Comparators, hypothetical comparators and HR involvement in disciplinary dismissals

By Stephen Wyeth
3PB Barristers

***Shing v University of the Arts London* [2026] EAT 154**

In a characteristically (and refreshingly) succinct Judgment of John Bowers KC, who is a recent addition to the EAT sitting as a Deputy High Court Judge, this decision addresses two recurring themes in discrimination and unfair dismissal litigation: the proper approach to comparators in direct race discrimination claims, and the extent to which HR professionals may become involved in disciplinary decision-making without compromising the fairness of a dismissal.

The claimant/appellant was represented pro bono by 3PB's Eaindra Cho through the auspices of Advocate.

The facts

The claimant, Mr Shing, was employed by University of the Arts London as a Senior Lecturer. He formed a relationship with a mature student, known in the proceedings as EA, who was enrolled on a BA (Hons) Interior and Spatial Design course. Although she was not his allocated tutee, the employment tribunal found that the relationship crossed professional boundaries. The relationship included a brief romantic element and, amongst other matters, the claimant offered her a ticket to New York. Following a complaint by the student, disciplinary proceedings were commenced and the claimant was summarily dismissed. The dismissal decision was taken by Professor Crow.

During the disciplinary process the claimant accepted that he had made "unintentional errors" in the relationship and acknowledged that he was now aware of the respondent's professional boundaries policy. He also expressed a willingness to undertake training relating to that policy.

The claimant subsequently presented claims in the Employment Tribunal. For present purposes, the relevant claims were direct race discrimination and unfair dismissal. The race

discrimination complaint was advanced on the basis that the claimant, who is Chinese, had been treated less favourably than two other employees, identified as G and H, who had also been the subject of disciplinary proceedings involving inappropriate conduct towards students or matters of professional boundaries.

The Employment Tribunal rejected both claims. The claimant appealed to the Employment Appeal Tribunal.

The issues before the EAT

The appeal raised two key questions.

First, whether the Employment Tribunal had erred in its assessment of comparators for the purposes of the direct race discrimination claim. In particular, the claimant argued that the Tribunal should have constructed and analysed a hypothetical comparator notwithstanding its findings on the actual comparators relied upon.

Secondly, whether the Tribunal had misapplied the principles arising from *Ramphal v Department of Transport* [2015] IRLR 985 concerning HR involvement in disciplinary decision-making and had failed properly to consider the extent to which HR influenced the dismissal decision.

The claimant also advanced a reasons challenge as a third ground of appeal but this was dismissed with little discussion and is not in focus here.

The comparator analysis

The claimant's discrimination case was founded entirely upon comparison with two colleagues, G and H. The Tribunal had examined both cases in detail and concluded that neither individual was a valid comparator because the circumstances were materially different from those of the claimant. It further found that their cases did not assist even as "evidential comparators".

The EAT upheld that approach.

Under section 23 Equality Act 2010 there must be no material difference between the circumstances relating to the claimant and the comparator. The Tribunal had found significant distinctions between the misconduct committed by the claimant and the conduct leading to disciplinary action against G and H. In G's case only limited allegations were upheld. In H's

case the Tribunal regarded the conduct as less serious and attached significance to H's contrition, apology, acknowledgement of wrongdoing and lengthy disciplinary record free from previous sanctions.

The EAT held that those findings were plainly open to the Tribunal. Once the Tribunal had concluded that G and H were not true comparators, and that no inference of discrimination could properly be drawn from their treatment, the claimant's discrimination case was in considerable difficulty because it had been advanced entirely through those comparisons.

Of greater general interest is the EAT's treatment of hypothetical comparators. The claimant relied upon authority establishing that a tribunal may construct a hypothetical comparator in discrimination cases. However, the EAT rejected the argument that a tribunal is under a freestanding obligation to do so in every case. Having considered the authorities of *Shamoon v Chief Constable of the RUC* [2003] ICR 337, *Balamoody v UKCCNMV* [2002] ICR 646*, The No 8 Partnership v Simmons* [2024] ICR 380, *Jones v Secretary of State* [2025] ICR 1503, and *Bahl v Law Society* [2003] IRLR 640, the EAT observed that the essential question remains whether the evidence permits an inference that the claimant was treated less favourably because of the protected characteristic. Where no evidential basis exists for such an inference, requiring a Tribunal to construct a hypothetical comparator was not necessary where this would amount to an "empty and arid exercise".

