Appeal No. UKEAT/0270/19/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 March 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MISS J IHEKWOABA — APPELLANT

1) ASTON SERVICES GROUP LIMITED — RESPONDENTS
2) MR M AHMED

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS LAURA PRINCE (of counsel) Appearing via the Free Representation Unit
For the Respondents	MR RICHARD MORTON (solicitor) Instructed by: Avensure Limited South Central 11 Peter Street Manchester M2 5QR

SUMMARY

Sex Discrimination, Race Discrimination

The claimant, a litigant in person, made allegations of harassment related to both sex and race. Her claim form identified the alleged harasser, when the alleged harassment began, and the forms that she said it took. But it lacked particulars of specific incidents.

The Tribunal did not direct the claimant to provide further particulars, whether before, at, or following, a case management preliminary hearing. In it its decision arising from the full merits hearing the Tribunal found that there had been two instances of harassment related to sex. However, it failed to address another particular alleged incident to which the claimant had referred in her witness statement, in which it was said that the second respondent had touched her neck and made a personal remark that related both to sex and to race.

That alleged incident was within scope of the original particulars of claim. Given that she was a litigant in person, and had never been directed to provide particulars, it was not fair to the claimant for the Tribunal to have done nothing in relation to it. The respondents were entitled to a fair opportunity to respond to it, but the Tribunal should at least, at the start of the trial, have explored how that allegation might be addressed and adjudicated in a way that was fair to all parties. That might well have been possible.

The matter would be remitted to the same Tribunal to consider and determine whether this alleged incident happened, and whether it amounted to a further instance of harassment, related to both race and sex. Were it to find that the second defendant did make the remark that the claimant alleged, the Tribunal would then also need to consider whether that cast in a different light, the complaint that the two other incidents which the Tribunal had already found amounted to harassment related to sex, were also related to race.

HIS HONOUR JUDGE AUERBACH

Introduction

1. The claimant in the Employment Tribunal was employed by the first respondent, a company which provides cleaning and other services, until she was dismissed on the given ground of conduct. She thereafter presented a claim form, at that stage solely against the first respondent. She ticked the boxes in Section 8.1 for sex and race discrimination, unfair dismissal and other money claims, though no money claims were in the event pursued. She set out in box 8.2 a narrative of what she said had happened, including referring to alleged harassment by Mr Ahmed, who later became the second respondent. She was a litigant in person.

2. The first respondent's grounds of resistance complained of lack of particulars of the sex and race discrimination complaints, and, in relation to Mr Ahmed, raised the reasonable steps defence in section 109(4) **Equality Act 2010**. It gave its account of the disciplinary process which it said led to the claimant's dismissal; and set out its case that this related solely to various matters of alleged misconduct on her part, and was wholly unrelated to her allegations of harassment. It described the grievance that she had also unsuccessfully raised internally.

3. In September 2018 a case management preliminary hearing took place before Employment Judge O'Rourke. The claimant was in person. The minute included the following:

> **"The Issues**
>
> **2. The Employment Judge discussed the issues with the parties and recorded the matters between the parties which will fall to be determined by the Tribunal are as follows:**
>
> **3. Section 26 Equality Act 2010: Harassment on Grounds of Sex and Race**
>
> **3.1. Did the Respondent engage in unwanted conduct as follows:**
> **3.1.1. From 14 December 2017 onwards, Mr Mustafa Ahmed (the Claimant's supervisor) made sexual comments and touched the Claimant. These comments were focussed on the Claimant's skin colour.**
> **3.1.2. Having rejected these approaches, Mr Ahmed, from early January 2018 onwards, obliged the Claimant to carry out demeaning cleaning tasks that were impossible to complete, to include being forced to use a toothbrush.**

3.1.3. Suspending the Claimant on 26 January for 2018 for allegedly made unreasonable accusations against Mr Ahmed. The Claimant asserts that she made repeated reports of Mr Ahmed's behaviour to Ms Thompson, the manager, before suspension."

4. The Tribunal set out the sub-issues to which a complaint of harassment gives rise, and that the first respondent relied on the section 109 defence. It indicated that the claimant had permission, if she so wished, to add the second respondent as a respondent following that hearing. It continued with its identification of the complaints and issues as follows.

"4. Section 27 Equality Act: Victimisation

4.1. Did the Claimant carry out a protected act? The Claimant relies upon her complaints to Ms Thompson of sexual and racial harassment against Mr Ahmed.

4.2. If there was a protected act did the Respondent refuse a pay rise to the Claimant, discipline her and then dismiss her because of the act? The Respondent asserts that in fact, during the disciplinary process, contrary to the alleged protected act, it was the case that the Claimant blamed a personal vendetta against her by Ms Thompson, due to the Claimant having previously requested a pay rise, for the treatment she received.

5. Following that hearing, the second respondent was joined, and entered his own response.

6. The matter came to a full merits hearing before Employment Judge O'Rourke, Mr Launder and Ms Luscombe-Watts in March 2019. The claimant was in person but assisted by a friend. The respondents were both represented by a solicitor, Mr Morton. The Tribunal gave an oral decision and dealt with remedy. It written judgment was in the following terms:

"1. The first and second respondents sexually harassed the claimant;
2. The claimant's claims of racial harassment and victimisation on grounds of race and sex fail and are dismissed."

3. Written reasons were requested and provided later in March 2019.

4. The claimant instituted an appeal to the EAT, again acting as a litigant in person. The appeal was considered at a PH, at which the claimant had the benefit of representation by Ms Prince of counsel under the ELAAS scheme. She presented seven draft amended grounds of

appeal, of which six were permitted to proceed to a full appeal hearing, in substitution for the original grounds. That hearing has taken place today. Ms Prince appeared for the claimant, and Mr Morton appeared for both respondents. I had the benefit of written skeleton arguments from both representatives and I heard full oral argument this morning.

5. In the run-up to the hearing, Mr Morton had tabled a supplementary bundle to which, in correspondence, Ms Prince took objection. But in the event I was not particularly referred to any documents in it, although it was common ground that a number of the documents that it contained were before the Employment Tribunal and are indeed referred to in its decision.

