EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mr N Zulu & Mr H Gue	**- V -**	Ministry of Defence

Heard at: London Central

On: 1-10 July 2019 (11-12 July 2019 in chambers)

Before: Employment Judge Baty
Mrs J Cameron
Mr J Carroll

Representation:

For the Claimants: Mr C Milsom (counsel)
For the Respondent: Mr S Tibbitts (counsel)

RESERVED JUDGMENT

1. The claimants' complaints of harassment related to race at paragraphs 2(xii) of their respective lists of issues succeed.

2. Mr Zulu's complaint of direct race discrimination and harassment related to race at paragraph 2(i) of his list of issues and Mr Gue's complaint of direct race discrimination and harassment related to race at paragraph 2(i) of his list of issues were presented out of time and it was not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear these complaints and they are therefore dismissed.

3. All of the claimants' remaining complaints fail.

REASONS

The Complaints

1. By claim forms presented to the employment tribunal on 14 August 2018, the claimants, Mr Zulu and Mr Gue, brought complaints against the respondent of

harassment related to race, direct discrimination because of race and victimisation. The respondent defended the complaints.

2. Further to a preliminary hearing on 1 March 2019 before EJ McNeill QC, the victimisation complaints in respect of both claimants and certain of Mr Zulu's other complaints were struck out. The reasons for this are set out in EJ McNeill's extensive reasons for her judgment which we do not repeat here but cross refer to in their entirety. However, in summary, because of the interaction between the service complaints procedure which applies in relation to Armed Forces cases and section 121 Equality Act 2010, which precludes the tribunal from having jurisdiction in relation to certain complaints (which it would otherwise ordinarily have jurisdiction to hear) where a service complaint has not been brought by the claimant or where a service complaint has been brought but has then been withdrawn, EJ McNeill concluded that the tribunal did not have jurisdiction to hear those complaints which she then struck out. Her decision was not appealed nor was any application for reconsideration of that decision made.

The Issues

3. Lists of issues (one in respect of each claimant) were produced to the tribunal at the start of the hearing. These were largely agreed subject to the points set out below.

4. The list of issues in relation to Mr Zulu was as follows:

The references in '[…]' are to the paragraph references in the C's Rider to their ET1s

1. The First Claimant is black and was born in South Africa. He pursues his race discrimination complaints by reference to colour, nationality and/or national origin (South African and / or "African") whether individually or cumulatively.

Racial Harassment (s.26 EqA 2010)

2. Did members of the British Army, in particular members of 3 PARA, engage in the following unwanted conduct?

   i. The handling of the First Claimant's leave request and response by Sgt B towards the end of 2014: [11];
   ii. The display of Nazi flags and assorted memorabilia by members of the Second Claimant's former rifle company in their rooms: [21(i)];
   iii. The display of Confederate flags [21(ii)];
   iv. Posting a photograph of 3 PARA members with Tommy Robinson in October 2017 [21(iii)];
   v. Posting a photograph of personnel in July 2017 with Nazi flags as a backdrop [21(iv)];
   vi. The warning by British Army Training Unit Kenya (BATUK) staff not to behave badly as they

would "go to prison and get AIDS:" [23(i)];

vii. The comments of Corporal Johnson in actual or equivalent words "Look at these idiots running, fucking niggers don't have a clue:" [23(ii)];

viii. The description by Corporal A of C Company of the Kenyan soldiers as "African animals:" [23(iii)];

ix. The description by Cpl Kinnell of Kenya as a "shithole country:" [23(iv)];

x. Private C describing Nelson Mandela as a terrorist and Cpl Kinnell's agreement of the same: [23(v)];

xi. The behaviour of the Company towards the Kenyan local people, regularly telling locals to 'fuck off' and children begging for food 'fuck off you shit cans': [23(vi)];

xii. The graffiti discovered on 23 January 2018: [33].

3. If so, did any such unwanted conduct have the purpose or effect of violating the First Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the First Claimant taking account of the matters set out in s.26(4) EqA 2010?

4. If so, was such unwanted conduct related to race?

Direct race discrimination (s13 EqA 2010)

5. Do the following matters amount to less favourable treatment of the First Claimant?

   i. Any proven factual matters set out in Paragraph 2 above;

   ii. Cpl Kinnell's alleged complaint as to the First Claimant undertaking preparation time for his training course: [30 - 31]. Insofar as a comparator is required he relies upon Cpl D as an actual or evidential comparator; in the alternative, he relies on a hypothetical comparator.

6. If so, was any such less favourable treatment because of the First Claimant's race?

Jurisdictional Issues

7. Are any aspects of the claims time-barred by virtue of s.123(2) EA 2010? The Respondent accepts that matters occurring after 15th January 2018 are prima facie in time. Specifically:

   a. Are any proven acts of discrimination and / or harassment isolated incidents or do they form part of a course of conduct extending over a period?

   b. Accordingly, are any proven acts of discrimination prima facie out of time?

   c. Is it just and equitable in all the circumstances to extend time for those claims that are out of time?

Statutory Defence

8. In respect of any proven claims of discrimination and / or harassment should the Respondent be held vicariously liable? Namely, pursuant to s.109 (4) EqA 2010, has the Respondent shown that it took all reasonable steps to prevent such individuals from doing that thing or from doing anything of that description?

Remedy

9. What is the just and equitable remedy in the circumstances? This question needs to be approached as a two-stage process:

Stage one:

1. Was the First Claimant's application for early termination of service on 22nd February 2018 caused by any proven acts of harassment or discrimination?
2. Is the First Claimant entitled in principle to an uplift in compensation for any failure by the Respondent to follow the ACAS Code of Practice in respect of the handling of his Service Complaints?
3. If so, at what percentage?
4. Is the First Claimant entitled in principle to an award of aggravated damages in respect of the Respondent's handling of his Service Complaints?
5. If so, should any such award be separate or encompassed within any award for Injury to Feelings?
6. If an uplift is awarded for failure to follow the ACAS Code, should any award of aggravated damages be valued at zero to avoid double recovery?

Stage two:

As appropriate in light of the conclusions at Stage one:

1. Is the First Claimant entitled to suitable declarations?
2. Should the Employment Tribunal make recommendations?
3. What amount of compensation should be awarded for Injury to Feelings?
4. What amount, if any, should be awarded for aggravated damages?
5. What amount of compensation, if any, should be awarded for financial losses (including pension losses) flowing from the termination of the First Claimant's service? In particular:

    i. Over what period of time following termination of service should such compensation be calculated?
    ii. During that period, what promotions would have occurred in respect of the First Claimant, and when would they have occurred?

iii. To what extent has the First Claimant properly mitigated any losses and what, if any, reduction should be made for any failure to do so?

5. Other than the different references to the respective claimants and their personal characteristics, the two lists of issues were identical in relation to the claimants save for three matters set out in the paragraphs below.

6. Paragraph 1 of Mr Gue's list of issues states instead:

"The Second Claimant is black and pursues his race discrimination complaints by reference to colour, nationality and/or national origin (both Ugandan and "African") whether individually or cumulatively."

7. The item at issue 2(i) in the list of issues in relation to Mr Zulu is not a complaint brought by Mr Gue but instead, at issue 2(i) of the list of issues relating to him, Mr Gue brings the following complaint:

"(i) Vandalising of the Second Claimant's accommodation in January 2014: [10];"

8. The item at issue 5(ii) in the list of issues in relation to Mr Zulu was not contained in the list of issues in relation to Mr Gue and therefore not a complaint brought by Mr Gue.

9. The reference at issue 9 (Stage one) (1) in Mr Gue's list of issues contains a different date and therefore reads instead:

"Was the Second Claimant's application for early termination of service on 8th January 2018 caused by any proven acts of harassment or discrimination?"

10. Save in these respects, the lists of issues were the same.

11. The parties had not attended on the first day of the hearing and so, when the tribunal came to discuss the lists of issues with the representatives at the start of the second day of the hearing, it had already had the benefit of having read the witness statements and documents referred to in those statements.

12. The judge asked, in the light of the fact that several of the respondent's witnesses seemed to think that allegation 2(ii) was, in the light of the claimants' responses to the respondent's request for further and better particulars, in fact covered by allegation 2(v), what the claimant's position was on allegation 2(ii). Mr Milsom said that, whilst he may make reference to some of the allegations at 2(ii) by way of background, it did not stand as a separate head of complaint and it was therefore agreed that it should be deleted from both lists of issues.

The preliminary hearing judgment

13. Mr Milsom then explained that, whilst the lists were agreed as far as they went, there remained an outstanding issue in relation to one particular victimisation complaint. Both representatives made detailed submissions on this which are not repeated in full here. However, in summary, Mr Milsom contended that, notwithstanding the phraseology of the judgment of EJ McNeill, one of the

victimisation complaints brought by Mr Gue had not in fact been struck out by EJ McNeill. Mr Tibbitts maintained that all of the victimisation complaints had been struck out.

14. Having heard the submissions, the tribunal adjourned to consider the position. The tribunal's decision was that its view was that all of the victimisation complaints had been struck out by EJ McNeill, for the following reasons. The judgment of EJ McNeill was absolutely clear that the tribunal did not have jurisdiction to hear "the First and Second Claimants' complaints of victimisation"; no exceptions from this decision in relation to the victimisation complaints were set out in her judgment. Mr Milsom's argument was based upon an analysis of what he said was being considered by EJ McNeill based on separate lists of complaints recorded within the detailed reasons for her decision; Mr Tibbitts also cross referred to further written submissions in relation to that preliminary hearing which were later submitted and maintained that EJ McNeill intended to dismiss all of the victimisation complaints. It was impossible for us to know (without speaking to EJ McNeill, who was not present at the tribunal and indeed ordinarily sits on a part-time basis at a different tribunal region) precisely what her intentions were. Both representatives acknowledged that, this being an issue, it was an oversight that had not been picked up earlier. However, the correct course, if there was any doubt about the judgment, would have been to make an application for reconsideration or to appeal, neither of which had been done, either at the time, or at any time within the last few days after Mr Milsom had become aware of the point. We did not consider that it was possible for us either to speculate as to what EJ McNeill's intentions were or to overturn what was an otherwise clear judgment given by a different employment judge. We therefore considered that we were bound by the clear terms of EJ McNeill's judgment that the victimisation complaints had all been dismissed.

15. We noted that Mr Milsom was still free to apply for reconsideration to EJ McNeill or to appeal the decision (subject to applicable time limits under the rules), but also noted the practical implications of this given that EJ McNeill did not sit at this tribunal and the impact that this might have on the ability to proceed with this hearing. Mr Milsom said that he was keen to proceed with this hearing but would take instructions on whether or not his clients wished to appeal or apply for reconsideration and would let us know if they wished to do so. We were not subsequently notified during the hearing of any intention to do so and the claimants' position remained reserved.

16. There was therefore no change to the lists of issues as a result.

<u>Remedy points</u>

17. The tribunal discussed with the representatives the extent to which issues which related to remedy could be dealt with at this hearing. Both representatives acknowledged that many of the aspects of remedy were complex and, for example, involved calculation of pension loss, which inevitably would need to be dealt with, if applicable, at a separate remedies hearing. However, Mr Milsom hoped that we could deal with as many remedy issues as possible at this hearing.

18. It was initially agreed that issues 1-3 under "stage one" of issue 9 in the lists of issues could and should be determined at this hearing. Following discussion, it was agreed that issues 4-6 under "stage one" of issue 9 should be left for a separate remedies hearing, along with all of the issues at "stage two" (subject to the discussion detailed in the paragraphs immediately below in relation to issue 5 of "stage two").

19. Again, both representatives made detailed submissions which are not repeated in full here. However, following discussion, Mr Milsom suggested that, whilst he was not suggesting that the tribunal should determine what the claimants' career progression would have been (including whether they would have been promoted), it could determine how long they would have remained in employment with the respondent had they not left (allegedly) because of the alleged discrimination. The tribunal adjourned to consider this (the same adjournment as it took to consider the issue regarding the victimisation complaints set out above).

20. The tribunal decided that it would not consider this issue for the following reasons. First, consideration of the issue of how long the claimants would have remained employed would have involved extra evidence and extra cross examination about how long they would be likely to have stayed employed by the respondent, which would require additional time, on top of what was already likely to be a very full hearing on liability; secondly, it was a classic remedy point and not one which flowed naturally from the evidence on liability; thirdly, based on the discussions with the representatives, we considered that this was a point in relation to which the parties were in a good place to agree it if it became relevant, in terms of assessing how long it was likely that soldiers in the positions held by the claimants in the claimants' circumstances would remain in the Army; and, importantly, we considered that there was likely to be an overlap in the issue of how long they were likely to stay and the issue of whether they were likely to get promoted (which we were not being asked to determine at this hearing) as it seemed to us that whether or not someone achieved promotion might potentially be a significant factor in their deciding to stay in the Army or not.

21. Therefore, we decided that the only remedy issues which we would consider at this hearing were those at issues 1-3 under "stage one" of issue 9.

22. Having made these decisions, the representatives agreed with us that the hearing would determine only the issues detailed in the paragraphs above.

23. During submissions, Mr Tibbitts suggested that the tribunal should not in fact determine any percentage uplift in relation to an unreasonable failure to follow the ACAS Code (although it could determine whether it would be just and equitable in principle to award one) because of the principles in Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290, which indicate that a failure to have regard to the size of the overall award when considering the appropriate uplift will amount to an error of law. Mr Milsom did not disagree with this. The tribunal therefore decided that, whilst it would determine whether it

would be just and equitable in principle to award such an uplift, it would leave any determination of the percentage uplift (if applicable) to a future remedies hearing.

The Evidence

24. Witness evidence was heard from the following:

For the claimants:

The claimants themselves.

For the respondent:

Corporal Tyler Johnson, a Corporal in the 3rd Battalion, the Parachute Regiment (“3 PARA”), who joined 3 PARA in March 2008 and has held the rank of Corporal for the last 2½ years;

Captain John Bryning, who joined 3 PARA in May 2016, taking on the role of Adjutant from September 2017 onwards;

Lieutenant Colonel Geoffrey Hargreaves, the Commanding Officer (“CO”) of 3 PARA between July 2016 and February 2019;

Captain Kurt Perzylo, who, until being commissioned as a captain in June 2019, held the rank of Warrant Officer (First Class) (“W01”) and was the 3 PARA Regimental Sergeant Major (“RSM”) from July 2017 until June 2019;

Corporal Daniel Kinnell, who joined 3 PARA in 2006, has held the rank of Corporal since 2015 and was and is a member of the Sniper Platoon in 3 PARA, having joined the Sniper Platoon in 2009; and

Sergeant Thomas Murray, who has been a member of 3 PARA for 13½ years and, between October 2016 and December 2018, was the 3 PARA Sniper Platoon Sergeant.

25. The claimants also produced witness statements from: Mr X, an ex-soldier, who describes himself as “black African from Nigeria and currently a British citizen”, who served in a different part of the Army to the claimants (2nd Battalion, the Parachute Regiment (“2 PARA”)) and who was in the Army from 2012 until he left in November 2017; and from Mr Y, who describes himself as “mixed white and Indian non practising Sikh”, and who is an ex-soldier who was a member of 3 PARA from 2014 and who left the Army in 2019. Neither attended the tribunal to give evidence.

26. The respondent produced a witness statement in respect of Sergeant A, a serving soldier who has been in the Army for the last 12 years, the last six of which have been in 3 PARA. For the avoidance of doubt, Sergeant A is the Corporal A referred to at issue 2(viii) in the list of issues (we assume that he has since been promoted). The evidence in his short statement largely concerned

one self-contained issue. Mr Tibbitts explained that the reason why the respondent was not calling Sergeant A was that he was engaged on a career defining course with daily assessment which covered the duration of this tribunal hearing; that if he came even for one afternoon, he would fail that course; that would have a significant impact on his career; and that, in the light of the limited involvement which he had, the respondent had decided not to call him but to ask the tribunal to give what weight it felt fit to the contents of his statement.

27. The respondent also produced a statement from Captain David Leary, who since April 2018 has been the Regimental Career Management Officer ("RCMO") for 3 PARA. In the end, however, because of the limitations as to which issues should be determined at this hearing which were agreed (as set out above), it was not necessary to call him.

28. An agreed bundle in three volumes numbered pages 1-1067 was produced at the hearing. Various documents were added to the bundle by agreement during the hearing. In addition, after submissions, and by agreement between the representatives, a complete copy of the respondent's "Equality and Diversity Complaint Log (Harassment and Bullying)" was also produced to the tribunal to consider.

29. The respondent produced an acronym list and a cast list, the contents of which were agreed. Both representatives produced chronologies, which were not agreed.

30. The tribunal read in advance all the witness statements (including for those witnesses who did not attend the tribunal to give evidence) and the documents referred to in those statements.

31. The representatives had discussed and produced a proposed timetable for the hearing. The tribunal agreed this with the representatives at the start of the hearing. The timetable was largely adhered to.

32. Both parties produced written submissions and supplemented these with oral submissions. The tribunal's decision was reserved.

Anonymisation Order under Rule 50

33. Just after lunch on the third day of the hearing, Mr Tibbitts asked if the tribunal would make an anonymisation order in respect of the names of various individuals referred to or who may be referred to in the proceedings. Mr Milsom did not object and asked if the category in the order could be expanded to include individuals who may have made complaints but who were not attending the hearing to give evidence in person. The terms of a potential order were discussed. There were several members of the press in the tribunal at the time. The judge asked them if they had any views in relation to such an order. No one from the press objected to the order being made.

34. The tribunal adjourned to consider whether or not to make the order, in doing so considering the terms of rule 50 of the Employment Tribunal Rules

2013, giving full weight to the principle of open justice and to the Convention right to freedom of expression as well as the Convention right to respect for private and family life. Having done so, the tribunal decided to make the order set out below; there was no public interest in the individuals covered by the order being named; those individuals were not here to give evidence or defend themselves and some of the allegations being made were of a very serious nature; the naming of those individuals was not important in terms of the allegations against the respondent in general; and nobody objected to the order being made.

35. The terms of the order were as follows:

"ANONYMISATION ORDER
Employment Tribunals Rules of Procedure 2013

Pursuant to rules 50(1) and (3)(b) of the Employment Tribunals Rules of Procedure 2013, it being in the interests of justice to do so, it is ORDERED that anyone who is involved in this case by virtue of their affiliation with the Army at NCO or private rank who does not give evidence in person at this tribunal may not be identified publicly in any way whatsoever (save that such an individual may only be referred to by their rank and (if necessary) a letter which does not correlate to the first letter of their surname)).

This order shall remain in force until the preliminary hearing which is proposed to be held following the promulgation of the tribunal's judgment on liability in these cases."

36. The tribunal has of course followed the terms of this order in relation to anonymisation in these written reasons; it will be evident from a reading of these reasons of how relatively limited the effect of the order is in terms of anonymisation.

The Law

Direct race discrimination and harassment related to race

37. Under section 13(1) of the Equality Act 2010 ("EA 2010"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (direct discrimination).

38. Under section 26(1) of EA 2010, a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

39. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

40. Race is a protected characteristic in relation to both discrimination and harassment as referred to above.

41. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator. By contrast, there is no requirement for such a comparison in establishing harassment.

Submissions on the Law

42. We were greatly assisted by the detailed summary of the relevant legal principles prepared by Mr Tibbitts in his submissions. Mr Milsom indicated that, save in two respects which we address below (in relation to the statutory "reasonable steps" defence and causation respectively), he agreed with that summary of the law and much of it is therefore incorporated into our summary of the law set out here.

Inferential Material

43. Employment tribunals have a wide discretion to draw inferences of discrimination where appropriate. However, they must do so based on clear findings of fact. There is a danger if a tribunal relies simply upon generalised assumptions or a mere impression of a discriminatory culture as the basis for drawing an inference in a particular case. As Lord Justice Peter Gibson put it in Chapman v Simon 1994 IRLR 124, 'a mere intuitive hunch… that there has been unlawful discrimination is insufficient without facts being found to support that conclusion'. The Court of Appeal again stressed this point in Anya v University of Oxford and anor 2001 ICR 847, where it held that the employment tribunal in that case had failed to make specific findings of fact in relation to various circumstantial allegations raised by the employee, and so had no material from which it could properly draw an inference of discrimination. Indeed, in British Medical Association v Chaudhary (No.2) 2007 IRLR 800, CA, it was held that an employment tribunal made the mistake of inferring discrimination from assumed facts, as opposed to clear findings of fact based upon the evidence.

44. In Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, HHJ Shanks in the EAT having looked at the relevant authorities summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

> it is very unusual to find direct evidence of discrimination;
>
> normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;
>
> it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances;
>
> the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;
>
> assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and

> involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities;
>
> where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations;
>
> the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;
>
> if it is necessary to resort to the burden of proof in this context, S.136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

45. In HSBC Asia Holdings BV and anor v Gillespie 2011 ICR 192, the EAT made the point that 'relevance is not an absolute concept'. Evidence might be 'logically' or 'theoretically' relevant but nevertheless too marginal, or otherwise unlikely to assist the court, for its admission to be justified. In the Gillespie case the EAT held that evidence of alleged acts involving people in other departments many years previously was inadmissible, stating that it was 'fanciful' to suppose that this evidence would assist the tribunal in deciding whether the claimant had been discriminated against on the ground of sex.

Harassment (s.26 EA 2010)

46. There are three essential elements of a harassment claim, namely (1) unwanted conduct, (2) that the conduct has the prescribed purpose or effect and (3) that that conduct is related to a relevant protected characteristic. Indeed, it is a 'healthy discipline' for a tribunal in any such claim to specifically address each of these three elements in its reasons (Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT).

47. The Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') provides the following guidance:

> Unwanted conduct can include 'a wide range of behaviour - para 7.7
>
> Unwanted conduct will often arise from a series of events. However, a single incident can amount to unwanted conduct and found a complaint of harassment if 'serious' - para 7.8
>
> The conduct does not have to be directed specifically at the complainant in order for it to be unwanted by him or her - para 7.10
>
> The necessary connection with a protected characteristic can arise where 'the unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic'— para 7.10.

