



**Immuno Biotech Limited v Lucia Pagliarone**  
Royal Court  
27<sup>th</sup> April 2016

**JUDGMENT**  
**17/2016**

Appeal against the decision of the Employment and Discrimination Tribunal in a sex discrimination case

**IN THE ROYAL COURT OF GUERNSEY**  
**(ORDINARY DIVISION)**

**On appeal from the Employment and Discrimination Tribunal**

**Case No: ED004/15**

**Between: IMMUNO BIOTECH LIMITED Appellant**

**-and-**

**LUCIA PAGLIARONE Respondent**

**Date of hearing: 7<sup>th</sup> March 2016**

**Decision handed down: 27<sup>th</sup> April 2016**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Advocate for the Appellant: Advocate T A Crawford**  
**The Respondent represented herself, with assistance from her friend, Andrew Castle**

**Legislation referred to:**

The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005

*da Mata v George* (unreported, 7 July 2008)

The Sex Discrimination (Appeals and References) Order, 2006

The Discrimination (Jersey) Law 2013

The Sex Discrimination Act 1975

The Employment Equality (Sex Discrimination) Regulations 2005

*Macdonald v Ministry of Defence* [2003] UKHL 34

*A J Troalic & Sons Limited v Kinsey* (unreported, 9 April 2010)

*Burford v Flybe Limited* (unreported, 23 June 2009)

*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26

**Introduction**

1. This is an appeal against the decision of the Employment and Discrimination Tribunal in a sex discrimination case. On 10 November 2015, the Tribunal dismissed the claim of unfair dismissal made by the Respondent, Lucia Pagliarone, but upheld her complaint of sex discrimination. The Tribunal made an award in her favour of £10,500 against her former employer, Immuno Biotech Limited, the Appellant.

2. By a Notice of Appeal dated 20 November 2015, the Appellant appeals pursuant to section 48 of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005. Such an appeal must be on a question of law. A ground can be that the factual findings made were perverse (see, eg, *da Mata v George* (unreported, 7 July 2008)). Four grounds of appeal were raised in that Notice. The Appellant's Skeleton Argument dated 22 February 2016 advanced three of those pleaded grounds and, at the hearing on 7 March 2016, Advocate Crawford, who has represented the Appellant, abandoned a further ground and pursued only the first and fourth original grounds.
3. The first ground is that "*The Tribunal misapplied the law by failing to adopt and use the correct legal test in determining that the Appellant breached section 6(2)(b) of The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 as amended*" and the other ground is that "*The Tribunal's determination that the Appellant breached section 6(2)(b) of the Ordinance was perverse on the basis that the conduct of Mr Noakes complained of by the Respondent was not directed at her and/or did not affect her own dignity and/or was trivial in nature and/or was merely offensive rather than conduct amounting to sex discrimination under the Ordinance.*" Advocate Crawford candidly acknowledged that the Appellant's first ground of appeal was its strongest.
4. The Respondent was not represented by Counsel. She sought leave to have the assistance of a *McKenzie* friend, Andrew Castle, who had represented her before the Tribunal. This assistance was not opposed by Advocate Crawford. Indeed, article 7(1)(b) of the Sex Discrimination (Appeals and References) Order, 2006 provides that a party to a complaint which is the subject of an appeal may "*address the Royal Court in person, by a friend or by an Advocate of the Royal Court*". Accordingly, although the Respondent made her primary submissions herself, when it came to answering certain questions, Mr Castle himself addressed the Court in accordance with this provision.

## **Background**

5. The facts are set out in the Tribunal's written reasons. The Tribunal heard evidence from the Respondent, from two of her former colleagues (Tom Rushton and Karen Solway), from Peter Dawson-Ball, an officer of the Appellant, who also represented it, and from three other persons who worked for the Appellant (Beate Keisa, Kathryn Touzeau and David Noakes). The key finding of sex discrimination is at para. 11.4 of the Tribunal's Decision:

*"On this issue the Tribunal prefers the evidence of the Applicant and her witnesses to the evidence given by the Respondent's witnesses. It has been persuaded that insulting, gender specific comments were uttered by Mr Noakes on multiple occasions and it was clear that Ms Pagliarone suffered a detriment. It concludes that this constituted a breach of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, Section 6(2)(b)."*
6. The Respondent was employed by the Appellant from 26 August 2014 to 9 January 2015. Initially, she was the Personal Assistant to Mr Noakes, the Managing Director of the Appellant, but was later reassigned into an administrative/client supporting role. Her normal place of work was initially at the company's offices but was subsequently changed to Mr Noakes' residence. Her salary was £40,000 per annum and she received a bonus of £500 in December 2014.
7. The Tribunal appears to have accepted the Respondent's evidence about the working environment she experienced: "*It was ... an environment in which lots of inappropriate remarks were made about staff, mostly about women, and mostly by Mr David Noakes himself. The Applicant witnessed violent outbursts from him with lots of swearing being commonplace, which the Applicant found very intimidating.*" (para. 3.2). She made contemporaneous notes in a log, copies of which she provided to the Tribunal. There are 30 items recorded from the commencement of her employment to the day she was dismissed. At paragraphs 3.5 to 3.13 of its Decision, the Tribunal has extracted some of these. By way of example:

"3.10 On 13 October 2014 the Applicant's personal effects were moved out of the office she shared with Mr Noakes. The Office Manager told the Applicant that, upon his arrival, Mr Dawson-Ball needed to sit with Mr Noakes. Ms Keisa explained to the Applicant it would be "boys together, they have a lot in common regarding the Aero and Yacht clubs".

3.11 On 16 October 2014, Mr Noakes became upset over a payment issue and called the Applicant "a fucking stupid woman". Mr Dawson-Ball intervened and advised Mr Noakes that he would deal with the issue."

Having considered the whole log, it is apparent that some of the comments made by Mr Noakes were directed towards the Respondent and drew attention to her being a woman.

8. The evidence of Mr Rushton and Ms Solway corroborated a number of the incidents to which the Respondent referred. Mr Rushton had been employed by the Appellant for just six weeks during the time the Respondent had been employed. Ms Solway was employed for slightly longer than Mr Rushton and was dismissed on the same day as the Respondent. The Tribunal was alive to the fact that both of the witnesses giving evidence on behalf of the Respondent may have had reason to feel aggrieved, but found them both to have given truthful, reliable evidence (see para. 11.1):

*"The Tribunal is mindful that both of the witnesses called by the Applicant had, like her, been dismissed after relatively short periods of employment, without being told the reasons for the dismissal. The Respondent drew attention to the fact that the witness statements of the Applicant and her witnesses had many similarities in both their wording and spelling. This begs the question as to whether the evidence could be relied upon or whether, as the Respondent argued, each of them was using this as an opportunity to indulge in malicious grudges against their former employer. Having heard their evidence under Oath the Tribunal concluded the evidence given by Mr Rushton and Ms Solway was truthful and objective."*

9. On behalf of the Appellant, Mr Dawson-Ball, who commenced his employment on 12 October 2014, denied that there was open hostility to women in the workplace, pointing out that there was, in early 2015, six women and just three men working for the Appellant in Guernsey. Ms Keisa had been the Office Manager since November 2012. She stated she had never heard Mr Noakes make a single sexist comment to the Respondent or anyone else in the office. Ms Touzeau had commenced her employment with the Appellant in September 2013. Her desk adjoined that of the Respondent when the Respondent worked in the open office area. She had never heard anything that suggested there was a culture of sex discrimination and confirmed that the idea that there was open hostility towards women was fictitious. They all explained that the reason for the Respondent's dismissal was that she made errors and failed to learn from her mistakes. In respect of the evidence of Mr Noakes, the Tribunal *inter alia* found (at para. 9.7):

*"Mr Noakes was referred to the log of events maintained by the Applicant and asked whether he recalled the alleged events of his discriminatory abuse toward the Applicant and her female colleagues. Many of the events he could not remember or he denied took place; he did however confirm that he did shout and lose his temper in the office on occasions. When questioned as to his preference as to the physical/appearance requirements for front line staff at public conferences he stated that after 25 years in marketing he might not give the Tribunal the answer it expected in terms of required non-discriminatory practice."*

10. As a result of its findings on the evidence, prior to reaching the conclusion set out at para. 11.4 to which I have already referred, the Tribunal held:

"11.2 ... The Applicant provided an extensive log of her period of employment with multiple examples of alleged inappropriate conduct by the CEO David Noakes; the Tribunal finds this evidence compelling. In most cases there was clear corroboration of these events from Ms Solway and Mr Rushton.

