk which Mr Bechelet should reasonably have anticipated as a senior professional and the founding part of an LLP. Files, even archived files, were regularly referred to where necessary. The Tribunal also noted that the courts’ attitudes towards complaints of discrimination have evolved considerably since 1986, in line with those of society and the increasing level of statutory provision.
- b) The Tribunal also found, although only to a limited degree, that some inference could be drawn from the Respondents’ failure to answer the shortened questionnaire, as they had agreed to do. They could have chosen to answer such questions as might have protected their positions in the face of the discrimination allegations in general.

[...]

- d) The Tribunal concluded unanimously that the Second Respondent’s investigation of the Claimant’s homophobic grievance was seriously defective in the following respects: there was no evidence before the Tribunal of the investigation process; no notes were kept although the Second Respondent told the Tribunal that he had conducted several interviews with various staff members, face to face and by telephone; the conclusions drawn within 24 hours, between 5 and 6 May, that “Mr Bechelet does not hold homophobic views” were unjustified giving the plain wording of the aide memoire, the 24 hour time frame and the lack of any evidence of a properly conducted and evidenced investigatory process. Further, the Tribunal concluded that the Summary of Investigation Findings dated 6 May were not provisional, as the Second Respondent later attempted to assert, given the plain, final, past tense wording of the correspondence of 6 May. The Second Respondent later tried to back-peddle, having received a further letter from the Claimant’s solicitor. He told the Tribunal that he knew that Mr Bechelet was not homophobic because he had worked with him every day for 13 years and knew his family, although he asserted that he had taken the investigation seriously. The Tribunal noted that the Second Respondent had received no awareness training whatever in matters of equality, diversity or the possibility of unconscious as well as conscious prejudice. Further, the Second Respondent admitted in Tribunal that he had not been the best person to conduct such an investigation since he had a conflict of interest as between dealing fairly with the Claimant’s grievance and his desire to protect the firm. He accepted that this had had some effect on his capacity to conduct the grievance in an

independent and impartial way. In the Tribunal's view the Second Respondent simply accepted that Mr Bechelet didn't mean it and did not conduct a rigorous investigation of the kind which, given the wording of the aide memoire, was plainly called for.

24. The Tribunal therefore turned to consider whether the Respondents had shown, by cogent evidence, on a balance of probabilities, that their treatment of the Claimant in the respects complained of had been in no sense whatever on the grounds of sexual orientation.
25. In respect of the Third Respondent's aide memoire: this is offensive and insulting on its face and plainly constitutes a detriment to the Claimant. It is in its terms insulting to gay men, named the Claimant in this context and implicitly included and insulted him in the respects set out in paragraph 22a) of these Reasons. There was no evidence before the Tribunal that other members of the staff were insulted in respect of their personal attributes or characteristics in a similar way. The passages referring to Mr Sharp in the same aide memoire are strongly critical of his work and behaviour to some extent but contain no insulting personal term nor equivalent professional slur.
26. The Tribunal concluded based on the tape and transcript evidence before it and the good relationship which the Claimant had with the Second Respondent, that the Second Respondent's reference to "hanging outside lavatories", referred to in paragraph 15 above, had not caused offence to the Claimant and had not been intended offensively. The Tribunal did not accept that the Claimant's laughter was embarrassment rather than amusement and the conversation continued without any indication whatever of an hiatus. However, this does not reduce the offensive nature of Mr Bechelet's aide memoire, which was in an entirely different tone and was written by the Third and not the Second Respondent.
27. The Respondents were unable to offer any explanation for the offensive nature of the aide memoire other than an apology.

[...]
29. As to the conduct of the grievance investigation: the Tribunal concluded unanimously that the First and Third Respondents have failed to show, by cogent evidence, on a balance of probabilities, that the Claimant's sexual orientation played no part whatever in the flawed and inadequate conduct of the investigation into his sexual orientation grievance as set out in paragraph 23d) above, because
 - a) the Respondents brought before the Tribunal no evidence of the conduct of any other staff grievance, of whatever kind.
 - b) this was a grievance about an aide memoire offensive to gay men on its face.
 - c) the second Respondent, who conducted the grievance investigation, made assumptions that the Third Respondent was not homophobic, did not conduct a rigorous or impartial investigation, felt himself to be caught in a conflict of interests in his desire to protect the firm and had himself shown a level of stereotypical assumptions in his "hanging outside lavatories" remark on 30 April, even though this in itself was found by the Tribunal not to have been offensive to the Claimant at the time. He had no awareness training in discriminatory matters."