The EAT considered that this was precisely such a case. There was no evidence that race featured in the reasoning of any decision-maker. Indeed, the claimant's original counsel at first instance had accepted before the Tribunal that race did not operate on the minds of those involved in the dismissal process. Against that background, there was no meaningful purpose in constructing a hypothetical comparator merely for the sake of formal analysis.

HR involvement and the scope of *Ramphal*

The second aspect of the appeal concerned unfair dismissal.

The claimant argued that the Tribunal had failed properly to apply *Ramphal v Department of Transport* [2015] IRLR 985, which warns against HR professionals influencing disciplinary findings and sanctions. The submission was that HR involvement in the present case improperly influenced the dismissal decision and rendered the dismissal unfair.

The EAT rejected that argument.

A notable feature of the judgment is its careful examination of what *Ramphal* actually decided. The EAT observed that both *Ramphal* and the earlier Supreme Court decision in *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 (which *Ramphal* purported to apply) were concerned with situations in which HR personnel had become involved in substantive decision-making rather than merely advising on process or law.

The EAT held that *Ramphal* should not be understood as authority for the proposition that any significant HR involvement will automatically undermine fairness. Rather, the ratio of *Ramphal* is that undue pressure or improper external influence upon the disciplinary decision-maker may be relevant to the fairness assessment under section 98(4) Employment Rights Act 1996. Whether the line has been crossed depends on the facts of the individual case.

Importantly, the Judgment goes further and contains observations recognising the practical value of HR input. The EAT expressly observed that there may be good reasons why HR should advise on matters such as the distinction between misconduct and gross misconduct and that such involvement may assist organisations in maintaining consistency across disciplinary decisions.

On the facts, the Tribunal had found that the relevant HR representative did not exert pressure on Professor Crow, alter investigative conclusions or dictate the outcome. The HR involvement extended no further than communications about process and drafting correspondence after the decision to dismiss had already been taken. The Tribunal had therefore been entitled to conclude that there was no improper influence of the kind contemplated by *Ramphal*.

The EAT's decision

The appeal was dismissed in its entirety. The EAT held that the Tribunal had been entitled to conclude that the claimant's chosen comparators were materially different and that no inference of race discrimination arose from their treatment. The Tribunal was not required to construct a hypothetical comparator where doing so would have served no practical forensic purpose.

The EAT also rejected the challenge based on HR involvement, finding that the Tribunal had correctly identified and applied the principles arising from *Ramphal* and had been entitled to conclude that there was no improper external influence upon the decision-maker.

Why this decision matters and practical considerations that flow

Although the factual background is somewhat unusual, the decision carries broader significance for practitioners.

First, it is a reminder that comparator analysis remains intensely fact-sensitive. Mere similarity of allegation or subject matter will rarely suffice. Tribunals will scrutinise the entirety of the surrounding circumstances, including the seriousness of the conduct, the employee's response, previous disciplinary history and other contextual matters before determining whether circumstances are truly comparable. From a practical point of view, where express comparators have been identified in the list of issues, it is imperative for respondents to ensure sufficient evidence is produced at trial dealing with any differences in applicable circumstances to that of the claimant.

Secondly, the Judgment confirms that hypothetical comparators are a tool rather than an end in themselves. The question remains whether the evidence supports an inference that the protected characteristic materially influenced the treatment complained of. Where no such evidence exists, a Tribunal does not commit an error of law by declining to engage in a purely theoretical comparator exercise.

Thirdly, the Judgment provides welcome clarification of the proper reading of *Ramphal*. Practitioners sometimes encounter arguments that extensive HR involvement is inherently problematic. The EAT makes clear that this is an over-simplification. The critical question is not whether HR was involved, but whether HR usurped the role of the decision-maker or exerted undue influence over the outcome. Appropriate advice designed to secure legal compliance, procedural fairness and consistency across an organisation remains entirely legitimate.

For employers, the practical lesson is to ensure that disciplinary decision-makers remain demonstrably responsible for findings of fact and sanction decisions, whilst recording the purpose and scope of HR advice. For claimants, the decision highlights the importance of identifying genuinely comparable cases and establishing an evidential basis from which discrimination can properly be inferred before relying upon comparator evidence alone.

2 November 2026

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team by emailing Russel.Porter@3PB.co.uk or call 01865 793 736.



Stephen Wyeth

Barrister
3PB

01962 868 884
Stephen.Wyeth@3pb.co.uk

3pb.co.uk