11.3 *It would seem to the Tribunal that such conduct, clearly based on sex, would affect the dignity of women in any workplace; indeed many of their male colleagues might find it very distasteful as well, even though not directed at them. In the opinion of the Tribunal this constituted an intimidating, hostile and humiliating working environment for the recipient. Mr Noakes gave in evidence that he was "not perfect" and that he, did on rare occasions, shout and swear but he denied swearing at the Applicant."*

### **Submissions on first ground of appeal**

11. In developing the Appellant's first ground of appeal, Advocate Crawford has concentrated on the provisions in the 2005 Ordinance that, when read together, explain what a complainant needs to establish. Section 1(1)(a) provides:

*"In any circumstances relevant for the purposes of any provision of Part II of this Ordinance, a person discriminates against a woman if ... on the grounds of her sex he treats her less favourably than he treats or would treat a man ..."*

By virtue of section 63(3):

*"A comparison of the cases of persons of different sex ... under section 1(1) ... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."*

Section 6(2)(b), which is within Part II of the Ordinance, provides that:

*"... a person shall not, in the case of a woman employed by him at an establishment in Guernsey, discriminate against her ... by ... subjecting her to any other detriment."*

12. Whilst the Tribunal has referred in its Decision to section 6(2)(b) of the Ordinance, Advocate Crawford suggests that it fell into error by not referring to the need to identify a comparator and linking any detriment to it being treatment that is less favourable on the grounds of the complainant's sex. His submission is really confined to arguing that the Tribunal appears to have done no more than consider section 6(2) when the scheme of the Ordinance required it to go further. Moreover, in his submission the Tribunal has, by referring to a guidance booklet issued by the Commerce and Employment Department of the States of Guernsey, approached sexual harassment as if it were in itself the basis for a claim for sex discrimination in circumstances where Guernsey's statutory regime makes no such provision, unlike in Jersey and the United Kingdom, where the legislative framework has been changed to accommodate that position.

13. In Jersey, Article 28 of the Discrimination (Jersey) Law 2013 makes harassment an act of discrimination prohibited by that Law. Similarly, section 4A of the Sex Discrimination Act 1975, as amended, which was inserted by the Employment Equality (Sex Discrimination) Regulations 2005, also makes provision for harassment, including sexual harassment, to be an express form of discriminatory treatment. There is no equivalent provision in the 2005 Ordinance. As a result, Advocate Crawford has relied heavily on the statements of principle found in *Macdonald v Ministry of Defence* [2003] UKHL 34, which was a decision reached on the United Kingdom legislation before it was amended by the 2005 Regulations. In short, Advocate Crawford submits that these principles can sensibly be applied as a matter of Guernsey law because our legislation reflects the old position in the United Kingdom.

14. The passage from the Department's booklet "*Sex Discrimination at Work - Your Responsibilities*". quoted at para. 10.1 of the Tribunal's Decision, reads:

*"An employee may have been subjected to unwelcome behaviour of a sexual nature. This sort of behaviour constitutes harassment, which can lead to low morale, lack of confidence or even feelings of fear and panic. The kind of behaviour that could be unlawful includes:*

- *Insulting or humiliating remarks*

- *Indecent or suggestive remarks*".

In the booklet, this passage appears under the heading "Situations that could give rise to discrimination complaints". After further examples, the section concludes with "*Any of these factors could create a hostile working environment for employees.*" Advocate Crawford suggests that the language used by the Tribunal closely mirrors the language used in this booklet, but that the scheme of the legislation requires a more comprehensive assessment of whether or not this type of conduct actually amounts to unlawful discrimination on the ground of sex.

15. He accepts that there is a reference to sexual harassment in the 2005 Ordinance, but it features in section 59(11) in relation to the power of the Department to issue codes of practice:

*"For the removal of doubt, and without limitation, a code of practice issued under this section may include provision relating to sexual harassment, which expression includes (by way of illustration) unwanted, unreasonable or offensive conduct (physical, verbal or otherwise) of a sexual nature or other conduct based on sex affecting the dignity of men or women at work."*

16. I accept Advocate Crawford's submission that, in order to establish sex discrimination based on allegations of sexual harassment, a complainant is required to meet the general test set out in the provisions to which I have just referred found in the 2005 Ordinance rather than the complainant being able to avail himself or herself of a different, more direct route to establishing the basis for the complaint as is the case in Jersey and the United Kingdom. In other words, such harassment must be shown to amount to a detriment and the employer must be shown to have treated the complainant less favourably than it treats (or would treat) a man in the same circumstances by reference to an appropriate comparator for the purposes of section 63(3). The issue in this appeal is whether the Tribunal complied with that requirement or fell into error.

