Appeal No. UKEAT/0247/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 29 July 2019
Judgment handed down on 18 October 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR COLLERIDGE BESSONG — APPELLANT

PENNINE CARE NHS FOUNDATION TRUST — RESPONDENT

JUDGMENT

(Appeal & Cross-Appeal)

APPEARANCES

For the Appellant	Ms Karon Monaghan (One of Her Majesty's Counsel) Mr Nathaniel Caiden (of Counsel) Instructed by: Legal Services Royal College of Nursing Chesham House St Georges Square Bolton BL1 2HB
For the Respondent	Ms Joanne Connolly (of Counsel) (Written submissions only) Instructed by: Hempsons Solicitors 16th Floor City Tower Piccadilly Plaza Manchester M1 4BT

SUMMARY

RACE DISCRIMINATION – Harassment, Third-Party Harassment

The issue in this appeal is whether s.26 (1) of the **Equality Act 2010** ("the 2010 Act") should be interpreted so as to impose liability on an employer for third-party harassment against employees. The Claimant worked as a mental health nurse and was assaulted by a patient on racial grounds. Whilst the Tribunal found that as a result of various failures on the part of the employer, including a failure to ensure that all incidents of racial abuse were reported, the Claimant had been indirectly discriminated against, it rejected the Claimant's claim of harassment because the employer's failings were not themselves related to race. On appeal, the Claimant argued that s.26(1) of the 2010 Act should be construed in accordance with Directive 2000/43/EC ("the Race Directive") under which it is sufficient for liability to arise where the act of harassment "takes place" without any requirement that the employer's failings themselves had to be related to race.

Held: Dismissing the appeal, that on a proper construction of the Race Directive there is a requirement for the unwanted act (in this case, the employer's failings) to be related to race and the words "takes place" in Article 2(3) of the Race Directive do not give rise to the interpretation for which the Claimant contends. The EAT is in any event bound by the decision of the Court of Appeal in **Unite the Union v Nailard** [2019] ICR 28, which confirms that there is currently no explicit liability under the 2010 Act on an employer for failing to prevent third-party harassment.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. The issue in this appeal is whether s.26 (1) of the **Equality Act 2010** ("the 2010 Act") should be interpreted so as to impose liability on an employer for acts of harassment against its employees by third parties where the employer has failed to prevent and/or protect an employee against such harassment, and where such failure by the employer is not itself related to race. For the purposes of this judgment, I shall refer to such harassment as "third-party harassment".

2. The appeal is brought by the Claimant in the proceedings below. He is represented by Ms Monaghan QC and Mr Caiden. The Respondent NHS trust was not represented by Counsel at the hearing before me. Instead, the Respondent relied upon written submissions prepared by Ms Connolly of Counsel, who did appear on behalf of the Respondent before the Employment Tribunal ("the Tribunal").

Factual Background

3. The Respondent provides mental health services including a secure, residential unit for adult men who are the subject of a treatment order under s.3 of the **Mental Health Act 1987**. The Claimant was employed by the Respondent at the unit as a registered mental health nurse. The Claimant is Black and African.

4. On 7 April 2017, the Claimant was subject to a serious assault by a patient ("Patient A"). Patient A threw about 8 punches at the Claimant and held a pen as a weapon. The assault was accompanied by racist abuse including Patient A saying, "*You fucking black I'm going to stab you now*".

5. Although the Claimant managed to fend Patient A off, he sustained significant facial swelling and redness and had to go to hospital. The assault was reported to the police and a record of the assault was made by the Trust. An incident report form about the assault was completed. It made no mention of the racist element of the assault.

6. Patient A, the Tribunal found, had a history of racist behaviour towards black members of staff. An incident on the night before the assault in question involved Patient A asking, "*Why it was all black people working in the ward*?".

7. The Claimant commenced proceedings in the Tribunal against the Respondent on 16 August 2017. He claimed direct race discrimination, indirect race discrimination and harassment. The direct discrimination complaint involved an allegation that the Respondent had failed to take steps to counter the threat posed by Patient A on 7 April 2017 and that the Claimant was exposed to racial abuse from patients without redress. The particular ways in which the Respondent was said to have failed to provide protection included failing to employ an adequate number of staff, failing to provide adequate training, and a failure to redeploy the Claimant to other roles. The claim of indirect discrimination involved three matters relied upon as provisions, criteria or practices ("PCPs") which were said to be discriminatory. The principal PCP for present purposes was that the Respondent had failed to ensure that all staff reported each and every incident of racial abuse by patients on an incident reporting form. This was described by the Tribunal as "*the incident reporting failing*". The claim of harassment was initially based on the failures on the part of the Respondent to take these steps relied upon in the claim of direct discrimination. However, at the hearing before the Tribunal, it was argued by the Claimant that the incident reporting failing should also be considered to be an act of harassment through inaction. The Tribunal accepted that argument. No point is taken against the Tribunal's approach in this regard.

8. The Claimant's claim of indirect race discrimination succeeded in relation to the incident reporting failing. As to this matter, the Tribunal made the following findings:

> **"151. It was clear that the policy was that all incidents of racial abuse should be the subject of an incident report. So much was evident from the MVA training pack at page 540, from the evidence of Mr Heath, and from the definition of an incident at page 363 which included any incident which could have resulted in mental injury. The categories of incident reporting available via menus on the electronic form included "verbal abuse to staff" and a potential sub-cause was "racism".**
>
> **152. Equally, it was clear that not every incident of racial abuse was reported using the incident report system. The grievance reached that conclusion (page 318). It was evident from staff interviews that there were more instances of racial abuse than were formally reported. The recommendations included that there be a review and that steps should be taken to ensure that all staff knew they should report such matters.**
>
> **153. Indeed, Mr Liffen accepted not only that staff were not reporting such matters but also that the comments made by patient A at the community meeting on 6 April 2017 ought to have been the subject of an incident report if the policy were applied strictly.**
>
> **154. The Tribunal unanimously concluded that a perception had formed amongst many black staff that reporting every single racist incident was pointless. The consequence was that the incident report system fell into disrepute in that respect…**
>
> **155. Further, we concluded that there were steps which the Respondent should have taken to reinforce the message to staff that they should do an incident report after every such incident. The failure to take those steps contributed to the negative perception held by many black staff about the value of incident reporting…"**

9. The Tribunal then went on to make findings as to the steps which should have been taken. These included ensuring that patients were made aware that racist incidents were unacceptable, reinforcing that message in various respects, completing an incident report every time a racist comment was made irrespective of how it came to their attention, providing clear feedback to individuals once it was made, conducting a staff survey, and focusing on racist abuse in staff training.