48. Where there is disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used. In Cam v Matrix Service Development and Training Ltd UKEAT 0302/12 an employment tribunal had erred by failing to find

whether or not the alleged harasser had used the expression ‘white trash’, given that he denied doing so.

‘Related to’ Race

49. Whilst the words ‘related to’ in S.26(1)(a) have a broad meaning and holding that conduct that cannot be said to be ‘because of’ a particular protected characteristic may nonetheless be ‘related to’ it (Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT), the EAT nonetheless stated that a tribunal considering the question posed by S.26(1)(a) must evaluate the evidence in the round. The alleged harasser’s knowledge or perception of the victim’s protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser’s perception of whether his or her conduct relates to the protected characteristic ‘cannot be conclusive of that question’. The tribunal should consider the overall picture.

50. Indeed despite the broad meaning of ‘related to’, many tribunal and EAT decisions have adopted the view of the EAT in Warby v Wunda Group plc UKEAT 0434/11 that the context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic. For example, in Ukeh v Ministry of Defence UKEAT 0225/14 a tribunal found that although U — an Army cadet — was addressed as a ‘bag of shit’, this comment was not related to her race. It was in widespread use to signify that a cadet was not properly turned out.

51. Indeed where a tribunal finds that an employer acted for a reason that is not related to a protected characteristic, then the conduct will not be related to the protected characteristic either, even if, on the face of it, it appears to be. For example, in Kelly v Covance Laboratories Ltd 2016 IRLR 338, the EAT considered that an instruction to the claimant not to speak in her native tongue was not related to her race or national origins because the reason for the employer’s instruction was not race.

52. Similarly, the EAT in Bakkali v Greater Manchester Buses (South) Ltd t/a Stage Coach Manchester 2018 ICR 1481, upheld the tribunal’s finding that a remark was made because of a previous conversation, rather than because of B’s race or religion. This meant that there was no direct discrimination. The EAT considered that as the complaint of harassment was based on the same facts as those relied on for the direct discrimination complaint, the tribunal did not err in referring to those findings. In concluding that the remark was not ‘related’ to race or religion or belief, the tribunal properly took into account the context in which the offending words were spoken.

Having the prescribed ‘purpose or effect’

53. The adverse purpose or effect can be brought about by a single act or a combination of events. The EAT in Reed and anor v Stedman 1999 IRLR 299, commented about how the effect should be assessed when dealing with a combination of events, suggesting that tribunals should adopt a cumulative approach rather than measure the effect of each individual incident.

54. Whilst it is possible for remarks not directed at a claimant to amount to unwanted conduct, such remarks are unlikely to have the proscribed purpose (unless they are said with the intention that the claimant should overhear). In Cam v Matrix Service Development and Training Ltd the EAT remitted the case to the tribunal as it had failed to make clear findings, but it observed that it was likely that, as the remarks were not directed at C, the tribunal would have found them not to have had the proscribed purpose — whether they had the proscribed effect was much less clear.

55. In Richmond Pharmacology v Dhaliwal it was held that, in assessing effect, *'One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt'*.

56. Indeed, in the CA in HM Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390, Lord Justice Elias confirmed that *'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'* Although it is the objective element of the test which generally ensures that not every little incident will attract liability for harassment, the subjective element can also play an important role in this regard.

57. In Richmond Pharmacology v Dhaliwal, Mr Justice Underhill, then President of the EAT, said: *'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'*. The EAT affirmed this view in Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13. The EAT observed that 'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'. Indeed the CA in HM Land Registry v Grant further stated in this context that *'tribunals must not cheapen the significance of these words since they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment'*.

58. Context is therefore of significant importance in determining the question of 'purpose or effect'. Some of the factors that a tribunal might take into account in deciding whether an adverse environment had been created were noted in Weeks v Newham College of Further Education EAT 0630/11. Mr Justice Langstaff, then President of the EAT, held that a tribunal did not err in finding no

harassment, having taken into account the fact that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint and that the words objected to were used only occasionally. Langstaff P also pointed out that the relevant word here is 'environment', which means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within what is now S.26(1)(b)(ii) EA 2010.

59. Similarly, in General Municipal and Boilermakers Union v Henderson [2015] IRLR 451, the EAT found that an act relied upon by a claimant to found his harassment claim was an 'incident' and not an 'environment'.

60. In the CA in Pemberton v Inwood [2018] ICR 1291, Lord Justice Underhill, who sat as the President of the EAT in Dhaliwal, revised his guidance as follows: *'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'*

61. The 'other circumstances' of the case to be taken into account under S.26(4) will usually be used to shed light both on the complainant's perception and on whether it was reasonable for the conduct to have the effect. It can also include the environment in which the conduct takes place. Indeed, in Bham v 2Gether NHS Foundation Trust EAT 0417/14 the EAT considered it relevant that the claimant only learnt about comments *after* they had been made (emphasis added);

62. The proscribed effect must, self-evidently, have been brought about *by the perpetrator's conduct*.

Jurisdiction / Continuing Act

63. First, we note that the primary time limit in relation to Armed Forces cases under the EA 2010 is six months (rather than the usual three months) (EA 2010 section 123(2)). This can be increased in accordance with the provisions relating to time spent in ACAS early conciliation.

64. The CA in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 clarified that employment tribunals should not take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. The CA in Lyfar v Brighton and Sussex University Hospitals

Trust [2006] EWCA Civ 1548 affirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in Hendricks. Thus, tribunals should look at the substance of the complaints in question, as opposed to the existence of a policy or regime, and determine whether they can be said to be part of one continuing act by the employer as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

65. The CA in Aziz v FDA [2010] EWCA Civ 304 noted that in considering whether separate incidents form part of an act extending over a period, *'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'*.

66. There is no presumption in favour of extension of time under s.123 EA 2010 and the onus lies with the claimant to satisfy the tribunal that it is 'just and equitable' to extend time in the context that time limits in employment cases are intended to apply strictly (Robertson v Bexley Community Centre [2003] IRLR 434).

67. In determining whether it is 'just and equitable' to extend time, the tribunal may find assistance by giving consideration to the factors set out in s.33 of the Limitation Act 1980. However, the tribunal is not required to consider the s.33 limitation act matters, but two factors which are almost always relevant when considering whether to extend time are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh) (Southwark London Borough Council v Afolabi [2003] ICR 800).

68. The absence of an explanation (and evidential basis for the explanation) for the delay from a claimant does not *preclude* the tribunal from extending time on a just and equitable basis. However, given the purpose of the time-bar is to promote finality and certainty, the absence of such an explanation is a highly relevant factor and it was difficult to see how a claimant could discharge the burden of showing that it is just and equitable to extend time if they do not explain the delay (Edomobi v La Retraite RC Girls School EAT 0180/16)

69. Whilst the tribunal may consider the merits of the claim this is not necessarily a definitive factor as even if the claimant has a strong case time may not be extended. For example, in Ahmed v Ministry of Justice (UKEAT 0390/14) the EAT upheld the tribunal's decision not to extend time despite them finding that the claim was made out because the claimant had given no satisfactory explanation for why the claim was not presented in time and some witnesses had had difficulty in recollecting what had happened.

Vicarious Responsibility / Statutory Defence

70. S.109(1) EA 2010 provides that *'Anything done by a person (A) in the course of A's employment must be treated as also done by the employer'*. Pursuant to s.83(3) / (4) EA 2010 this thereby applies to service in the Armed Forces. Pursuant to s.109(4) EA 2010 it is however a defence for the 'employer'

to show that it "*took* *all reasonable steps* *to prevent 'A' from doing that thing or from doing anything of that description"* (our emphasis).

71. The CA in Unite the Union v Nailard [2019] ICR 28 affirmed that third-party harassment has not survived the repeal of s.40(2) – (4) EA 2010. Thus, the respondent can only potentially be liable for the acts of its 'employees' and thus, in an Armed Forces sense, the acts of members of the Armed Forces and focus should be given to factually what the tribunal is satisfied that members of the Armed Forces have actually done.

72. The EHRC Employment Code provides some guidance on the 'reasonable steps' defence:

> An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective – Para 10.51
>
> Reasonable steps might include: implementing an equality policy, ensuring workers are aware of the policy, providing equal opportunities training, reviewing the equality policy as appropriate, and dealing effectively with employee complaints - Para 10.52.

73. The EAT in Canniffe v East Riding of Yorkshire Council [2000] IRLR 555 held that the proper test of whether the employer has established the defence is to identify first, whether there were any preventative steps taken by the employer, and secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable. The EAT went on to say that where employers or managers are not aware of any risk of inappropriate behaviour or harassment by an employee, particularly towards another employee, it may be sufficient for the tribunal simply to ask whether there was a policy in place and whether it was disseminated. The EAT contrasted that situation with one where the management or other employees knew or suspected that there was a risk that a particular employee might carry out inappropriate acts towards a certain employee or other employees. However even then the EAT noted that a tribunal might conclude that there was nothing more that was reasonably practicable that the employer could have done in the circumstances.

74. If employers have taken reasonable steps to encourage employees to report discrimination such as making it clear in any harassment or equal opportunities policy that employees with knowledge or suspicion of possible discrimination should inform their employer then (and we accept the Mr Tibbitts' submission in this respect) the defence can still be made out. In short what amounts to 'all reasonable steps' will of course depend on the context and circumstances of each individual case.

75. The EAT held the tribunal had erred in not finding that such steps as were reasonably practicable had been taken to prevent the discriminatory conduct in Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical and Environmental Services) EAT 158/00. The EAT found that the tribunal had misled itself by looking only at events after the incident and focusing on the disciplinary process and what it perceived to be a

lenient penalty. However, the tribunal had found that the Council had put in place policies on racial awareness; that employees, including the wrongdoer in question, had received training on such policies; and that employees who violated the policies were disciplined. The tribunal had also expressly rejected the suggestion that the Council only paid lip service to its policies. The EAT therefore held that the evidence accepted by the tribunal could only lead to the conclusion that the Council had taken all such steps as were reasonable to prevent race discrimination.

76. It is in the context of the case of Al-Azzawi that one of the disputes between the representatives as to the law arose. Al-Azzawi was decided under the Race Relations Act 1976 (which, amongst other pieces of legislation, was replaced by the EA 2010). The statutory defence in that Act is contained at section 32(3). It states that it shall be a defence for the employer to prove that *"he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description"* (our emphasis). We accept Mr Milsom's submission that the change in language in the EA 2010 represents a stricter test for the employer, namely to take "all reasonable steps" rather than merely "such steps as were reasonably practicable".

77. In this context, Mr Milsom also referred us to paragraph 14 of Canniffe, which (albeit also decided before the EA 2010 came into force) sets out the proper approach to be taken by tribunals as follows:

"14. We are satisfied that the proper approach is:

(1) to identify whether the Respondent took any steps at all to prevent the employee, for where it is vicariously liable, from doing the act or acts complained of in the course of his employment;

(2) having identified what steps, if any, they took to consider whether there were any further acts, that they could have taken, which were reasonably practicable.

The question as to whether the doing of any such acts would in fact have been successful in preventing the acts of discrimination in question may be worth addressing, and may be interesting to address, but are not determinative either way. On the one hand the employer if he takes steps which are reasonably practicable will not be inculpated if those steps are not successful, indeed, the matter would not be before the court if the steps had been successful, and so the whole availability of the defence suggests the necessity that someone will have committed the act of discrimination, notwithstanding the taking of reasonable steps; but on the other hand the employer will not be exculpated if it has not taken reasonable steps simply because if he had taken those reasonable steps they would not have led anywhere or achieved anything or in fact prevented anything from occurring."

78. Two points arise from the above passages. The first, which we understand is not disputed by Mr Tibbitts, is that, even if the step in question would not have prevented the discrimination, that is an irrelevant consideration and the correct approach is to consider whether the step was one which was reasonable to take.

79. The second is Mr Milsom's submission that, in conjunction with the change of wording in the EA 2010, however many reasonable steps the employer took, if the tribunal can identify one reasonable step which was not

taken, the statutory defence cannot be made out. We accept that the change in the language of the statutory defence in the EA 2010 (however difficult that may make the defence to establish for an employer) entails that this must be correct and we accept Mr Milsom's submission in this respect.

80. The statutory defence is limited to steps taken *before* the discriminatory act occurred - this much is apparent from the use of the word 'took' in the past tense, which 'requires the employer to prove what it had done in the past' (Mahood v Irish Centre Housing Ltd EAT 0228/10). Both representatives specifically confirmed that there was no dispute between them on this point.

81. Subsequent events are therefore relevant only in so far as they shed light on what occurred *before* the act complained of.

Causation of loss

82. Whether any compensation should be awarded for 'loss of service' in this case fundamentally falls under the tribunal's discretion in respect of compensation. The compensatory measure is awarded in the same way as damages for tort and accordingly, the focus / aim is *'as best as money can do it the applicant must be put in same position that he or she would have been but for the unlawful conduct'* (MOD v Cannock [1994] ICR 918). Thus, the tribunal should ascertain the position the claimant would have been in had the discrimination not occurred, or in other words, what loss has been *caused* by the discrimination in question.

83. Indeed, Ahsan v Labour Party EAT 0211/10 exemplifies the point that the tribunal can and should be cautious to only compensate for losses *caused* by proven acts of discrimination before them.

84. There are fundamentally two aspects to tortious causation principles – 'Causation in Fact' and 'Causation in Law'. In light of the issues before the tribunal, we agree with Mr Tibbitts' assumption that at this hearing the tribunal is merely determining the first of these questions, 'causation in fact' which is a necessary hurdle which must be surpassed to get to the latter 'causation in law' question.

85. The base position for causation in fact is the 'but for' test and the burden of proving that rests with the claimant. There can of course often be a number of subsequent or even concurrent causes, but that does not mean the "but for" test should not still be applied. In certain *exceptional* situations, the 'but for' test of causation has been relaxed for a test of 'material contribution' to enable a crossing of the factual causation threshold. However, that 'exception' to the general rule has only arisen and been permitted in certain specific areas (generally involving scientific or medical data) and the crucial point of note is that it is only to be adopted where it is *impossible* for the claimant to prove factual causation using 'but for' principles. Certainly, we are not aware of any authority stating that, in cases of harassment and discrimination such as the present, the tribunal should depart from the normal "but for" test. Indeed, the very exceptional

nature of the Fairchild (material contribution) test was confirmed in International Energy Group Ltd v Zurich Insurance Plc UK [2016] AC 509.

86. Thus we accept Mr Tibbitts' submission that the burden of proving 'loss' and the cause of that loss lies with the claimant. The appropriate test to apply in determining factual causation in this case is the 'but for' test. Accordingly, the claimants must satisfy the tribunal on the balance of probabilities that 'but for' any prescribed cumulative environment of harassment proven to be present as at the point notice to terminate ("NTT") was served, that the claimant in question would not have served NTT in any event. If the tribunal is not so satisfied on the balance of probabilities then factual causation will not have been established and thereby the 'loss of service' in the Armed Forces was not *caused* by an act of harassment / discrimination before the tribunal.

87. Mr Tibbitts relied on and referred to the authorities cited and commentary provided by the practitioner text 'McGregor on Damages' in furtherance of the above stated position (which he attached to his written submissions at Appendix 1).

88. Mr Milsom disagreed with Mr Tibbitts' position on two grounds. Firstly, he referred to the extract from McGregor on Damages in question to suggest that the position was not as stated above; however, the section he referred to was in the "causation in law" section rather than the "causation in fact" section and therefore does not impact upon the above analysis. Secondly, Mr Milsom submitted that the test should be as to whether the respondent's conduct had a material contribution to the claimants leaving and that, if it did, some measure of post-termination losses must follow. However, the authority which he cited in this respect (BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188) appears to relate to the "causation in law" aspect and the issue of competing reasons and apportionment rather than the "causation in fact" aspect which we are dealing with here. The analysis above therefore remains unchanged. Furthermore, Mr Milsom has given no reason why, as an exception to the "but for" test referred to above, a "material contribution" test should be applied; we therefore consider that the normal "but for" test should be applied.

ACAS Code

89. Pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992, the tribunal has a discretion whether (and in what amount) to award an uplift for an unreasonable breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "ACAS Code").

90. Self-evidently it first must be established that there was a breach of the ACAS Code. However, after a breach has been established the tribunal must consider whether in all the circumstances that breach (or breaches) are unreasonable. We accept that, as Mr Tibbitts submitted, this will undoubtedly require consideration of what the employer has done as well as the reasons for what they have not done and the conduct of the other party.

91. If it is found that there is an unreasonable breach of the ACAS Code, then the tribunal may, if it considers it just and equitable in all the circumstances to do so, decide to make a further award by way of an uplift and, if so, decide by what percentage it should make such an uplift up to a maximum of 25%. Fundamentally the tribunal is using its discretion as to what is 'just and equitable'. Factors such as the significance of the breach and any breach of the ACAS Code by the other party or their conduct might be relevant as will having regard to the size of the overall award. Indeed, failing to have regard to the size of the overall award when considering the appropriate uplift will amount to an error of law (Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290). For this reason, as referred to earlier, we will not at this hearing determine the percentage of any uplift; we will limit our determinations to whether there was a breach of the ACAS code; whether that breach was unreasonable; and whether in principle we should order an uplift on the basis that it is just and equitable to do so.

92. Paragraphs 33 and 40 of the ACAS Code provide respectively that, in relation to grievances, a formal meeting should be held without unreasonable delay after a grievance is received and decisions on grievances should be communicated without unreasonable delay. Mr Milsom's submissions in relation to alleged breaches of the ACAS Code were limited to an allegation that there was unreasonable delay for the purposes of these paragraphs of the ACAS Code in relation to the processing of the claimants' service complaints. He submits, and we accept (it being not disputed), that the claimants' service complaints are a form of grievance for the purposes of the ACAS Code.

Some Observations on the Evidence

The Evidence of the Witnesses

93. A large part of the task before the tribunal has been to determine the primary facts in those allegations where there is a conflict of evidence. There has been a conflict of evidence in a large number of those allegations, in particular the allegations in relation to what happened in Kenya. This has not been an easy task, in large part because we did not have doubts about the genuineness or honesty of any of the witnesses who appeared before us, whether they were called by the claimants or by the respondent. Nevertheless, we have had to make findings on the balance of probabilities on the basis of the evidence before us. There are some areas where a witness appears to have been confused in their evidence and has misremembered something (an example referred to below is Mr Zulu's recollection in relation to the briefings for the 2015 and 2017 Kenya deployments). We wish to make it clear, however, that in making the findings which we have, we are not making any suggestion that any witness has deliberately sought to mislead the tribunal or lied to the tribunal.

Secondary and Other Evidence

94. Secondly, in both his cross-examination and in his submissions, Mr Milsom has devoted a large amount of time to matters which are not directly relevant to these findings of primary facts. This includes evidence of the

demographic breakdown of the Army in general and 3 PARA in particular, a report prepared by a Dr Balissa Greene in relation to the experience in the Army in general of Foreign and Commonwealth soldiers, the results of a "climate assessment" carried out by 3 PARA in the wake of the 23 January 2018 graffiti incident and various newspaper reports (the vast majority of which do not relate to 3 PARA). While some of this material could indeed be very relevant were he seeking to persuade us that the burden of proof should shift to the respondent in instances of proven less favourable treatment, it is of far less relevance to us in determining the primary facts (and we remind ourselves again of the principles which are relevant to determining the primary facts set out in our summary of the law above). We are not suggesting that this material is entirely irrelevant; however, its evidential value is small in comparison to those other considerations which we need to apply in determining the primary facts.

95. In addition, we note that the lengthy report from Dr Greene, who was engaged by the MOD to produce it, related to the Army as a whole and concerned a focus group of just 63 soldiers of which two thirds were Foreign and Commonwealth. We do not consider that we can draw any probative inferences from that report, both for this reason and because of the general points made in the paragraph above.

96. Finally, certain documents which have been provided as part of these proceedings (in particular the photograph at page 681 and the extract from a video at page 685.4), were not in the possession of the respondent at the time of the events of these claims in relation to which we have to find the primary facts. It is not clear how the claimants obtained them and indeed the latter was only provided to the respondent a few weeks before these proceedings. As it happens, and as we shall see in our analysis in our fact findings below, there is little probative value in such documents in relation to finding those primary facts.

Findings of Fact

97. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Background findings of fact

98. We start by making some general background findings of fact, setting out the framework and context, before turning to the more detailed facts in relation to the specific allegations which form part of these claims.

99. Mr Zulu commenced service in the Armed Forces on 29 June 2008. After initial training and selection, he joined 3 PARA on 23 January 2009, where he remained until his service in the Armed Forces ended. Mr Zulu started out as a Private and was promoted to Lance Corporal on 6 May 2014. Mr Zulu was very well-regarded within 3 PARA, as his appraisal reports make clear. Mr Zulu is black and was born in South Africa.

100. Mr Gue commenced service in the Armed Forces on 14 October 2012. After initial training and selection, he joined 3 PARA on 15 September 2013. Within 3 PARA, he initially joined “A Company”, before transferring to “D Company” in around September 2014 (for reasons which we will return to). Mr Gue was very well-regarded within 3 PARA, as his appraisal reports make clear. Mr Gue is black African of Ugandan nationality.

101. Therefore, apart from their initial training and selection, both Mr Zulu and Mr Gue had no experience of serving in any other part of the Army apart from 3 PARA.

102. Both Mr Zulu and Mr Gue were part of the “sniper platoon” within 3 PARA. Between October 2016 and December 2018, the 3 PARA sniper platoon sergeant was Sergeant Murray. He had a very close working relationship with both Mr Zulu and Mr Gue when they were members of the sniper platoon. They became very close friends and he remains in contact with them to this day.