The Tribunal's Reasons

6. After referring to the background and noting that the issues had been identified at the earlier case management hearing, under the heading "The Law", the Tribunal stated: "We reminded ourselves of ss. 26, 27 and 109(4) of the Equality Act 2010."

7. The next section of the decision is headed "The Facts" and opens as follows.

> **"5. We heard evidence from the claimant and on her behalf from Mrs Monika Ciemieja-Kopacz, a friend and former colleague and we also read a statement of a Miss Julia Majorcyzk, the Claimant's sister and another former colleague. We heard evidence from the Second Respondent and on behalf of the First Respondent, we heard from Ms Anne-Marie Thompson, at the time the Second Respondent's line manager; Mrs Cath Mangan, who heard the Claimant's appeal against dismissal and Mr Barry Holmes, an area manager who had some dealings with the Claimant. We also read a statement from a Miss Hannah Print, the dismissing officer.**
>
> **6. Chronology: we set out the following undisputed chronology:**
>
> **a. 16 October 2017 – the Claimant is promoted to cover supervisor by Ms Thompson.**
>
> **b. 6 December 2017 – the Claimant was notified of R2s appointment [213] (although there is some dispute as to whether this was as supervisor, or site manager).**
>
> **c. 14 December 2017 – R2 starts work. That is stated to be as site manager. The Claimant considered however that she remained as supervisor, working to R2.**

R1 however denies this. It is agreed evidence that the Claimant was asked to assist R2 in his role.

d. 3 January 2018 – the Claimant texts Ms Thompson [125] stating '*Mustafa (R2) he came to close to my personal space, and it wasn't first time. If you will be able please check on cameras: fourth floor side on the first lady's…*Ms Thompson replied the next day. '*I will see if Will can look*.'

e. 5 January 2018 - The Claimant again texts Ms Thompson 'again yesterday he used opportunitie (sic) (when he was showing me something on stairs), a*nd was touching my hand. Kadra made me double-worried as she said in him religion and culture man cannot touch in any way woman if she is not his wife. Horrible man. Have a good day and safe journey.'* Ms Thompson replied *'you will have to tell him straight if he does it again. He clearly doesn't see anything wrong.'* Ms Thompson again wrote '*if he gets too close tell him to get out of your personal space*.'

f. In either mid-or later January Ms Thompson and the Claimant met. The claimant reiterated her concerns about R2 and Ms Thompson said that she told the Claimant to make formal written complaint. The Claimant denies being told this. Ms Thompson also states that during this meeting she told the Claimant that she had never been offered the position of permanent supervisor, which the Claimant disputes.

g. 15 January – the Claimant texted Ms Thompson [202] saying '*another thing on Friday Mustafa asked to clean lifts using his old toothbrush, sorry but I couldn't do that. I used normal brush*' (attaching a photograph of a toothbrush).

h. 27 January – Miss Print, the area manager, having taken over from Ms Thompson, wrote to the Claimant to introduce herself and simultaneously to warn her that she would be subject to disciplinary procedure and then suspended her [82]

i. 14 February – following several re-arranged hearings, the disciplinary hearing took place on this date. At the outset, the Claimant challenged the fact that R2 was the notetaker, but he continued to be so.

j. 15 February – the Claimant complained about the conduct of the disciplinary hearing and separately raised a grievance against Miss Thompson and also mentioned that R2 had touched her [123 & 124]

k. 22 February – Miss Print suspends the disciplinary process and invites the Claimant to a grievance hearing on 26 February [129].

l. 23 February – R2 resigns

m. 26 February – the grievance hearing takes place [131]

n. 7 March – the grievance outcome is sent [135], dismissing the grievance.

o. 19 March – the disciplinary hearing outcome is sent, dismissing the Claimant with immediate effect.

p. 17 April – R2 texts the Claimant, following a telephone call from her [204]

q. 24 March – the Claimant appeals against both decisions.

r. 24 April - Mrs Mangan hears the appeals.

s. 24 April – Claimant makes complaint to the police about R2s behaviour [279]

t. 11 June – Appeals outcome [175-177] dismissing both appeals."

8. From around mid-October 2017 the claimant worked as a supervisor. When the second respondent started as site manager from mid-December, she lost that role. The Tribunal observed:

> **"Throughout these proceedings, [the claimant] seemed to be under the misunderstanding that the loss of this role was a central plank of her case, when, based as it was on sexual and race harassment by R2, it cannot have been. This resentment at the 'loss' of the role was, unfortunately, exacerbated by Ms Thompson's informal reliance on the claimant, continuing to communicate with her, in which communications Ms Thompson frequently made disparaging statements about R2, which Ms Thompson accepted in retrospect was unprofessional of her. The claimant did not however assist her case, either with her employer at the time, or with this Tribunal, by her obsession with this point, potentially clouding the real issues of sex and racial harassment."**

9. The Tribunal noted that the claimant said that the text messages of 3 and 5 January 2018 reflected her real concerns at the time as to sexual harassment by the second respondent. It noted that the second respondent denied having any knowledge of those messages or the allegations against him that they contained, until in fact he was notified of the Employment Tribunal claim. Ms Thompson's evidence included that she had met the claimant in mid-January 2018 and advised her to put her concerns in a written complaint to enable a formal investigation to take place. But the claimant did not do that, nor did Ms Thompson share these allegations with anyone else.

10. Paragraph 9 of the Tribunal's reasons began with the heading, "Sexual Harassment" and the following words: "We find that R2 did sexually harass the claimant on or about the dates of the two text messages, and we do so for the following reasons …". The Tribunal then set out its detailed reasoning supporting that conclusion in five sub-sections of this paragraph: (a) to (e).

11. In section (a) the Tribunal set out why it found the claimant to be a credible witness, responding to Mr Morton's submissions attacking her credibility. The Tribunal also described the police officer who interviewed the claimant as having been receptive to what she was saying, and contrasted that with the approach of either Ms Thompson or Ms Print, who had dismissed her allegations for lack of evidence. The Tribunal also stated, explaining why, that it did not believe that Ms Thompson had encouraged the claimant to put her allegations in writing.