The Notice of Appeal

17. The Notice of Appeal appears at appeal bundle pages 13-17. The Respondent's answer appears at appeal bundle pages 18-21. They were supplemented by the written and oral submissions of counsel. We take each ground of appeal in turn.

Ground 1: Detriment

18. Despite Mr Massarella’s beguiling invitation to add to the law on the meaning of word “detriment” in discrimination legislation, we resist the siren call. This Judgment is limited solely to the facts of this particular case.

19. Paragraph 6(1) of the Notice of Appeal states that the Tribunal erred in law in deciding that an insult constitutes a detriment for the purposes of Regulation 6(2)(d) of the **Employment Equality (Sexual Orientation) Regulations 2003**. The point is elaborated in paragraphs 7-11 of the Notice of Appeal but in essence, Mr Lacy submits that in paragraph 21 of the Judgment, that when the Tribunal said this:

“In respect of the Third Respondent’s aide memoire: this is offensive and insulting on its face and plainly constitutes a detriment to the Claimant.” [Original emphasis.]

it was in error because it failed to follow **De Souza v Automobile Association** [1986] ICR 514 and, in particular, a passage in the Judgment of May LJ at 522G-H, which was approved by the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337.

20. By contrast, Mr Massarella’s submission was that conduct which gives rise to injury to feelings may, in a particular case, be sufficient to amount to detriment, but in any event this Employment Tribunal went beyond that in finding a detriment.

Discussion

21. In **Ministry of Defence v Jeremiah** [1979] ICR 13, at page 26B-C, Brandon LJ said this:

“I do not regard the expression “subjecting [...] to any other detriment” as used in s.6(2)(b), as meaning anything more than “putting under a disadvantage.”

22. In that case, the Court was concerned with the **Sex Discrimination Act 1975**, but no point arises on that. At page 30F-G, Brightman LJ said this:

“In deciding whether or not there is a detriment to a worker who complains, the Court must in my opinion take all the circumstances into account.”

23. At page 31A-B he said this:

“I think a detriment exists if a reasonable worker would or might take the view that the duty was in all the circumstances to his detriment.”

24. In **De Souza v Automobile Association** [1986] ICR 514, at 522G-H, May LJ said this:

“[...] I think that this necessarily follows upon a proper construction of s.4, and in particular s.4(2)(c) of the Act. Racially to insult a coloured employee is not enough by itself, even if that insult caused him distress; before the employee can be said to have been subjected to some “other detriment” the court or Tribunal must find that by reason of the act of acts complained of, of a reasonable worker, would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.”

25. In **Barclays Bank Plc v Kapur and Others** [1989] ICR 753, at page 767F-H, Bingham LJ (as he then was) said this:

“S.4 declares certain forms of discrimination in the employment field to be unlawful. Subsection (1) is directed to discrimination before a contract of employment is made, subsection (2) to discrimination afterwards. Since “subjecting him to any other detriment” in s.4(2)(b) is to be given its broad, ordinary meaning (*Ministry of Defence v Jeremiah*) [1980] ICR 13; *BL Cars Ltd v Brown* [1983] ICR 143 and *De Souza v Automobile Association* [1986] ICR 514), it is plain that almost any discriminatory conduct by employer against employee, in relation to the latter’s employment will be rendered unlawful by s.4(2).”

26. In **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, at paragraphs 51-53, Lord Hoffman said this:

“51. The second question is whether Mr Khan was actually treated less favourably than someone who had not brought proceedings would have been. The chief constable says that it is not enough that he was treated differently. His treatment must be worse. This is an

objective question and if one looks at the matter objectively, he was better off without a reference. If he had been given one, it would have contained an express statement that his application for promotion was not supported. In that case, the Norfolk constabulary would not even have asked him to an assessment. As it was, he at least got through to interview.