103. Prior to the deployment to Kenya in late 2017, the sniper platoon within 3 PARA was a close-knit group. Members of it got on well with one another. In making this finding, we rely on the oral evidence given by Sergeant Murray, which was not disputed and which we accept. We should add that, over and above the remarks which we have already made regarding the general plausibility of the witnesses from whom we heard, we found the evidence given by Sergeant Murray to be particularly compelling; he was particularly open and honest in response to the questions put to him; he remains in contact with the claimants but is still in the Army, so has reason not to be unfair to either party; and when he was questioned the answers which he gave had a particular ring of truth to them.

104. Mr Zulu and Mr Gue were and are close friends with each other. They were also close friends with Corporal T, a BAME soldier within 3 PARA. Together the three of them were a close-knit group. Corporal T remains a serving soldier within 3 PARA.

105. Corporal Kinnell, who has been a member of the sniper platoon since 2009, had been particularly good friends with Mr Zulu for quite a long time. Mr Zulu attended Corporal Kinnell’s wedding, his daughter’s birthday party and he joined Corporal Kinnell’s family for barbecues at home. Although he was not as close to Mr Gue as he was to Mr Zulu, Corporal Kinnell was also friends with Mr Gue; they went to the cinema together and Corporal Kinnell vouched for Mr Gue in order that he could join the sniper platoon.

106. We will return to this later, but something happened, most likely on the 2017 Kenya deployment, which caused the friendship between Corporal Kinnell and Mr Zulu to fragment.

107. Swearing is commonplace within the Army and within 3 PARA, with expletives such as “fuck”, “fucking”, “shit” etc being commonplace. Both claimants readily accepted this and it is also evident from some of the covert recording transcripts which we have seen as part of the evidence.

108. 3 PARA, as an “air-manoeuvre battle group”, is one of two battalions that is maintained for periods at the highest readiness within the British Army (the duty is alternated with 2 PARA). This means that the whole battalion is on standby at all times to deploy at very short notice whenever, and to wherever, HM government might require. 3 PARA’s barracks in the UK are in Colchester.

109. The high readiness status has a considerable influence and impact on how the battalion must be managed and commanded, in that all activities and all personnel decisions must be carried out and decided upon with due consideration of that. Whilst it will not automatically dictate every outcome, nonetheless this question of military operational effectiveness must always be a priority consideration - it is the fundamental purpose of the two battalions (2 PARA and 3 PARA).

110. As we shall see, that high readiness status and the fact that, at times, members of the battalion are posted in various places all over the world, has an impact on how and when the battalion is able to deal with certain issues which arise, including personnel issues, and in particular how quickly the battalion can deal with such issues.

111. Towards the end of 2017, 3 PARA was moving towards once again taking on high readiness status. Part of that process is to achieve formal validation for that role, which is the Army’s way of ensuring that the battalion is fully fit and properly trained and manned for a wide variety of operations should it need to deploy. The deployment to and exercise in Kenya in October/November 2017 was the key element of that validation process. This was not the first time that 3 PARA had deployed in Kenya for this sort of exercise; there had been previous deployments, for example one in 2015.

112. Both Mr Zulu and Mr Gue, in common with others within 3 PARA, deployed to Kenya on 26 October 2017. During the first three weeks of the Kenya deployment, Mr Gue was paired/attached to Sergeant Murray as a “sniper pairing” and operated together with local soldiers from the Kenyan forces. At the end of the first three weeks, Sergeant Murray was injured and therefore returned from the Kenya deployment.

113. During the Kenya deployment, Mr Zulu raised two matters with Sergeant Murray. One of these was the “Nelson Mandela comment” which now forms the basis of issue 2(x) (although we are not clear what level of context was given to Sergeant Murray in relation to this comment); the other concerned operational issues within the sniper platoon. Other than this, Mr Zulu did not raise with Sergeant Murray any of the other comments which are alleged in these proceedings at issues 2(vi-xi) to have been made during the Kenya deployment. Mr Gue (who accepts that he was not present when most of these alleged comments were made) did not raise any of them with Sergeant Murray either.

114. We asked Sergeant Murray what his view was of the reason why the friendship between Mr Zulu and Corporal Kinnell broke down. He said that Mr Zulu was genuinely offended by the “Nelson Mandela” incident and, in addition,

that he thought it broke down as a result of operational differences between Mr Zulu, Corporal Kinnell and another corporal who, once Sergeant Murray had to return from Kenya following his injury, were together then running the sniper platoon in Kenya. In the light of our findings below that the other allegation relating to Kenya which pertained to Corporal Kinnell (the "shithole country" comment at issue 2(ix)) was not proven, which if proven might have been another reason why Mr Zulu might have started to feel antipathy towards Corporal Kinnell, and our findings above regarding the plausibility of Sergeant Murray's evidence, we accept that on the balance of probabilities the reasons for the breakdown in friendship between Mr Zulu and Corporal Kinnell were the "Nelson Mandela" incident and the operational differences in Kenya.

115. Mr Zulu returned early from Kenya on 1 December 2017. Shortly afterwards, Mr Zulu took an extended period of leave in South Africa before returning to barracks in the UK on or around 21 January 2018.

116. Mr Gue's service in Kenya ended on 11 December 2018. Mr Gue left directly from deployment in Kenya to visit his mother in Zanzibar. He then returned to barracks in the UK on 8 January 2018. Mr Gue served notice to terminate ("NTT") (in other words notice terminating his employment with the Army) on 8 January 2018.

117. In doing so, he supplied two letters. They are headed "Racial discrimination and disparity in the British Army" and "the British Army's guide to jovial racism and how to turn a blind eye". Together they read like observations of alleged racial attitudes in the Army as a whole, albeit examples of what Mr Gue alleges are his or his colleagues' experiences are contained within them.

118. In the first letter, Mr Gue states "Please accept this letter as a formal complaint of direct racial discrimination within the British Army and my resignation which I plan to take with immediate effect". It makes general allegations of having suffered racial discrimination and disparity, references an alleged debate among soldiers about whether or not someone can use the word "nigger" or not; suggests racial discrimination is brushed off as banter; and then references "how members promote and proudly display Nazi/SS flags alongside pictures of Hitler himself in the confines of the block… coupled alongside this are confederate flags displayed in the windows. In addition to this; members also proudly brag of their exploits within far-right racist groups, case in point, recent pictures of EDL leader Tommy Robinson splashed all over Facebook". Mr Gue goes on to say that he doesn't expect anything to change because the "racial problem is far-reaching and deeply entrenched within the British Army; systematic, inherent and institutional racism that is proudly displayed". He concludes by asking for "immediate termination of his employment within the British Army".

119. The second letter is longer and reads like an article on alleged racism within the Army as a whole. Mr Gue references diversity information, showing that those from a BAME background are under-represented in the Army, particularly at officer class; and the report of Doctor Balissa Greene which we have already referred to. He makes generalised references to racial language

being used. The only two references to concrete examples contained in this letter are allegations of two individuals (Corporal T and Mr Zulu) having been racially discriminated against within 3 PARA; no details of the alleged discrimination are given in Mr Gue's letter but there does not appear to be any dispute that the allegations referred to by Mr Gue are to the racist comment by Sergeant B to Mr Zulu in September 2014 and an allegation by Corporal T that in October 2016 his door had been defaced with racist graffiti (we deal with each of these allegations in more detail further on). Mr Gue did not witness either of these alleged events himself; however, he later heard about them from Mr Zulu and Corporal T themselves.

120. Mr Zulu accepted that he had read and had been provided with a copy of Mr Gue's letters around late January when he had come back from South Africa.

121. Following his serving his NTT, Mr Gue had a series of meetings with various individuals at the respondent on 10 January 2018, namely: with the Company Sergeant Major ("CSM") (with Sergeant Murray present for the first part of it); with Captain Perzylo (the then RSM of 3 PARA); with RCMO Proud (Captain Leary's predecessor as RCMO of 3 PARA) and with Colonel Hargreaves. Mr Gue covertly recorded all of these meetings; transcripts of those meetings were before the tribunal. During his meeting with Colonel Hargreaves, Mr Gue told Colonel Hargreaves that the reason that he was serving his NTT was a wider issue with the Army as a whole, not just 3 PARA. He also spoke to Colonel Hargreaves at length about the statistics regarding BAME soldiers which he referred to in the letters which he submitted at the time he served his NTT. During these covert recordings, Mr Gue focused on his perception of historic matters not involving himself, with the one historic matter involving himself being the alleged vandalism of his room back in early 2014; he did not reference the alleged incidents in Kenya which now form the basis of some of the allegations in his claim.

122. In one of the covertly recorded interviews, Mr Gue referenced the fact that, prior to his recent visit to his mother, he had not seen her in five years and that it was therefore a "bit emotional".

123. Mr Zulu and Mr Gue had accommodation in a particular block in the Colchester barracks, which was only accessible by key, and their rooms were opposite each other. At around 9 AM on 23 January 2018, Mr Gue was in Mr Zulu's room having a cup of tea. Soon afterwards, Corporal T came to join them. On his arrival, Corporal T noticed that the three photographs on the door to Mr Gue's room had been defaced. The words "fuck off" together with a swastika had been written on one photo of Mr Gue and Mr Zulu; someone had drawn a swastika and a Hitler moustache on a photo of Mr Gue; and, on a photograph of Mr Gue and Mr Zulu and another (white) private, the word "niggers" had been written across Mr Gue and Mr Zulu.

124. It remains unknown to this day who did this. It is somewhat mysterious inasmuch as it is agreed that the block could only be accessed by key and so only one or two individuals had access to the block, with the only suspect suggested by Mr Gue being ruled out in the subsequent Royal Military Police

("RMP") investigation on the basis that he was not present at the barracks that week. However, Mr Tibbitts was clear, for the avoidance of doubt, at the start of this hearing that it was not the respondent's position that the claimants defaced their own photographs and that the respondent accepted that a member of 3 PARA, other than the claimants, must have defaced those photographs.

125. Mr Gue's mother submitted two letters, both dated 30 January 2018, supporting his application for early termination of his employment by the Army. In them, she states that she considers that his engagement with the Army "is no longer his place" and references her great satisfaction with Mr Gue's decision to resign, which she describes as a "decision I have been waiting for so long". The letter goes on to reference her hopes that they can now spend more time together.

126. Sergeant Murray gave evidence, which we have no reason to doubt and therefore accept, that he understood from conversations with Mr Gue prior to his serving his NTT that Mr Gue had a job lined up with ESPA (in Africa) by the time he served his NTT. Mr Gue subsequently went on to take up this job after he had left the Army. We therefore find that Mr Gue did have a job lined up with ESPA prior to his serving his NTT.

127. Colonel Hargreaves gave evidence orally that there is a general spike in individuals serving NTT following periods of leave with family and experiencing civilian life for a period, when they have time to reflect on things generally. We have no reason to doubt this and accept this evidence.

128. Mr Zulu was undertaking a preparation course for special forces selection for two weeks around late January/beginning of February 2018. After this, he and Mr Gue spoke to a lawyer. They compiled service complaints together, which they submitted on 21 February 2018. Both claimants were absolutely candid in their evidence before us that they submitted their service complaints only so that they could bring claims in the employment tribunal and that they considered that the employment tribunal was the proper forum for resolution of their complaints.

129. The following day, 22 February 2018, Mr Zulu submitted his NTT. In his accompanying letter, which is relatively brief and headed "Reason(s) for early termination", he references the racist graffiti on Mr Gue's photographs as his reason for leaving. No other reasons are given. He confirms that he has decided that he will no longer be attempting special forces selection, that he "can no longer serve in such a place", and he asks that his "services and employment with the British Army is terminated with immediate effect based on racial discrimination".

130. As noted, the RMP investigated the 23 January 2018 graffiti incident. The RMP conducted interviews with Mr Zulu and Mr Gue on 27 February 2018.

131. On 3 March 2018, Colonel Hargreaves held separate meetings with each of the claimants regarding the service complaints.

132. Both claimants issued updated service complaints dated 5 March 2018.

133. Corporal T also issued a service complaint, dated 21 March 2018.

134. Mr Gue's employment with the Army terminated on 1 June 2018.

135. Mr Zulu's employment with the Army terminated on 6 July 2018.

136. We go into further detail later on in relation to the respondent's handling of the claimants' service complaints. However, as part of that that process, Brigadier Perry interviewed Mr Zulu and Mr Gue respectively on 11 January 2019 and 14 January 2019.

137. That concludes the background facts we have found, setting out the framework. We now go into some more specific findings in relation to the details of the claims.

Uganda deployment

138. In Brigadier Perry's January 2019 interview with Mr Gue, in the context of the claimants' service complaints which had referenced allegations of racist language being used by soldiers in the November 2017 Kenya deployment, Brigadier Perry referenced his disappointment at hearing about this, because he thought it was something which had been specifically addressed in relation to a previous deployment in Uganda "nine years ago", in other words in roughly 2009/2010. Brigadier Perry stated that some NCOs and staff in the regiment had "absolutely gripped people who were using inappropriate and racist language towards Ugandans and staff, so we seem to have gone backwards which is more than disappointing." Brigadier Perry was not at this tribunal to give evidence (unsurprisingly, given that he does not appear to have been a witness to events which form the basis of the allegations in the claims) and so we have no information beyond this reference in the notes of the January 2019 interview with Mr Gue.

139. However, we are able, on the basis of those notes alone, to find as a fact that, in or around 2009/2010, some soldiers in 3 PARA had used inappropriate and racist language towards Ugandans and that the NCOs had "absolutely gripped" those individuals in relation to their conduct.

January 2014 vandalism involving Mr Gue

140. Mr Gue maintains that, in the early stages of his career in 3 PARA, when he was still in A Company, there were regular instances when people would trash the corridor which he was staying in (which he shared with a white South African colleague, Private J) on purpose; that his door and that of Private J would often be urinated on, have beer bottles smashed on them, and racial slurs written on them with marker pen which Mr Gue had to remove each morning.

141. Mr Gue maintains that, as a result of this, both he and Private J were transferred to different companies, with Mr Gue moving to D Company in

September 2014; when Mr Gue's platoon commander questioned his reason for moving companies, Mr Gue told him some of the things that had gone on during his time in A Company but also told him that he didn't want to take it further and make a formal report to his chain of command as he feared the potential repercussions of doing so. He maintains that he also felt that, as a private, it wasn't his place to report the harassment that he was receiving from soldiers in the ranks above him (although he has not indicated to us specifically who he believes did this and what rank they were). He also maintains that his experiences in A Company led him to decide to change his surname from Gue-Hassan to Gue, because "Hassan is Muslim" and he thought that it would make him more prone to racial abuse if he continued to be known by this name. Mr Gue confirmed that, whilst he was in D Company, things got much better and he didn't experience any of the racial harassment that he had suffered in A Company (until, he alleges, the July 2017 Nazi flag incident which forms the basis of allegation 2(v)).

142. No evidence has been presented suggesting that Mr Gue's doors were not vandalised and we have no reason to doubt Mr Gue's evidence that they were. Furthermore, Corporal Kinnell gave evidence that he remembered hearing about the incident in January 2014 when both Mr Gue's and Private J's doors were vandalised, although he said that he did not see it himself and did not know the details of it. Furthermore, he accepted that Mr Gue changed company soon afterwards and he changed his name; both of these actions are of such a serious nature as to indicate that they are responses to something very serious having happened. For all these reasons, we accept that Mr Gue's door was indeed vandalised in January 2014, and that that included racist slurs being written on the door.

143. It is not suggested by the respondent that Mr Gue or Private J vandalised their own doors. On that basis, and given that only people from 3 PARA would have had access to the accommodation in question, the vandalism must have been done by a member or members of 3 PARA (other than Mr Gue or Private J) and we find that it was.

144. Mr Gue referenced the vandalism as part of his service complaint, although there and in his claim to the tribunal, and indeed in the list of issues, it is presented as one-off incident in January 2014. In his witness statement and oral evidence, however, Mr Gue maintained that it happened a number of times in late 2013/early 2014. Furthermore, as is evident from the transcript of his meeting with RCMO Proud on 10 January 2018, just after he handed in his NTT but before he issued his service complaint (and his claim), Mr Gue referred to the racial inscriptions on the door and that he had to remove them "every morning", indicating that it did happen on multiple occasions. In the light of that contemporaneous reference, we find that on the balance of probabilities the vandalism happened on more than one occasion, during the period of late 2013/early 2014.

145. Mr Gue also confirmed in evidence that he did not raise a complaint about this until over four years later when he raised his service complaint, except that on moving from A Company to D Company in around September 2014 (nine

months after the vandalism incidents) he did mention it to a Lieutenant Wood; but that he made it clear to Lieutenant Wood that he did not want further action to be taken and that he did not tell Lieutenant Wood everything. He also confirmed in evidence that he did not expect further action to be taken and that he could have complained further or brought tribunal proceedings about this incident at the time but that he “chose not to do so”.

146. In his covertly recorded meeting with RCMO Proud on 10 January 2018, Mr Gue was asked who the people in A Company were who had done this; he replied that he didn’t really want to mention names at that stage because he didn’t want them to lose their job. In his service complaint, he also appeared to indicate that he knew who had done it but did not reveal anyone’s identity.

147. In his recorded meeting with Captain Perzylo that same day, Mr Gue referenced the vandalism again. Captain Perzylo asked who it was that did it and whether he was still in A Company. He asked Mr Gue if he would give his name. Mr Gue replied that he respected the values and standards of the Army, as in loyalty, and that he was not going to give his name because he didn’t want him to lose his job. Captain Perzylo suggested to Mr Gue that it might be Corporal G. Mr Gue said that he couldn’t say anything. Captain Perzylo then appeared to indicate to Mr Gue that he thought, given the reaction in his eyes, that Mr Gue was agreeing with him, although Mr Gue never actually confirms in the transcript that he is agreeing that it was Corporal G. Captain Perzylo is then absolutely clear that this sort of behaviour won’t be tolerated, that people who behave like this, even if it’s just “1%”, could destroy the battalion and that he is not prepared to have people in the battalion that behave like this and abuse other people. Captain Perzylo’s response in wanting to root racists out of the battalion is consistent with the other officers’ response in Mr Gue’s interviews with them on 10 January 2018, who are similarly adamant that they will not tolerate such behaviour and they want it rooted out.

148. We find several facts out of the exchanges referenced in the paragraphs above. First, there appears to have been a suspicion on the part of Captain Perzylo (without Mr Gue first hinting that Corporal G was responsible for the vandalism) that Corporal G was potentially someone in the battalion who might have done it. Secondly, Captain Perzylo was desperate for Mr Gue to confirm Corporal G’s name so that he could investigate it. Thirdly, Mr Gue’s reaction appears to have indicated that Captain Perzylo’s suspicion in relation to Corporal G was correct but at no stage did Mr Gue actually say that he did consider it was Corporal G who he thought was responsible for the vandalism. Fourthly, the reasons given by Mr Gue for not naming the suspect were not a fear of reprisals (as is the claimants’ case at this tribunal) but rather a fear that the individual in question would lose their job. Fifthly, this in itself is indicative that, if the individual were named and found to have acted in a racist manner, the respondent would indeed have been likely to have dismissed him. Sixthly, what we have quoted above and the context of the rest of the transcript appears to indicate that Captain Perzylo regarded any potentially racist behaviour to be limited to Corporal G and a handful of individuals “that are going along with him”. And finally, both Captain Perzylo and the other officers wanted to root out racist behaviour and take action, albeit that their reasons for doing so were not only to

stop the abuse itself but also, not unreasonably, to protect the reputation of the battalion.

149. In the transcript of the meeting with Captain Perzylo, Mr Gue also referenced a "company clerk who was a victim of racial abuse" who transferred because he could not carry on working here and that there was "all sorts of racial abuse written on his desk, like daily". Mr Milsom referred to this in his written submissions. However, it isn't referenced in Mr Gue's witness statement, nor do we know any further details about it, including whether it was raised earlier and investigated. The only reference to it is in passing in the transcript of the covertly recorded meeting with Captain Perzylo. Given the paucity of detail and the fact that it is not directly relevant to any of the specific allegations of racial harassment in the claims before us, we decline to make any findings of fact as to whether or not racial abuse of this clerk actually occurred and if so in what way.

September 2014 incident involving Mr Zulu and Sergeant B

150. In September 2014, an incident occurred involving Mr Zulu and Sergeant B which was witnessed by virtually the whole platoon. Sergeant B had asked Mr Zulu if he had spoken to the sergeant major about "rear party"; Mr Zulu replied that he had just spoken to him and that he would be doing rear party; Sergeant B replied "I had spoken to him earlier too, and told him I had someone. I told him to put the black cunt's name down". Sergeant B had therefore directly and openly referred to Mr Zulu as a "black cunt". Sergeant B was immediately told by another corporal that that was "bang out of order". The incident was reported, investigated, and entered on the respondent's equality and diversity log (a record of issues relating to equality and diversity). The contemporaneous documents indicate that others could see "the upset and frustration" in Mr Zulu's face and we accept that Mr Zulu (unsurprisingly) was deeply offended by this remark. Mr Zulu stated at the time that he wanted an informal resolution. Sergeant B apologised to Mr Zulu, albeit he indicated that he made a "jokingly racial remark" in a "non-malicious manner" but understood that he had "overstepped the mark". The matter was dealt with at the lowest level and the parties indicated that they were content that the matter had been resolved. The log indicates that the respondent's view is that there is a zero tolerance policy regarding such behaviour.

151. Mr Zulu accepted in cross examination that this was the first instance of race discrimination or harassment directed to him personally in over six years of service in the armed forces. He accepted that it was escalated quickly and that the chain of command took the matter seriously. He confirmed that he, as the contemporaneous documents indicated, had wanted an informal resolution and that it was not unreasonable for the respondent to respect his wishes and to deal with the matter informally.