10. In determining the effect of the failure to take such steps, the Tribunal held as follows:

> **"156. Of course, the failure to take such steps to encourage incident reporting would be immaterial unless it contributed to the claimant's exposure to racial abuse and physical violence from patient A on 7 April 2017. The Respondent's case was that the gaps in the incident reporting system were not material because those incidents of racist abuse were recorded in other ways. They would go in the nursing notes and then be fed into the monthly CTM, and thereby form part of the patient risk assessment and any behaviour management plan. Further, the Respondent suggested that given the patient population, some level of racist comment was unavoidable.**
>
> **157. Although we recognised that the absence of an incident report did not mean that racial abuse went unrecorded, we were satisfied unanimously that the failure to create a culture in which all such incidents were formally reported in that way contributed to an environment in which racial abuse from patients was more likely to occur. There was a perception among some staff that it was**

> **simply part of the job and had to be tolerated. That made it more likely that patients would not be challenged over racist comments and abuse. At a corporate level the absence of incident reports on every occasion meant that the risk of verbal racist abuse was under-appreciated and therefore not sufficiently prioritised as a risk to be addressed. At ward level the confidence of staff to challenge such behaviour was impaired by the perception that management were not taking the issue as seriously as they should…"**

11. The Tribunal went on to consider whether a practice of universal reporting of racist incidents would have made any difference to the situation with which the Claimant was confronted on 7 April 2017. The Tribunal concluded that it would have done: see paragraph 159. At paragraph 162, the Tribunal concluded as follows:

> **162. For those reasons the Tribunal was unanimously satisfied that the Respondent had failed to take sufficient steps in relation to the proper reporting of racist abuse, and that this contributed significantly to the situation in which staff perceived themselves as unsupported in relation to such matters. A proper approach to this could have made a difference to the exposure of the claimant to the events of 7 April 2017.**

12. Having made those findings, the Tribunal went on to consider whether the incident reporting failing give rise to any breach under **the 2010 Act**. The Tribunal considered the claim of harassment first. It found that the incident reporting failing represented unwanted conduct on the part of the Respondent. However, the Tribunal did not accept that such conduct (in the form of inaction) was "related to" race so as to bring it within the scope of s.26 (1) of **the 2010 Act**:

> **Related to race**
>
> **167. The Tribunal then considered whether the incident reporting failing related to race. It is clear (see Nailard paragraph 97) that the words "related to" were intended to effect a change to the previous formulation of "on the grounds of" race. The test is broader than the causation test for direct discrimination where the protected characteristic has to have a material influence on the mental processes of the person taking action or failing to take action.**
>
> **168. However, equally it would be an error of law (unless Mr Caiden is correct in his contention about the direct effect of the Directive - see below) for the Tribunal to assume that conduct is related to race simply because the actions of the third parties (in this case, the patients) were themselves harassment related to race. That approach would have been permissible under the now-repealed third-party harassment provisions of the Equality Act but they were not in force at the time of this incident.**
>
> **169. It appeared from [Unite the Union v Nailard [2017] ICR 121], however, that there is still a requirement that the employer's conduct/inaction is itself related to the protected characteristic, as per Conteh. The claimant's success in [Sheffield City Council v Norouzi [2011] IRLR 897] was a result of a concession by the Respondent about the meaning of the Directive (based on the EOC Case), a concession about which the EAT had its doubts. Nailard was the most recent authority and we preferred to follow it rather than the approach agreed by the parties in Norouzi. As a result we rejected Mr Caiden's argument that the Directive had direct effect so as to make the Respondent liable for racial harassment by patients. We therefore considered whether the incident reporting failure by the Respondent could be said to be related to race.**

> **170. It seemed to us that to make that finding would be to distort the meaning of section 26, even recognising that it is a formulation wider than "because of" (or "on the grounds of" as in [Conteh v Parking Partners Ltd [2011] ICR 341]). We rejected the contention that this was treatment "because of race" (see below). Nevertheless in his written submission Mr Caiden invited us to conclude that "given the scale of the issue and the Respondent burying its head in the sand there must have been some relationship with the claimant's race". He based that on a suggestion that such a scale of sexual assaults, touching and language would have been addressed differently. We rejected that argument. It was merely supposition. There was nothing in the Respondent's failure to ensure universal reporting of racist incidents which was related to race other than the subject matter of the failure. On that basis the harassment complaint failed."**

13. The claim of direct discrimination therefore failed because the Tribunal declined to draw the inference that the incident reporting failure was because of race, either consciously or subconsciously. It found that the fact that the abuse was racial in nature played no part in the mental processes of management in failing to ensure that such matters were properly reported on the incident reporting system.

14. As stated above, the claim of indirect discrimination did succeed. The Tribunal was satisfied that the incident reporting failure "*was at least in part a consequence of the failure by the Respondent to take adequate steps to ensure that this was done*." The Tribunal also found that non-white British members of staff are much more likely to be subjected to racial abuse than white British staff, and that the failure to ensure universal incident reporting helped to create an offensive and humiliating environment for non-white staff in which they felt unsupported and racist behaviour by patients became more likely. That constituted a disadvantage for non-white staff and one which was suffered by the Claimant as well. On that basis the Tribunal found that the ingredients of s.19 of **the 2010 Act** were satisfied. The question of remedy was adjourned to a later date.

Legal Provisions

15. Section 26 of **the 2010 Act**, so far as relevant, provides:

> **"(1) A person (A) harasses another (B) if -**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of -**

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are –

…

race;

…"

16. Section 40 of **the 2010 Act** deals with harassment against employees and applicants. It provides:

"(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

(b) who has applied to A for employment."

17. That is the version of s.40 that has been in force since 1 October 2013. On that date, subsections (2), (3) and (4) of s.40 were repealed by the coming into force of the **Enterprise and Regulatory Reform Act 2013 ("the 2013 Act")**. Those subsections dealt with third-party harassment. It is relevant to note what those provisions said. I shall refer to them as "**the old s.40 provisions**":

"(2) The circumstances in which A is to be treated as harassing B under subsection (1) include those where—

(a) a third party harasses B in the course of B's employment, and

(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.

(3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.

(4) A third party is a person other than—

(a) A, or

(b) an employee of A's"

18. The legislative history of these provisions is explained by the Court of Appeal in **Unite the Union v Nailard** [2018] EWCA Civ 1203. I set out the explanation in **Nailard** in full as Ms Monaghan seeks to argue, as will become apparent below, that the Court of Appeal in **Nailard** was wrong:

> **"Section 26**
>
> **53.In the earliest versions of the discrimination legislation there was no distinct proscription of harassment. Cases of what we would now regard as harassment were brought as cases of ordinary direct discrimination. The fit with the legislative language was awkward, and some difficult case-law was generated. However, an amended version of the EU Equal Treatment Directive (EU/2002/73 EC), promulgated in 2002, required member states to proscribe "harassment", which was defined in the Directive as "where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment [my emphasis]".**
>
> **54.That requirement was sought to be implemented in 2005 by secondary legislation which inserted an express prohibition on harassment – section 4A – into the Sex Discrimination Act 1975. (Similar amendments were made to the legislation relating to other protected characteristics.) Section 4A essentially tracked the Directive, save that it used the formulation "on the ground of her sex" – that is, the same language as in the definition of direct discrimination – rather than "related to sex".**
>
> **55.The Equal Opportunities Commission believed that the amendment legislation failed in that respect – and in several others – to conform to the requirements of the Directive. It brought judicial review proceedings. In Equal Opportunities Commission v Secretary of State for Trade & Industry [2007] EWHC 483 (Admin), [2007] ICR 1234, ("the EOC Case") Burton J upheld the Commission's challenge. We are only concerned with two of the grounds of challenge, which I take in turn.**
>
> **56.First, the Commission argued, and Burton J accepted, that the Directive's formulation of "related to … sex" proscribed not only harassment which was "caused by" the claimant's sex but also harassment which was "associated with" it: see paras. 6-28 of his judgment. Burton J illustrated the distinction between the two types of case, at paras. 10-11 (p. 1242-3), by accepting three examples taken from the case-law by counsel for the Commission (Dinah Rose QC), namely:**
>
> - **where an RAF NCO had used offensive and obscene language in front of a group of male and female staff but which was peculiarly offensive to the women (Brumfitt v Ministry of Defence [2004] UKEAT 1004/03, [2005] IRLR 4);**
> - **where the claimant had been unfairly treated by a manager who was jealous of her sexual relationship with a colleague (B v A [2007] UKEAT 0450/06);**
> - **where a manager "barged into" a female toilet but would equally have barged into a male toilet (adapted from Kettle Produce Ltd v Ward [2006] UKEATS 0016/06/0811).**
>
> **Those were all cases where the harassment would be "associated" with the complainant's sex but not "caused by" it, in the sense of it forming any part of the actor's motivation. The Commission contended that that type of case was not caught by the formulation in section 4A "on the grounds of sex". Counsel for the Secretary of State (David Pannick QC) argued that it was, if necessary applying a Marleasing approach to construction. Burton J was doubtful about whether that was so, but he held that in any event it was important that the legislation was drafted in a way that put the matter beyond doubt: see paras. 59-63 of his judgment (pp. 1257-8). In the summary of the relevant part of his decision at para. 63 (i) he required section 4A to be "recast so as to eliminate the issue of causation".**
>
> **57.Secondly, the Commission contended that the Directive required member states to provide for employers to be liable in cases where they failed to take reasonable steps to protect employees**

against harassment by third parties – labelled as "third party liability"[5]. However in her oral submissions Ms Rose retreated from that position. She is recorded by Burton J at para. 40 of his judgment (p. 1250H) as acknowledging that:

> **"… there is nothing explicit, or even arguably implicit, in any of the Articles requiring a Member State to impose vicarious liability on an employer, or indeed liability for negligent failure to take steps, such as were expressly found by the House of Lords in Pearce not to exist in the present discrimination legislation".**

(The reference to Pearce is to the decision of the House of Lords which I consider at para. 88 below.) Her submissions proceeded on the basis that, even if there was no such requirement in the Directive, the Secretary of State himself had accepted that in some circumstances third party liability might be appropriate – see paras. 36 and 37 of the judgment (pp. 1249-50). Her argument was that the language of "on the grounds that" precluded such an outcome, but that the problem could be resolved by "adopting an associative rather than causative approach" which she was already contending for on other grounds. As I read his judgment, Burton J accepted that that was so, and the effect of his decision to require the adoption of "associative" language gave Ms Rose what she was asking for. But that was not in itself the reason for adopting that construction, and in para. 63 of his judgment, where he gives his final decision, he does not expressly refer to the third party liability point (see p. 1258B).

58.In response to the decision in the EOC Case the Secretary of State, exercising his powers under the European Communities Act 1972, made the Sex Discrimination (Amendment of Legislation) Regulations 2008, which took effect from 6 April 2008. So far as relevant for present purposes the Regulations did two things:

> **(1) They amended the definition of harassment section 4A of the 1975 Act so as to substitute the "related to" formulation used in the Directive. That formulation was then, as we have seen, carried over into the 2010 Act.**
>
> **(2) They inserted into section 6, which proscribed discrimination and harassment in employment, a new sub-section (2B) dealing with third party liability. This was in substantially the same terms as section 40 (2)-(4) of the 2010 Act, which I set out at para. 59 below.**

Section 40

59.As originally enacted, section 40 had three further sub-sections, as follows:

> **"(2) The circumstances in which A is to be treated as harassing B under subsection (1) include those where—**
>
> > **(a) a third party harasses B in the course of B's employment, and**
> >
> > **(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.**
>
> **(3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.**
>
> **(4) A third party is a person other than—**
>
> > **(a) A, or**
> >
> > **(b) an employee of A's."**

As will be seen, those sub-sections were designed to impose liability on employers who had failed to take reasonable steps to prevent their employees being harassed by third parties.

60.However by section 65 of the Enterprise and Regulatory Reform Act 2013 sub-sections (2)-(4) were repealed, and there is now no explicit liability on an employer for failing to prevent third party harassment."

19. The following points, relevant to this appeal, may be drawn from that analysis:

a. An express prohibition on harassment was introduced into domestic legislation in 2005 following the promulgation of the **Equal Treatment Directive 2002/73/EC** (OJ 2002 L269, p.15).

b. The domestic provisions – s.4A of the **Sex Discrimination Act 1975** – in defining harassment, used the formulation of "on the grounds of" instead of "related to" as in the Directive;

c. The failure to use the "related to" formulation was challenged in **R (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234** ("**the EOC Case**");

d. Burton J in **the EOC Case** decided that s.4A of the 1975 Act should be "recast" so as to eliminate the issue of causation. Thus, an act which was associated with a person's gender would be caught;

e. Whilst the EOC had also argued that the Equal Treatment Directive required Member States to impose liability on employers for third-party harassment, it was accepted that there is "*nothing explicit, or even arguably implicit*" in that Directive requiring that;

f. Liability for third-party harassment was not the reason that Burton J required s.4A of the 1975 Act to be recast;

g. In response to the decision in **the EOC Case** the Secretary of State introduced amendments to the domestic legislation which defined harassment by reference to the "related to" formulation used in the Equal Treatment Directive and which inserted new provisions prohibiting third-party harassment

h. Those third-party harassment provisions were carried over to **the 2010 Act** s.40(2), (3) and (4):

i. However, those subsections were repealed by the coming into force of the 2013 Act with the effect that there is now no explicit liability on an employer for failing to prevent third-party harassment.

20. "Discrimination" for the purposes of **the 2010 Act** includes indirect discrimination: see s.28 to **the 2010 Act**. By s.39(2) of **the 2010 Act** an employer must not discriminate against an employee by subjecting the employee to a "detriment". Section 212(1) of **the 2010 Act** provides that, " "detriment" does not … include conduct which amounts to harassment".