12. At section (b) the Tribunal set out why it found the second respondent's evidence to be less credible. It referred to texts that he had exchanged in January 2018 with the claimant's sister, who also worked for the first respondent, in which he made advances to her and sought to have time alone with her, by offering to pay her himself to take the day off. At section (c) the Tribunal referred to the claimant's report to the police, containing more detailed allegations, as supporting her credibility, including an allegation that the second respondent had offered to pay the claimant if she was off sick, and told her that if she was good to him, he would be good to her.

13. At section (d) the Tribunal referred again to the two text messages, and the claimant in one of them asking for CCTV to be viewed, which the Tribunal considered suggested that she was confident that it would corroborate her account. Finally, at section (e) the Tribunal considered submissions from Mr Morton about whether, even if the incidents had happened as described, the conduct in question met the legal definition of harassment. In particular, he submitted that there was only one incident, being the hand-touching, which could have an innocent explanation. The Tribunal disagreed, in particular finding that the invasion of the claimant's space did create a proscribed environment for her, as did the hand-touching.

14. At paragraph 10 the Tribunal rejected the suggestion that, if the claimant was asked to use a toothbrush or small brush to perform sanitary tasks, this was by way of harassment or as a form of punishment.

15. Paragraph 11 began with the statement that the claimant had not "proved her case" of racial harassment. The Tribunal noted that she had raised with the police her suspicion that the second respondent had behaved as she alleged, because she was one of the only white females. The Tribunal recorded the police report as saying that she had told them that she was Polish and that all the other women, save one, were Somalian. The Tribunal also noted that the second respondent had made advances to the claimant's sister, also a white Polish woman, but that his texts made no reference to her skin colour or nationality. The Tribunal concluded: "In the absence therefore of any other evidence to support this allegation, we conclude that it is not made out."

16. Paragraph 12 has the heading, "Protected Disclosure and Victimisation", although I agree with Ms Prince that it is clear that by "protected disclosure" the Tribunal meant to refer to a protected act within the scope of section 27 of the **2010 Act**. This paragraph reads:

> **"It is clear to us that the text messages constituted a protected disclosure. They make allegations of sexual harassment, which clearly potentially engages the Equality Act. However, we do not find that any such protected disclosures were the reasons for the Claimant being disciplined or dismissed. As an aside, we dismiss outright the allegations about pay, as being completely unrelated to the acts of harassment, but instead entirely related to the Claimant's misunderstandings as to her role. Our reasons for finding that the protected disclosure did not lead to victimisation are as follows:**
>
> **a. There is clear evidence that the Respondent genuinely believed, on reasonable grounds that the Claimant had breached their disciplinary procedure, focused, in the end, entirely on her alleged falsification of time sheets. Ms Mangan gave good evidence as to why such acts were taken seriously.**
> **b. Crucially, we don't believe that at the point that Miss Print decided to embark on the disciplinary process that she was aware of the sexual harassment allegations, confirmed by Ms Thompson in evidence that she hadn't told her of them. Ms Print says in her statement that she was unaware of the allegations until she received the grievance, but we suspect that she actually first became aware at the disciplinary hearing, the day before. Those allegations, therefore, cannot have been the motivation for Ms Print's decision to discipline the Claimant.**

> **c. We accepted the evidence of Mrs Mangan that the sole focus of any allegation of victimisation by the Claimant was in respect of her role as supervisor, as set out in the appeal decision letter [177] and earlier, by the director originally appointment to hear the appeal, Mr Clews, in his letter [149], neither assertion of which was corrected at the time by the Claimant and nor did she make the link to the acts of sexual harassment in her letter of appeal. This is also borne out by her single-minded focus on the supervisor issue in this Hearing."**

17. The Tribunal then went on to set out why the first respondent's statutory defence failed, although Mr Morton observed to me in submissions that, at the hearing, he represented both respondents because that defence in fact was no longer pursued. The Tribunal then stated its conclusion, that the second respondent had sexually harassed the claimant, for which the first respondent was liable, and that the claims of racial harassment and victimisation failed.

18. The Tribunal awarded the claimant £6000, and interest, for injury to feelings. A proposed freestanding ground of appeal in respect of that award was not permitted to proceed to this hearing, so I do not need to summarise the reasoning by which the Tribunal arrived at that figure. However, it is pertinent to note that, among the factors it considered to be relevant was what it called "[o]ur finding as to there being two distinct incidents of sexual harassment".

The Statutory Framework

19. The relevant provisions of the **2010 Act** (omitting irrelevant sub-sections) are these:

> **"26. Harassment:**
> **(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.**
>
> **(2) A also harasses B if --**
> **a. A engages in unwanted conduct of a sexual nature, and**
> **b. the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **(3) A also harasses B if --**

a. A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
b. the conduct has the purpose or effect referred to in subsection (1)(b), and
c. because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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 --
age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

27. Victimisation:
(1) A person (A) victimises another person (B) if A subjects B to a detriment because --
a. B does a protected act, or
b. A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act --
a. bringing proceedings under this Act;
b. giving evidence or information in connection with proceedings under this Act;
c. doing any other thing for the purposes of or in connection with this Act;
d. making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

… …

136. Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
… …
(6) A reference to the court includes a reference to --
a. an Employment Tribunal; …"

Grounds of Appeal

20. As set out in the statement of amended grounds (omitting what was proposed ground 6, which was not permitted to proceed to this hearing), the grounds of appeal were as follows.

"(1) Harassment (sex). The ET failed to consider and/or make factual findings in respect of a number of C's sex harassment complaints (alternatively the ET's reasons on sex harassment are not Meek compliant).
(2) Harassment (race). The ET failed to consider and/or make factual findings in respect of a number of C's race harassment complaints (alternatively the ET's reasons on race harassment are not *Meek* compliant).
(3) Harassment and victimisation (burden of proof): the ET applied the burden of proof incorrectly in that they required C to prove her harassment and victimisation claims contrary to s.136 of the Equality Act 2010 (alternatively the ET's reasons on harassment and victimisation are not *Meek* compliant).
(4) Victimisation: The ET reached a decision in respect of the reason for C's dismissal which was not supported by the evidence and/or was perverse and/or the ET failed to consider whether the decision to subject C to disciplinary proceedings and/or to suspend C and/or to dismiss C was orchestrated by C's line manage (R2) and/or Ann Marie Thompson and therefore this was a 'tainted information' case (per *Jhuti* [2019] UKSC 55 and *Reynolds*). Alternatively, the ET's decision in respect of victimisation is not Meek compliant).
(5) Whistleblowing: The ET failed to consider C's whistleblowing claim.
(7) The ET's decision is not *Meek* compliant.