17. The *Macdonald* case (*supra*) concerned a member of the Royal Air Force who was dismissed because he was a homosexual. In the other appeal dealt with at the same time (*Pearce v Governing Body of Mayfield School*), a female teacher was subjected to a sustained campaign of harassment because she was a lesbian. Advocate Crawford has highlighted a number of statements of principle in the speeches delivered. Lord Scott of Foscote stated (at para. 117):

*"But the 1975 Act is an act to combat discrimination. It is not an Act to combat harassment. Discrimination must always be of the essence of a complaint under the 1975 Act, or under any of the other anti-discrimination Acts. Discrimination always involves a comparison between the treatment meted out to the complainant and the treatment that would have been meted out to a person in similar circumstances to those of the complainant save that he or she was not a member of the protected class."*

Further, as Lord Hope of Craighead explained (at para. 86):

*"Section 4(1) of the Sex Discrimination Act 1975 identifies victimisation as a distinct category of discrimination. The Act does not accord the same treatment to sexual harassment. If this occurs in the field of employment it is a "detriment" within the meaning of section 6(2), as Lord President Emslie said in Strathclyde Regional Council v Porcelli 1986 SC 137, 144-145; [1986] ICR 564, 568. It is not made unlawful by the Act unless the employer discriminates against the person who, he subjects to it by treating her less favourably than he would treat a man or, if the victim is a man, than he would treat a woman."*

18. His Lordship then rejected the suggestion that sexual harassment is so plainly discriminatory that there is no need to look for a comparator: "*There is no escape, then, from the need to resort to a comparison. The words "less favourable treatment" in section 1(1)(a) render this inevitable.*" Lord Nicholls of Birkenhead similarly explained (at para. 17):

*"The fact that the harassment is gender specific in form cannot be regarded as of itself establishing conclusively that the reason for the harassment is gender based: 'on the ground of her sex'. It will certainly point in that direction. But this does not dispense with the need for the tribunal of fact to be satisfied that the reason why the victim was being harassed was her sex. The gender specific form of the harassment will be evidence, whose weight will depend on the circumstances, that the reason for the harassment was the sex of the victim. In some circumstances the inference may readily be drawn that the reason for the harassment was gender based. A male employee who subjects a female colleague to persistent, unwelcome sexual overtures may readily be inferred to be doing so on the ground of her sex."*

Lord Hobhouse of Woodborough sounded a note of caution (at para. 110):

*"Harassment of any kind is deplorable. But to give rise to a complaint under the 1975 Act it has to be discriminatory and on the ground of her sex. In some situations the bare facts may speak for themselves and admit of only one conclusion, for example a male employer demanding sexual favours from female employees in return for continued employment. But the vast majority of contested cases will not be so straightforward. The harassment may merely be the selection of the most effective weapon by a bully to achieve some non-sexual objective. The comparison test must be satisfied and dicta which state or suggest the contrary are wrong."*

19. Lord Rodger of Earlsferry clarified the importance of dealing with section 1(1)(a) (at para. 194):

*"No words should be read into section 1(1)(a). The provision requires the employment tribunal to compare the way the alleged discriminator treats the woman with the way he treats or would treat a man. In any case where discrimination is established, this exercise must by definition involve comparing two forms of treatment which are different, whether in kind or degree. It also involves the tribunal in evaluating the differences and deciding which form of treatment is less favourable. That is an exercise for the judgment of the tribunal, with its lay members using their experience and acting rather like a jury. Although the exercise may be more complicated, the same applies where the alleged discrimination takes the form of a course of conduct against the woman. The tribunal must compare that course of conduct as a whole with any action, or with the whole of any course of conduct, that the alleged discriminator pursues or would pursue against a man in similar circumstances. On the basis of that comparison the tribunal decides whether the alleged discriminator treats the woman less favourably on the ground of her sex than a man in similar circumstances."*

