

# Direct discrimination claims: comparators and the burden of proof

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## [Leicester City Council v Bindu Parmar \[2025\] EWCA Civ 952](#)

[ ] paragraph number of the Court of Appeal's judgment.

Some references are made to the ET's original decision **Case no: 2601134/2021** (available on the online ET decisions database).

1. This appeal considers multiple issues. However, this article focuses on the CA's decision in relation to the issue of comparators and the application of the burden of proof in relation to complaints of Direct Discrimination. It is important to emphasise that in relation to all issues before the Court of Appeal, in order to fully comprehend the findings, the full appeal decision should be consulted. It is hoped that the below may serve as a helpful summary.

### Background facts<sup>1</sup>

2. Mrs. Bindu Parmar ('BP') brought claims of direct race discrimination, pursuant to (s.13 Equality Act 2010 "EA") against her employer Leicester City Council ('LCC').
3. BP is a British National who describes herself as of Indian origin. BP qualified as a Social Worker in the mid-90s and was later appointed as LCC's Head of Service for Locality West in 2015. In that role, BP was responsible for several teams, each of which was managed by a Team Leader. The individual team leaders under BP's supervision were: JR (white British), NM (white British), AL (Indian), MA (white British) and ZA (Indian). AE and HM who are both Heads of Service are described as white British. Until the events in these proceedings, BP had not been subject to any disciplinary or capability proceedings.
4. Ms. Lake was at the material time the Director of Adult Social Care and Safeguarding, had responsibility for 8 Service Areas in her Division including Locality West and Contact and Response (C&R). There had been some tension in the working relationships between

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<sup>1</sup> I have consulted both the ET and CA judgments for this section.

Locality West and the C&R Team Leader, HM (white British):

- (a) In May 2018 HM swore in an open-plan office, at the end of a call with Ms. Lake, which was overheard by others. HM accepted that she had acted inappropriately and unprofessionally, and Ms. Lake did nothing further.
  - (b) In November 2018 HM sent an email to BP and several other recipients raising some issues about staffing. HM stated her team were unable to cope with their workload and that she was transferring some of her team's work to others and particularly Locality West. HM did not have the power to do this and the email was not well received.
  - (c) BP complained to Ms. Lake about that email correspondence and alleged harassment and bullying of colleagues by HM. In December 2018, Ms. Lake informed BP that the extra work would move to Locality West. Ms. Lake confirmed she had decided not to take any action against HM for the way in which she first raised the issue.
  - (d) In January 2019, during a supervision meeting BP raised concerns about the tone of communications from HM and accused Ms. Lake of unconscious bias against BAME Heads of Service.
  - (e) Subsequently, a collective grievance was raised by team members against HM including allegations of oppressive and inequitable treatment.
5. Ms. Lake was ultimately responsible for ensuring that the Teams and Heads of Service co-operated and worked towards the same goals and objectives.
  6. In February 2020, another employee JR was involved in an incident on a training course led by JD, a Principal social worker. JR felt she had been publicly humiliated by JD in the session. JR raised this to Ms. Lake who decided to offer mediation.
  7. In December 2020, AE sent an email to Ms. Lake raising concerns about the relationship between Locality West and C&R. This was not a direct complaint about BP. Ms. Lake contacted HR a few days later to discuss her concerns about BP.
  8. In early January 2021, there was an angry email exchange between AE, JR and another colleague SR about a case which apparently did not have safeguarding alerts actioned. The email was copied to BP as Head of Service (she was not directly involved). BP decided to seek the opinion of a Principal Social Worker on what she considered to be a difference of opinion on the matter. AE took exception to this decision and complained to Ms. Lake

claiming that BP has escalated a simple matter beyond all reason. AE also alleged that BP was targeting SR. BP explained that Heads of Service may need to be involved in decisions between SR and transfers to her team due to previous concerns as to his work. AE again reacted poorly to this and made a formal complaint of victimisation by BP. AE tendered her resignation, but did not in fact leave LCC.

9. In January 2021, Ms. Lake decided (after consultation with HR) to commence a disciplinary investigation against BP. BP was then transferred from her role under the disciplinary procedure and an investigation was commenced. The investigation was later transferred to another manager, Ms. Tote, who discontinued it on the basis of no case to answer.