52. This was not a point taken in the industrial tribunal, the Employment Appeal Tribunal or the Court of Appeal. It seems to have surfaced as a result of remarks made at the hearing of the application for leave to appeal before the Appeal Committee. It is attractive but I think that upon analysis it is wrong. There is distinction between the question of whether treatment is less favourable and the question of whether it has damaging consequences. Mr Khan, with full knowledge of what Chief Inspector Sidney's assessment contained, wanted it to be sent to Norfolk. His request was refused when a similar request by someone else would have been granted. That seems to me to be less favourable treatment which the tribunal found caused injury to Mr Khan's feelings. The fact that he was actually invited to an assessment showed that the less favourable treatment caused him no economic loss but does not prevent it from having been less favourable.

53. The point is allied to the question of whether, assuming that there was discrimination under section 2(1), Mr Khan was subjected to 'detriment' within the meaning of section 4(2)(c). Being subjected to detriment (or being treated in one of the other ways mentioned in section 4(2)) is an element in the statutory cause of action additional to being treated 'less favourably' which forms part of the definition of discrimination. A person may be treated less favourably and yet suffer no detriment. But, bearing in mind that the employment tribunal has jurisdiction to award compensation for injury to feelings, the courts have given the term 'detriment' a wide meaning. In *Ministry of Defence v Jeremiah* [1980] ICR 13, 3I Brightman LJ said that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'. Mr Khan plainly did take the view, at any rate in October 1996, that not having his assessment forwarded was to his detriment and I do not think that, in his state of knowledge at the time, he can be said to have been unreasonable."

27. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, the House of Lords reviewed the authorities on detriment. Paragraph 1 of the head note states that a "detriment" existed if a reasonable worker would or might take the view that the treatment accorded to her had, in all the circumstances, been to her detriment; that it was not necessary to demonstrate some physical or economic consequence; and that the Applicant was entitled to a finding that she had been subjected to a detriment. In that case the detriment was the removal of a female chief inspector from making appraisals of police constables when two male colleagues continued to make them. At paragraphs 34-36, Lord Hope said this:

"34. The statutory cause of action which the applicant has invoked in this case is discrimination in the field of employment. So the first requirement, if the disadvantage is to qualify as a 'detriment' within the meaning of article 8(2)(b), is that it has arisen in that field. The various acts and omissions mentioned in article 8(2)(a) are all of that character and so are the words 'by dismissing her' in section 8(2)(b). The word 'detriment' draws this limitation on its broad and ordinary meaning from its context and from the other words with which it is associated. *Res noscitur a sociis*. As May LJ put it in *De Souza v Automobile Association* [1986] ICR 514, 522G, the court of tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

35. But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Brightman LJ. As he put it in *Ministry of Defence v Jeremiah* [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to ‘detriment’: *Barclays Bank plc v Kapur (No 2)* [1995] IRLR 87. But, contrary to the view that was expressed in *Lord Chancellor v Coker* [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. As Lord Hoffmann pointed out in *Khan’s* case [2001] ICR 1065, 1077, para 52, the employment tribunal has jurisdiction to award compensation for injury to feelings whether or not compensation is to be awarded under any other head: Race Relations Act 1976, section 57(4); 1976 Order, article 66(4). Compensation for an injury to her feelings was the relief which the applicant was seeking in this case when she lodged her claim with the tribunal. Her complaint was that her role and position had been substantially undermined and that it was becoming increasingly marginalised.

36. The question then is whether there was a basis in the evidence which was before the tribunal for a finding that the treatment of which the applicant complained was to her detriment or, to put it more accurately as the tribunal did not make any finding on this point, whether a finding that the applicant had been subjected to a detriment could reasonably have been withheld.”