Particulars of Perversity appeal (Ground 4)

1. At paragraph 12(a) of their judgment the ET find that that disciplinary procedure "focussed, in the end, entirely on [C's] alleged falsification of time sheets".
2. The evidence of the witness statement of the decision maker (Hannah Print) was that the she "*felt that the allegation that [C] had attended work at the end of her shift during a time she had said she could not attend work was the most serious*" (at paragraph 22).
3. This was not an allegation regarding falsification of timesheets.
4. The ETs conclusion that the disciplinary procedure focused 'entirely' on C's alleged falsification of timesheets is perverse.
5. In addition, at paragraph 12(b) the ET find that Ms Print first became aware of the protected act 'at the disciplinary hearing' and that 'those allegations, therefore, cannot have been the motivation for Ms Print's decision to discipline the [C]'.
6. Ms Print's decision to discipline C took place *after* the disciplinary hearing (the disciplinary hearing took place on 30th January 2018, the decision to dismiss C was not made until 19th March 2018). It is therefore perverse to conclude that the decision to discipline C (by dismissing her) could not have been the motivation for Ms Print's decision to discipline C."

Argument, Discussion and Conclusions

21. Ground 1 and 2 assert in summary that there was a failure by the Tribunal to address, or address properly, a number of the complaints of harassment related to, respectively, sex and race.

22. As developed by Ms Prince in argument, there were I think two sub-strands to ground 1. First, while the Tribunal did find that the second respondent had sexually harassed the claimant on or around the dates of the two text messages, it did not make a finding as to what the conduct

on each of those occasions actually consisted of. Secondly, the allegations of sexual harassment were, she submitted, not in any event limited to the two particular incidents referred to in those texts. The claim form went wider than that, and this was reflected in the minute of the case management hearing and in turn in the contents of the claimant's witness statement.

23. In her skeleton, Ms Prince highlighted the statement in the claim form:

> **"The first discrimination acts started since Mustafa Ahmed started his employment by saying sexual comments, touching inappropriately, interrupting my personal space, using his manager position to be close to me."**

24. Ms Prince referred to the issues identified at the case management hearing, including alleged unwanted conduct from 14 December 2017 onwards by Mr Ahmed having "made sexual comments and touched the claimant. Those comments also focused on the claimant's skin colour." She referred to the claimant stating in her witness statement that he regularly put his hands on her arm or shoulder, used his site manager position to come close to her, and on one occasion touched her neck saying: "The white girls, especially from Poland, are so pretty, not like my wife." Ms Prince also noted the references by the Tribunal at paragraph 9(a), to the internal grievance raised by the claimant, including an allegation of hugging; and at 9(c) to what she had said to the police about the composition of the workforce. The Tribunal, submitted Ms Prince, erred by failing to consider this full range of allegations of harassment relating to sex, or if it did, by failing to set out what it concluded in relation to all of them.

25. As to ground 2, Ms Prince focussed on the alleged remark: "white girls, especially from Poland, are so pretty." She submitted that the Tribunal erred by not giving any consideration to this critical piece of evidence, including not just the sexual, but the racial element.

A

26. The first respondent's Answer contended that there was no error as alleged by either ground 1 or 2, as neither the claimant nor the Tribunal had been able to identify clearly what the alleged specific acts of harassment were. The grounds of appeal did not specify which allegations were not addressed. Mr Morton submitted that the claimant had had ample opportunity to do so, not only during the internal process but in the course of the Tribunal litigation. As the Tribunal recorded in its decision, she was more preoccupied with her case that she had been wronged in relation to the supervisory role. The Tribunal could only be expected to address the specific complaints advanced in the claim form. That it had done. It had identified them at the case management preliminary hearing, and the claimant had not queried the record. It had gone on to address those complaints in its decision arising from the full merits hearing.

B

C

D

27. In relation to the alleged reference to white girls from Poland, Mr Morton said that to his best recollection the claimant had not expanded on this in oral evidence at the hearing, nor had she or her friend specifically put this to the second respondent in cross-examination. Once again, he said the Tribunal's remarks about her focus being on the issue of the supervisor role were in point. It was entitled to conclude that she had not made out her race harassment complaint.

E

F

28. Ms Prince in reply maintained that this was a significant and specific allegation that was in the claimant's witness statement and was within the four walls of the more general allegations made in her particulars of claim. Even if the second respondent had not been specifically cross-examined about this, bearing in mind that the claimant was a litigant in person with only the support of a lay colleague, the Tribunal should have taken some steps either to clarify whether the allegation was maintained or to have the point put to the second respondent. It was not sufficient, submitted Ms Prince, for the Tribunal simply not to have dealt with it at all.

G

H

29. My conclusions on these two grounds are as follows. I start by noting that this appeal relates only to the outcome of the full merits hearing, and Tribunals in any event have a broad discretion in matters of case management. But in this case the history of the litigation provides essential context for a consideration of how matters stood, and were approached, at the full merits hearing. The starting point is the claim form. As I have noted, in section 8.1 the claimant ticked the boxes for sex and race discrimination. The narrative in 8.2 included the following:

> **"The first discrimination act started on 14.12.2017 made by new site manager, Mustafa Ahmed. On 14.01.2018, I have asked for a pay rise due to other employees offered pay rise. The first discrimination act started since Mustafa Ahmed started his employment by saying sexual comments, touching inappropriately, interrupting my personal space, using his manager position to be close to me. When I have tried to defend myself, he made my work situation get worse by adding the cleaning tasks impossible to complete using the toothbrush, et cetera."**

30. This passage is descriptive of the general nature of the alleged harassment. It covers who the claimant says the harasser was, when she says the harassment began, and its general nature, being by way of (a) sexual comments, (b) inappropriate touching, (c) using his position as a manager to invade her personal space, and (d) responding to her defending herself by giving her impossible tasks. Save that, in relation to the last of these, it gives the example of being required to use a toothbrush to clean, no further particulars are given. Though it is, I think, obvious that each of (a) to (c) are said to be viewed as sexual or relating to sex, (d) could be seen as falling within section 26(3) of the **2010 Act**: conduct because of rejection of unwanted conduct. This account, however, does not explain how any of the conduct is said, if it is, to be related to race.