21. Directive 2000/43/EC ("**the Race Directive**"**)** provides, so far as relevant, as follows:

> **"Article 2**
> **Concept of discrimination**
>
> **1 For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.**
> **2 For the purposes of paragraph 1:**
> **a. direct discrimination shall be taken to occur where one person is treated less favourably than another is has been more would be treated in a comparable situation on grounds of racial or ethnic origin.**
> **b. indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.**
> **3 Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice the Member States.**
>
> **…**
>
> **Article 3**
> **Scope**
>
> **1 Within the limits of the powers conferred upon the Community, this directive shall apply to all persons, as regards both public and private sectors, including public bodies, in relation to:**
> **a. conditions for access to employment, …**
> **b. access to all types and to all levels of vocational guidance, vocational training, advanced vocational and retraining, including practical work experience;**
> **c. employment and working conditions, including dismissals and pay;**
> **d. membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;**
> **e. social protection, including social security and healthcare;**
> **f. social advantages;**
> **g. education;**
> **h. access to and supply of goods and services which are available to the public, including housing**

22. It can be seen from the provisions of Article 3 of the **Race Directive** that it is intended to apply in a wide range of situations and not just in the employment sphere.

23. Ms Monaghan also referred me to the **Charter of Fundamental Rights of the European Union** ("**the Charter**"). Article 21 of **the Charter** establishes non-discrimination as one of those rights. So far as relevant, it provides:

> **"Article 21**
>
> **Non-discrimination**
>
> **1.Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited…"**

24. Article 31 of **the Charter** provides:

> **"Every worker has the right to working conditions which respect his or her health, safety and dignity."**

25. Finally, Article 47 of **the Charter** deals with the right to an effective remedy and to a fair trial. So far as relevant, it provides that:

> **"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a Tribunal in compliance with the conditions laid down in this Article…"**

Grounds of Appeal

26. The Claimant lodged his appeal against the Tribunal's judgment on 24 August 2018. There are three grounds of appeal:

a. Ground 1: The Tribunal misinterpreted s.26 (1) of **the 2010 Act** in requiring that the employer's conduct/inaction must itself be related to race in a complaint of third-party harassment.

b. Ground 2: The Tribunal erred in concluding that the Claimant was not entitled to rely directly on the **Race Directive**.

c. Ground 3: The Tribunal erred in concluding that it was bound to follow and/or in deciding to follow the decision of the EAT in **Unite the Union v Nailard** [2017] ICR 121 ("**Nailard EAT**")

27. Permission to proceed with the appeal on all three grounds was granted on the sift by then President, Simler J (as she then was). The Respondent resists that appeal and cross-appeals on two grounds which arise only in the event that the Claimant succeeds in his appeal. The grounds of cross-appeal are that:

a. Cross Appeal Ground 1: The Tribunal erred in law in finding that the relevant conduct of the Respondent had the proscribed effect described in s.26 (1) (b) of **the 2010 Act**.

b. Cross Appeal Ground 2: If the appeal succeeds, by virtue of the definition of "detriment" in s.212 of **the 2010 Act**, the Tribunal's finding of indirect discrimination was erroneous in law and should be set aside.

The issues in this appeal

28. These have been succinctly summarised by Ms Monaghan in her skeleton argument as follows:

a. Is the appeal on third-party harassment academic in light of the Tribunal's conclusion on the indirect discrimination claim?

b. Does the **Race Directive** require Member States to outlaw third-party harassment where the harassment was foreseeable and preventable, without a requirement that the employer's failures were themselves "related to" race?

c. If the **Race Directive** covers third-party harassment, can s.26 (1) **the 2010 Act** be interpreted to give effect to this?

d. If s.26 (1) of **the 2010 Act** cannot be read and given effect to conform to the requirements of the **Race Directive**, does the relevant provision of the **Race Directive** have direct effect?

e. Was the Tribunal, and now the EAT, bound by the decision of the Court of Appeal in **Unite the Union v Nailard** [2018] EWCA Civ 1203; [2019] ICR 28 ("**Nailard CA**")?

f. If the Claimant succeeds in his appeal, does the Respondent's conduct have the proscribed effect in s.26 (1)(b) of **the 2010 Act**?

g. If the Claimant succeeds in his appeal was the Tribunal's conclusion on indirect discrimination erroneous in law by reason of s.212 of **the 2010 Act** such that it should be set aside?

29. I shall deal with each issue in turn.

Is the appeal academic?

Submissions

30. The Respondent submits that as the Claimant's success in his indirect discrimination claim would entitle him, in effect, to the same remedy to which he would have been entitled had he succeeded in his harassment claim, this appeal is rendered academic. The Respondent further submits that the Claimant has a declaration that he has been discriminated against and he can seek recommendations in respect of his indirect discrimination claim in the same way that he could for his claim of harassment had he succeeded in that. The Respondent acknowledges that whilst the absence of an intention to discriminate may lead to a different approach to the award of compensation in the indirect discrimination claim, the Tribunal is not precluded from making a compensation order, albeit that it must first consider whether to make a declaration and/or an appropriate recommendation. In this regard, the Respondent highlights the fact that it is not

seeking to adduce any evidence on intention at the remedy hearing and states that it would not object to the Tribunal making a compensation order. In the circumstances, submits the Respondent, the outcome of the appeal as between the Claimant and the Respondent is academic.

31. Ms Monaghan submits that the appeal is not academic given that the level of compensation may differ depending on the heads of claim which succeed. The finding of harassment may be of real importance to the Claimant and others in his position since an individual subject to harassment might regard the declaratory relief that follows as a vindication of the position. The need to consider intention in the claim of indirect discrimination means that compensation might not be awarded at all for that claim. Ms Monaghan submits that even if the appeal were considered academic in respect of the potential remedy, the EAT should exercise its discretion to entertain academic appeals where they raise a point of general public importance and it is in the public interest to do so. She cites in support of that proposition the cases of **Waterman v AIT group** UKEAT/0358/05/DM at [5] and [11] and **Rolls-Royce plc v Unite the Union** [2010] ICR 1 at [49] to [58]. In this case, submits Ms Monaghan, the appeal does raise a point of general public importance as the EAT is being asked to construe a statutory provision derived from a Directive of widespread importance and affecting a large number of employees.

Discussion

32. In my judgment, this appeal is not academic. I say that for the following reasons:

a. Although the Claimant has succeeded in his claim of indirect discrimination, the claim of harassment is a very different head of claim which might give rise to a different (and possibly greater) level of compensation, if successful, than under the claim of indirect discrimination. As Ms Monaghan submits, correctly in my view, the more serious nature of the claim of harassment - which involves the creation of a hostile working environment that could well give rise to losses in respect of injured feelings

and aggravated damages - would not be the same as or achievable under a claim of indirect discrimination. The situation here is quite different from that in the case of **IMI Yorkshire Imperial Ltd v Olender** [1982] ICR 69, upon which the Respondent relied. In that case, it was established at the outset of the hearing that compensation had been paid to the employees bringing the appeal, that they had been reinstated and that whatever the outcome of the appeal they would not lose their jobs. In that situation the appeal was truly academic as all apparent issues between the parties had been resolved leaving nothing to be determined which could have an effect on the outcome. That is quite different from the situation in this case where the Claimant appeals in respect of a head of claim which could produce quite a different outcome in terms of remedy from the head of claim which did succeed;