28. Finally, at paragraph 105 of Shamoon, Lord Scott was in general agreement with the views expressed by Lord Hope, set out above, but went on to say this at paragraph 105:

“My only reservation is that the test of detriment as expressed by Brightman LJ in *Ministry of Defence v Jeremiah* [1980] ICR 13, 31, cited by Lord Hoffman in *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, 1077-1078, para 53 (see paragraphs 33 and 35 of Lord Hope’s opinion), namely, that ‘a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment’, must be applied by considering the issue from the point of view of the victim. If the victim’s opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice. In *Khan’s* case the complainant, desiring to apply for a new job, wanted a reference to be given by his employers. His employers refused to give one. It was clear that if they had given one it would have been an unfavourable one. It might be said that a reasonable worker would not want an unfavourable reference. But the complainant wanted to be treated like all other employees and to be given a reference. The House concluded that this was a reasonable attitude for him to adopt and that the refusal to give him a reference constituted ‘detriment’. He was being deprived of something that he reasonably wanted to have. And, while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute ‘detriment’, a justified and reasonable sense of grievance about the decision may well do so. On the facts of the present case I agree with Lord Hope that the applicant was entitled to a finding that she was subjected to a detriment within the meaning of article 8(2)(b) of the 1976 Order.”

29. We turn to the Judgment of this Tribunal. In this case the Appellants’ challenge is to the Tribunal’s finding in paragraph 25 of its Judgment, that the *aide-memoire* “plainly constitutes a detriment to the Claimant”. It goes on in the same paragraph to give clear reasons why this is so:

“25. It is in its terms insulting to gay men, named the Claimant in this context and implicitly included and insulted him in the respects set out in paragraph 22a) (sic in fact 23a) of these Reasons. There was no evidence before the Tribunal that other members of staff were insulted in respect of their personal attributes or characteristics in a similar way. The passages referring to Mr Sharp in the same aide memoire are strongly critical of his work and behaviour to some extent but contain no insulting personal term nor equivalent professional slur.”

30. In our judgement, one cannot read the Tribunal’s conclusion in paragraph 25 without reference back to paragraph 23(a). It is quite clear from paragraph 23(a) that the Tribunal considered the two aspects it had referred to in paragraph 25. First was that the term “his batty boy mate” implicitly referred to the Claimant’s own sexual orientation as a gay man and were insulting to him personally (and by inference a reasonable employee). However, the Tribunal went further than Mr Lacy submits. At paragraph 23(a) it said this:

“23.

- a) (ii) reading the entire passage, what is being said is that the Claimant, as a gay man, is passing work to somebody else because they are gay and not therefore for other meritorious reasons. This is a professional slur of the utmost gravity.”

31. In our judgment, the Employment Tribunal took all the circumstances into account and looked at the issue, and decided that treatment of such a kind was such that a reasonable worker would or might take the view that in all the circumstances it was to his detriment: see paragraph 35 of **Shamoon** per Lord Hope. Given the factual circumstances before the Tribunal, i.e.

- (i) the wording of the *aide-memoire* itself;
- (ii) the circumstance in which it was found, when the Respondent was with Mr Mark Rainsford QC, who also read it and clearly took a serious view of the matter, because of the advice he gave to the Respondent;
- (iii) the fact that the Respondent went off sick the next day; and made a complaint;
- (iv) the effect that finding such an *aide-memoire* would have on his trust and confidence in his employers.

It is not difficult to see how the Tribunal could take the view that a reasonable worker would or might take the view that in all the circumstances, the *aide-memoire* was to his detriment. While there will clearly be cases where a Tribunal must think long and hard about how a reasonable worker would or might respond to particular treatment and while, in such cases, it will clearly be helpful for the Tribunal to state the test explicitly in these terms, this is not such a case. This was a case in which the Tribunal found the aide memoire to have been “offensive and insulting on its face and plainly constitutes a detriment to the Claimant”. When the Tribunal finds facts as plain as this there can be no doubt that it is reasonable for a worker to take this treatment as being to his detriment, so that on the facts of the present case, there was no need to construct a hypothetical reasonable worker and consider how he might have reacted to the insulting memorandum.

32. We note that there is no challenge to the Tribunal’s finding at paragraph 23(a) of its Judgment that Mr Bechelet knew, or ought reasonably to have anticipated, that the Respondent would become aware of the *aide-memoire* and its contents.