31. The first respondent, in its grounds of resistance, indicated that further particulars were required of these complaints. However, the claimant was not, prior to the case management hearing, directed by the Tribunal to provide, as best she was able, particulars of the alleged acts of harassment of which she complained. Mr Morton submitted that nevertheless she had the opportunity to do that during the course of that hearing. However, what orders were or were not

made at it, was the responsibility of the judge. The minute records only that the judge discussed the issues with the parties and then that the matters to be determined were as set out by the judge at paragraph 3.1. This appears largely to have been drawn from what was in the claim form, although the minute does record the additional particulars in relation to harassment by way of comments on the claimant's skin colour. The minute also, I observe, omits any reference to the complaint in the claim form, that there was also harassment by invasion of space, although there is no suggestion that such allegation had been abandoned by the claimant.

32. At 3.1.3 the minute records the complaint that the claimant was suspended for having allegedly made unreasonable accusations against the second respondent by way of complaints to Ms Thompson. It appears to me that this was, in its natural meaning, a complaint of victimisation. However, I am inclined to think by simple error, it appears in the minute at paragraph 3.1.3, with the complaints of harassment, rather than among the complaints of victimisation at paragraph 4.2. However, the Tribunal at the full hearing does appear correctly to have approached the complaint about the suspension as being part and parcel of the victimisation complaint.

33. The minute of the case management hearing does not record whether the claimant was asked whether she felt able to provide any more specific particulars of each alleged incident of harassment. In any event, the Tribunal did not direct her to do so. In its amended response following that hearing, the first respondent continued to complain of lack of particulars. Having been joined following that hearing, the second respondent also entered a response denying making sexual comments, inappropriate touching, interrupting the claimant's personal space or asking her to use a toothbrush for cleaning tasks; and he denied racial discrimination.

34. Witness statements were produced, in the usual way. In the claimant's witness statement, the account she gave included the following:

> **"During the first week, he started asking me about my personal life, family, children, partner instead of work environment responsibilities, staff.etc, I am a mother of three children and having a stable and happy life. Mr Mustafa Ahmed was extremely grateful for helping him regularly coming to me saying "thank you for your work", putting his hand on my arms or shoulder. He used his Site Manager position to come close to me. In one occasion when I was filling out paperwork, he came closer and touched my neck, saying "the white girls especially from Poland are so pretty not like wife." I became terrified and intimidated that he might do any harm to me and I left the room. Since then I have never stayed alone with him at the same room and I have tried to avoid him as much as possible. I have informed Anne Marie Thompson about Mr Mustafa Ahmed inappropriate and racist behaviour by sending text message to her asking to check the CCTV recordings. She replied advising, "you will have to tell him straight if he does it again he clearly doesn't see anything wrong," adding "if he gets too close tell him to get out of your personal space." She completely ignored the problem. Since then Mr Mustafa Ahmed started to harass me, requiring cleaning lifts using his old toothbrush (text message sent to Anne Marie Thompson on the 15.01.2018 reporting the matter)."**

35. In the Tribunal's bundle were the text messages to which the claimant referred. I was told by Mr Morton that the police log was brought by the claimant to the full merits hearing and permitted to be added to the bundle. That log was found to include the following statement: "She feels this was because she was Polish and a female whilst the other women in the office are Somali." The police report also contained an allegation that, after he began in his role, the second respondent began being "inappropriate towards her verbally", raising personal topics and complimenting her, touching her arm on one occasion in a sensual way. It also referred to alleged incidents on 3 and 5 January 2018, corresponding to the dates of the text messages to Ms Thompson. It also included the allegation that he had offered to pay her if she was off sick, and told her that he would be good to her if she was good to him.

36. Pausing there, it seems to me that in her witness statement, and by reference to the text messages, the claimant was putting forward evidence to the Tribunal about the following alleged incidents of harassment by the second respondent: (a) inappropriate discussion of matters relating

to the claimant's personal life, including her partner, in the week after he joined on 14 December; (b) touching her on the neck and making the "white girls especially from Poland" remark; (c) invading her space on or before 3 January 2018; (d) touching her hand on or around 4 January, the day before the 5 January text; and (e) at some point thereafter requiring her to clean the lifts using his old toothbrush. The evidence of the police report added further detail.

37. Did the Tribunal consider, and dispose of, these five strands of the claimant's case as to what had occurred, as distinct allegations of sexual and racial harassment? To the extent that it did not, did it err by failing to do so?

38. The Tribunal upheld two complaints of sexual harassment, identified by it as having occurred on or about the dates of the two text messages. Although it would have been better to have spelled it out, I think it is clear, reading the reasons as a whole, that it found that what had factually occurred was as alleged in those text messages: invading her personal space on one occasion and touching her hand on the other. I reach that conclusion having regard to the fact that the Tribunal did set out the content of the texts in its findings of fact, and stated at the start of paragraph 9 that it found that the second respondent did sexually harass the claimant around those dates. This is also having regard to its later discussion of Mr Morton's submissions about whether invading personal space could constitute harassment, and also to its reference in the remedy section, to having found that there were two distinct incidents of sexual harassment. I therefore do not think that the first strand of ground 1 lands home.

39. The Tribunal also, in paragraph 10, plainly did consider the allegation that making the claimant use a toothbrush amounted to a form of harassment, by way, implicitly, of punishment for being unreceptive to the second respondent's unwanted overtures. But it rejected that

complaint, and Ms Prince confirmed to me in argument that the appeal does not seek to challenge that conclusion as such. The Tribunal did therefore address those three particular complaints.