b. The key difference relevant to remedy in a claim of indirect discrimination is the need to consider intention. It is only if there is an intention to discriminate, albeit indirectly, that the Tribunal can move straight to a consideration of compensation: see s.124(2) of **the 2010 Act**. If, however, the Tribunal is satisfied that the PCP in question was not applied with the intention of discriminating against the Claimant, it must not make an order for compensation unless it first considers whether to make a declaration and/or make an appropriate recommendation within the meaning of s.124(2)(a) or (c) of **the 2010 Act**; see s.124(4) and (5) of **the 2010 Act**. By contrast, if a claim of harassment is made out the Tribunal is not required to consider whether such harassment was intentional before awarding compensation, and nor is it required to consider other remedies first. The Respondent's assurance that it does not seek to produce any evidence on intention does not obviate the need for the Tribunal to consider the point and to go through certain steps which are not required in the harassment claim. These seem to me to be material differences in approach and which

mean that the claim of harassment possesses a sufficiently different character to render an appeal in respect of that head of claim substantial and not academic;

c. Finally, I agree that the declaratory relief in respect of a claim of harassment may have a certain value for the Claimant in that it may provide a degree of vindication which would not arise in a claim of indirect discrimination. As Ms Monaghan puts it, the application of a "racially neutral PCP" is very different from, and arguably less culpable than, the creation of a hostile working environment.

33. Even if I am wrong about that and the appeal is considered to be academic, the EAT could, in the exercise of its discretion, proceed to hear the appeal. The Court of Appeal in **Hamnett v Essex County Council** [2017] 1 WLR 1155 (in the context of an appeal relating to traffic regulation orders) considered the scope of that discretion:

> **"33. In a case involving a public authority and raising a question of public law, the court has a *discretion* to hear the appeal, even if by the time it is heard, there is no longer an issue to be decided which will directly affect the rights and obligations of the parties as between themselves: see *R v Secretary of State for the Home Department, Ex p Salem [1999] 1 AC 450* , 456, per Lord Slynn of Hadley. However, as Lord Slynn went on to emphasise, at p 457, that discretion was to be exercised with caution:**
>
> > **"and appeals which are academic … should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."**
>
> **34. Just how narrow this discretion is, was underlined in this court in *Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party) (Practice Note) [2012] 1 WLR 782* . Lord Neuberger of Abbotsbury MR said, at para 12, that "the mere fact" that a projected appeal may raise a point or points of significance did not mean that "it should be allowed to proceed where are no longer real issues in the proceedings as between the parties." Lord Neuberger formulated the following propositions, at para 15:**
>
> > **"Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the Respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."**
>
> **Even taking into account that Hutcheson did not involve a public authority or a question of public law, the caution needed before exercising the discretion to proceed in a case which has become academic is readily apparent. (Emphasis Added)**

34. Had I considered that the appeal was academic, the position as regards the three requirements identified above which must be satisfied before an academic appeal may proceed is, in my judgment, as follows:

a. The issue in relation to third party harassment is one of some general importance. It affects the scope of an important protection under **the 2010 Act** and could potentially affect many employees and employers. The Respondent contends that the matters raised are not ones of general importance because relevant protection is already afforded by the provisions on indirect discrimination. For reasons set out above, I do not consider that, in the circumstances, the protection against indirect discrimination affords a sufficiently equivalent remedy.

b. Although the Respondent does not consent to the appeal proceeding, it is not at any realistic risk on costs (given the limited costs jurisdiction in the Tribunal and the EAT);

c. Whilst it is not ideal that the Respondent was unrepresented at the hearing before me, I did have the benefit of very full written submissions from Ms Connolly on each of the issues I have to consider. In these circumstances, I am satisfied that both sides of the argument were properly put.

35. Taking all of those matters into account, and approaching the matter with due caution, it seems to me that this is an appropriate matter to proceed to hearing. I should mention that in coming to this conclusion I have not relied upon the fact that permission to proceed was granted on the sift. The argument that the appeal was academic was not before the then President and it would not be appropriate simply to have adopted the then President's view that the matter was one of general public importance without considering the question afresh and in light of the Respondent's submissions.

Does the Race Directive require Member States to outlaw third-party harassment where the harassment was foreseeable and preventable, without a requirement that the employer's failures were themselves "related to" race?

36. Ms Monaghan submits that the **Race Directive** and the other **EU Equality Directives** (**2000/78/EC**, **2006/54/EC** and **2004/113/EC**) require Member States to outlaw third-party harassment in certain circumstances; in particular where an employer has failed to protect or prevent his/her employee from foreseeable harassment by a third-party. She submits that the **Race Directive** does not require that the employer's inaction in such circumstances be related to any protected characteristic.

37. The first point made by Ms Monaghan in support of that submission is that Article 2(3) of the **Race Directive** treats harassment as discrimination when "*unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*". Ms Monaghan submits that the underlined words indicate that there is no requirement that the employer itself engages in conduct "*related to*" race and that it is sufficient that such conduct, by a third party, merely 'takes place' or occurs. That interpretation is said to be supported by the terms of Article 3(1) which does not require that the acts of racial harassment are themselves done by the employer but requires only that the acts are done within the sphere of occupation and working conditions: Article 3(1)(a) and (c).

38. In my judgment there are several difficulties with Ms Monaghan's submission:

a. It does not accord with the natural and ordinary meaning of the words used in Article 2(3) of the **Race Directive**. On a natural reading of that Article, the mischief to which it is directed is unwanted conduct relating to racial or ethnic origin. That is the conduct

which is deemed by Article 2(3) to be discrimination within the meaning of Article 2(1). Conduct must be both unwanted *and* related to race before it can be deemed to amount to discrimination. There is nothing in the Article to suggest that some other act (or failure to act) that is either not unwanted or related to race, could also be deemed discriminatory.

b. Whilst it is correct that Article 2(3) does not stipulate that the unwanted conduct related to racial or ethnic origin must be conduct by the employer, that is merely because this broadly applicable directive seeks to adopt a definition for harassment that can be applied in a number of contexts, only one of which is employment. As is made clear by Article 3, the **Race Directive** is intended to apply to "*all persons*" in relation to the various sectors and areas identified, the third of which is employment and working conditions. The absence, therefore, of a specific perpetrator in the definition is unsurprising, and does not, in my judgment, mean that the intention was that liability should arise whenever unwanted conduct related to racial or ethnic origin takes place or occurs (it being accepted by Ms Monaghan that "occurs" is a synonym for "takes place").

c. Indeed, if Ms Monaghan's submission were correct then there would be no reason to impose liability for third-party harassment only on employers. Similar liability would have to be imposed in respect of persons in the spheres of education, social security and access to the supply of goods and services, irrespective of whether they would be in any position to take preventative steps in respect of potential harassment. Insofar as it is said that liability for third-party harassment should only extend to situations where a person is in a position to prevent or take steps to prevent such conduct, there is nothing in the **Race Directive**, or indeed any of the other Directives, which provides

any basis for drawing such a distinction between the different categories of persons falling within the scope of the measure.