152. Nonetheless, Mr Zulu appeared to suggest to the tribunal that he wasn't happy with the outcome or feedback he received in respect of the incident. However, he accepted that he didn't request any feedback or raise any complaint about the absence of any action or feedback shortly after this incident. Furthermore, in an interview with Brigadier Perry in September 2017 in relation to

Mr Zulu's career progression, several years after he had been promoted to Lance Corporal, he was asked specifically by Brigadier Perry about concerns or allegations of racism. In response, Mr Zulu openly referred to the September 2014 incident and stated that "it was investigated at the time and dealt with" and that at the time "Lieutenant Colonel Shervington dealt with his informal complaint" and that "he was happy with the outcome at the time".

153. Mr Zulu accepted in evidence that he could have sought legal advice at the time in respect of this incident if he was unhappy with how it had been dealt with and that he could have submitted a formal complaint and ultimately a claim before the employment tribunal but that he had chosen not to do so.

154. We accept, therefore, that Mr Zulu was content with how the matter had been handled at the time but that his view of this incident has changed in the light of him having ruminated on this matter several years later and (as we refer to later) most notably during discussions with Mr Gue in late 2017, most likely whilst on deployment in Kenya.

155. Sergeant B left the Army in around September 2015.

156. Mr Zulu does not allege that, during the period after the September 2014 incident, he suffered any further incident of racial harassment until the July 2017 Nazi flag incident at allegation 2(v).

157. There is a reference in one of the contemporaneous documents in relation to the September 2014 incident where a Major states amongst other things that a "Rule of three should probably apply here - first incident was an accident, second (this one) a coincidence if a third such incident occurs then we would be looking potentially at an habitual wider problem." Mr Milsom has accordingly suggested that the respondent applied a "rule of three" policy to instances of racial discrimination. However, we have not heard from the Major in question (unsurprisingly, as what happened in the September 2014 is not disputed), so we do not know the context of what he is saying; whether he indeed applied a rule of three himself; what the first incident referred to was and whether it was an incident of race discrimination or another sort of misdemeanour. Furthermore, when this document was put to Captain Bryning, Captain Bryning said that he had never heard of there being a "rule of three". Given the lack of details and Captain Bryning's denial that such a rule was in place, we do not find on the balance of probabilities that any such rule was in place.

<u>October 2016 graffiti in Corporal T's room</u>

158. Corporal T's service complaint of 21 March 2018 makes reference to an alleged incident in October 2016 when the door of Corporal T's room had been defaced with graffiti, with the words "nigger", "wog", "spear-chucker" and "jungle-bunny" having been scrawled across his door in permanent marker. His service complaint references his having begun to clean the graffiti off before deciding to take a picture of it and send it to his platoon sergeant.

159. Neither of the claimants referenced this in their witness statements. Corporal T (again unsurprisingly) was not at the tribunal to give evidence. We do not know what the position is in terms of investigation of Corporal T's service complaint and this allegation in particular. The incident is not recorded in the respondent's "Equality and Diversity Complaint Log (Harassment and Bullying)", as you would expect a complaint of racial harassment to be.

160. We do not, therefore, consider that we have enough evidence to make a positive factual finding that, on the balance of probabilities, it is proved that this incident occurred, nor indeed is it necessary for us to do so for the purposes of determining the issues before us. We do, however, find that a complaint about this incident was made (in Corporal T's service complaint) and that, given that it specifically details this in the service complaint, on the balance of probabilities, Corporal T reported it to his platoon sergeant. It was certainly not recorded in the Equality and Diversity Log, a full copy of which we have seen and which covers that period.

Confederate flags

161. The allegation in 2(iii) of the list of issues simply states "the display of Confederate flags". It gives no further detail as to where such flags were displayed or when.

162. Colonel Hargreaves and Captain Bryning gave evidence that they had never seen any Confederate flags displayed in the barracks. Corporal Kinnell speculated that, as 3 PARA deploys regularly to the USA and in particular to North Carolina and that he has seen Confederate flags all over the place there, he would not be surprised if someone bought one as a souvenir and brought it back to the UK with them just as people bring back American national flags as a souvenir; however, his evidence was that he had never personally seen Confederate flags in the barracks at any time.

163. Mr Y, who provided a statement on behalf of both claimants, gave no evidence in relation to Confederate flags. Mr Zulu gave no evidence in relation to Confederate flags.

164. The only person who gave evidence in relation to Confederate flags was Mr Gue. The claimants' replies to further and better particulars for this claim, in response to a question about when soldiers in the barracks were supposed to have displayed Confederate flags in their rooms, stated that this was "during winter 2017 (the claimants cannot remember the month)". However, factually, Mr Gue went out to Kenya on 26 October 2017 and, having visited his mother in Zanzibar after the deployment, did not return to barracks in the UK until 8 January 2018. It would, therefore, have been physically impossible for him to have seen any Confederate flag in the barracks in winter 2017.

165. Mr Gue's witness statement simply states in a very general way that "during the course of his employment" he noticed that there were, amongst other things, Confederate flags displayed in A Company accommodation, which was just a stone's throw away from battalion headquarters and that he walked past

these on a regular basis when walking past A Company's accommodation on the way to the canteen.

166. During the recorded meetings of 10 January 2018, Mr Gue mentions to Colonel Hargreaves that there are Confederate flags "being flagged upon windows just by the block" and, when asked where they are, says that they have "been recently removed since the [Nazi flag incident (referenced at issue 2(v))]" but that "you'd literally, everyone uses the Costa facility, literally you'd see them". When asked by Colonel Hargreaves to confirm that they were in A block rather than in any other company's block, Mr Gue said that he didn't actually remember what block they were in but they were there. If, as Mr Gue stated on 10 January 2018, the Confederate flags had been removed since the Nazi flag incident, then he could not have seen any Confederate flags displayed on the block after his return to the UK in January 2018 either.

167. Mr Milsom took us to a passage from the transcript of the meeting of 10 January 2018 between Mr Gue and RCMO Proud in which, during a discussion regarding the Confederate flag, RCMO proud says "yeah, I know what it is. I've most probably seen it to be honest with you…". Mr Milsom appears to be suggesting that this is an admission from RCMO Proud that he has seen such a flag in the barracks. However, when one looks at the context of that conversation as a whole, we do not consider that it is such an admission. What goes before that statement, following Mr Gue's assertion that there were Confederate flags displayed in the windows of the block near the Costa, is a discussion of what the Confederate flag is. RCMO Proud is initially unsure of what a Confederate flag is and Mr Gue describes it to him in some detail. Once he has done so, RCMO Proud makes the comment which we have quoted above in this paragraph. He is almost certainly simply saying that, having had the benefit of Mr Gue's description, he now understands what the flag is that Mr Gue is talking about and that he has probably seen such a flag before, in other words that he now recognises what flag Mr Gue is talking about; he is not confirming that he has seen such a flag in the barracks.

168. There is no reference to having seen Confederate flags displayed in either of the claimants' service complaints or updated service complaints.

169. We therefore accept that, as Mr Tibbitts submits, Mr Gue's own evidence and case on this matter is unspecific, unclear and self-contradictory. It is clearly important as to where and when (at least approximately) such items were displayed, because that evidence allows the respondent to investigate and defend any such allegation appropriately in these proceedings. Furthermore, even if such flags were in fact displayed but it in fact occurred, say, back in 2015 or 2016, then further jurisdictional arguments may arise. Therefore, in the light of the totality of the evidence above, we accept Mr Tibbitts' submission that, with no evidence to corroborate Mr Gue's contention of the display of any Confederate flags and with his own account being unclear and contradictory, Mr Gue has not proven on the balance of probabilities that Confederate flags were displayed. Certainly, Mr Zulu has not proven it, having given no evidence as to having seen Confederate flags at all.

<u>July 2017 photograph with Nazi flag as a backdrop</u>

170. In July 2017 a Facebook photograph was uploaded depicting soldiers in front of a Nazi flag together with a regimental flag up on the wall behind them. We accept Mr Milsom's submission that it necessarily follows that someone (or more than one person) had purchased the flag, displayed it, socialised in its presence, taken a photograph of soldiers with the flag in the background on the wall and uploaded that photograph onto a public social media space.

171. The individuals identified in the photograph were junior rank (three Privates and two Lance Corporals) and junior in terms of age; they had been drinking at the point that the photo was taken and posted.

172. The respondent took very swift action in response, taking the post down from Facebook within a matter of hours, taking prompt steps to identify the individuals who were captured in the picture, seizing the flag in question and promptly referring the matter to the Royal Military Police ("RMP").

173. Both Mr Zulu and Mr Gue confirmed that they did not actually see the post on Facebook, but rather became aware of the photo through messages which they say were sent within 3 PARA. However, the matter was openly spoken about by Colonel Hargreaves, who addressed the battalion shortly afterwards, emphasising how this type of behaviour was unacceptable. Mr Gue accepted that "we all knew about it" and accepted that "everyone knew this type of behaviour was not accepted and that sanctions would follow" and that the individuals involved "knew they'd get punished".

174. Colonel Hargreaves was given legal advice that he should deal with all of the individuals involved at the same "summary hearings" (a procedure open to him in the military). Because of the deployment of certain individuals involved in the incident (as we have found earlier, this is one of the operational problems of dealing with personnel matters in an organisation on high readiness such as 3 PARA), he was not able to hold summary hearings for all of them until January 2018. Colonel Hargreaves was not happy about the delay, but followed the legal advice in this respect.

175. The notes of the summary hearings go into some detail. Colonel Hargreaves clearly took the matter extremely seriously. He took into account aggravating factors such as the consumption of alcohol, that in the case of the Lance Corporals amongst them, they should have known better and should have had the moral courage to remove the flag and stop the situation developing. He accepted some of their mitigating factors put forward by the individuals, including that, although some soldiers admitted understanding the racially discriminatory aspect of the flag, it genuinely seemed that none of them had given it a thought; that it appeared to be an act of stupidity on their part, with several having admitted to being naive but that there was no evidence of any malicious or discriminatory intent on their part; that all were remorseful about their involvement. Colonel Hargreaves concluded that it had been a stupid, drunken prank done without thought for the impact or consequences.

176. However, he nonetheless considered it quite rightly a serious matter and he exacted extremely severe penalties. The three private soldiers were all fined (five days' pay in two cases and 10 days' pay for the soldier who owned the flag; the two Lance Corporals were reduced in rank to private (this is a substantial penalty that involved an immediate cut in salary commensurate with the drop in rank, plus a significant loss of standing within the battalion and wider Army and which had a significant impact on the individual's pension and career progression). In their evidence before the tribunal, the claimants acknowledged that the penalties imposed were extremely severe.

177. Whilst he accepts that the respondent rightly took action over this issue, Mr Milsom has sought to criticise Colonel Hargreaves in a number of respects, extracting from the notes of the summary hearings references by some of the soldiers involved to "not understanding what the flag stands for"; "stupidity rather than deliberate"; "not realising the flag was in the background"; believing that the flag represented the Fallschirmjager due to their tactics and capabilities"; and an unwillingness by one private to give names of other individuals who were involved but who were not captured by the photograph; as well as Corporal Kinnell's view in his witness statement that whilst he had heard about the incident but didn't know the details, experience suggested to him that it was a "stupid joke by young soldiers who had no idea what they were getting themselves into" (before expressing his view that, in his opinion, Colonel Hargreaves had dealt with the matter very firmly indeed).

178. We note that, to even a reasonably educated observer, some of the comments made by the five individuals involved at the summary hearings which are quoted in the paragraph above appear at best reflective of extreme ignorance and, at worst, potentially an unconvincing attempt to provide mitigation for their behaviour. However, we also note that the individuals involved were very young, very junior and that, as is not disputed, the Army recruits from a wide variety of backgrounds, with many of the recruits being poorly educated. The respondent's witnesses on several occasions emphasised the need for and the importance of educating soldiers. Furthermore, the above represent only a selection of quotations of things said at a series of detailed summary hearings. In the context of the whole, do not consider that it was unreasonable for Colonel Hargreaves to accept that this was a stupid, drunken prank rather than something that evidenced malicious or discriminatory intent. What is undisputed is that the sanctions which he applied were very severe. The matter was taken extremely seriously.

<u>Mr Zulu's September 2017 complaint</u>

179. In September 2017, Mr Zulu made a complaint. There is some dispute as to whether or not this was an "informal service complaint" or a full "service complaint" under the respondent's procedures. The distinction is not of relevance for the purposes of these reasons. For ease of reference, given that Mr Zulu did make a formal service complaint dated 21 February 2018, we refer to the September 2017 complaint simply as Mr Zulu's "September 2017 complaint".

180. Mr Zulu did discuss the issue of whether he should make a complaint with Corporal Kinnell who, as noted, was a good friend of his. Corporal Kinnell didn't think he should. Mr Milsom suggests that it is surprising that Corporal Kinnell does not address this in his witness statement and seeks to suggest that we should give less credence to his evidence as a result. However, the September 2017 complaint no longer forms part of the issues of Mr Zulu's claim (it having been struck out following the preliminary hearing before EJ McNeill); we therefore find it unsurprising that the matter is not covered in Corporal Kinnell's witness statement and draw no such inference.

181. Mr Zulu's complaint was about his career progression and, in particular, Colonel Hargreaves' decision in January 2017 that, Mr Zulu having already failed the special forces selection course ("SFSC"), it was in the best interests of his career progression to attend the section commanders battle course ("SCBC") before going on to do the SFSC again. It is not necessary for us to go into the detailed reasons for this decision (as it is no longer an issue of Mr Zulu's claim), save to say that we are satisfied that Colonel Hargreaves decision was a reasonable one and one taken with Mr Zulu's best interests in mind.

182. Mr Zulu had a meeting in relation to the complaint with Brigadier Perry on 7 September 2017 and a meeting with Colonel Hargreaves and Captain Bryning on 5 October 2017, the purpose of which was to seek to resolve the matter and during which Colonel Hargreaves was able to explain his reasoning for his decision in more detail. Furthermore, Mr Zulu had completed the SCBC in the interim and, that having been achieved, Colonel Hargreaves agreed that, once the forthcoming deployment to Kenya was completed, he could have two weeks preparation time to prepare for another attempt at the SFSC. At no time during this meeting did Mr Zulu suggest that there had been any race discrimination in Colonel Hargreaves' decision on the matter in January 2017. At the end of the meeting, Mr Zulu expressed himself to be content with the outcome and subsequently confirmed that he was taking no further action but withdrawing his complaint.

<u>Tommy Robinson</u>

183. On Saturday, 7 October 2017, various members of 3 PARA attended the Punch and Judy pub in Covent Garden. Shortly afterwards, a post appeared on Twitter (a social media network) containing a photo of various individuals from 3 PARA and other members of the public and Tommy Robinson, the former leader of the English Defence League ("EDL"). The photo was not taken by a member of 3 PARA and was not posted on Twitter by a member of 3 PARA. Colonel Hargreaves was informed of this on 10 October 2017.

184. Colonel Hargreaves immediately investigated, including interviewing as many of those concerned as he could. Having investigated, and based on the evidence before him, he concluded that it was an unplanned meeting as a number of 3 PARA soldiers were returning from Ascot races; having met someone with a mutual connection to the Army they agreed to have their photograph taken with that individual and his colleagues; and he accepted their explanations that they did not know that Tommy Robinson was one of the people

in that group or that the group contained people holding far right views. He was satisfied that the photograph itself did not suggest a racist element within 3 PARA, particularly as it was a multiracial grouping of soldiers, and he recognised that those members of 3 PARA involved had properly consumed a lot of alcohol. Nonetheless, he considered that they should have been more careful since this was clearly an embarrassing photograph for 3 PARA. Colonel Hargreaves briefed the battalion shortly after the incident, bringing the incident to their attention and warning them how they should be careful in future. The media was briefed on what happened and the matter soon died away.

185. Neither Mr Zulu nor Mr Gue made any complaint about this incident at the time. Furthermore, the incident is not referred to in either their original or updated service complaints of February and March 2018 respectively.

186. It appears that neither claimant saw the Twitter post referred to above at any point. In any case, as noted, that post was not made by anyone from 3 PARA.

187. Mr Gue made reference to the incident in his resignation letter of 8 January 2018, stating “members also proudly brag of their exploits within far-right racist groups, case in point, recent pictures of EDL leader Tommy Robinson splashed all over Facebook”. Other than this reference, we have seen no evidence of any post on Facebook (although we accept that Mr Gue could have been referring to social media in general). As a result of this reference, Colonel Hargreaves, in the covertly recorded meeting of 10 January 2018, updated Mr Gue as to the circumstances and action taken in relation to the incident, confirming the investigation he took in response to the Twitter post having come to his attention and the conclusions he reached at the time and why he came to them. Mr Gue then stated that he himself had been in the Punch and Judy pub that day, that he had left because he recognised Tommy Robinson and that he thought that there was therefore an element of concern. Colonel Hargreaves went on to reiterate the rationale for the conclusions which he had reached, indicating that there was probably naivete but that he was confident that not everybody there knew that it was Tommy Robinson who was there or what he stood for. He did not take any further action following this. In that conversation, Mr Gue did not go on to state that he knew in some way either that the people in the photograph knew who Tommy Robinson was, nor did he make any reference to any other photo that had been circulating on social media which might indicate that any members of 3 PARA knew who Tommy Robinson was.

188. A further photo (at page 681 of the bundle) was disclosed by the claimants during the course of these proceedings, only a few weeks prior to this hearing. The respondent was unaware of it until that point. That photo appears to put matters in a different light. It is a photo which is a selfie which appears to have been taken in the pub by a member of 3 PARA and is of a much smaller group of only four people, one of whom is Tommy Robinson, with at least two of the others being members of 3 PARA (including the individual taking the selfie). Whilst the matter has not yet been investigated, it appears far more likely from this photo that the individuals in it do know who Tommy Robinson is.

189. We do not know very much about the provenance of this photo or how it was obtained. We understand, however, that it was sent on “Snapchat”, which we understand is a private network as opposed to a social media site. In his oral evidence, Mr Gue confirmed that he was not on Snapchat, that he had never received this photo and was not suggesting that he or Mr Zulu were ever directly sent a photo such as this. His evidence in his witness statement was simply that “In October 2017, I saw that members of 3 PARA had posted pictures on social media of themselves with Tommy Robinson, leader of the English Defence League [pg. 681]”; he specifically cross-references page 681. This statement cannot be right if, as Mr Gue stated in all evidence, he was not on Snapchat and did not see this photograph at the time; furthermore, Snapchat is not “social media” but is a private network (which Mr Gue was not on). Coupled with his own reference to pictures of Tommy Robinson “splashed all over Facebook” in his resignation letter of 8 January 2018, which is also at odds with his witness statement, we accept Mr Tibbitts’ submission that Mr Gue’s evidence is at best unclear.

190. Mr Zulu’s evidence in his witness statement is that “In October 2017, it came to my attention that members of 3 PARA had posted pictures on social media of themselves with Tommy Robinson, leader of the English Defence League [pg. 681]”; in other words, his evidence is the same as Mr Gue’s save that he does not maintain that he saw social media posts but merely that they came to his attention, but he specifically references page 681. Again, his evidence was confused at best. He appeared initially to be suggesting that he had not seen page 681 but that there was another photo on Facebook that he was referring to that then went into a What’s App group (we have seen no such photos); he then accepted that the photo that he was talking about had not been posted by a member of 3 PARA but by Tommy Robinson himself; he then went on emphatically to suggest that this had contributed to his decision to leave the Army but could give no answer as to why he had not made any reference to the incident in his service complaint given that it was signed the day before he gave his NTT.

191. In the light of the confusion in the evidence of both claimants, we accept that they were at the time of the incident in October 2017 aware that it had happened (Colonel Hargreaves had, after all, briefed the entire battalion). However, we do not accept that the claimants have proven on the balance of probabilities that they saw either the Twitter post which came to the respondent’s attention at the time or the Snapchat photo on page 681 or any other photograph in relation to the incident until at least after they had left their employment with the respondent.

192. Furthermore, the claimant’s allegation at 2(iv) of their respective lists of issues is “posting a photograph of 3 PARA members with Tommy Robinson in October 2017”; as a matter of fact, that allegation is not proven. The only “post” on social media (i.e. a public forum) was that on Twitter; that post was by a member of the public and not a member of 3 PARA.

193. When questioned about the incident in his evidence at this tribunal, Sergeant Murray stated that both he, Mr Zulu and Mr Gue had attended the

Punch and Judy pub together, had become aware of Tommy Robinson's presence, which was pointed out to them by another Corporal, and that the three of them left because of Tommy Robinson's presence. This information was unknown to the respondent at the time of the investigation of the incident.

194. Both claimants gave evidence that it was their experiences in the subsequent deployment to Kenya in October/November 2017 which altered their view of life in the Army and any instances prior to that were background only. On the claimants' own case, neither the Tommy Robinson incident, nor indeed the Nazi flag incident which preceded it, caused them to leave the Army (notwithstanding some of the contradictory references elsewhere in their evidence, for example Mr Zulu's oral evidence set out above that the Tommy Robinson incident was part of his reason for leaving the Army). They both accepted that, up until Kenya, they didn't feel violated or offended.

<u>Kenya deployment</u>

195. As noted, both Mr Zulu and Mr Gue deployed to Kenya with 3 PARA in October/November 2017. A number of comments alleged to have been made during that deployment form the basis of several of the complaints in the lists of issues (2(vi)-(xi)).

196. Both claimants made reference to various comments allegedly made in Kenya in their service complaints (which they drafted together and which are in very similar if not identical terms in relation to the alleged Kenya comments). Their original February 2018 service complaints referred to a number of soldiers making "racial comments towards the Kenyan soldiers and Kenyan locals, such as "niggers", "choggies", "shithole country", "African idiots"". There was no detail beyond this or attribution to particular individuals in relation to these four alleged comments. Both claimants accepted under questioning in cross examination that these four references in fact related to four specific incidents which they say they witnessed, the "shithole country" comment being the alleged comment made by Corporal Kinnell.

197. Their updated service complaints of March 2018 both add an allegation of Kenyan children having been called "shit cunts" to their faces but this is said in the updated service complaints to be an example of an incident that had happened historically, prior to the 2017 deployment to Kenya (3 PARA had deployed to Kenya on previous occasions as well).