40. What of the allegation that the second respondent had engaged in inappropriate personal discussions? I note that the Tribunal recorded at paragraph 8 that the claimant said that the text messages reflected what were her real concerns at the time as to sexual harassment by him. Standing back, it seems to me that the allegation of inappropriate discussion of her personal life could reasonably have been understood to be merely background or scene-setting by the claimant, for the specific alleged incidents complained of, involving invasion of space or physical touching, as well as the toothbrush incident, rather than being a distinct matter of which she was seeking to complain in its own right. I therefore conclude that the Tribunal did not err in law by failing to consider that matter as a distinct complaint of harassment in its own right.

41. However, that leaves the alleged incident of touching her on the neck and making the "white girls especially from Poland" remark. This was specifically referred to in the claimant's witness statement, and I note that it would appear that a reference to the same alleged incident was to be found in the police report. Ms Prince correctly points out that, while the Tribunal did, at paragraph 11, refer to what the claimant was recorded as having told the police about why she believed her race to have been a factor, the Tribunal does not refer to this alleged remark having been made by the second respondent, or otherwise to this alleged particular incident.

42. This particular alleged incident, as set out in the witness statement, in principle fell within the four walls of the claimant's original particulars of claim, and the summary of the nature of her harassment complaints given in the case management hearing minute. It would also fall within the categories of behaviour covered by the text messages, involving, as it allegedly did,

physical touching, which was the sort of thing that she had indicated more greatly troubled her. Given that she was a litigant in person, that she was never specifically ordered to provide further particulars, nor was there any indication that she had told the Tribunal she was unable to give particulars, it seems to me that she could not be fairly faulted for having failed to set out the detail of this allegation prior to doing so in her witness statement.

43. That said, of course Mr Morton is right to say that the respondents for their part were entitled to a fair opportunity to respond to this allegation. The Tribunal could have enabled that by requiring the claimant to give further particulars of her specific complaints at an earlier stage. However, given that it had not done that, and given that, for reasons I have indicated, I do not think it was fair to the claimant simply not to address this at all, the Tribunal ought at least to have made some attempt at the full merits hearing to explore the matter further.

44. The respondents had, Ms Prince was able to confirm, been given the claimant's witness statement in advance. The second respondent was at the hearing and indeed gave evidence, and Mr Morton was at that point representing both respondents. The Tribunal could at least have sought some clarification from the claimant at the start of the hearing, as to which particular matters set out in her statement she was relying upon as individual allegations of harassment covered by her particulars of claim. It could have attempted then to ascertain from Mr Morton whether the respondents were in a position to respond to all of those allegations at the hearing, bearing in mind that the second respondent was present to give evidence. It could have explored whether this allegation might have given rise to a need for further disclosure, or, if it did, whether that might have been managed during the course of this multi-day hearing.

45. It was unfortunate that, as things turned out, this alleged incident was only raised by the claimant in express terms for the first time in her witness statement, but I conclude that this was not the fault of either party. The allegation was potentially important, not only because it was of a discrete alleged incident of harassment involving touching, but because, if true, it provided some potential substantiation, beyond the mere suspicion that the claimant was recorded as having voiced to the police, that the alleged harassment related to race as well as to sex.

46. Mr Morton relied upon the Tribunal's findings that the claimant was preoccupied with the supervision issue, and, he said, did not help herself in evidence when asked about the allegations of harassment. He says that the Tribunal did its best on the case she presented, by focusing on the allegations that were clearly identified and delineated in the two text messages. He also submits that paragraph 11, in which the Tribunal concluded that racial harassment was not made out, sufficiently covered the ground of how that aspect of the complaints was presented.

47. However, as I have said, this alleged incident was clearly set out in the claimant's witness statement. It was potentially significant to the racial aspect of the complaints, and I do not think it was satisfactory that it was not mentioned by the Tribunal, whether in paragraph 11 or indeed in its decision at all. For all of these reasons, I conclude that these grounds partially succeed, insofar as the Tribunal erred by not addressing in its decision this particular complaint of an incident involving the second respondent allegedly, when touching the claimant's neck, making the "white girls especially from Poland" remark; and also its potential implications for her claim that the other harassment which it found did occur was not just sexual but also racial.

48. I turn to ground 3. This asserts that the Tribunal took the wrong approach to the burden of proof in relation to both the harassment and victimisation claims. In her skeleton Ms Prince

directed her submissions to the complaint of race-related harassment and specifically to the observation at the start of paragraph 11 that the claimant had failed to prove racial harassment. She highlighted the Tribunal's failure to cite section 136 or any of the familiar authorities on the burden of proof. She submitted this was indicative of the Tribunal having set the bar too high. In the course of oral submissions, Ms Prince I think largely accepted that the thrust of this ground was directed at the complaints of race discrimination, as the complaints of sex discrimination were of conduct that was said to be inherently or obviously sexual or related to sex.

49. Mr Morton submitted that there was no error in this regard, and in particular that the Tribunal was entitled to take the view that the features identified in paragraph 11 of its decision were not sufficient to shift the burden of proof to the respondents.

50. I do think that the Tribunal ought at least, in its summary of the law, to have made some mention of section 136 or of the law relating to the burden of proof in relation to **Equality Act** claims. But what matters ultimately is whether the Tribunal made any error in its substantive decision, by taking the wrong approach to the burden of proof. In relation to the allegations of sexual harassment there was a factual dispute as to whether the alleged incidents occurred at all. It was the second respondent's case that they did not. It was not his case that they did occur but were not sexual or related to sex, and I do not think that in this case the burden of proof had anything significant to add to the Tribunal's evaluation of those complaints.

51. As to the alleged racial element of the claimed harassment, the Tribunal did refer in paragraph 11 to the police report, and it also referred to the evidence that the second respondent had made advances to the claimant's sister, who was also white Polish, and to what it said was the lack of any reference to race in his text messages. I do not think that the Tribunal ought to

A have treated *those* factual features alone as enough to cause the burden of proof to shift. I am fortified in this view by hearing from both Mr Morton and Ms Prince in submissions, in their different ways, that the police report was not an accurate record either of what the claimant said about the composition of the workforce or of the actual composition of the workforce.