d. The fact that "occurs" is a synonym for "takes place" means that, if Ms Monaghan's argument is correct, then the same liability for acts of third parties would arise in respect of both direct and indirect discrimination. Article 2(2)(a) provides that direct discrimination "shall be taken to occur" when one person is treated less favourably than another. As with the definition of harassment, the definition of direct discrimination does not identify a specific perpetrator of the less favourable treatment. In particular, it does not say that direct discrimination shall be taken to occur where one person is treated "by the employer" less favourably another. It cannot realistically be suggested that the intended effect of the **Race Directive** was to impose liability on employers and other persons for acts of direct discrimination by third parties. Ms Monaghan argues that the necessary causal relationship between the less favourable treatment and the protected characteristic dictated by the use of the formulation "on grounds of" in Article 2(2)(a) means that such liability could not arise in those circumstances, and that it is the broader "related to" formulation in Article 2(3) which permits of the liability for which Ms Monaghan contends. In my judgment, it is difficult to see why, on the one hand, the causative relationship means that the innocent employer is excluded from liability for the acts of a third party, whereas the associative relationship under Article 2(3) on the other means that he is not; in both Article 2(2) and Article 2(3), it would be sufficient, if Ms Monaghan is correct, for liability to arise simply because the act of discrimination or harassment has occurred or taken place. In neither case would it matter whether any associative or causative relationship between the conduct and the employer exists. There is nothing in any of

the case law to which I was taken to suggest that such a broad interpretation of this Directive is apt.

e. The result of Ms Monaghan's submission, if correct, would be to create a situation of strict liability for employers whereby they would be liable for acts of third-party harassment irrespective of any motivational element relating to race on its part. Ms Monaghan contends that the foreseeability of unwanted conduct would put the employer on notice of the potential for harassment to take place and that this would place some limit on the scope of the liability. However, even if that were not the case, and the position is one of strict liability, Ms Monaghan submits that the right under Article 31 of **the Charter** to working conditions that respect health, safety and dignity means that a position of strict liability is justified. I do not accept that submission. As I have already said above, Article 2(3) of the **Race Directive** seeks to prohibit unwanted conduct that is related to race; it does not have the effect of imposing liability when there is no such relationship between the conduct in question (in this case, by a failure to act or take steps) and race. If the intention had been to impose strict liability then one might have expected to see some explicit reference to such an aim in the preamble to, or elsewhere in, the **Race Directive**. However, there is no such reference.

39. I agree, therefore, with the Respondent's submission that the Claimant seeks to place far more weight on the phrase "takes place" than it can bear.

40. Ms Monaghan sought to derive support for her broad interpretation of Article 2(3) of the **Race Directive** by reference to several other EU provisions and international instruments, chief amongst which was **the Charter**. Reliance is placed, in particular, upon Article 31 of **the Charter** which provides that:

> **"Every worker has the right to working conditions which respect his or her health, safety and dignity"**

41. In my judgment, the right to fair and just working conditions under Article 31 of **the Charter** cannot be read as requiring Member States to impose liability on employers for third-party harassment. Article 21 of **the Charter** deals specifically with "non-discrimination" and prohibits discrimination "based on" any ground such as sex, race etc. It seems clear therefore that insofar as it deals with non-discrimination, **the Charter**, in using the formulation of "based on", which is narrower in scope than the "related to" formulation, was not seeking to impose liability for discrimination where there is no link between the act complained of and the relevant protected characteristic. The right in respect of working conditions under Article 31 of **the Charter** is a distinct right which cannot, in my judgment, be relied upon to expand the scope of another right dealt with under an entirely separate provision of **the Charter**. It follows that there is nothing in **the Charter** which justifies the imposition on employers of strict liability for third-party harassment.

42. Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ("the **Recast Directive**") upon which the Claimant also relies does not take the position further. Article 2(1) of the **Recast Directive** defines harassment as "*where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment*." Recitals (6) and (7) of the Recast Directive provide:

> **"(6) Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.**

> **(7) In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice."**

43. The Claimant submits that these recitals reinforce his contention that the **Race Directive**, which is to be read consistently with the other directives dealing with discriminatory conduct, does not require that the employer itself engages in conduct "related to race" in order to be liable for harassment. It is said that the requirement to take preventative action makes it plain that liability for third-party harassment is intended also to be imposed on employers. I do not agree that the recitals can be construed as having that effect. These recitals appear to me to be directed to the encouragement of the taking of preventative measures by employers, but do not indicate that liability is to be imposed for the failure to take such measures (unless of course such failure is in itself such as to amount to unwanted conduct *relating to* the protected characteristic in question).

44. I was also referred to the **International Labour Organisation's Convention 190** ("**the ILO Convention**") "on violence and harassment", which was adopted 21 June 2019, but (as at the date of the hearing) was yet to be ratified by the UK or any other country. Article 4 of **the ILO Convention** provides that States must adopt:

> **"…an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work. <u>Such an approach should take into account violence and harassment involving third parties, where applicable</u>, and includes… (c) adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment". (Emphasis Added)**

45. This express reference to third-party harassment appears to be unique amongst the various international instruments to which I was referred. Although it has not yet been ratified, Ms Monaghan submits that the contents of **the ILO Convention** form part of the international context to be taken into account by Member States in implementing and applying Directives and indicate that the prevention of third-party harassment is a common aim. I do not agree that this yet-to-be ratified Convention can legitimately inform the meaning to be given to provisions of

A the Directives. Until it is ratified, there seems to me to be no particular obligation on any country, or upon the UK in particular, to give the **ILO Convention** any significant weight in construing other instruments. In any event, the terms of Article 4 of **the ILO Convention** merely "*encourage"* the taking of an approach to deal with harassment that "*takes into account"* B harassment involving third parties "*where applicable"* and the adoption of a "*comprehensive strategy*" to implement measures to prevent harassment. It cannot properly be read as imposing or seeking to impose liability on employers where there is a failure to implement such measures C as being an act of harassment in itself.

46. I have not so far dealt with the final sentence of Article 2(3) of the **Race Directive**. This provides that "*the concept of harassment may be defined in accordance with the national laws* D *and practice of the Member States*.". The Respondent contends that the Claimant's interpretation of Article 2(3) ignores this part which gives Member States a degree of flexibility as to how harassment is defined. That flexibility enabled Parliament to adopt a definition of harassment E which could in certain circumstances cover third-party harassment (i.e. where an employer's conduct in failing to take steps to prevent harassment by a third party was itself related to race) and that it was not bound to impose liability on the employer where such conduct is unrelated to race. F

47. On this aspect I am in agreement with Ms Monaghan that if the **Race Directive**, properly construed, did impose liability on employers for third-party harassment irrespective of any relationship between the employer's conduct and race, the flexibility afforded by the final G sentence of Article 2 (3) would not entitle the UK to dilute that liability so as to amount to something different. I have found, however, that the Article 2 (3) of the **Race Directive** does not have the effect contended for by the Claimant. Therefore, any flexibility afforded by that Article H in defining the concept of harassment does not need to be invoked; there is no requirement to

impose liability on an employer for third-party harassment where the employer's conduct or inaction is unrelated to race.