### ***The claims before the Employment Tribunal***

10. In short, in her Employment Tribunal proceedings, BP alleged that Ms. Lake's agenda was to protect her own employment and that of her white colleagues and friends. It was also alleged that Ms. Lake had shown a racially motivated pattern of discriminatory behaviour towards BAME staff. BP referred to examples such as, more BAME managers in Ms. Lake's division being disciplined compared to white managers even where serious concerns had been raised. Between 2015-2021 three BAME senior managers in Ms. Lake's division were disciplined but no white managers had been [4].
11. BP alleged that there was a discriminatory agenda by Ms. Lake. BP's case was that she had been subjected to less favourable treatment because of race in relation to the following 5 factual allegations:
  - (i) **Allegation 1:** The Council made false allegations against BP on or around 12 January 2021<sup>2</sup>.
  - (ii) **Allegation 2:** The Council transferred her from her role as Head of Service.
  - (iii) **Allegation 3:** The Council started a disciplinary investigation against her on or around 12 January 2021.
  - (iv) **Allegation 4:** The Council required her to go to several disciplinary investigation meetings only to tell her that there was no case to answer.
  - (v) **Allegation 5:** The Council did not consider lesser and more proportionate ways of

<sup>2</sup> There appears to be a typo in para 6 of the CA judgment in referring to 2012. The ET decision 2601134/2021 paragraph 55 confirms that this is 2021.

dealing with the allegations against her, such as mediation on or around 12 January 2021. [6]

12. **Comparators:** BP relied on a hypothetical comparator. However, in the claim form BP named two heads of service, which she believed were and would not have been treated in the same way as her by LCC – **AE** (a team leader and at times an Acting Head of Service) and **HM** (head of service for C&R up to November 2020). Both were described as white British.

## ET decision

13. The ET rejected Allegation 1 on the basis that the allegations against BP were not “false” in the sense that they were manufactured or fabricated. However, the Tribunal upheld Allegations 2-5 and thus found that BP had been directly discriminated against because of race.
14. In upholding those 4 complaints, the Tribunal made detailed findings of fact in its concise 16-page judgment. The ET concluded that those facts raised an inference of discrimination, shifting the burden of proof to LCC to show that race was not the reason for the treatment. The ET concluded that they failed to do so, and therefore direct race discrimination was established.

### **Burden of proof:**

*There is no substitute for reading the full decisions of the ET, EAT and CA in order to fully understand how inferences were drawn and the burden of proof operated in this case but the following is a concise summary of factors the Tribunal referenced.*

#### *Prima facie case of direct discrimination*

15. The ET was satisfied that BP had established a prima facie case of direct discrimination. It concluded that BP had proved facts from which an inference of discrimination could be drawn and thus facts from which an inference of discrimination might be drawn. Therefore, the burden of proof shifted to LCC to establish a non-discriminatory reason for the treatment [ET decision, paragraph 69; CA decision 40].
16. The ET explained that it reached that conclusion for the reasons set out in its decision (ET decision paras 64-81) but specifically stated:

(a) “Putting the case” is merely a formality, it is rare that discrimination is admitted. [ET

decision para 66-7]

- (b) There could be no real argument that BP was subject to potentially less favourable treatment. The real areas of contention were in relation to comparison and whether the burden of proof passes to LCC to show a non-discriminatory reason for the treatment and if so whether that burden has been discharged [ET decision, para 68].
- (c) BP established a prima facie case of discrimination. The ET's decision included reference to the following reasons:
  - (i) 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 the Claimant. Instead, her normal approach was to offer mediation or to deal with it informally by discussion. In the case of the Claimant however she decided to take much more drastic action, and she did so after she had been accused of unconscious racial bias.
  - (ii) HM admitted to swearing which was undoubtedly inappropriate conduct; she also sent an email which resulted in a collective grievance, yet no disciplinary investigation was commenced. There was nothing equally serious against BP.
  - (iii) JR made serious allegations against JD of deliberate humiliation/denigration and mediation was offered rather than initiating an investigation.
  - (iv) Despite AE alleging BP had victimised SR and this being a central allegation against her, Ms. Lake did not interview SR. The Tribunal concluded this illustrated Ms. Lake did not consider there was any substance to that allegation.
  - (v) BP had acted properly in seeking advice from a Principal Social Worker in relation to the JR issue.
  - (vi) The only employees Ms. Lake had ever disciplined were of Asian ethnicity.
  - (vii) Whilst BP conceded the allegations against her were serious, the Tribunal concluded this was on the proviso they were only serious if they were correct, which she did not believe they were. The Tribunal did not therefore consider that to be a concession that disciplinary action was appropriate/necessary.
  - (viii) The Tribunal concluded that there was nothing of substance to start a disciplinary

investigation and there was no evidence such investigations are routinely commenced.