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52. However, were the second respondent to be found to have made the "white girls especially from Poland" remark, the Tribunal would then have needed to consider the implications for the race harassment claims generally, including having regard to the burden of proof; or alternatively, if the Tribunal believed there was some good reason why it could not deal with this complaint, it should have said what it was. To that extent, I therefore allow ground 3 in support of ground 2.

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53. I turn to ground 4. This concerns the victimisation claims, which, as I have indicated, were rightly treated at the full hearing as relating to the decision to raise disciplinary charges against the claimant and suspend her, and then the decision to dismiss her, as well as there being a complaint of victimisation in relation to pay. All of those claims failed.

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54. Leaving aside at present the catch-all complaint of lack of *Meek*-compliance, there are two substantive limbs to this ground. The first is perversity. The further particulars in the amended grounds raise in substance, I think, two strands. The first is the submission that the finding at paragraph 12(a) of the reasons, that the disciplinary procedure focused in the end entirely on the alleged falsification of timesheets, was inconsistent with the evidence of Ms Print, that "the allegation she had attended work at the end of her shift during the time she had said she could not have attended work was the most serious." That, said Ms Prince, was not an allegation of falsification of timesheets.

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55. The second part of the perversity strand is that the Tribunal erred by finding that, as Ms Print only learned of the claimant's allegations against the second respondent at the disciplinary hearing, this could not have influenced the decision to "discipline" her. That, said Ms Prince in her skeleton, was erroneous, because the decision to discipline the claimant by way of dismissing her, took place *after* the disciplinary hearing.

56. Mr Morton submitted that the first of these was a case of the Tribunal being colloquial or imprecise in its language, and that when it referred to falsification of timesheets it was referring to the allegations about whether the claimant had been truthful about her fitness to attend work when rostered. He recalled that the phrase had been used in evidence by the respondent's witness Ms Mangan, who had heard the appeals against dismissal and in respect of the grievance. As to the second strand, the reference to the decision to "discipline" the claimant was clearly to the decision to subject her to a disciplinary procedure, and associated with that, to suspend her, and not to the final decision as to the outcome of the disciplinary process being to dismiss her.

57. The second substantive limb of ground 4 contends that the Tribunal erred by failing to consider whether this was a so-called tainted-information case in the sense explored by Underhill LJ in **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 or in the whistleblowing context in **Jhuti** [2020] IRC 731, the allegation being that, for discriminatory reasons, the second respondent and/or Ms Thompson, by false representations, induced Ms Print to suspend and subject the claimant to disciplinary process, and/or to dismiss her.

58. The Answer raised the point that there was no suggestion in this case, or basis on which the Tribunal ought to have found, that the allegations of misconduct, or evidence supporting them, had been manipulated or misrepresented in some way so as to procure disciplinary action to be

initiated on a false premise. Nor could this be said of the decision to dismiss. Mr Morton also relied on the fact that Ms Thompson's evidence to the Tribunal was that she told no one of the claimant's harassment allegations at the time, and indeed the second respondent's own case was that he did not know about them until he received the Tribunal claim.

59. Further, albeit in the context of the paragraph superfluously dealing with the section 109(4) defence, the Tribunal had found as a fact that Ms Thompson did not regard the claimant's harassment accusations as serious and had not troubled to tell anyone about them (something that the Tribunal mentioned because it deprecated it and found it relevant to that defence).

60. As for these aspects, I observe that the following appears not to have been in dispute and is reflected in the Tribunal's findings. On 23 January 2018 Ms Thompson and the second respondent met the claimant and discussed the supervisory role that she had hitherto carried out and her associated request for a pay rise. There was not a meeting of minds. Ms Print joined the respondent that very day and took over responsibility for this part of Ms Thompson's territory. On 24 January 2018 Ms Thompson and Mr Ahmed both informed Ms Print of misconduct allegations against the claimant. Ms Print suspended the claimant, carried out an investigation of her own, and then invited the claimant to a disciplinary hearing. The allegations included leaving site before the end of her shift, claiming for time not worked, and attending work at the end of her shift during a period when she had stated she could not work.

61. Following the disciplinary hearing, the claimant raised what were treated as grievances, complaining about the second respondent's role as notetaker at that hearing, and referring to his alleged harassment. Ms Print investigated those matters, holding a grievance hearing, and then dismissed the grievance. Thereafter, she sent the claimant her decision arising from the

disciplinary process, which was to dismiss the claimant for gross misconduct. In her witness statement, Ms Print wrote: "In particular, I felt that the allegation that she had attended work at the end of her shift during the time she had said she could not attend work was the most serious." Finally, following the claimant's dismissal, appeals against both the dismissal and the grievance outcome were heard by Ms Mangan and both were unsuccessful.

62. My conclusions in relation to this ground are as follows. Firstly, I think it is clear that when, at the end of paragraph 12(b), the Tribunal said, "Those allegations, therefore, cannot have been the motivation for Ms Print's decision to discipline the claimant" they were referring to the decision taken to raise disciplinary charges against the claimant and suspend her. It is apparent that Judge O'Rourke sometimes uses the verb "to discipline" to mean "to initiate formal disciplinary process". See for example paragraph 4.2 of the minute of the case management hearing referring to the decision to "discipline her and then dismiss her". The preamble to paragraph 12 also refers to the claimant being "disciplined or dismissed" and 12(b) then starts by referring to what happened at the point that Ms Print decided to embark on the disciplinary process, and her lack of knowledge of the allegations of harassment at that point.

63. As to the reference to falsification of timesheets, I am persuaded by Mr Morton's submission that, unfortunate though it was, this was a case of terminological inexactitude. The Tribunal did not have to subject the disciplinary process and decision to dismiss to the same careful appraisal as it would have to apply, had it been considering a complaint of unfair dismissal. Its concern, in the context of the victimisation complaint, was with whether it accepted that the decisions taken in that connection were at least materially influenced by the protected acts, or whether they were wholly explained by the view having been taken that there was a case that the claimant needed to answer, based on evidence of misconduct, and in due course the view

being taken that she had been guilty of such conduct warranting dismissal. The Tribunal plainly knew what conduct the claimant was accused of. It had the relevant documents before it and the ground was covered in Ms Print's statement. It also had the dismissal letter setting out why she said she had taken the decision to dismiss. The expression "falsification of timesheets" may also have been apt to describe one of the charges, being of leaving site before the end of shift, and it seems to me may simply have been used by the Tribunal to describe another charge, which was in the same general neighbourhood of issues about attendance.