48. I turn therefore to the next limb of Ms Monaghan's argument which is that the history of the enactment of provisions addressing third-party harassment demonstrates that Parliament intended to outlaw third-party harassment and did so because it considered that it was required to do so by EU law. Considerable reliance is placed here on the decision of Burton J in **the EOC Case**. The issue of third-party liability is dealt with at paragraphs 36 to 40 of **the EOC Case**:

> **"36. Again the difference between the parties narrowed in the course of the hearing. The Defendant's position was made clear, in a Fact Sheet on harassment published by the Women and Equality Unit of the new Department of Communities and Local Government, in paragraphs 37 and 38 of the Defendant's Summary Grounds and in Mr Pannick's skeleton argument. In the Fact Sheet, published in October 2006, it was stated at page 4:**
>
> **"*Nevertheless, it might be argued, on appropriate facts, that an employer should take steps to protect an employee from third-party actions, which provide an offensive working environment for employees, in respect of which the employer might have some degree of control, and in such a case liability might arise if an employer fails to do so. So, on appropriate facts, the harassment provisions in the* [1975 Act] *might be interpreted so that where an employer knowingly fails to protect an employee from, for example, repetitive harassment by a customer or a supplier, the employer is "subjecting the employee to harassment".*"**
>
> **37. Similar points are made in paragraph 70 of Mr Pannick's skeleton:**
>
> **"*Adopting this approach does not necessarily exclude the possibility that an employer could be held liable on appropriate facts for the conduct of, for example, a supplier or customer (or, more accurately, held liable for the violation of dignity or unwelcome working environment brought about by such conduct). It might be the case that an employer could be held liable for failing to take action where there is a continuing course of offensive conduct, which the employer knows of but does nothing to safeguard against. The employer could be responsible for failing to act, albeit not responsible for the third party's actions in themselves. By contrast, fixing an employer with liability arising from a single act by a third party could go too far.*"**
>
> **38. Miss Rose's primary submission was that the 1975 Act failed to implement the Directive by imposing third party liability. She accepted however the difficulty of such a submission. She referred, in regard to its general reference to the workplace, to Recital 8 of the Directive, which I have already cited in full at paragraph 16 above, and also to Recital (9):**
>
> **"*In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of sexual discrimination and, in particular, to take preventive measures against harassment and sexual harassment in the workplace, in accordance with national legislation and practice.*"**
>
> **39. There is an exhortatory Article 1.2.5:**
>
> **"*Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace.*"**
>
> **40. She accepted however that there is nothing explicit, or even arguably implicit, in any of the Articles requiring a Member State to impose vicarious liability on an employer, or indeed liability for negligent failure to take steps, such as were expressly found by the House of Lords in Pearce not to exist in the present discrimination legislation. It became apparent in the course of her submissions**

that her real best position was that which she soon adopted, namely that, whereas the position taken by the Defendant, by reference to the passages in the Fact Sheet and the skeleton referred to above, would, at any rate from her point of view arguably, constitute adequate compliance with the Directive, yet on the face of paragraph 4A, as it stands, it is impossible to see how such a result could be achieved. This once again returns me to consideration of the respective arguments under the first aspect above. So long as s4A is to be framed in terms of unwanted conduct engaged in *on the ground of her sex* by the employer, it seems difficult, if not impossible, to see how an employer could be held liable simply for even knowing failure to take steps to prevent harassment by others. If, by reference to the disapproved authority of De Vere Hotels, it could have been shown that the employers knew of continuing and/or regular objectionable conduct by Mr Manning, and failed to take any steps to prevent it, it could be said that they were thereby themselves indulging in unwanted conduct (including omission) in relation to sex, with the consequent upsetting effect on the claimant waitress. However, it would seem very difficult to be able to say that such knowing failure on their part would amount to unwanted conduct by the employers *on the ground of her sex*. However, the result of adopting the associative rather than causative approach to harassment, either by a purposive and transliterative construction such as is urged by Mr Pannick or by its replacement by wording more compatible with Article 1.2.2, as urged by Miss Rose, would resolve the problem. Hence once again the issue, so far as it survives in the abbreviated form which alone Miss Rose now pursues, is bound up with my conclusion on the first aspect."

49. Ms Monaghan submitted that it is clear from the Government's argument in **the EOC Case**, as set out in paragraph 36 therein, that its position was that some cases of third-party harassment may be made out even where the causative test of "*on the grounds of*" was applicable. It was further submitted that the EOC's concession, set out at paragraph 40 of **the EOC Case**, in which Counsel for the EOC accepted that, "*there is nothing explicit, or even arguably implicit, in any of the Articles requiring a Member State to impose vicarious liability on an employer or indeed liability for negligent failure to take steps…*", was made in the context of the Government having effectively already conceded that the "*on the grounds of*" formulation was wide enough to encompass third-party harassment. In these circumstances, when the old s.40 provisions were enacted following the decision in **the EOC Case**, that must, submits Ms Monaghan, have been on the basis that that was what EU law already required.

50. I do not accept that submission. As the careful analysis of Underhill LJ in **Nailard CA** demonstrates, the decision in **the EOC Case** was not to the effect that there was any obligation under EU law to change the statutory language in order to provide for third-party liability: see paragraphs 18 and 19 above. Instead, the introduction of the old s.40 provisions was a matter of Government policy at that time. My conclusions above as to the meaning and effect of Article

2(3) of the **Race Directive**, are to the same effect: there is no obligation to impose liability for third-party harassment on an employer. The fact that the Government chose to impose such liability for the years during which the old s.40 provisions were in force does not mean that the Government was obliged to do so. Furthermore, the fact that the old s.40 provisions were enacted under s.2 of the European Communities Act 1972 act does not assist the Claimant. As provided for by Article 6 of the **Race Directive**:

> **"Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the directive."**

51. For all of those reasons, the answer to this issue must be that the **Race Directive** does require that an employer's conduct/inaction be itself related to race in order to give rise to any liability for third-party harassment.

If the Race Directive covers third-party harassment, can s.26 (1) the 2010 Act be interpreted to give effect to this?

52. Given my conclusions above as to the scope of the **Race Directive**, this question does not arise. However, even if it did, it would have been my view that s.26 of **the 2010 Act** is not susceptible to an interpretative exercise that would encompass liability for third-party harassment. As set out by Underhill LJ in **Nailard CA**, the "*negligent failure to prevent another's discriminatory acts is a very different kind of animal from liability for one's own: it requires careful definition, and I would expect it to be covered by explicit provision*." To extend the scope of s.26 through an interpretative exercise conducted by the Court would, in my judgment, lead to uncertainty and/or exceed the constraints on such an exercise: see **Vodafone 2 v Revenue and Customs Commissioners** [2009] EWCA Civ 446, [2010] Ch 77:

> **"38(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not**

equipped to evaluate: see the Ghaidan case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the IDT Card Services case, at para 113".