<u>BATUK warning to staff not to behave badly as they would "go to prison and get AIDS"</u>

198. In November 2017, a welcome brief was, as was normal, given in relation to the Kenya deployment by an officer from the British Army Training Unit Kenya ("BATUK"). The claimants allege that they were both present and that the officer giving the briefing warned those present that they should not behave badly or they would "go to prison and get AIDS".

199. Neither claimant makes reference to such words having been said in either their original or updated service complaints, nor do either of them make reference to this during their interviews with the RMP on 27 February 2018. In fact, the first time the phrase is actually alleged is as set out within these proceedings submitted in August 2018.

200. However, both claimants do make reference in their updated service complaints to “the BATUK staff in previous deployments have spoken in a dehumanising way of the locals in previous RSOI briefs”. We therefore accept Mr Tibbitts’ submission that it appears that both claimants are not actually alleging such words were said in November 2017 but in one of the prior deployments to Kenya. During questioning, Mr Zulu confirmed his recollection of this incident and how people had laughed and that afterwards Major McVitie had reprimanded them and told them they needed to take it seriously; Mr Zulu said he clearly recalled this incident and could not be mistaken that it had occurred in 2017. He was then taken by Mr Tibbitts to his own updated service complaint of March 2018 in which he stated, following the comment about BATUK staff speaking in a dehumanising way of the locals, that “this must be gripped in future (as Major McVitie did in 2015)”. We accept, therefore, that to the extent that the claimants were alleging that these words were said, the reference was to a 2015 deployment and that the allegation that the words were said in 2017, as set out in the lists of issues, is not made out.

201. By contrast, the evidence of Corporate Kinnell, who was at the 2017 briefing, was that they were warned not to fall foul of the Kenyan authorities because that would mean going through Kenyan courts, and perhaps ending up in a Kenyan prison, rather than the British courts. Corporal Johnson’s evidence was that the BATUK staff warned in briefings that AIDS was rife in Kenya and also that if soldiers committed offences outside of the training base then they would be subject to Kenyan law and the local authorities, not British or military law, but as far as he was aware the two subjects were never linked together. Both gave evidence that as far as they were aware the two things were not linked together and that they had no recollection of the BATUK staff saying that personnel should not behave badly as they would go to prison and get AIDS.

202. We have no reason to doubt the evidence of either Corporal Kinnell or Corporal Johnson and we refer to our comments about the credibility of the witnesses whom we heard from in general which we have made earlier. Mr Milsom has suggested that there were some inconsistencies in Corporal Kinnell’s evidence such that we should not believe him; however, rather than inconsistencies, we consider that it was rather the case that Corporal Kinnell was asked questions about matters beyond his witness statement (for example in relation to Mr Zulu’s September 2017 informal complaint, which was not an allegation in these proceedings and was (not surprisingly) not therefore covered in his witness statement) and, as he was asked these questions, more information which was not in his statement came out; to the extent that there were any inconsistencies in this evidence, these were minor and do not impact on our view that he appeared to give open and honest evidence. We therefore accept the evidence of both Corporal Kinnell and Corporal Johnson in this respect.

203. We therefore find that the claimants have not proven that, on the balance of probabilities, these comments were made, and certainly not at the 2017 BATUK briefing as alleged.

<u>"Look at those idiots running, fucking niggers don't have a clue"</u>

204. It is alleged by the claimants that, during the course of one of the training exercises with the Kenyan troops, Corporal Johnson stated "look at those idiots running, fucking niggers don't have a clue". That is the full extent of the context given in relation to this comment in Mr Zulu's witness statement. Mr Gue's witness statement is similar, although he adds that he understood that Corporal Johnson apologised to Mr Zulu after he confronted him about the use of this racist language. However, although Mr Gue does not make this clear in the statement itself, he accepted in evidence that he himself was not present when this alleged comment was made.

205. In his witness statement and oral evidence, Corporal Johnson denied that he made this comment and stated that he would never use a derogatory term like "nigger". He also explained that he considered that the claimants had totally misrepresented what he actually said and what he meant by it. In contrast to the claimants, he gave context to the comment which he says was made. His evidence was that he was only with Mr Zulu for one operation during the whole of the Kenya deployment, which was a 12 hour night operation where they were up in the mountains covering action on the lower ground; that at the end of the exercise, early in the morning, they were coming down off the mountain and a body of Kenyan troops came running past; and that he clearly remembered saying something along the lines of "Jesus Christ, those fuckers can run!"; that the point that he was making was that he was impressed; that the Kenyan troops could run very well, as he could see, and that it was not meant as a criticism but as a compliment; that none of the soldiers who were with him at the time (and there were a number of them) complained or suggested that he had said anything offensive or improper; and that the first time that he had become aware that Mr Zulu and Mr Gue had an issue with what he said was when he was told of the allegation against him in order to make his witness statement.

206. Corporal Johnson gave clear and frank evidence before the tribunal and we do not have any reason not to believe what he said.

207. Furthermore, if Corporal Johnson said what Mr Zulu now alleges he said, using the N word would have been a highly inflammatory word to use, all the more so knowing that a black South African soldier was in the group of soldiers whom he was with. In addition, if matters can be made even worse than the use of the N word in itself, the context of the comment which the claimants allege is clearly highly derogatory, not only towards the Kenyan troops but to black people in general. We therefore accept Mr Tibbetts' submission that it is noticeable and surprising that neither Mr Zulu nor Mr Gue set out this alleged phrase anywhere prior to August 2018 (whether in their service complaints, amended service complaints, interviews with the RMP or, in Mr Gue's case, during his covertly recorded discussion with Colonel Hargreaves on 10 January

2018 where he brings up a separate issue about an alleged discussion of whether it was ever appropriate to use the N word). Furthermore, Mr Zulu did not mention this comment to Sergeant Murray in Kenya, although he did raise the Nelson Mandela comment and the operational issues; again that is very surprising if the N word was indeed used.

208. For these reasons, we prefer Corporal Johnson's evidence and find that on the balance of probabilities the claimants have not proven that this comment was made as alleged by them. Rather, we find on the balance of probabilities that Corporal Johnson's account is what happened.

209. We do not accept Mr Milsom's submission that in the context of banter at a scene of high activity, the comment is something that Corporal Johnson was more likely to have forgotten that the claimants; rather, Corporal Johnson was very clear in his recollection and gave far more context than the claimants. Furthermore, we do not accept Mr Milsom's submission that, as the claimants did not suggest that Corporal Johnson intended the comment with any malice and that they were friends with Corporal Johnson, that is indicative that they would not make this assertion without any evidential foundation; again, whilst we reiterate that we make no findings that any witness is seeking deliberately to mislead the tribunal, for the reasons above we prefer Corporal Johnson's evidence.

210. As we have already found, swearing is commonplace in the Army. Mr Zulu in his oral evidence accepted that, if the words had been used as Corporal Johnson said they had been used, he wouldn't have taken offence at such a comment and that such a comment could easily and equally have been said if a group of white special forces had been running by. Therefore, in the light of the finding which we have made above that Corporal Johnson's account of what was said is on the balance of probabilities to be preferred, we find that not only was the comment not related to race but that, on the balance of probabilities, Mr Zulu did not take offence at the comment.

“African animals”

211. Mr Zulu alleges that, on another training exercise in Kenya, during a conversation between Sergeant A, Private C and himself, Sergeant A referred to the Kenyan soldiers as “African animals”; and that Mr Zulu responded by telling Sergeant A to “screw the nut”, which is a term used by paratroopers to mean “behave yourself”. Mr Gue does not reference this comment in his witness statement but accepts that he was not present when this comment was allegedly said.

212. As noted, whilst a witness statement had been produced in respect of Sergeant A, he was not present at the tribunal. In the witness statement, Sergeant A denies that he referred to members of the Kenyan defence forces as “African animals”; and stated that there was no reason why he should have done so and that he would not do this anyway.

213. First of all, Mr Milsom has suggested that we should not take the explanation for Sergeant A's absence from the tribunal at face value. However, there is no reason why we should not accept that explanation, which appears entirely plausible to us. Mr Milsom suggests that he could have attended very briefly to give his evidence. That is correct, but we accept that doing so would mean he would fail a course with career implications for him. It is equally true that it would be in the respondent's interest, if it were able to bring him to the tribunal, to get him to come along and for him, as set out in his witness statement, simply to deny the allegation. We see no reason why the respondent would seek not to bring him unless there were a good reason for it. We therefore accept the respondent's explanation in this respect. Whilst we appreciate that he was not here to be cross-examined, there was a good reason for it and we do not, therefore, give no weight at all to his evidence as Mr Milsom suggests we should.

214. As noted, Mr Gue was not present when this comment was allegedly made. That leaves us from the claimants' point of view with the evidence of Mr Zulu alone in relation to this comment.

215. We note that the only reference in the claimants' service complaints of anything similar is to an (unattributed) comment that the expression "African idiots" was made (there is no reference in the service complaints to a comment about "African animals"). Furthermore, Mr Gue does talk separately in his witness statement (and again in very general terms) about hearing the comment "African idiots", albeit not in the context of any of the specific allegations made as part of the claimants' claims. Furthermore, no complaint was raised about this phrase by Mr Zulu (or Mr Gue) with Sergeant Murray (although Mr Zulu was more than capable of raising the comment about Nelson Mandela with Sergeant Murray in Kenya at the time). The context given by Mr Zulu is relatively limited; there is the reference (which was supplied only in responses to further and better particulars) to "screw the nut", but beyond that there is no context given as to how this comment is said to have arisen. Whilst, as we reiterate, we make no findings that any of the witnesses have sought to mislead the tribunal, there have been some other points which we have referred to already where mistakes have been made by Mr Zulu in his evidence generally. Given that, and the lack of context and clarity as to exactly what was said, and the lack of any complaint at the time by Mr Zulu, we find that the claimants have not proven on the balance of probabilities that the expression "African animals" was used.

<u>"Shithole country"</u>

216. Both claimants allege in their witness statements that, whilst they were in Kenya, they heard Corporal Kinnell describe Kenya as a "shithole country". No further context is given. The expression is referenced in both of their service complaints as having been used in Kenya but is not attributed to anyone in those service complaints nor is any further context given; only later during these proceedings has it been alleged that the comment was made by Corporal Kinnell.

217. In his witness statement, Corporal Kinnell stated that he strongly denied ever calling Kenya a "shithole country" as alleged and that, if this allegation

referred to the comments that he suspected that it did, then all he ever said was that he did not like the exercise in Kenya, because it was a hard training exercise and this was the third time that he had done it; that it was a comment on the training exercise and that he did not say anything about the country itself.

218. Mr Milsom submitted that Corporal Kinnell's witness statement was silent on what exactly was said save for strongly denying the comment was made but that in oral evidence Corporal Kinnell admitted that the comment was made but that it was in the context of the deployment rather than the country itself. However, this is not correct; what is set out in the witness statement is referenced in the paragraph above and it clearly does say that what was said was about the training exercise/deployment rather than the country. Corporal Kinnell was consistent in this respect in his written and oral evidence.

219. It is not disputed that the Kenya deployment was a tough training exercise and Corporal Kinnell's explanation is, in that context, not only consistent but plausible. Furthermore, given the accepted friendship between Corporal Kinnell and both claimants (and in particular Mr Zulu), both of whom are from African countries, it is unlikely that he would be seeking to make derogatory comments about a country in Africa in their presence. Furthermore, Mr Zulu made no complaint about this to Sergeant Murray at the time when, as noted, he was quite capable of making and did make a complaint to Sergeant Murray about the "Nelson Mandela" comment and about operational decisions within the sniper platoon. Furthermore, in this respect Mr Zulu was quite capable of complaining about Corporal Kinnell specifically, as his concern about those operational decisions was to do with disagreement with Corporal Kinnell about those decisions and, as we shall come to, Corporal Kinnell was present (we shall come to the extent of his involvement in due course) at the "Nelson Mandela" incident. However, Mr Zulu did not make any complaint to Sergeant Murray about the alleged "shithole country" comment allegedly made by Corporal Kinnell, which is indicative that he did not have a problem, or certainly a significant problem, with it at the time.

220. For these reasons, we find on the balance of probabilities that Corporal Kinnell used an expression such as "shithole country" or something similar, but that he made the comment about the deployment/training exercise and not about the country itself (Kenya the deployment rather than Kenya the country); that he did not, therefore, as alleged, describe Kenya itself as a "shithole country"; that the claimants knew this at the time; that, as it was about the deployment, the comment was not related to race (it could have been used of any tough deployment anywhere in the world); that the claimants did not consider the comment to be a racist comment at the time; and that they were not offended by the comment (we reiterate in this respect that swearing per se is commonplace in the Army and that the claimants would not, therefore, have been offended by swearing per se).

<u>"Nelson Mandela" incident</u>

221. In his witness statement, Mr Zulu stated that, on the deployment in Kenya, during a platoon conversation, Private C stated that "Nelson Mandela is a

terrorist"; that this statement was supported by Corporal Kinnell; and that "both Corporal Kinnell and Private [C] knew that Nelson Mandela, who fought for the liberation of black people under the evil apartheid regime in South Africa, was a big part of my life and South Africa's history". No further context is given. However, in cross examination, Mr Zulu accepted that the comment had been made in the context of a political discussion between soldiers.

222. Mr Gue was not present at this incident and does not address it in his witness statement.

223. Corporal Kinnell gave evidence about this incident. His evidence was that he was present when the incident occurred; that at the time he was watching something on a tablet with earphones in and was not part of the conversation in question but that, as he could be called upon at any time, he effectively kept one ear open in case someone needed him; that he overheard someone make a comment that Nelson Mandela was a terrorist; that, given that he was watching something on his tablet, he didn't know who made the comment at the time; that on hearing the comment Mr Zulu, who was not part of the conversation, immediately jumped up and angrily addressed Private C; that because of this, whilst he had not seen who made the comment originally, Corporal Kinnell therefore assumed that it had been Private C who had done so; that once Mr Zulu had got up a heated argument commenced; that as a Corporal it was his duty to get the situation under control, so he removed his earphones, put his tablet down, and ushered everyone out of the room to go and eat as, by chance, it was dinner time, and in that way he diffused the situation; that at no time did he express any views on what had been said and that he did not join in the conversation; that he did not make any statement agreeing with the comment and that all he did was to disperse the soldiers and so bring the argument to an end.

224. There is no dispute that the comment that "Nelson Mandela was a terrorist" was made and we find that, in the light of Mr Zulu's attribution of that comment to Private C and Corporal Kinnell's assumption, based on Mr Zulu's reaction, that it was Private C who made it, that Private C did indeed make that comment.

225. Whilst they were in Kenya, Mr Zulu, as noted, complained about this comment to Sergeant Murray (and it was the only one of the allegations of things alleged to have been done in Kenya for the purposes of his claim which he did complain to Sergeant Murray about in Kenya). Whilst Sergeant Murray in his evidence confirmed that Mr Zulu did complain to him about the incident, we do not know whether or not his complaint was just about the comment made by Private C or whether he went on specifically to make a complaint that Corporal Kinnell specifically agreed with Private C that Nelson Mandela was a terrorist. We do not even know whether or not Mr Zulu complained to Sergeant Murray about Corporal Kinnell's handling of the incident in general.

226. Therefore, in the light of some of the previous inconsistencies in Mr Zulu's evidence, the fact that we do not have any evidence that Mr Zulu complained at the time that Corporal Kinnell specifically agreed with Private C,

and Corporal Kinnell's consistent denial that he did agree with Private C (in an explanation that gave detailed context of what he maintained happened), we find that on the balance of probabilities Mr Zulu has not proved that Corporal Kinnell did agree with this comment and we therefore find that he did not do so. We would add to our reasons for this finding that, given the very close friendship which existed at the time between Corporal Kinnell and Mr Zulu, it is unlikely that Corporal Kinnell would choose to endorse a statement where, knowing that his friend was a black South African, such endorsement would be likely to cause him offence; and that, as we have found, following this incident and the subsequent operational disagreements between Mr Zulu and Corporal Kinnell in relation to the sniper platoon, the friendship between Mr Zulu and Corporal Kinnell soured significantly, which may in turn in retrospect have impacted upon Mr Zulu's recollection of these events.

227. We find that Mr Zulu was indeed offended by the comment which Private C made; firstly, he is a black South African who, understandably, considered Nelson Mandela a big part of his life, so it is likely that he would be offended by the comment; secondly, his evidence was that he was offended; thirdly, Corporal Kinnell acknowledged that Mr Zulu was indeed offended, as was evident by his reaction, in relation to a conversation which he was not part of, in getting up and confronting Private C when he heard the comment in question; and fourthly, he complained to Sergeant Murray about it.

228. (Whilst the finding in this paragraph is not necessary to determine the issues which we have to determine, we find that (whilst we have found that Corporal Kinnell did not agree with the comment made by Private C) it is quite possible that Mr Zulu was offended by Corporal Kinnell's handling of the incident; this is not something asserted by Mr Zulu in his relatively brief evidence on the matter nor was it something which was put to Corporal Kinnell; however, it is one possible explanation of why this incident was part of the reason for the souring of the friendship between Mr Zulu and Corporal Kinnell.)

229. We turn to the question of whether Private C's comment was related to race. It is accepted that the comment was made as part of a political discussion. Furthermore, Mr Zulu was not a participant in that discussion (albeit he overheard the comment), so there is no evidence that the comment was directed at him which, if it was, might be an indicator that the comment about a black South African political leader was indeed being used in a way related to race. (Just to be clear, we are well aware of the distinction between purpose and effect in terms of the test as to whether a hostile environment has been created for the purposes of a harassment complaint and that that environment can be created regardless of whether or not the comment in question had the purpose or had the effect; however, we are not considering that part of the test here but are merely assessing, as a matter of fact, whether or not the comment about Nelson Mandela was "related to race".)

230. Whilst it goes without saying that we would certainly not regard Nelson Mandela as a terrorist, we note that Nelson Mandela was at one time indeed regarded as a terrorist, not only in apartheid South Africa but also by, for example, the US and UK governments. Distinctions depending upon individual

points of view at the time in relation to individuals who have been regarded by some as freedom fighters and others as terrorists are not common only to South Africa and one can think of any number of examples in other parts of the world where the individual in question is neither black nor African. Furthermore, we do not know any more of the context of the comment (other than that it was part of a political discussion) than the words "Nelson Mandela was/is a terrorist"; it could just as easily have been a reference to the fact that there was a time when Nelson Mandela was regarded as a terrorist by, for example, the US and UK governments. For these reasons, we find that, on the balance of probabilities, Mr Zulu has not proven that Private C's comment was related to race (notwithstanding that, as we have found, he was very offended by it).

<u>Telling locals to "fuck off" and children begging for food "fuck off you shit cunts"</u>

231. First of all, it is agreed that, notwithstanding what is set out in the list of issues, the allegation of the expression used is actually to "shit cunts" and not "shit cans".

232. The witness statements of both claimants, in the section about what they say they experienced on the November 2017 Kenya deployment, refer to the claimants having heard their colleagues telling the Kenyan locals to "fuck off" and telling children who were begging for food to "fuck off you shit cunts". They give no further context beyond this.

233. The context of this allegation, which does not appear to be disputed, is that, when deploying to Kenya, members of 3 PARA are told that there will be a lot of beggars (as indeed there are) and that they should not feed them; that that is because a lot of them are children and that they run around the vehicles if they are encouraged to do so, which puts them in danger of getting run over; that it is in fact a disciplinary offence to give food to the locals; and that beggars will therefore be ignored or told to get out of the way of the lorries.

234. In his witness statement, Corporal Kinnell, when describing what is set out in the paragraph above, referred to there being a lot of beggars, a lot of whom are children, and that they would "swarm" around their vehicles if soldiers encourage them by giving food. Mr Milsom submits that the use of the word "swarm" is dehumanising language which should lead to the tribunal accepting that the comments alleged by the claimants were indeed made. We accept that Corporal Kinnell could have chosen a better word in his witness statement; however, we do not consider that it indicates a dehumanising attitude either on his part or on anyone else's; it is merely his way of describing the very large number of children which would surround the vehicles. In any event, we do not consider that the use of this word has any impact upon whether or not his evidence of whether the expression was used should be accepted or not.

235. Corporal Kinnell, who as noted was present on the 2017 deployment to Kenya, gave evidence that as far as he was aware members of 3 PARA had not told local Kenyans to "fuck off" or told child beggars to "fuck off you shit cunts". He went on to say that certainly he would not have tolerated any of the soldiers talking to people in that way.

236. In the claimants' original service complaints of February 2018, no reference was made to these expressions being used. In their updated service complaints of March 2018, the claimants state "as an example of incidents that have happened historically (prior to the most recent deployment to Kenya), Kenyan children… have been called "shit cunts" to their faces". On their own service complaints, therefore, these allegations appear to be about things which happened in previous deployments, the last of which was in 2015, and not the 2017 deployment as alleged in their claim forms and the lists of issues.

237. No complaint about these alleged comments was made to Sergeant Murray whilst in Kenya in 2017, in other words at the time when they were allegedly made. In his oral evidence, Sergeant Murray said that the phrase "shit cunts" was mentioned to him by Mr Gue at some point in January 2018; he was unclear as to exactly when and accepted that his recollection of the sequence of events back in and around January 2018 was "blurry". First, in terms of timing, Mr Gue must have said this to Sergeant Murray only after he had handed in his NTT (as he was not back in the country prior to then) and therefore at a time when he had taken the decision to leave and was soon to embark upon the process of putting in his service complaint which, on his own admission, was a means to enable him to bring an employment tribunal claim. Secondly, and more significantly, whilst we accept that Sergeant Murray was undoubtedly doing his best to recall and give an honest and truthful account, it is entirely unclear as to whether Mr Gue mentioned the expression as a previous example or of something which happened during the most recent deployment to Kenya.