20. Against those principles, Advocate Crawford submits that the Tribunal reached a conclusion that the Respondent had suffered a detriment under section 6(2)(b) but it failed to proceed to consider whether such harassment amounted to sex discrimination in accordance with section 1(1) of the Ordinance. Accordingly, it failed to apply the correct legal test. The Tribunal is not permitted to bypass the requirements of the Ordinance, and should have referred to an identifiable comparator, whether a real or a hypothetical person, with whom to compare the treatment meted out to the Respondent.
21. One of the points made in response by the Respondent is that, as this Court has noted previously, because the Tribunal is constituted by lay people, the Court on an appeal should not be over-critical or over-analytical. In *A J Troalic & Sons Limited v Kinsey* (unreported, 9 April 2010), the following passage from *Burford v Flybe Limited* (unreported, 23 June 2009) was cited with approval:

*"4. In approaching a review of the Tribunal's written decision, Advocate Bell urged that I should not be over-critical or over-analytical; the Tribunal is a lay body, not a court of law and cannot be expected to draft its decision in the same manner as an experienced, legally-qualified judge. He said the exigencies of daily life in the court room or the Tribunal are such that judgments could always be better expressed*

and so they should be read on the assumption that the Tribunal knew how to perform its functions and what matters to take into account, unless the contrary can be demonstrated and he cited Piglowska v Piglowski [1999] 3 All ER 632.

5. In Allonby v Accrington & Rossendale College [2001] IRLR 364 ... Sedley LJ considered the nature and purpose of a tribunal's reasons, at paragraph 22:

*"Before looking again at the employment tribunal's reasoning, it is necessary to remember, as this court has more than once said, that it is not appropriate to expect an analysis of every fact and argument with reasons for accepting or rejecting them (Kearney & Trecker Marwin Ltd v Varndell ...); that a tribunal's reasons are not to be construed like a statute or a deed; and that 'what matters is whether the decision under appeal was a permissible option' (Piggott Bros Ltd v Jackson ...). That said, there is no point in giving reasons unless they make it possible, at the very least for parties, advisers and appellate courts to see whether the tribunal has correctly understood the law, has addressed the right questions and has reached its conclusions by permissible means (see Piggott Bros...). Beyond this point the nature of the issues and the evidence will call for more or less in the way of explicit findings. To dilute this minimum would not only deplete the duty to give reasons and devalue the election under the Industrial Tribunals (Rules of Procedure) Regulations 1985, Sch 1, para. 9(3), to give full (or 'extended') rather than summary reasons; it would risk contravening s.6 of the Human Rights Act 1998 by permitting tribunals' written reasons to fall below the standard, corresponding broadly to our domestic standard, required by Article 6 of the European Convention on Human Rights (see Van de Hurk v The Netherlands [1994] 18 EHRR 481, paragraph 61; Hiro Balani v Spain [1995] 19 EHRR 566, paragraph 27)."*

## Discussion

22. Given the importance of undertaking a comparison exercise, as required by the provisions of the 2005 Ordinance to which I have referred and adopting as applicable in Guernsey the guidance set out in the Macdonald case, it is a little surprising that the Tribunal's Decision does not expressly state that this took place. To that extent, I agree with Advocate Crawford's criticism that the reasoning given is abbreviated where a fuller explanation would have been welcome. It would have been simple enough for the Tribunal to have spelt out how it undertook the comparison exercise. Its omission to do so means that the approach described in the Burford case has needed to be relied on instead. I have, therefore, reached the conclusion that, if one pieces together the various findings made, the exercise that has taken place is adequate because the decision reached by the Tribunal was a permissible option for it on the evidence it had received and the parties (and others) are able to understand how that decision was reached. Accordingly, this first ground of appeal is rejected.
23. One of the Appellant's employees who was a man and was found to have been treated differently was Mr Rushton himself. At para. 4.2 of the Decision, the Tribunal records that Mr Rushton was provided with an Apple Mac computer on his first day at work whereas he noticed that the women in the office had just laptops. This is an example of where the Tribunal could have drawn a comparison showing that the Respondent had been treated less favourably than an actual man who was a fellow employee. In similar vein, the Tribunal referred to the way in which Mr Dawson-Ball, another actual male employee of the Appellant, was installed in the office of Mr Noakes in place of the Respondent. The explanation offered by Ms Keisa (see para. 3.10 quoted above) referred to the pair being "*boys together*". The clear inference from this explanation was that the Respondent, as a woman, could be treated differently. Further, what happened shows that the Appellant, through Mr Noakes' words and actions, was treating the Respondent less favourably than it was a male employee. No explanation was offered as to why there had been different treatment. As a result, whilst it would have been preferable had the Tribunal drawn together these strands in its Decision and spelt out that it had directed its mind to the requirements of section 1(1)(a) of the 2005

Ordinance in this fashion, I am satisfied that its omission to be explicit does not affect the validity of its finding of sex discrimination.