53. Where liability for third-party conduct is to be introduced, there would need to be careful consideration of the precise circumstances in which such liability should arise: for example, questions as to the kind of conduct that could give rise to such liability, the number of instances of such conduct, whether or not the employer needs to be aware of such conduct and the kind of steps that the employer would be expected to take to prevent such conduct, may need to be addressed in designing an appropriate scheme of liability. In this regard, it is noteworthy that the old s.40 provisions did address some of these questions. In particular, they provided that liability could not be imposed unless the employer "*knows that the woman has been subject to harassment in the course of her employment on at least two other occasions by a third party*": see subsection (2)(c) of the old s.40 provisions. The strict liability scheme contended for by Ms Monaghan would go considerably further even than the careful scheme previously devised by the Government as it would impose liability for the first incident of harassment by a third party. I see no reasonable basis on which any Court could deploy an interpretative exercise to develop such a scheme. Such a scheme would, in any event, also be contrary to the "*grain*" of the legislative scheme as it would seek to impose liability on persons whose thought processes contained no motivational element relating to race. It is well-established that liability for discrimination will depend on the reason why an employer has acted in the way that it did, and that that will generally involve an analysis of the mental processes of the relevant decision maker: see **CLFIS (UK) Ltd v Reynolds** [2015] EWCA Civ 439.

54. It was also submitted by the Claimant that the "related to" formulation can be read sufficiently broadly to capture third-party harassment. However, s.26 provides that "*A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic…*" That means that unwanted conduct unrelated to a protected characteristic will

not amount to harassment. It is difficult to see how even a broad construction of this provision could impose liability on an employer whose actions are found not to have been related to a protected characteristic (as was the case here).

If s.26(1) of the 2010 Act cannot be read and given effect to conform to the requirements of the Race Directive, does the relevant provision of the Race Directive have direct effect?

55. In light of the conclusion that the **Race Directive** does not impose the liability contended for by the Claimant, its direct effect does not assist him as there is no such liability for him to directly enforce against any emanation of the state.

Was the Tribunal, and now the EAT, bound by the decision of the Court of Appeal in Nailard CA?

56. The answer to this question is clearly, "Yes". For the reasons set out above, there is nothing in **Nailard CA** which can be said to be inconsistent with, or that amounts to a failure to apply, EU Law.

Conclusion

57. Liability for third-party harassment in certain circumstances has much to commend it. However, desirable as such liability might be, in the absence, as I have found, of any obligation under EU law to impose such liability, it cannot be said that the Tribunal erred in law in concluding as it did.

58. For all of the reasons set out above, the Claimant's grounds of appeal do not succeed and this appeal is dismissed. In the circumstances, the Respondent's Conditional Grounds of Cross-Appeal (and therefore issues (f) and (g) in paragraph 28 above) do not need to be considered.

Leap-frog certificate

59. The Claimant seeks a leapfrog certificate under s.37ZA, of the **Employment Tribunals Act 1996** so that the matter can proceed directly to the Supreme Court.

60. Section 37ZA of the 1996 Act, so far as relevant, provides:

> **"(1) If the Appeal Tribunal is satisfied that –**
>
> **(2) The conditions in subsection (4) or (5) are fulfilled in relation to the Appeal Tribunals decision or order in any proceedings, and**
>
> **(3) As regards that decision or order, a sufficient case for an appeal to the Supreme Court has been made out to justify an application under section 37ZB,**
>
> **the appeal Tribunal may grant a certificate to that effect.**
>
> **…**
>
> **(4) The conditions in this subsection are that a point of law of general public importance is involved in the decision or order of the Appeal Tribunal and that point of law is –**
>
> **a. A point of law that –**
>
> **i. relates wholly or mainly to the construction of an enactment or statutory instrument, and**
>
> **ii. has been fully argued in the proceedings and fully considered in the judgment of the Appeal Tribunal in the proceedings, or**
>
> **b. a point of law –**
>
> **i. in respect of which the Appeal Tribunal is bound by a decision of the Court of appeal or the Sabine code in previous proceedings, and**
>
> **ii. was fully considered in the judgements given by the Court of Appeal or, as the case may be, the Supreme Court in those previous proceedings.**
>
> **…"**

61. Section 37ZC provides for certain exclusions to s.37ZA. The relevant one for present purposes is that contained in subsection (3):

> **"(3) Where no appeal would lie to the Court of Appeal from the decision or order of the Appeal Tribunal except with the leave or permission of the Appeal Tribunal or the Court of Appeal, no certificate may be granted under section 37ZA in respect of a decision or order of the Appeal**

Tribunal unless it appears to the Appeal Tribunal that it would be a proper case for granting leave or permission to appeal to the Court of Appeal.

62. It is not contended that the decision in this case relates to a matter of national importance within the meaning of s.37ZA(5). Therefore, the issue is whether the conditions in s.37ZA(4) are satisfied, whether a sufficient case has been made out for an appeal to the Supreme Court and whether any of the exclusions under s.37ZC apply.

63. As to s.37ZA(4), there are two alternative conditions that may be satisfied. The first is that a point of law of general public importance is involved, that point of law relates wholly or mainly to the construction of an enactment or statutory instrument and the point is one which has been fully argued in proceedings and fully considered in the judgment of the EAT. As to this condition, I have already found, under issue one above, that the appeal does involve a point of law of general public importance. Furthermore, the point of law is one that is mainly related to the construction of an enactment – namely the **Race Directive** - and it has been fully argued before me (albeit by way of written submissions on the part of the Respondent). However, I am not satisfied that a sufficient case has been made out to justify an appeal to the Supreme Court. The Claimant's principal argument is based on a construction of the words "take place" in Article 2(3) of the **Race Directive**. I have rejected the Claimant's interpretation of that phrase for the reasons set out above. I do not consider that the Claimant's construction would have any real prospect of success if it were to be considered by a higher court. That alone is sufficient to regard this appeal as not satisfying the requirements of s.37ZA(1)(b). The discretion to grant a certificate does not therefore arise. I also note that the argument based on the words "takes place" was not one considered by the Court of Appeal in **Nailard CA (**or by the High Court in the **EOC case)**. Accordingly, although I am bound by **Nailard CA**, it cannot be said that the point as it emerged before me has been fully argued before the Court of Appeal so as to dispense with the need for any further consideration of the point before going to the Supreme Court. It seems to me that, if

the point had any real prospect of success, it is one that ought to be considered more fully by the Court of Appeal before going to the Supreme Court.

64. In any event, given my view as to the prospects of success of any appeal, this is a case where the exclusion under s.37ZC(3) applies. It is not a proper case for granting permission to appeal to the Court of Appeal. Any permission would have to be sought directly from the Court of Appeal.

65. The request for a leapfrog certificate is therefore refused.

66. Finally, I would wish to record my gratitude to Ms Monaghan for her expert and even-handed oral submissions and to Ms Connolly for her extremely helpful written submissions.