238. In the light of that, we accept in the circumstances that, as Mr Tibbitts submits, the written service complaints of the claimants should be preferred and that even the claimants' original allegations themselves therefore related to a previous deployment and not the 2017 deployment; and that, taking that into account and the evidence of Corporal Kinnell that as far as he was aware such comments were not made on the 2017 deployment, on the balance of probabilities those comments were not made on the 2017 deployment.

239. It is not necessary to find any facts in relation to previous deployments as those are not the subject of the allegations before this tribunal and we do not, therefore, make any findings one way or another as to whether such comments were made on previous deployments. We would note, however, that we have heard evidence that the expression "shit cunts" is an expression that is commonly used in 3 PARA in general, and therefore not just in Kenya, and that it is not therefore an expression that is, if it were used at all on previous deployments to Kenya, confined to use in relation to black or African people and therefore is not related to race. That sort of expression, and indeed the use of the word "fuck", are, whilst unpleasant, commonplace in general in both 3 PARA and the Army.

<u>Conversations in Kenya</u>

240. As noted, the claimants and Corporal T were very close. It is clear that at some point around this time, probably in Kenya, the claimants and Corporal T

had a discussion about their prior experiences of racism. Mr Gue felt strongly on hearing Mr Zulu's and Corporal T's recounting of two specific historic incidents (the September 2014 incident with Sergeant B in the case of Mr Zulu and the October 2016 defacing of his room in the case of Corporal T), the first of which he described in his witness statement as having "infuriated" him. Both these incidents were subsequently referenced by Mr Gue in his resignation letters of 8 January 2018 and he recounted them during the covert recordings on 10 January 2018.

Action taken following Mr Gue's NTT

241. As noted, further to Mr Gue's serving his NTT and his letters alleging discrimination, Colonel Hargreaves conducted an interview with Mr Gue on 10 January 2018 (which was covertly recorded by Mr Gue). As also noted, Mr Gue was unwilling to provide the names of anybody involved in racist incidents. Colonel Hargreaves then addressed the battalion at the battalion cross brief on 11 January 2018 about racism and discrimination. The following week, Captain Perzylo briefed the corporals' and sergeants' messes and Colonel Hargreaves briefed the officers' mess that some incidents had occurred, that this behaviour was unacceptable and that it needed to stop immediately with a continued focus on cultural change and inclusivity. On 19 January 2018, Colonel Hargreaves again addressed the battalion on this. Captain Perzylo conducted a number of interviews with soldiers from a minority background within the battalion to investigate what if anything they might be aware of. Colonel Hargreaves directed an investigation into racism within the battalion which was ongoing; it included anonymous surveys, a climate assessment and interviews once A and B companies were back at the barracks.

242. The RMP were made aware of the 23 January 2018 graffiti incident on the same day that it was discovered.

Sniper rifles incident

243. When Mr Zulu returned to the UK in January 2018, he was preparing for special forces training. Colonel Hargreaves had agreed to give him time off to prepare for the course. Corporal Kinnell did not know that Mr Zulu had been given this time off to prepare.

244. Towards the end of January 2018, 3 PARA was facing an inspection, which meant that all kit had to be cleaned and ready for the inspection. Corporal Kinnell was in the armoury cleaning the sniper rifles on his own; he was annoyed about this as it was a major task and some assistance would have been very welcome. Corporal Kinnell asked Sergeant Murray if he could ask Mr Zulu to come and give him a hand. Mr Zulu alleges that Corporal Kinnell raised a complaint about him with Sergeant Murray and with the Company Sergeant Major. Corporal Kinnell's evidence was that he did not raise any such complaint. Sergeant Murray's evidence (and we reiterate that Sergeant Murray is friends with both claimants) was that Corporal Kinnell did not raise any complaint and, as Corporal Kinnell maintains, merely asked if Mr Zulu could come and help him. We have seen no record of any complaint. We therefore prefer the corroborating

evidence of Corporal Kinnell and Sergeant Murray and find that Corporal Kinnell did not make any complaint about Mr Zulu.

245. As Mr Zulu was not free to come and assist (because he had been granted time off to prepare for special forces training), Sergeant Murray explained this to Corporal Kinnell and he immediately accepted that Mr Zulu could not come and assist him.

246. In his witness statement, and as part of his claim, Mr Zulu alleges that another Corporal, Corporal D, who had also been given time off to prepare for special forces training, had no complaint raised about him by Corporal Kinnell. We have already found that Corporal Kinnell did not raise a complaint about Mr Zulu. He did not raise one about Corporal D either. More to the point, Corporal Kinnell could not have asked Corporal D to come and assist with cleaning the sniper rifles as only certain members of the sniper platoon were authorised to clean these weapons and Corporal D was not part of the sniper platoon and therefore not so authorised. Corporal Kinnell did not therefore even ask Corporal D to come and assist with cleaning the sniper rifles, let alone make a complaint about him.

247. Mr Milsom's written submission on this issue focuses on Corporal Kinnell having asked Sergeant Murray to ask Mr Zulu to assist him. As such, it appears now to be argued that the mere request for assistance amounted to a complaint. However, that is not what Mr Zulu's witness statement says; he clearly references an allegation that Corporal Kinnell raised a complaint about him. As a matter of plain English, we find that asking someone to ask someone else for assistance does not amount to a complaint.

<u>23 January 2018 graffiti incident</u>

248. As already referenced in our general findings of fact, the incident when the photographs on Mr Gue's door were defaced occurred on 23 January 2018.

<u>7 February vandalism incident regarding Corporal T</u>

249. On 21 March 2018, Corporal T raised a service complaint. Corporal T made an allegation that, on 7 February 2018, whilst on an exercise in Jordan, he found that his notebook had been vandalised with racial slurs such as "nigger" and "paki"; and that the slurs had been written over several pages which had been ripped out of his notebook and left all over his bed space. Corporal T reported this through the chain of command and Colonel Hargreaves became aware of this straightaway (as is reflected in notes of his which we have seen). Colonel Hargreaves directed an investigation to be conducted which was completed on 14 February 2018 and sent to him. Colonel Hargreaves decided that he needed to interview Corporal T himself when he visited Jordan and he duly did so. Corporal T confirmed to Colonel Hargreaves that he was unable to identify anyone over the racist slurs and that this was the only incident that happened to him since joining B Company in April 2017. Colonel Hargreaves recovered the notebook, took it back to the UK with him and handed it to the

RMP. Corporal T informed Colonel Hargreaves that he intended to make a service complaint, which he duly did on 21 March 2018.

250. As noted, the respondent keeps an "Equality and Diversity Complaint Log (Harassment and Bullying)". Furthermore, the respondent's policy states that all complaints will be recorded. The 7 February 2018 notebook graffiti incident alleged by Corporal T is not recorded in the Equality and Diversity Complaint Log; nor, as already noted, is the October 2016 allegation that Corporal T's door had been defaced with racist graffiti, which Corporal T reported to his platoon sergeant at the time.

Leaving drinks

251. In their witness statements, both claimants made reference to an incident that allegedly happened at their leaving drinks on 25 May 2018 involving another Corporal in the sniper platoon and them. The incident does not form part of the allegations before this tribunal and it post-dates all of the allegations of discrimination/harassment which are the subject of these proceedings. The Corporal in question was (unsurprisingly given the lack of relevance to the issues which we have to determine) not called to give evidence to the tribunal. Therefore, and particularly as what did or did not happen at those drinks is not relevant to the issues which we have to determine, we make no findings in relation to it.

The handling of the claimants' service complaints

252. We set out below various findings of fact in relation to the handling of the claimants' service complaints, which are relevant to the allegation that there was an unreasonable breach of the ACAS Code such that it is just and equitable that a percentage increase in compensation should be made.

253. The respondent, unlike other employers, is bound by statute to handle service complaints in a certain way.

254. Colonel Hargreaves promptly upon receipt of the service complaints held individual meetings on 5 March 2018 with the claimants, who were given the opportunity to clarify their complaints. As part of the process, the claimants were afforded the assistance of an "assisting officer" to provide advice and support and that assisting officer attended those initial meetings with them.

255. There was an overlap between the contents of the service complaints and any criminal investigations carried out by the RMP, in particular in relation to the vandalising of Mr Gue's photographs, which was regarded as potentially a criminal act. The RMP is part of the respondent. However, the respondent was advised that any criminal investigation by the RMP had to take precedence over a service complaint investigation and provided the RMP with the service complaints from the outset to investigate those matters of a potentially criminal nature.

256. Following the meetings in early March 2018, the respondent continually kept the claimants updated as regards why their service complaints were stayed (because of the RMP investigation) and, latterly, what was needed from them in order to remove the stay and proceed with the service complaint process.

257. Mr Gue was initially reticent to give a statement to the RMP and Colonel Hargreaves repeatedly chased him to give his statement to the RMP so that investigations could proceed. There was some confusion initially when Mr Gue first attended to meet the RMP which meant that that meeting did not go ahead; however, that confusion was swiftly resolved and any further delay in the RMP interviewing Mr Gue was down to Mr Gue being unwilling to attend.

258. Mr Gue initially refused to provide to the RMP for forensic examination the original photographs which were defaced and only finally agreed to the release of those photographs a year later.

259. Mr Gue specifically told the RMP in his interview he did not want to complain about certain matters. This caused confusion for the respondent when the report from the RMP was then produced on 20 April 2018 which did not deal with other criminal matters which the respondent believed were being investigated by the RMP.

260. The respondents took advice from the service complaints and legal team as to how to proceed in the light of that anomaly. Captain O'Neill of the RMP responded explaining the need for formal statements of complaint in order for the RMP to take matters forward on 19 June 2018. The respondent therefore wrote to the claimants on 28 June 2018 offering them the opportunity for a criminal investigation to be undertaken in respect of the other matters and notifying them of the requirement for a formal statement of complaint to be made and urging them to make that to the RMP.

261. The claimants' legal representatives replied on 6 July 2018 explaining the reluctance of the claimants to provide further statements and asking for the RMP to rely on the statements already provided. This appeared to be essentially asking for the RMP investigation to continue but refusing to provide further statements.

262. Therefore, a fuller letter was sent on 16 July 2018 explaining clearly the position to the lawyers representing the claimants. This letter, from the service complaints secretariat, made clear that criminal matters had to take precedence but stated "if your clients are unwilling to engage further with the RMP, please could you inform us and we will instruct the Specified Officer to continue with the service complaints". At that point, therefore, the claimants just needed either to provide formal statements to the RMP or confirm that they wished their service complaints to proceed without RMP investigation.

263. On 31 July 2018, Mr Zulu confirmed that he would not make a further statement for the RMP; however, Mr Gue purported to do so by a pre-prepared statement. That led to a further delay (given the similarity of complaints raised by the respective claimants) and the fact that the statement provided by Mr Gue was

not a formal "section 9" statement for the RMP's purposes. Captain Bryning and the claimants' assisting officer then chased Mr Gue for confirmation as to whether he would provide a formal statement or not. Mr Gue did not respond.

264. Ultimately Mr Gue did not provide a formal statement to the RMP. The "Specified Officer" therefore proceeded with the service complaints, the first task in relation to which was to make admissibility decisions as per the service complaints process prescribed by statute. This the Specified Officer did in early November 2018.

265. Under the statutory procedure, certain complaints which would otherwise be admissible in employment tribunal proceedings are not in fact admissible for the purposes of the service complaints procedure. The Specified Officer decided that some of the complaints under the claimants' service complaints could proceed but that others were inadmissible in accordance with the rules.

266. The claimants were entitled under the statutory procedure to appeal this decision. They did so on 7 December 2018. Whilst they were perfectly entitled to do so, this caused further delay in dealing with the service complaints.

267. The statutorily prescribed course of appeal over the admissibility decision was to the Service Complaints Ombudsman ("SCO"), an independent body over which the respondent had no control. The SCO upheld the respondent's decision in relation to the complaints which the respondent had deemed inadmissible. However, it also went on (ultra vires its own powers) to decide that certain other complaints within the service complaints, which the respondent had deemed admissible, were not in fact admissible. It made its decision on 9 January 2019.

268. Within a matter of days of the SCO's decision, Brigadier Perry held initial decision body meetings without delay with each of the claimants as required under the service complaints process (on 11 January 2019 and 14 January 2019 respectively).

269. Because the SCO had gone beyond its authority in terms of the decision it made on appeal, the respondent (quite reasonably) sought further legal advice in this respect. On 20 February 2019, following this, the respondent confirmed (in the claimants' favour) that the service complaints team would not be following the SCO's adverse recommendation in respect of admissibility in relation to the further complaints which the SCO had (ultra vires) deemed inadmissible. This was a highly complicated situation in the light of the statutory constraints.

270. Thereafter, meetings were attempted to be held with the claimants and a further decision board meeting was held with Mr Zulu on 25 March 2019.

271. On 28 May 2019, however, the service complaints were stayed again pending further RMP investigations and remain stayed as at the time of this hearing.

Further findings of fact relevant to the statutory defence

272. There were various documents in place within 3 PARA at the relevant times in relation to equality and diversity, including those set out in the paragraphs below.

273. Firstly, there is the 3 PARA "Equality, Diversity and Inclusion Plan", which is renewed annually, and stresses the need for all those in leadership positions to take ownership of equality, diversity and inclusion and ensure that all staff, military and civilian, are treated fairly, irrespective of (among other characteristics) race and ethnic origin.

274. Secondly, there are the 3 PARA Commanding Officer Equality and Diversity/Diversity and Inclusion statements. The express purpose of these annual statements is to ensure that 3 PARA complies with the requirements of both 16 Air Assault Brigade and the British Army diversity and inclusion policies. They emphasise the ethos of 3 PARA as being free of bullying and harassment and supporting diversity; they are displayed on all company noticeboards and must be complied with by all members of the battalion. They provide for a battalion equality and diversity adviser and an assistant to whom complaints can be taken and from whom advice can be obtained.

275. Thirdly, there is Colonel Hargreaves' command philosophy statement. This was issued to all commissioned and non-commissioned officers by Colonel Hargreaves when he took over as commanding officer in September 2016. The statement set out the baselines for how the battalion should operate. It also specified three "red lines", the transgression of which would not be tolerated: discrimination or harassment of any kind, substance abuse, and lack of integrity. One of the key points of the philosophy is that 3 PARA must work as a cohesive unit, with its members all respecting and trusting each other, and it is inherent in the statement that any actions by battalion members which in any way undermine that cohesion will be dealt with decisively. (Colonel Hargreaves cited the action which he took in relation to the "Nazi flag" incident as being an example of dealing with such a situation decisively.)

276. These policies and philosophies were disseminated to the entire battalion, during individual meetings and wider briefings and presentations.

277. Both Mr Zulu and Mr Gue accepted in oral evidence that part of their initial training prior to joining 3 PARA was on equality and diversity and that they underwent a workplace induction programme on arrival at 3 PARA of which one part was equality and diversity training.

278. In addition, all military personnel were and are required to undertake military annual training tests ("MATT"s), one of which (MATT 6) covers equality and diversity in the context of values and standards. We have seen the slides used in the MATT 6 training, which are extensive and which cover the sort of issues which one would expect to see in equalities training. MATT 6 is, as Colonel Hargreaves confirmed, continually reviewed and evolves.

279. In the claimants' respective meetings with Brigadier Perry on 11 and 14 January 2019, MATT 6 training was discussed.

280. In the meeting with Mr Zulu, Brigadier Perry states:

"Secondly, you ask that MATT 6 further education is required and I'm sure you know this, that MATT 6 is mandatory. I accept your comments that it's often not done properly, not done properly, it's kind of cursory and a tick box.

I'm in the process of working with others actually at the moment to review the content of the MATT 6 and particularly the way it's delivered and see if we can't improve that very, very significantly and make it hard-hitting."

281. In the meeting with Mr Gue, Brigadier Perry states:

"Great. So, MATT 6, further education required. I think that you're aware MATT 6 is mandatory, but I'm aware and have understood from discussion with others, that it could be done a lot better. We're going to review how it's done. The content of the MATT 6, the way it's delivered in the Brigade, to make sure that particularly the bits that deal with racism are specifically - and discrimination more broadly - are not watered down by cramming a whole load of other stuff into MATT 6 that sort of an hour lesson that is trying to cover too much and that people are just in there to tick the box."

282. We also heard evidence, which we have no reason to doubt and therefore accept, that the quality of the MATT 6 training is variable depending on who is giving it.

283. As well as the equality and diversity adviser and assistant referred to above, there were, as both Mr Zulu and Mr Gue accepted, various support groups which they could access such as the speak out helpline, the Army wide BAME network and the Army mediation service. Both Mr Zulu and Mr Gue accepted that they had not sought out support from any such sources at any point.

284. Mr Gue accepted in oral evidence that the individuals responsible for the incidents complained of were only a small handful. He also told RCMO Proud in his covertly recorded interview with him on 10 January 2018 that it was "like 1%, not even 1%".

285. We have already noted that, when incidents arose, Colonel Hargreaves addressed the whole battalion following those incidents; in those addresses, he made it clear what had arisen and how it was not acceptable and would not be tolerated.

286. Prior to the deployment to Kenya in October/November 2017, Colonel Hargreaves again addressed the battalion on cultural awareness and discrimination. Mr Gue, in one of his covertly recorded interviews on 10 January 2018, described this address as "spot on".

287. We have already set out the measures which Colonel Hargreaves took following receipt of Mr Gue's NTT and letters on 8 January 2018, including addressing the battalion and setting up anonymous surveys, a climate

assessment and interviews etc. During Mr Gue's oral evidence, it was put to him that it could not have been made more clear to the battalion between 10 January 2018 and 23 January 2018 by Colonel Hargreaves that racist behaviour would not be tolerated; Mr Gue accepted first that Colonel Hargreaves "did what was necessary" and then confirmed "yes, he did all he could".

Conclusions on the issues

288. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Harassment and direct discrimination

289. We turn first to the issue of which of the claimants' allegations of unwanted conduct/less favourable treatment have actually been established (in terms of whether the conduct alleged has been proven to have taken place).

290. We refer to the findings of fact we have made in respect of the various allegations in full, without repeating them here. However, in summary, the following allegations have not been factually established and therefore fail, both as allegations of harassment and direct discrimination, at the first hurdle:

1. 2(ii): this allegation was withdrawn and is dismissed.

2. 2(iii): we found that it was not proven that Confederate flags were displayed.

3. 2(iv): we found that it was not proven that anyone at the respondent posted a photograph of 3 PARA members with Tommy Robinson in October 2017.

4. 2(vi): we found that it was not proven that BATUK warned staff not to behave badly as they would "go to prison and get AIDS".

5. 2(vii): we found that it was not proven that Corporal Johnson used the actual or equivalent words "look at these idiots running, fucking niggers don't have a clue".

6. 2(viii): we found that it was not proven that Sergeant A referred to Kenyan soldiers as "African animals".

7. 2(ix): we found that it was not proven that Corporal Kinnell described Kenya as a "shithole country".

8. 2(xi): we found that it was not proven that soldiers told locals to "fuck off" and children begging for food "fuck off you shit cunts".

9. 5(ii) (direct discrimination only): we found that it was not proven that Corporal Kinnell made a complaint about Mr Zulu undertaking preparation time for his training course. (We would add that, in

relation to this direct discrimination complaint, Corporal D, whom Mr Zulu cited as his comparator, was not a valid comparator because, as he was not part of the sniper platoon, Corporal Kinnell could not have asked him (and indeed did not ask him) to assist him in cleaning the sniper rifles. There was therefore a material difference between Corporal D's circumstances and those of Mr Zulu.)

291. This therefore leaves allegations 2(i) (two different allegations in respect of each claimant); 2(v); 2(x); and 2(xii).

292. We now address each of those remaining allegations in turn, considering the extent to which they are factually proven and the relevant statutory tests, including the questions of (for the purposes of the harassment test) whether the allegations are of unwanted conduct, whether they are related to race and whether the relevant environment has been created (as a result of each individual allegation or cumulatively) and (for the purposes of the direct discrimination test, to the extent it remains relevant having considered harassment) the question of whether the act in question amounted to less favourable treatment of the relevant claimant because of race. Thereafter, we go on to consider the jurisdictional/time limits points. Mr Tibbitts suggested that we should consider the jurisdictional/time limits points before the "environment" points for the purposes of the harassment complaints; however, we do not think that it matters in this case and for ease of reference and the flow of the decision, we have decided to consider the points in the order which we have set out above in this paragraph.

2(i) (Mr Gue only): vandalising of Mr Gue's accommodation in January 2014

293. We found that, on more than one occasion in late 2013/early 2014, Mr Gue's accommodation was vandalised, including racist slurs being written on the doors, by a member or members of 3 PARA (other than Mr Gue or Private J). The conduct complained of is therefore proven.

294. This conduct was inherently unpleasant and was clearly unwanted conduct; the fact that Mr Gue chose to change his name and move companies shortly afterwards only backs this finding up further.

295. Given the racist slurs were part of the vandalism, the conduct was clearly related to race.

296. Furthermore, we find that in itself, this conduct at the very least had the effect of violating Mr Gue's dignity and creating an intimidating, hostile, degrading humiliating and offensive environment for Mr Gue. The conduct was of an extremely unpleasant nature; furthermore, the fact that Mr Gue changed his name and changed companies shortly afterwards is further indicative of the seriousness of the impact which it had upon him. (We make no finding about what the purpose of the conduct was in the absence of the individual who did it; however, it is not necessary to do so given that the effect was so clear.)

297. Subject to our conclusions below regarding jurisdiction, this complaint of harassment would therefore have been made out. As the complaint of harassment would have been made out, it is not necessary to go on and consider it as a complaint of direct discrimination (although we should note that the same jurisdictional arguments would apply in relation to this complaint as one of direct discrimination just as much as they apply to it as a complaint of harassment).

2(i) (Mr Zulu only): the handling of Mr Zulu's leave request and response by Sergeant B in September 2014

298. As we have found, and as is not disputed, Sergeant B did refer to Mr Zulu as a "black cunt" in September 2014. The conduct complained of is therefore proven.