Ground 2: The reverse burden of proof

33. Ground 2 is that the Tribunal erred in law in reversing the burden of proof in respect of the grievance investigation, without first having identified any facts from which it could conclude, in the absence of an adequate explanation, that the Claimant had been discriminated against.

34. Mr Lacy submits that for the burden of proof to shift to a Respondent under Regulation 29(2) of the 2003 Regulations, it is necessary for a Claimant to establish facts from which the Tribunal could conclude that he was treated less favourably on the grounds of sexual
UKEAT/0254/11/JOJ

orientation. He submits that the findings made by the Tribunal before shifting the burden of proof do not amount to a *prima facie* case of direct discrimination. He submits that the findings amount to the following:

- (i) a detriment - the inadequate investigation;
- (ii) a potential reason for the inadequacy of the investigation, that was not on the grounds of sexual orientation- the conflict of interests point; and
- (iii) the absence of equality training.

35. He submits that the Tribunal did not consider the questions of:

- (i) less favourable treatment: there is no consideration of a hypothetical comparator; or
- (ii) on the grounds on sexual orientation: there is only detrimental treatment.

36. Mr Massarella submits that, for the reasons set out in paragraphs 23(c) and 29(d), the Tribunal were entitled to reverse the burden of proof under Regulation 29(2) of the 2003 Regulations.

Discussion

37. The correct approach is set out in **Igen v Wong** [2005] IRLR 258, where the Court of Appeal amended the guidelines in **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] IRLR 332. In applying the burden of proof regulation, the Tribunal is to adopt a two-stage approach, namely:

- (i) Has the Claimant proved, on the balance of probabilities, the existence of facts from which the Tribunal could, in the absence of an adequate explanation, conclude that the Respondent has committed an act of unlawful discrimination? If so;

- (ii) Has the Respondent proved that it did not commit (or is not to be treated as having committed) the unlawful act.

Madarassy v Namura International Plc [2007] IRLR 246 confirmed the guidance in **Igen**.

38. There is now no dispute between counsel that the Employment Tribunal did reverse the burden of proof: Reasons paragraphs 23(d), 24 and 29.

39. This is not a case where the Appellant is arguing that the Tribunal should not have applied the two-stage test in **Igen v Wong**, but rather applied the single “reason why” test: see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at paragraph 7-8 per Lord Nicholls.

40. In our judgment there was ample material on which the Tribunal could decide to reverse the burden of proof under Regulation 29(2) of the 2003 Regulations. In particular, the Tribunal relied upon the following matters:

- (i) the finding that the *aide-memoire* was discriminatory: paragraph 23(a);
- (ii) the rushed and inadequate nature of the investigation by Mr Brown: paragraph 23(d);
- (iii) the fact that the investigation was in the nature of a finding rather than an investigation: paragraph 23(d);
- (iv) Mr Brown’s admission that he was not the best person to conduct an investigation because there was a conflict of interest: paragraph 23(d);
- (v) to a limited degree, the Appellant’s failure to answer the questionnaire: paragraph 23(b) - the questionnaire is at appeal bundle page 82.

- (vi) the inconsistent nature of Mr Brown's evidence about how he formed his views on whether or not Mr Bechelet was homophobic: paragraph 23(d);
- (vii) the fact that the Respondents were unable to offer any explanation for the offensive nature of the *aide-memoire* other than apology: paragraph 27 - although this appears in the Judgment after the Tribunal have reversed the burden of proof, it is impossible to believe that the Tribunal did not have that also in mind.

41. Once the burden of proof had been reversed, then the onus is on the Appellants to show, on a balance of probabilities, that there was no discrimination on the grounds of sexual orientation. The Tribunal considered the matter and, in paragraph 29, gave three reasons why they found discrimination on the grounds of the Claimant's sexual orientation proved. In addition, they refer themselves back to their findings at paragraph 23(d).

42. In our judgement there was ample material upon which this Tribunal could (a) reverse the burden of proof under Regulation (2) of the 2003 Regulations; and (b) find discrimination as to the conduct of the grievance investigation proved.

Conclusion

43. For these reasons the appeal is dismissed.