- (ix) The disciplinary invite did not set out any identifiable acts of misconduct.
- (x) When the disciplinary investigation was moved to another manager (Ms. Tote), it was discontinued. However, there was nothing to suggest Ms. Lake would have discontinued it had it remained with her.
- (xi) When it came to assessing the merits of behaviour allegations against white employees such as HM, AE and JD (the CA has confirmed the reference to JR in the ET's decision is a typo for **JD**), Ms. Lake was slow to move to formal measures. For BP on the other hand she moved fairly speedily to suspension and investigation for something that was either at the same level or lower level of alleged misconduct. The Tribunal was satisfied that race played a part in her decisions and there was no other credible explanation.
- (xii) Adverse inferences were drawn from LCC's failure to disclose relevant evidence. There was a conscious decision of LCC (or their legal team) not to disclose highly relevant evidence. This included recordings (or transcripts) of investigation meetings conducted. The Tribunal concluded they were relevant because Ms. Tote considered these before concluding there was no substance in the allegations and to terminate the investigation. Reference was also made to Ms. Lake's notes of witness interviews, Miss Tote's notes of investigation meetings (which were not preserved in light of litigation) and recordings of meetings she conducted.

#### *The Respondent's potentially non-discriminatory explanations*

17. The Tribunal rejected the potentially non-discriminatory explanations provided by LCC for the treatment:

- (a) That the disciplinary process was appropriate to gather evidence/investigate: The Tribunal rejected this and stated that Ms. Lake could have made informal enquiries as she often did and not every enquiry requires suspension/investigation.
- (b) That HR authorised the process: The Tribunal stated Ms. Lake could not hide behind HR advice or actions and it was her managerial decision.
- (c) A disciplinary process was preferable to a grievance procedure (no-one had lodged a

grievance): This was not offered as an explanation at the time and was found to have no merit and be bizarre.

- (d) Concerns raised by Ms. Lake to BP before were not acknowledged as being valid: Ms. Lake's evidence on this was in her evidence only and events relied on were not supported by disclosure of the underpinning emails referenced. Therefore, the Tribunal could not properly assess the allegation.
- (e) Given potential misconduct an investigation was appropriate: The Tribunal rejected the suggestion of potential misconduct on the facts and stated the allegations have never been particularised.
- (f) AE intended to resign: The Tribunal concluded this was not a serious suggestion and was not treated as such by Ms. Lake at the time.
- (g) There was potential targeting of SR and allegations of victimisation: The Tribunal did not accept Ms. Lake genuinely considered this to be the case as she did not interview SR and he did not make that complaint himself.

18. Therefore, the Tribunal concluded that LCC had not established on the balance of probabilities a non-discriminatory explanation for the treatment of BP. They went on to find that anyone in the same or similar circumstances who was white or not Asian would not have been subjected to the same treatment.

## EAT decision

- 19. HHJ James Tayler upheld the Tribunal's decision and rejected LCC's 11 grounds of appeal and held that there had been a "*paradigm application*" of the principles in ***Igen Limited v Wong [2005] EWCA Civ 142*** in relation to the burden of proof.
- 20. Whilst there were 11 grounds of appeal, I focus in this article on the main aspects of that decision cited by the CA in determining the narrower appeal before it [55]. The CA summarised those between paragraphs 52-70 of its decision.
- 21. The EAT provided a helpful summary of the legal principles and authorities in relation to the concepts of an evidential comparator, statutory comparator and a hypothetical comparator and this was in part summarised by the CA in its decision as well at paragraphs 56-64.



## Court of Appeal

22. In summary, LCC appealed on the following four grounds [70]:

- (i) **The comparator issue:** 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).
- (ii) **The disclosure issue:** The ET was wrong to draw adverse inferences from the Council's failures to disclose relevant documents (ground 7 before the EAT).
- (iii) **LCC's potentially non-discriminatory explanation issue:** 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).
- (iv) **The invitation issue:** The ET's approach to the Council's inviting Mrs Parmar to disciplinary meetings was wrong (ground 11 before the EAT).

23. The unanimous decision of the Court of Appeal was delivered by Laing LJ. And rejected all four grounds of appeal.

24. The CA has helpfully summarised the relevant legal test in relation to direct discrimination in paragraph 85 of its decision.

### **Ground 1: The comparator issue**

25. LCC argued 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. LCC argued that the ET had used the comparators as actual comparators and did not consider the extent of differences to those of BP. In relation to the two Asian employees who were disciplined, there was no finding that their circumstances were comparable.