299. The expression used is clearly related to race.

300. The comment was unwanted; Mr Zulu was deeply offended by the remark, as was evident to others around him at the time. That is hardly surprising, given that it was a deeply offensive racial remark.

301. Furthermore, we find that in itself, this conduct at the very least had the effect of violating Mr Zulu's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for Mr Zulu at the time. The conduct was of an extremely unpleasant nature and Mr Zulu was deeply offended by it. (We make no finding about what the purpose of the conduct was in the absence of the individual who made the remark (all we have before us is what Sergeant B said at the time the incident was investigated, namely that he intended the remark as a joke, implying that he did not intend to cause offence); however, it is not necessary to do so given that the effect was so clear.)

302. Subject to our conclusions below regarding jurisdiction, this complaint of harassment would therefore have been made out. As the complaint of harassment would have been made out, it is not necessary to go on and consider it as a complaint of direct discrimination (although we should note that the same jurisdictional arguments would apply in relation to this complaint as one of direct discrimination just as much as they do to it as a complaint of harassment).

2(v): posting a photograph of personnel in July 2017 with Nazi flags as a backdrop

303. As we have found, a member or members of 3 PARA did post a photograph of personnel on Facebook in July 2017 with a Nazi flag as a backdrop. We do not repeat all of the surrounding details and context here and refer back to our findings of fact in this respect, but simply note that the alleged conduct is proven.

304. Whether or not the individual or individuals either posed for the photograph or posted it as an act of thoughtless stupidity or not, we consider that, as the photograph was in front of a Nazi flag and given the racial implications of that flag, the conduct was related to race.

305. We accept that, from the point of view of Mr Gue and Mr Zulu (and also, clearly, from the point of view of the chain of command), this conduct was unwanted.

306. In terms of the environment created, there is no evidence before us to suggest that the soldiers who posted the photograph did so with the purpose of violating the dignity of either Mr Zulu or Mr Gue or of creating an intimidating, hostile, degrading, humiliating or offensive environment for either of them; to the contrary, it is hardly likely that they had Mr Gue or Mr Zulu in their minds when they carried out this act. We do not, therefore, find that the "purpose" element of the test is proven.

307. As to "effect", both Mr Zulu and Mr Gue confirmed that they did not actually see the post on Facebook, but rather became aware of the photo through messages which they say were sent within 3 PARA. The matter was openly spoken about by Colonel Hargreaves, who addressed the battalion shortly afterwards, emphasising how this type of behaviour was unacceptable. Mr Gue accepted that "we all knew about it" and accepted that "everyone knew this type of behaviour was not accepted and that sanctions would follow" and that the individuals involved "knew they'd get punished". The penalties which Colonel Hargreaves imposed on the individuals involved were, as both Mr Zulu and Mr Gue accepted, extremely severe. Neither claimant made any complaint about the Facebook post at the time. Furthermore, as they accepted in evidence before this tribunal, the claimants did not (with the exception of the incidents referred to above back in 2013/2014 at allegations 2(i)) feel violated or offended until the treatment which they say they were subjected to in Kenya, which post-dated this incident; even in terms of the claimant's own perception, therefore, the incident did not have the relevant effect. Nor is there any evidence to suggest that, taken with the respective incidents from 2013/2014, there was a cumulative effect to which the Nazi flag incident contributed; quite the contrary, there was a gap of roughly three years between the incidents during which both claimants accepted that there were no other incidents which were problematic to them in terms of racial harassment. We also remind ourselves of the high standard for establishing the relevant environment as set out in our summary of the law above. For all of these reasons, we find that the posting of the photograph on Facebook did not have the effect of violating either claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for either claimant.

308. These harassment complaints therefore fail.

309. As regards direct discrimination, the act of posting the photograph was nothing to do with the claimants and was not an act which amounted to "treatment" of either claimant, let alone less favourable treatment, so it cannot stand as an allegation of direct discrimination. These complaints therefore also fail.

2(x): Private C describing Nelson Mandela as a terrorist and Corporal Kinnell's agreement of the same

310. Firstly, we have found that Corporal Kinnell did not agree with the statement that Nelson Mandela was a terrorist; that part of this allegation is therefore not proven.

311. We have found that Private C did make a comment that Nelson Mandela was a terrorist. That part of the factual allegation is therefore proven.

312. However, we have also found that the comment was not related to race. We refer in full to our findings of fact in this respect, which we do not repeat here. These allegations of harassment therefore fail.

313. Whilst it is not, therefore, strictly necessary to go further in terms of these harassment allegations, we set out for completeness' sake the conclusions in the paragraphs below.

314. As we have found, Mr Zulu was indeed very offended by the comment. That much is evident from the fact that he is a black South African to whom Nelson Mandela was a hero; the fact that he immediately got up and confronted Private C; and the fact that he complained to Sergeant Murray about this incident. The comment was, therefore, unwanted.

315. In terms of the environment, it appears that Mr Zulu was not part of the discussion in question and there is no evidence that the discussion was directed at him; it is not, therefore, proven that Private C's comment was made with the purpose of violating Mr Zulu's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

316. In terms of effect, as noted, Mr Zulu was unquestionably offended by the comment. In terms of his personal perception, the offence caused was great. Furthermore, in terms of whether or not it was reasonable for him to have been so offended, in the light of his particular characteristics of being a black South African to whom Nelson Mandela was a hero, we do not consider that it was unreasonable for him to have been so offended. However, we again remind ourselves of the high test set out in our summary of the law above for establishing the environment in question. We would not go so far as to suggest that a political discussion containing this remark, albeit on a topic of such a sensitive nature to Mr Zulu, had the effect that Mr Zulu's dignity was violated or that an environment which was intimidating, hostile, degrading or humiliating was created. We pause briefly in considering the word "offensive". However, whilst Mr Zulu was certainly "offended", we remind ourselves of the guidance referred to in our summary of the law above (in Dhaliwal, Hughes, Grant and most especially Weeks and Henderson) and in particular that the relevant issue is whether an "environment", which means a state of affairs, was created and that, while such an environment may be created by a one-off incident, its effects must be of longer duration to come within the terms of the EA 2010. In the light of that, we conclude that, whilst Mr Zulu was undoubtedly offended by the comment, this was a one-off incident, the effects of which in terms of creating an "environment"

were not of longer duration, and the remark did not therefore create the “offensive environment” for him required for it to fall within the legislation.

317. These allegations, therefore, also fail on the basis that the conduct in question had neither the requisite purpose nor effect.

318. As the harassment complaints have failed, we therefore consider the allegations as ones of direct discrimination. As noted, the context of the conduct was a political discussion to which Mr Zulu was not party. The remark by Private C was not therefore treatment of Mr Zulu at all, let alone less favourable treatment of him. Furthermore, it was not made because of race. For these reasons, therefore, the direct discrimination complaints also fail.

2(xii): the graffiti discovered on 23 January 2018

319. It is not disputed that graffiti was discovered on Mr Gue’s photographs on 23 January 2018. Furthermore, the response accepts that the graffiti was not done by either of the claimants and must have been done by a member of 3 PARA. The conduct in question is therefore proven.

320. The three photographs on the door to Mr Gue’s room had been defaced. The words “fuck off” together with a swastika had been written on one photo of Mr Gue and Mr Zulu; someone had drawn a swastika and a Hitler moustache on a photo of Mr Gue; and, on a photograph of Mr Gue and Mr Zulu and another (white) Private, the word “niggers” had been written across Mr Gue and Mr Zulu. The graffiti was, therefore, unquestionably related to race.

321. The conduct was unquestionably unwanted; the graffiti in question was of the most unpleasant nature, set out on Mr Gue’s personal photographs and was racially highly offensive.

322. Notwithstanding the fact that the perpetrator is still unknown and was not before the tribunal to give an account of his/her motivation, we find that the carrying out this act was so unpleasant that it can only have been done with the purpose of violating the claimants’ dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for them.

323. For completeness sake, the conduct also had the effect of violating the claimants’ dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for them. They were both (entirely understandably) deeply offended and made complaints; indeed, in the case of Mr Zulu, as we shall come to, this act was key to his decision to leave the Army. Furthermore, given the deeply offensive nature of the graffiti, it is entirely reasonable for it to have this effect.

324. These allegations of harassment are therefore established and succeed in relation to both claimants.

325. It is not, therefore, necessary or appropriate to consider the matter as an act of direct discrimination.

Jurisdiction - time limits

326. The claimants presented their claims on 14 August 2018. They were in ACAS early conciliation between 7 March 2018 and 7 April 2018. Therefore, allowing for the extension of time for ACAS early conciliation and the fact that members of the Armed Forces have six months to present their claims before an employment tribunal, any complaints which have been presented for which time starts to run prior to 15 January 2018 are prime facie out of time.

327. Of the three allegations which remain following the analysis in the sections above (2(i) in respect of each claimant; and 2(xii)), it is not therefore disputed that allegation 2(xii), the racist graffiti discovered on 23 January 2018, was presented in time. By contrast, the allegations at 2(i) of vandalising Mr Gue's accommodation (late 2013/early 2014) and Sergeant B's race-related remark about Mr Zulu (September 2014) were presented prime facie considerably out of time.

Conduct extending over a period

328. We turn first to the question of whether either of these allegations can amount to conduct extending over a period together with the 23 January 2018 graffiti complaint such that they can be considered to be in time.

329. In his written submissions, Mr Milsom submits that all of the allegations which the claimants brought were indisputably a continuing state of affairs bar the September 2014 Sergeant B comment in relation to Mr Zulu; he goes on to say, however, that he considers that the better view is that the ongoing state of affairs should also encompass that incident but sets out no further reasons for this. Save for the general comment referred to above, he does not address the 2013/2014 vandalism incident in relation to Mr Gue in terms of alleging it as being part of conduct extending over a period.

330. Mr Tibbitts specifically submits that neither of these two incidents form part of a continuing course of conduct with any of the later incidents alleged (although in light of the fact that the 23 January 2018 incident is the only "in time allegation" which has been proven, for either of the two 2013/2014 allegations to be in time, such allegation must be shown to have been part of conduct extending over a period specifically with the 23 January 2018 allegation). Mr Tibbetts makes a number of points, many of which we find persuasive, and which are included in our reasons set out below as to why we find that neither of those 2013/2014 allegations amounts to conduct extending over a period with the 23 January 2018 incident.

331. As regards the late 2013/early 2014 vandalism of Mr Gue's accommodation, this took place four years prior to the January 2018 incident, which is a huge time gap. Whilst there are some similarities regarding the vandalism of Mr Gue's accommodation in 2013/2014 and the defacing of the photographs in 2018 in terms of damage to property in a racist manner, it is not known who committed either incident and there is no suggestion that it was done

by the same person. Furthermore, the 2013/2014 incident was in fact, as we have found, several incidents in that period, all of which occurred when Mr Gue was in A Company. As he admitted, once he moved to D Company later in 2014, all of this stopped. Nothing further occurred for several years. We therefore find, on the balance of probabilities, that the vandalism in 2013/2014 was an isolated series of incidents at that time, when Mr Gue was in A Company, and do not, therefore, accept that it is proven that there is a connection between what happened to Mr Gue in 2013/2014 and the incident in January 2018. The four-year time gap between the two is also extremely significant. We do not, therefore, consider that this incident amounted to conduct extending over a period with the 23 January 2018 incident; accordingly, the complaint relating to the 2013/2014 vandalism was presented out of time.

332. As regards the September 2014 comment by Sergeant B in relation to Mr Zulu, there is a gap of considerably in excess of three years between that incident and the 23 January 2018 incident. Sergeant B left the armed forces in September 2015 (some 2½ years prior to the 23 January 2018 incident) so, in terms of any continuity of perpetrator, it could not have been Sergeant B who defaced the photographs in January 2018; it must have been someone else. The September 2014 incident was also of a somewhat different nature to the January 2018 incident; it was an open verbal comment made publicly in front of other soldiers, whereas the January 2018 incident was a secretive and surreptitious act of vandalism; whilst that does not detract from the offensive nature of the September 2014 incident, it does indicate that it was of a different nature for the purposes of considering whether or not it amounted to conduct extending over a period. Furthermore, Mr Zulu accepts that there had been no racially offensive language directed at him either at any time in his Army career (which commenced in 2008) prior to the September 2014 incident or at any time afterwards (prior to the 23 January 2018 incident). We therefore accept Mr Tibbitts' submission that the September 2014 incident was an isolated incident. It did not form part of a continuing course of conduct with the 23 January 2018 incident. It was, therefore, presented out of time.

333. Both of these complaints were, therefore, presented out of time and, in each case, very significantly out of time (four years and well over three years respectively).

Just and equitable

334. We turn now to the question of whether it is just and equitable to extend time in relation to either of these complaints and remind ourselves that the burden of proof in this respect is on the claimants.

335. We note that, were we to extend time, both of these complaints would be successful but remind ourselves that, whilst we may consider the merits of the complaints in question, this is not necessarily a definitive factor even if the claimants have a strong case (as per the decision in Ahmed). In fact, for the reasons set out below, we do not consider the otherwise successful nature of these complaints to be definitive, as there are strong reasons why it would not be just and equitable to extend time, including the extremely long delay in

presenting these complaints, the lack of an adequate explanation for that delay and the balance of prejudice against the respondent.

336. As Mr Tibbitts submits, neither claimant set out in their witness statements an adequate explanation for such a significant delay in presentation or why time should be extended on a just and equitable basis. Indeed, both claimants in cross examination accepted that they could have submitted a claim at the time and that they simply chose not to do so. The respondent in no way caused any such delay in presentation as service complaints about these matters were only first raised by the claimants on 21 February 2018.

337. Furthermore, as Mr Tibbitts further submits, given the historical nature of these complaints, the fact that persons such as Sergeant B have long since left the Armed Forces and the lack of any complaint regarding the incidents of vandalism in late 2013/early 2014 by Mr Gue at the time preventing any investigation into such matters, the delay in presentation has clearly prejudiced the respondent in its defence to these matters.

338. We also accept Mr Tibbitts' further submission that, conversely, given the successful complaint in relation to the graffiti in January 2018, the claimants will suffer limited prejudice should the 2013/2014 matters be dismissed for lack of jurisdiction, whether as regards any potential award of financial compensation or otherwise. (In relation to this and for the purposes of the causation issue, which we deal with in full below, we note that, although Mr Gue served his NTT prior to the January 2018 graffiti incident, he never suggested that the reason why he chose to serve his NTT was the vandalism back in 2013/2014 but rather gave other reasons as to why he chose to serve his NTT; indeed, he admitted that he did not serve his NTT because of the 2013/2014 vandalism; therefore, as we shall come to, the fact that he could not have served his NTT because of the 23 January 2018 graffiti incident (because it post-dated his service of NTT on 8 January 2018), which obviously damages irreparably his causation argument, would not be remedied by his being able to bring a complaint about the 2013/2014 vandalism, as on his own case this was not the reason why he served his NTT).

339. The prejudice to the respondent in extending time is therefore clearly far greater than to the claimants.

340. Furthermore, we also accept Mr Tibbitts' submission that, in a just and equitable context, the fact that both claimants at the time of the 2013/2014 events accepted that they did not ask for further action to be taken at the time is significant as a reason pointing to it not being just and equitable to extend time. Without detracting from the offensive nature of the incidents in 2013/2014 themselves, the claimants did not indicate at the time that they were unsatisfied with the way in which the respondent acted in relation to the incidents and/or the respective outcomes (informal resolution, as requested by Mr Zulu, in relation to the Sergeant B comment; and Mr Gue moving to D Company following the vandalism (about which Mr Gue, on mentioning it well after the event to Lieutenant Wood, specifically asked that no further action be taken)).

341. We therefore accept, as Mr Tibbitts submits, that, in the light of the fact that time limits are to be applied strictly and that the burden of proof is on the claimants to satisfy us that time should be extended, and for the reasons set out above, the claimants have not discharged the burden of showing that extending time is just and equitable. We do not, therefore, extend time.

342. Accordingly, we do not have jurisdiction to hear the complaints at issues 2(i) (respectively the vandalism of Mr Gue's accommodation in late 2013/early 2014 and Sergeant B's comment about Mr Zulu in September 2014) and these complaints are struck out.

Statutory defence

343. The single outstanding successful allegation of harassment related to race is the 23 January 2018 graffiti incident. Therefore, given that it is agreed between the advocates that actions taken which are relevant for the purposes of the statutory defence are those taken prior to the discrimination/harassment in question, it is action taken prior to 23 January 2018 which is relevant for these purposes.

344. Mr Milsom was clear that the claimants were not arguing that the respondent took no steps to prevent discrimination from happening.

345. Indeed, as we have set out in our findings of fact, there were a considerable number of important and very significant things which the respondent did in this respect. In summary, these include: the existence and publication of the various equality and diversity policies which we have referred to; the provision of an equality and diversity adviser and assistant to whom complaints can be taken and from whom advice can be obtained, as well as the availability of other support groups such as the speak out helpline, the Army wide BAME network and the Army mediation service; Colonel Hargreaves' command philosophy statement with its emphasis on discrimination or harassment as a "red line" the transgression of which will not be tolerated; and the mandatory annual MATT 6 equality and diversity training, as well as the initial training and workplace induction programme training on equality and diversity which the claimants (and presumably other new recruits as well) went through. They include the numerous addresses which Colonel Hargreaves made to the battalion, both in connection with the Nazi flag and Tommy Robinson incidents, prior to the 2017 deployment to Kenya, and following Mr Gue's service of his NTT; the investigation which he put in place following that which was to include anonymous surveys, a climate assessment and interviews (albeit many of these had not had the chance to have taken place by the time of the 23 January 2018 incident two weeks later). (Mr Milsom acknowledged that he thought that the carrying out of a climate assessment was a good idea and indeed so do we.) They include the extremely firm action which he took in relation to the Nazi flag incident, notwithstanding Colonel Hargreaves' conclusion that the action was one of stupidity rather than racial motivation. They include the support given and personal involvement which Colonel Hargreaves gave once Mr Gue had handed in his NTT, interviewing him personally (and indeed, the personal action he took in response to the graffiti incident involving Corporal T in February 2018,

interviewing him personally in Jordan and immediately involving the RMP (although that incident was after the 23 January 2018 incident, it is corroborative of how seriously Colonel Hargreaves took these types of matters)). Indeed, it is clear that the respondent did take these matters very seriously. We would add that Colonel Hargreaves in particular appeared determined to root out any racism that may have been there and should be complimented for his efforts to do so. Mr Gue himself acknowledged that Colonel Hargreaves' address on cultural awareness and discrimination prior to the 2017 Kenya deployment was "spot on" and that in relation to action which he took following Mr Gue's handing in of his NTT, Colonel Hargreaves "did all he could". Furthermore, the reason which Mr Gue, in his covertly recorded interviews in January 2018, gives for not naming names is that he doesn't want the individuals in question to lose their jobs; the implication of that is that he genuinely believed that, if they were found guilty of racist conduct, they would indeed lose their jobs, in other words that the respondent did indeed take such conduct so seriously that it would dismiss people for it.

346. However, the test for us to apply is not whether Mr Gue's opinion was that Colonel Hargreaves "did all he could". The test for us to apply, which we have set out in more detail in our summary of the law above, is whether or not the respondent took "all reasonable steps" to prevent discrimination/harassment from taking place. Mr Milsom has set out at paragraph 98 of his written submissions 11 examples of steps which he says were reasonable but were not taken. If we were to consider that any one of them was a reasonable step but was not taken, then it will be the case that the respondent had not taken <u>all</u> reasonable steps and the respondent will be unable to establish the statutory defence. We fully appreciate that the consequence of this is that it is very difficult for any respondent to establish the statutory defence because, however many reasonable steps it has taken, a claimant only has to point to one reasonable step which it did not take in order to preclude that statutory defence from applying; however, as set out in our summary of the law above, that is what we consider the legal position to be.

347. We consider Mr Milsom's 11 examples below:

> 1. Mr Milsom submits that the failure to maintain a comprehensive equality and diversity log was a failure to take a reasonable step. He accepts, as we do, that having such a log is good practice; however, he goes on to maintain that, having taken the decision to have such a log, failing to maintain it comprehensively was a failure to take a reasonable step. As we have found, the log has gaps in it; specifically, in terms of the gaps we have identified, it contains no reference to the incidents in October 2016 and February 2018 in relation to Corporal T, although both of those were escalated up the chain of command. We appreciate that the latter of these took place after 23 January 2018, but the former was before it. The respondent's policy states that all complaints will be recorded. There was, therefore, a failure to maintain a comprehensive log prior to 23 January 2018. We accept that the respondent therefore committed to recording such complaints but has not done so, something which we consider important as a means properly to record and therefore

deal with and deter discrimination. We therefore accept that its failure to maintain a comprehensive equality and diversity log was indeed a failure to carry out a reasonable step. Therefore, for this reason alone, the respondent cannot establish the statutory defence.

2. Mr Milsom submits that there was a failure to ensure "coordination amongst chains of command to ensure matters are properly escalated". He has not gone into any detail of what is said to have been a failure in relation to this so it is hard for us to analyse this. We accept that, in general terms, depending on the nature of a particular incident, there is a certain discretion involved in escalating incidents or dealing with them at a lower level and that therefore sometimes this is done and sometimes not. We do not, therefore, consider that there has been a failure by the respondent in this respect, let alone a failure to take a reasonable step for the purposes of the statutory defence.