24. Even without the references to these two particular examples of treating the Respondent less favourably by reference to what occurred in the Appellant's workplace, the bare facts of this case, in my opinion, come close to what Lord Hobhouse indicated in the *Macdonald* case. At para. 11.2 of the Decision, the Tribunal found the Respondent's evidence from her log to be "*compelling evidence*". Whether or not that evidence also identified any male comparator, it is obvious from the incidents described that Mr Noakes is someone who struggles with the concept of women in the workplace being treated without discrimination, so even if there were no actual comparator, it would have been open to the Tribunal to have used a hypothetical comparator. The inclusion of the words "*or would treat a man*" in section 1(1)(a) of the 2005 Ordinance supports that approach (see, also, *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26, to which the Respondent has referred).
25. Having regard to the way the Respondent was dealt with, in particular by Mr Noakes, the Tribunal's finding that "*insulting, gender specific comments were uttered by Mr Noakes on multiple occasions*" leads first (as it stated) to the conclusion that the Respondent suffered a detriment for the purposes of section 6(2)(b) of the Ordinance, but then also leads to the conclusion, which is implicit from this finding, that the Appellant, through Mr Noakes, was treating the Respondent less favourably than it would treat a man by engaging in this course of conduct. This was not an isolated incident, where some other explanation might be needed as to whether a man had been or would be treated less favourably. The Respondent's log shows that, during the short period of her employment, there were regular incidents. They equate to being at least weekly. However one views this litany of events, the discriminatory behaviour of Mr Noakes, acting on behalf of the Appellant and not being tempered by others in its employment, is such that the Tribunal could have come to no other conclusion but that the Respondent was treated less favourably than a man. It was so gender-specific that it could only lead to that conclusion. Consequently, although the Tribunal should properly have added a sentence or two to clarify that the final aspect of the required statutory test had been established to the requisite civil standard of a balance of probabilities, recognising that it is a lay body, I am persuaded that the reasons given, when read as a whole, demonstrate that it could only have made the finding required by section 1(1)(a) of the Ordinance and that all those involved would inevitably have construed the Decision in that manner. Further, it would serve no purpose to remit the case to the Tribunal for it to add that sentence or two to the Decision. The ruling that there had been unlawful sex discrimination on this ground is, therefore, upheld.

#### **Submissions on second ground of appeal**

26. The Appellant's challenge on its alternative ground is one alleging that the Decision was perverse because the evidence did not show that the conduct of Mr Noakes was directed at her or it did not affect her dignity or it was trivial in nature or was merely offensive rather than conduct amounting to sex discrimination. Of course, one of the advantages of the Tribunal is that it gets to see and hear the witnesses who give oral evidence, which is a crucial advantage over an appellate court. That is one of the reasons why appellate courts hesitate before interfering with factual conclusions. In the present case, though, the Respondent's log of events is what has been treated by the Tribunal as compelling and so I can more readily assess whether there is any substance to Advocate Crawford's submissions on this ground.
27. Advocate Crawford is, I accept, correct to point out that a mere reference to gender does not constitute sexual harassment. However, even a cursory glance at the Respondent's log proves that this ground is without foundation because some of the incidents were clearly directed at the Respondent herself.
28. Mr Noakes gave the Respondent a dressing down on 15 December 2014. Although this was in an office with Mr Dawson-Ball present and the door closed, the loudness of his voice was such that other employees outside could hear. The Respondent's log records that *inter alia* she was told by him "*everybody fucking hates you ... you're shit at your job and are the most unorganised useless fucking woman I have ever met ... if I had my way you would have been*

sacked in the first fucking week". On 17 November 2014, Mr Noakes had told her "you're fucking useless, if I need anything done in this place I am better off doing it myself". On 16 October 2014, Mr Noakes shouted in her face calling her a "fucking stupid woman" in relation to a payment matter. Before then, the Respondent had been moved out from Mr Noakes' office to make way for Mr Dawson-Ball on 13 October 2014 and when Mr Rushton had started work on 22 September 2014 and asked Mr Noakes if other employees would be getting new computing systems, Mr Noakes ignored that enquiry. Whilst there are other incidents that were less obviously directed at the Respondent, these are examples from which I am satisfied the Tribunal was able to conclude that there was an underlying gender-specific nature to what Mr Noakes was doing and that the Appellant's detrimental treatment, acting through Mr Noakes, was directed at her, was done in the presence of others in such a way as to affect her dignity and cannot be considered as trivial in nature.