26. The CA endorsed the EAT's reliance on the judgments of Cavanagh J. in ***Martin v St. Francis Xavier Sixth Form College Board* [2024] EAT 22** and the decisions in ***Chief Constable of West Yorkshire Police v Vento* [2001] IRLR 124** and ***Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337**, in which the difference between an actual, a hypothetical and an evidential comparator was considered [56-60].

27. In relation to the concept of an evidential comparator, the CA summarised (with reference to previous case law) as follows:



*“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’.” [59-60]*

28. The CA summarised BP’s case as relying on AE and HM as comparators in her particulars of claim. Her case was that she had been treated more harshly than them even though they had been implicated in safeguarding failures. She also relied on the disparate treatment of Asian and white managers. BP argued she had been treated more harshly than white managers whose conduct was broadly similar to hers (if not more serious). By the time of the hearing the comparators, on the evidence, were HM, AE and JD. Further, the complaints about BP were never particularised and the procedure against her was baseless. Ms. Lake had disciplined at least two Asian managers, and no white managers and that supported BP’s claim. [86]
29. The CA found that the EAT was correct to characterise the ET’s reliance on comparators as relying on “**evidential**” rather than statutory comparators [87].

30. It found that the ET did not err in law by not itemising all of the similarities and differences between the cases of the comparators and BP. It was entitled to find on its findings of fact, that the circumstances of the evidential comparators were “**sufficiently similar**” to those of BP to mean that their different treatment by LCC supported an inference of discrimination. The making of a comparison is a matter of fact and degree for the ET;

*“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...”* [87]

31. The ET did not misidentify the comparators. AE and MH were the two white managers specifically identified by BP in her claim form. The ET also made relevant findings as follows:

(a) Re: AE - The ET had found that AE had sent intemperate and disparaging emails. It was entitled to view that as conduct by AE that was similar to the conduct for which BP was criticised (albeit in unhelpfully vague terms).

(b) Re JD – There was an allegation of in effect bullying behaviour made by JR against JD to which Ms. Lake offered mediation.

32. The CA also stated that the ET was entitled to rely on the evidence as to investigations and action against two other Asian employees. It did not matter that it was not a statistically significant sample. That was part of the overall evidence in the case and the ET was entitled to take it into consideration.

33. Therefore, the first ground of appeal was rejected.

### **Ground 2: The disclosure issue**

34. In short, LCC argued that the ET had automatically treated a failure to disclose relevant documents as raising a presumption of discrimination; BP had not made a formal disclosure application; there was no evidence that Ms. Lake had told Ms Tote to destroy documents; Ms. Tote had followed an internal policy in only retaining documents for 6 months and was not accused of discrimination and the disclosure decision was made by the Council’s legal department [82].

35. The CA rejected the submission that the ET had treated the failures of disclosure as

*automatically* shifting the burden of proof, which would have been an error of law. [92]

36. The CA stated that the undisclosed documents were clearly relevant, that the ET had taken that into account but did not say it had shifted the burden of proof. Instead, the ET drew adverse inferences from those failures, which it was entitled to do and to take those inferences into account. The ET was alive to the fact that the failures might have been the responsibility of LCC's legal team, but in this context LCC is one corporate entity and an ET is entitled to draw inferences from disclosure failures by LCC, whether or not different individuals were directly or indirectly responsible for it. [92]

37. The ET did not need to quantify the effect of those failures [93].

38. Therefore the second ground of appeal was dismissed.

### ***Ground 3: LCC's explanations***

39. LCC argued that the ET had wrongly asked itself whether it agreed with LCC's reasons for the treatment rather than whether LCC's reasons for its actions were the reasons for those actions. The CA stated that there was little more than a cigarette paper between these questions.

40. The CA concluded that it was clear that the ET was not persuaded that LCC's evidence did explain its actions and that it was also clear that it did not consider those explanations to be credible. The CA stated, if the explanations were not credible then it could not displace an inference of discrimination. [95]

41. This ground of appeal was also rejected.

### ***Ground 4: Approach to disciplinary investigation meetings***

42. LCC's grounds of appeal included an argument that the ET has not properly considered the legal test as it has stated it had upheld the allegations "for the reasons given above" and also that the finding was perverse on the facts [84].

43. This ground was also rejected. The CA observed that LCC was seeking to obtain a "pernickety approach" to the ET's decision and that the ET's conclusions were permissible on the findings of fact made [97].

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