3. Mr Milsom submits that there was a failure in terms of "moving MATT 6 away from a "box ticking" exercise… and/or ensuring consistency in the provision of equality education"; in doing so, he references the passages from the transcript of the interviews between Brigadier Perry and, respectively, Mr Zulu and Mr Gue on 11 and 14 January 2019 which we have quoted in our findings of fact above. Mr Tibbitts submitted that in those interviews, a year after the 23 January 2018 incident, the recognition at that stage by Brigadier Perry that MATT 6 required further development was not an admission of any failing but that rather, as Colonel Hargreaves confirmed, MATT 6 is something that is being continually reviewed and evolves; that for anyone ever to suggest that their equality and diversity training is perfect would clearly be naive and would demonstrate a closed mind to ongoing improvements and developments; that improvements can always be made; and that the recognition of that, if anything, supports the contention that this was an employer which was taking all reasonable steps, by having that ongoing discussion and review of training, rather than detracting from that. However, whilst we think that in general terms there is a lot of truth in this submission, we return to the words of Brigadier Perry, which go beyond the interpretation which Mr Tibbitts gives them. He specifically says that the training is often not done properly, that it's kind of cursory and a tick box, that it could be done "a lot better", and that it needs to be improved to make sure that it's not watered down by cramming a whole load of other stuff into it to cover too much. This seems to us to be much more than saying that the MATT 6 training is not perfect and could be improved; it appears to be a recognition that the way it has been done up until then has been inadequate and therefore ineffective. Clearly equalities training is central to the prevention of discrimination. We therefore considered the failure to ensure that MATT 6 training was done adequately and effectively to be a failure to take a reasonable step to prevent discrimination occurring. That failure alone prevents the respondent from establishing the statutory defence. As to the second part of Mr Milsom's submission under this heading, we have found that there was a lack of consistency in the quality of the MATT 6 training

when it was given; this appears to be backed up by Brigadier Perry's comment that "it's often not done properly, not done properly, it's kind of cursory and a tick box". Whilst we appreciate that there may be differences in the way that different individuals carry out the training, these findings appear to indicate something much more serious in terms of the inconsistency of quality of the training. Again, whilst we accept that perfection is unlikely to be achievable, we do think that it is incumbent upon the respondent to ensure that the consistency of quality of the training is at least to a reasonable standard; Brigadier Perry's words indicate that this was not achieved. Failing to ensure that the training does not fall below that standard is again something we consider to be a failure to take a reasonable step. That failure alone prevents the respondent from establishing the statutory defence.

4. Mr Milsom submits that there was a failure to take a reasonable step by not "conducting a thorough investigation of the Tommy Robinson incident whether in general or after the interview with Mr Gue". However, we reject this submission. In the light of the information which was before him at the time of the incident, Colonel Hargreaves carried out an appropriate investigation and took action that was appropriate in the circumstances. He did not have the benefit of seeing the "Snapchat" photograph which was at page 681 of the bundle and which emerged only shortly before these proceedings. In the light of the fact that the picture on Twitter which he did see was not taken or posted on Twitter by anyone in 3 PARA, he reasonably reached the conclusion which he did and took appropriate action in warning the battalion to be careful about such matters in future. Furthermore, it was also not unreasonable for Colonel Hargreaves to take no further action after his 10 January 2018 interview with Mr Gue; Mr Gue did not tell him that there were others from 3 PARA who knew who Tommy Robinson was and what he stood for and certainly did not suggest that there were any members of 3 PARA who, with that knowledge, may have deliberately posed with Tommy Robinson for a photograph; rather he just said that he himself recognised Tommy Robinson and therefore left the pub. There was nothing to change matters materially.

5. Mr Milsom submits that it was a failure to take a reasonable step not to interview Corporal G formally. The references to Corporal G derive from the covertly recorded interviews with Mr Gue on 10 January 2018, less than a fortnight before the graffiti incident. We have made fuller findings about these in our findings of fact above. However, whilst the transcripts seem to indicate that some of the interviewers, for example Captain Perzylo, suspected that Corporal G might be the individual to whom Mr Gue was referring, Mr Gue would not confirm this (to the evident frustration of Captain Perzylo, who appeared determined to get to the bottom of matters). In the light of this, whilst it was open to the respondent to interview Corporal G without anyone specifically having suggested that it was Corporal G who had done something, we do not consider that it was a failure to take a reasonable step not to choose to interview him.

6. Mr Milsom submits that adopting a "rule of three" approach to race - related misconduct was a failure to take a reasonable step. This is a reference to the passage in one of the documents relating to the September 2014 incident involving Mr Zulu and Sergeant B. However, as set out in our findings of fact, we found that there was no "rule of three" adopted by the respondent. There was, therefore, no failure to take a reasonable step in this respect.

7. Mr Milsom submits that not "conducting a climate assessment earlier and taking full stock of its conclusions" was a failure to take a reasonable step. However, whilst we acknowledge that carrying out a climate assessment, which Colonel Hargreaves set in train after Mr Gue served his NTT, was a positive step to take, we do not consider that not choosing to carry out a climate assessment was a failure to take a reasonable step. It would also be an odd conclusion indeed if we found that effectively, by extension, any employer who didn't put in place a measure of this particular nature had therefore acted unreasonably.

8. Mr Milsom submits that it was a failure to take a reasonable step not to "[ensure] full understanding of race discrimination from the top ranks downwards i.e. a recognition that conduct need not be directed at individuals or ill motivated to constitute harassment. "Banter" or "naivity" is no defence". This is a very vague submission and therefore quite hard for us to deal with. However, we speculate that this derives from the fact that Mr Milsom asked certain witnesses if they now knew that conduct need not be directed at individuals or ill motivated to constitute harassment, to which they replied "yes". However, he did not ask them whether they knew this at the time; when asked this second question in re-examination, the individual in question also said "yes". We therefore have no evidence to suggest that individuals were not aware of this at the time. Therefore, there is no factual basis established from which this submission can be made. We do not consider, therefore, that there has been a failure to take a reasonable step in this respect.

9. Mr Milsom submits that it was a failure to take a reasonable step not to "[document] discussions with [Sergeant P] and any enquiries in relation to the Kenya incident". Again, this is a very vague submission. We are not sure what is meant by "discussions with [Sergeant P]" and cannot therefore make any factual findings in this respect without guessing, which we are not prepared to do. Furthermore, "enquiries in relation to the Kenya incident" is also very vague as there are several incidents in Kenya which were alleged by the claimants as part of these proceedings. If, as on our findings of fact it only can be, it is a reference to the fact that Mr Zulu complained to Sergeant Murray in Kenya about the "Nelson Mandela" incident and the operational disagreements which Mr Zulu had with, amongst others, Corporal Kinnell, we do not consider that it was unreasonable in the context of Sergeant Murray dealing with a complaint of this nature out on a deployment by a colleague who was a friend of his to deal with it as he did and not to document it; in this

respect we would add that Mr Zulu has not provided any detail of what he told Sergeant Murray and whether or not he was satisfied with what Sergeant Murray did at the time and we have no evidence of whether Mr Zulu sought to have it escalated to a higher level or was happy for Sergeant Murray to deal with it at a local level. We do not, therefore, consider that there was a failure to take a reasonable step.

10. Mr Milsom submits that it was a failure to take a reasonable step not to "[formally investigate] the Kenya complaints including via "parading"". First, there was not a failure to formally investigate the Kenya complaints; those that were raised in the claimants' service complaints were to be investigated in accordance with the service complaints process. Furthermore, this all happened after 23 January 2018, so is not relevant to preventing the harassment which took place on 23 January 2018. The further reference to "parading" is to a process referred to by the claimants in these proceedings whereby, effectively, the whole battalion or a relevant part of it would be brought out on parade and effectively made to stay there until someone admitted to the conduct in question or their colleagues put pressure on them to do so. Regardless of the likely effectiveness of this process, it is hardly something that we can recommend as being "good HR practice", in the context of the Army or any other employer, for reasons which we trust it is not necessary for us to go into. We do not, therefore, consider that there has been a failure to put in place a reasonable step in this respect.

11. Mr Milsom submits that there was a failure to take a reasonable step by not "removing unnecessary bureaucracy and/or delay in the investigation of complaints". In respect of this submission, we cross refer to the conclusions which we set out below in relation to the ACAS Code and the statutory service complaints framework which applies to the respondent. The respondent was very much constrained by this process, for the reasons set out in our conclusions below, and the respondent does not have control over it. It was not, therefore, within the respondent's power to remove this "bureaucracy and/or delay in the investigation of complaints". There was, therefore, no failure to take a reasonable step in this respect.

348. Therefore, in summary, 9 of Mr Milsom's 11 submissions are unsuccessful; two of them (numbers 1 and 3 above) are successful as being reasonable steps which the respondent failed to take. As noted, under the legal provisions, this is not a numbers game, and any single failure to take a reasonable step means that the respondent has failed to take "all reasonable steps" and has not therefore established the statutory defence. The respondent has not, therefore, established the statutory defence and is, therefore, liable for the proven allegation of harassment of 23 January 2018 in respect of both claimants.

Was Mr Gue's application for early termination of service (on 8 January 2018) or Mr Zulu's application for early termination of service (on 22 February 2018) caused by any proven acts of harassment or discrimination?

349. The only proven act of harassment/discrimination is the 23 January 2018 graffiti incident, which was successful as an act of harassment in relation to both claimants. The causation issues to be considered in this section therefore relate to that act alone. As set out in our summary of the law above, the question for us to answer is one of causation in fact and is whether, but for the 23 January 2018 graffiti incident, each claimant would have served his NTT.

Mr Gue

350. In Mr Gue's case, the answer to this question is straightforward and rests entirely on a question of timing. Mr Gue served his NTT on 8 January 2018, before the graffiti incident of 23 January 2018 occurred. The graffiti incident could not, therefore, in any way have caused Mr Gue to serve his NTT. Mr Gue's decision to serve his NTT was not, therefore, in any way caused by the single proven act of harassment.

351. That, therefore, is the end of the matter. However, we think that it is nonetheless useful for us to analyse the reasons why Mr Gue served his NTT, not least of all because of the overlap of this reasoning with certain submissions which Mr Tibbitts has made as to the reason why, he asserts, Mr Zulu served his NTT (which he did after the proven 23 January 2018 graffiti incident).

352. First, we reflect on some of the findings of fact we have made above which relate to this question:

1. Mr Gue's decision was to resign from the Armed Forces as a whole and not just from 3 PARA. Although he does reference allegations of discrimination within 3 PARA in them, his letters of resignation are focused on systemic and institutionalised racism across the Army as a whole and they contain detailed reference to the statistics in terms of career progression for BAME soldiers. In his covertly recorded conversation with Colonel Hargreaves on 10 January 2018, he described why he was serving his NTT as being a wider issue with the Army as a whole, not just 3 PARA. Mr Gue was evidently very conscious of the statistics in question, as relayed by him to Colonel Hargreaves during the covertly recorded meeting of 10 January 2018.

2. Furthermore, during the covert recordings, Mr Gue focused on his perception of historic matters not involving himself, with the one historic matter involving himself being the vandalism back in 2014; he did not make any reference to any of the incidents which he now complains of in relation to Kenya. In his oral evidence before the tribunal, Mr Gue identified three factors which he said were the reason for his decision to serve his NTT, namely his family, what happened in Kenya, and, thirdly, he said he was "massively influenced by how things were dealt with. Nothing was done. The way the system approached the subject was

brushed under the carpet." We accept Mr Tibbitts' submission that that last comment clearly put an emphasis on things being brushed under the carpet and that, as of 8 January 2018, that must refer to Mr Gue's perception of how the historic incidents involving Mr Zulu in September 2014 and Corporal T in 2016 (which he had discussed with them both recently in Kenya and at least the first of which "infuriated" him) were handled.

3. Prior to visiting her in Zanzibar in late 2017, Mr Gue had not seen his mother for five years and he described the visit as "emotional". His mother's two letters of 30 January 2018 clearly outlined that she was not only happy and supportive of his decision to leave the Armed Forces but that she had been waiting for that decision "for so long" and that she was hoping that they could now spend more time together. As noted above, Mr Gue candidly admitted in his evidence that one of his reasons for serving his NTT was the family reason of wanting to spend more time with mother.

4. Mr Gue already had a job lined up with ESPA at the point when he served his NTT (which Sergeant Murray knew about prior to Mr Gue serving his NTT).

5. There is a general spike in soldiers serving NTT following periods of leave with family and experiencing civilian life for a period.

353. We therefore accept Mr Tibbitts' submission that, based on the above, Mr Gue fundamentally held the view that the Army was institutionally racist. That view was clearly based predominantly on the statistics which he was well aware of when he served his NTT. He was also infuriated upon hearing of the historic incidents of September 2014 involving Mr Zulu and of October 2016 involving Corporal T. Furthermore, he had taken a long period of time out to visit his mother in Zanzibar. His failure to mention the Kenya incidents in his lengthy covertly recorded interviews of 10 January 2018 indicates to us that, contrary to his evidence in the tribunal, these were at the very least not a significant cause for him handing in his NTT and, on the balance of probabilities, were not part of the reason at all.

354. Accordingly, we find that, on the balance of probabilities, Mr Gue chose to submit his NTT because of a combination of the following: his genuinely held belief based primarily on statistics that the Army as a whole was racist; his genuine annoyance about the way he perceived that the historic incidents involving Mr Zulu and Corporal T (which he had recently heard about from them in Kenya) were handled; a reflection on and re-evaluation of whether he wanted to stay in the Army, both in Kenya and on the extended period of leave with his mother in Zanzibar; and the family reasons to do with spending more time with his mother which formed part of that reflection/re-evaluation. In carrying out this process of reflection/re-evaluation, he had already lined up another job with ESPA.

Mr Zulu

355. The position regarding Mr Zulu is different from that of Mr Gue because, as noted, Mr Zulu served his NTT on 22 February 2018, after the proven harassment of 23 January 2018.

356. Mr Tibbitts has made a number of submissions to back up his assertion that Mr Zulu has not proven on the balance of probabilities that his decision to leave the Armed Forces entirely (as opposed to just 3 PARA) was caused by the proven harassment. He notes the following:

1. Mr Zulu did not resign immediately following the graffiti incident on 23 January 2018, but did so only a month later, having discussed matters with Mr Gue and his lawyer and having served the service complaint on 21 February 2018. Mr Tibbitts submits that Mr Zulu's decision to resign was therefore evidently significantly influenced by those discussions rather than the atmosphere/environment created by the proven act of harassment.

2. Mr Zulu served NTT from the Army as a whole rather than seeking to transfer to another unit within the Army and his decision to leave the Armed Forces entirely was taken after having read Mr Gue's two resignation letters (he confirmed in oral evidence that he read those in late January 2018 upon his return to the UK).

3. Mr Tibbitts submits that, whilst Mr Zulu did tick the "racial discrimination" box on the form which he completed as part of his NTT, his main grievance in his claim form was about his lack of career progression as opposed to the matters which form the basis of this tribunal. (We note, however, that, whilst it is true that lack of career progression was a major part of the original claim form (and indeed Mr Zulu references lack of career progression in some detail in his witness statement even before this tribunal), most of the other issues are very much there in the original claim too, including most pertinently the 23 January 2018 incident.)

4. Mr Tibbitts therefore submits that at the point when Mr Zulu served his NTT, he was still significantly aggrieved and motivated by his perception of a lack of career progression which no doubt was brought again to the forefront of his mind having read Mr Gue's letters about the career progression of BAME soldiers in the Army. He therefore submits that Mr Zulu has not proven on the balance of probabilities that, but for the proven harassment and the consequent environment it created, Mr Zulu would not have served his NTT in any event, given his past grievances as to career progression, having read Mr Gue's letters and having spoken to lawyers and Mr Gue about historic and past matters not involving himself. He accordingly submits that factual causation for loss of service is not made out.

357. Addressing some of those points, we do not consider that the delay of a month is indicative that the graffiti incident was not uppermost in Mr Zulu's mind when he served his NTT; it is perfectly normal to reflect for a while before taking the major decision to end a long Army career, whatever the level of offence caused by the harassment was. Nor can we conclude that the discussions with Mr Gue and with his lawyer between the graffiti incident and the service by Mr Zulu of his NTT indicate that the graffiti incident was not uppermost in Mr Zulu's mind; we do not even know what the contents of those discussions were.

358. We accept that Mr Zulu had major concerns about his career progression, as evidenced by the complaint he raised in 2017. However, this complaint was resolved to his satisfaction and was withdrawn and the aspect which appeared to have bothered Mr Zulu most, namely not putting him forward again for special forces training, was resolved because he was subsequently put forward for this training in 2018; indeed, he had come back in early 2018 with permission to have time off for two weeks to prepare for this training. He may well have been influenced by the statistical data set out by Mr Gue in his letters and he was, of course, a close friend of Mr Gue, but we do not consider that that alone would have been likely to have caused him to reflect and terminate his service without something much more significant happening. We accept that, in the light of his employment tribunal claim, he did retain concerns about his career progression but, particularly in the light of the contemporaneous evidence which we discuss below, we do not consider that that was a sole or even principal cause of his decision to submit his NTT. By contrast, absent the 23 January 2018 racist graffiti incident, we consider it highly unlikely that Mr Zulu, having come back in January 2018 to start his special forces training, which was what he specifically was wanting to do, would have chosen to submit his NTT.

359. We turn then to the reason which Mr Zulu gave contemporaneously in his resignation letter for submitting his NTT. In that letter, which is relatively brief and headed "Reason(s) for early termination", he references the racist graffiti on Mr Gue's photographs as his reason for leaving. No other reasons are given. He confirms that he has decided that he will no longer be attempting special forces selection, that he "can no longer serve in such a place", and he asks that his "services and employment with the British Army is terminated with immediate effect based on racial discrimination".

360. We would add that the 23 January 2018 incident itself was particularly offensive; the graffiti was deeply unpleasant, racially discriminatory and set out on personal property; it was thoroughly nasty. As well as this being the only reason given by Mr Zulu in his contemporaneous resignation letter for his serving his NTT, we do not find it remotely surprising that an incident of this nature would cause someone to resign. Furthermore, given the seriousness of the incident, we do not find it surprising that Mr Zulu chose to leave the Armed Forces entirely as opposed merely to requesting a transfer from 3 PARA (regardless of whether or not a transfer to another part of the Army would have stopped or reduced the possibility of such an incident occurring again).

361. Therefore, whatever other concerns Mr Zulu may have had in the background (be it concern over career progression or the material set out in Mr

Gue's letters or otherwise), we find that, on the balance of probabilities, but for the 23 January 2018 graffiti incident, Mr Zulu would not have served his NTT on 22 February 2018. We also find that, on the balance of probabilities, that incident was, at the very least, the principal reason why he served his NTT at that time.

ACAS Code

362. We accept, as Mr Milsom submits and as does not appear to be disputed, that the service complaints are a form of grievance for the purposes of the ACAS Code.

363. Mr Milsom's submissions in relation to the ACAS code are entirely concerned with what he maintains is an unreasonable delay in dealing with the service complaints. He refers us to paragraphs 34 and 40 of the ACAS Code, which provide respectively that an employer should "arrange for a formal meeting to be held without unreasonable delay after a grievance is received" and reach conclusions "in writing, without unreasonable delay". He submits that nearly 18 months have passed without meaningful progress and with no end in sight and that the claimants seek a 25% uplift.

364. There is no dispute that there has been a long delay in handling the claimants' service complaints and the respondent readily acknowledges that the delay is far from ideal. However, we refer to the findings of fact which we have made about the process and reasons for the delay in their entirety. We accept Mr Tibbetts' submission that, whilst there has been a significant delay, the respondent has been constrained by the statutory framework under which it has had to operate, the interaction between the RMP investigations and the service complaints investigations (the latter of which were stayed pending the former, with the respondent quite reasonably following the legal advice which it was given in terms of keeping these processes separate), the actions of the claimants, particularly Mr Gue in not confirming whether or not he wished for the RMP investigation to continue, and the actions of the independent SCO over which the respondent had no control.

365. It seems to us that part of the problem is the statutory service complaints procedure itself, not only in terms of the time-consuming procedural constraints which it involves but also the strange admissibility provisions which mean that certain complaints which could otherwise be heard by an employment tribunal are deemed inadmissible for the purposes of the service complaints procedure. All that seems to us to militate against the respondent employer being able to, as it would wish, deal with workplace grievances quickly and effectively. However, the respondent is not responsible for or in control of that statutory procedure.

366. Furthermore, as is reflected in the findings of fact which we have made, there were genuine attempts by the respondent to try and move the service complaints forward in terms of its interaction and correspondence with the claimants and their representatives and we do not find that the respondent, constrained as it was by the process, behaved unreasonably.

367. In short, for the reasons above, and whilst we fully acknowledge that the delay was extensive, we do not consider that it was unreasonable.

368. That is therefore the end of the matter; as there was no unreasonable failure to follow the ACAS Code, no uplift can be awarded. However, we nonetheless consider the other submissions made on this matter for completeness' sake.

369. Mr Tibbitts has submitted that, in any event, it would not be "just and equitable" in all the circumstances to make any uplift on any award. He highlights the following: the matters reflected in our findings of fact as to the context, complexities and difficulties which the respondent faced in dealing with the claimants' service complaints and the claimants own part in the delay; the fact that right from the outset it was clear that the only reason the claimants were issuing service complaints was on the basis of legal advice to enable them to bring these tribunal proceedings, which both claimants candidly confirmed in oral evidence; and the fact that this desire for the matter to be dealt with by the tribunal rather than the service complaints process was reiterated by the claimants and their legal advisers to the respondent in correspondence. We note these submissions and accept them, in particular the point that the claimants and their representatives were not interested in the service complaints procedure in any event (seeing it only as a means to bring employment tribunal proceedings), so that, in relation to the claimants' specific service complaints, there was no prejudice to them in there being a delay to a procedure that they weren't interested in anyway. For these reasons, we do not consider that, even if the delay had been unreasonable, that it would have been just and equitable to award any uplift.

370. Finally, we reiterate that, even if we had considered that there was an unreasonable delay and that it was just and equitable to make an uplift, we would not have gone on to consider the amount of the uplift at this hearing in the light of the case of Wardle, as referred to in our summary of the law above.

Next steps

371. At the end of this hearing, a telephone preliminary hearing was arranged for 11 September 2019 to consider next steps depending on the conclusions in our decision. In the light of the above conclusions, that hearing will go ahead.

Employment Judge Baty

Dated: 05/09/2019

Judgment and Reasons sent to the parties on:

06/09/2019

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For the Tribunal Office