29. There are too many examples of such insulting behaviour for them collectively to be trivial. Because of the many references to the Respondent as a woman, it was also demonstrated that Mr Noakes' reaction to her was very much gender-based. It is also evident that the comments being made to the Respondent were about her performance as a female employee of the Appellant. When they are considered in the light of the inappropriate comments that Mr Noakes made to her about other current or former female employees of the Appellant, it is understandable that the Tribunal could find that the Respondent was able to connect these comments together in such a way as regard them as denigrating her as a woman employee. As the Respondent put it, Mr Noakes made her feel small and victimised. I also accept Mr Castle's description of Mr Noakes as an "inveterate discriminator". In my judgment, there was ample evidence before the Tribunal for it to make the findings it did and regard them as unlawful discrimination against the Respondent.

30. During the course of the hearing, I asked Advocate Crawford about the impact of section 44(2) of the 2005 Ordinance dealing with the burden of proof:

*"Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –*

*(a) has committed an act of discrimination against the complainant which is prohibited by any provision of Part II, or*

*(b) is, by virtue of section 25 or 26, to be treated as having committed such an act of discrimination against the complainant,*  
*the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."*

His response was that discrimination still had to be proved. However, I consider that the Tribunal's approach to the complaint was appropriate in this respect. It had to assess the evidence given by and on behalf of the Respondent (as complainant) and to weight that against the evidence given on behalf of the Appellant. If, as the Tribunal states it did, it preferred the Respondent's evidence to that given on behalf of the employer Appellant, the Respondent had proved facts entitling the Tribunal to uphold the complaint. The effect of section 44 is that, having discharged that burden, the burden then shifted to the Appellant to prove that the act of discrimination was not committed.

31. It is apparent from the Decision (eg, para. 9.7 referring to the evidence of Mr Noakes) that the Appellant denied that the events listed in the Respondent's log took place or there was no recollection of them. This does not really assist in discharging the burden that section 44 placed upon the Appellant. Instead, Mr Noakes appears effectively to have conceded that the Tribunal would be unlikely to find that he adhered to required non-discriminatory practices had he answered the question about his preferences as to physical/appearance requirements. In this case, because the Respondent raised in her evidence facts that could lead to the conclusion that there had been discrimination on the ground of sex, the failure of the Appellant to counter those facts, thereby relying on the Tribunal not accepting the evidence of the Respondent and those who gave evidence on her behalf, left open the distinct possibility that the complaint would be upheld. In those circumstances, I am satisfied that the Tribunal

received evidence on which it was entitled to base its findings and that those findings are not perverse. This second ground of appeal is also rejected.

### **Conclusion**

32. For the reasons given, this appeal is dismissed. Reading the Tribunal's Decision as a whole, I am satisfied that the two bases on which Advocate Crawford has criticised it fail. It would have been better had the Tribunal expressly referred to one or more comparators or relied on a hypothetical comparator because that is clearly a step that has to be taken before a complainant can establish sex discrimination, but the conclusions themselves are set out adequately so that the reasoning behind the Decision is readily comprehensible to the parties and indeed everyone else. The Appellant's suggestion that the findings made were perverse is, in my view, unsustainable because there was ample material before the Tribunal from which it could reach its conclusions that the Respondent had been discriminated against by her former employer.

33. I am minded to order that the Appellant should be ordered to pay the Respondent's costs of the appeal. As she represented herself, albeit with assistance from a friend, I doubt these will be particularly high. If the Appellant wishes to argue for a different order, it must make written representations within 14 days of receiving this judgment, at which point I will consider how best to deal with the question of costs.

### **Postscript**

34. I have deferred handing down this judgment until now because the Respondent stood as a candidate in the General Election taking place today. I did so because I considered that the outcome of this appeal should not be capable of being publicised at any time when voters might have been influenced one way or the other by it. That is the reason why this judgment has been delayed for slightly longer than would otherwise have been the case.