64. In the context of paragraph 12, the point the Tribunal was making was that it was satisfied that the reason for dismissal was the belief there had been serious misconduct, unconnected to her allegations of harassment, as opposed to anything to do with those allegations. The point of the Tribunal referring to Ms Mangan's evidence appears to me to have been that it accepted that this conduct was generally thought to be serious enough to have warranted dismissal, reinforcing the conclusion that the decision to dismiss was genuinely taken and upheld for that reason.

65. As to the "tainted information" strand of this ground, the Tribunal found that Ms Thompson did not tell anyone, therefore including the second respondent, and did not (though the Tribunal deprecated this) regard the harassment allegations as serious. It heard evidence from Ms Print that she was informed of various conduct allegations against the claimant by Ms Thompson, from the client concerned, and from the second respondent, that she, Ms Print, carried out her own investigation before formulating disciplinary charges, and that she, Ms Print, sent the claimant what she described as evidence substantiating the allegations with the disciplinary charges letter. The Tribunal also knew that, following the disciplinary hearing, the claimant had emailed Ms Print, including mention of her allegations of harassment against the second respondent and complaining about him having been involved as a notetaker at the

disciplinary hearing, and that he had made false allegations of misconduct about her to Ms Thompson. The Tribunal in fact found that the claimant had probably foreshadowed this by voicing such concerns at the disciplinary hearing itself. The Tribunal also found that Ms Print put the disciplinary process on hold, and considered and determined the grievance herself, before proceeding to conclude the disciplinary process and dismiss the claim.

66. The Tribunal also had to consider as part of the victimisation claim, the complaint that the claimant had been refused a pay rise because of her allegations against the second respondent, specifically at the meeting with him and Ms Thompson in January. It made a clear finding at the start of paragraph 12 that this was "completely unrelated to the acts of harassment but instead entirely related to the claimant's misunderstandings as to her role." As I have noted, the Tribunal considered that the promotion/pay issue preoccupied the claimant, and found that at the internal appeal stage she focused on that issue.

67. In light of all of that, I conclude that this is not a case where the Tribunal ought to have considered whether, or found that, Ms Thompson or the second respondent had referred the conduct issues to Ms Print in bad faith because of the claimant's harassment allegations having been shared with Ms Thompson. Nor do I think the Tribunal erred by not considering or finding that they had misrepresented such issues, or the evidence related to them for that reason, or inveigled Ms Print unwittingly into dismissing the claimant on a false premise. The claimant's case was in fact that Ms Thompson and the second respondent had raised conduct allegations, because she had raised with them the issue of the supervisory role and her pay. But whether or not she might have had a sufficient basis in the evidence for *that* allegation (the Tribunal thought not), the Tribunal rightly identified that this did not advance or assist her **Equality Act** claims. For all of these reasons, ground 4 fails.

68. I turn to ground 5. Ms Prince submitted that the factual allegations made by the claimant provided the foundation for claims of detrimental treatment and unfair dismissal by reference to protected disclosures pursuant to section 47B and 103A **Employment Rights Act 1996**, whilst acknowledging that the latter might face the additional hurdle that by the time of the full merits hearing the original complaint of unfair dismissal had been dismissed. I will call these whistleblowing claims.

69. As well as amounting to protected acts, submitted Ms Prince, the two text messages also amounted to protected disclosures. The claimant was clearly asserting that the suspension and disciplinary process, and the later dismissal, were as a result of her harassment complaints. Having regard to her status as a litigant in person, the Tribunal's failure to explain to her the possibility of advancing a whistleblowing claim or claims, or to consider whether there was one implicit in her claim form, was, said Ms Prince, an error. Whilst it was not the Tribunal's task to advance a case for her, it did have a duty to assist her by putting legal labels on her factual claims. Ms Prince cited **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531.

70. Mr Morton submitted that no such claim existed in the claim form, or, if it did, none was in existence by the time of the full merits hearing, as any such claim had been expressly or tacitly withdrawn at the case management hearing. He noted that the claimant did not challenge the accuracy of the minutes of that hearing thereafter. The first time whistleblowing was ever raised, said Mr Morton, was by Ms Prince at the Rule 3(10) hearing of the appeal. In any event, the protected acts could not properly be viewed as also amounting to protected disclosures, as they could not reasonably be viewed as raising matters that were in the public interest.

71. My conclusions on this ground are as follows. First, there is nothing in the claim form to suggest that the claimant thought she had a whistleblowing claim or was seeking to bring one, in addition to claims of discrimination and, at that time, ordinary unfair dismissal. There is no hint of such a complaint in her narrative. She also did not tick box 10.1, which asks a party who is bringing a whistleblowing claim whether they want any relevant regulator to be told about it. There is nothing particularly surprising about this. She referred to sex and race discrimination and unfair dismissal, which are commonly understood complaints. The usual qualifying period required to present an unfair dismissal claim is often overlooked by litigants in person. These complaints, in familiar language, covered the ground of what she contended had occurred.

72. Secondly, while an allegation of victimisation under the **2010 Act** may also often be capable of being advanced as one of detrimental treatment or unfair dismissal for whistleblowing, this is not always the case. One important difference, raised by the respondents, is the need in relation to a whistleblowing claim for the complainant reasonably to believe that the disclosure is made in the public interest. Another is the fact that for an unfair dismissal claim for whistleblowing to succeed, the protected disclosure must have been the sole or principal reason for the dismissal, not just a material contributing reason. There are other legal differences. Accordingly, had the Tribunal proactively cast the complaints as being, in the alternative, of protected disclosure detriment or dismissal, it would not merely have been adding a further legal label to them. Further issues would have arisen on which both the claimant's and respondents' positions would then need to have been explored and set out.

73. The present case was therefore in my view not on all fours with **Mensah**, which concerned a situation where a complaint was included in the claim form, but the complainant did not adduce any evidence or argument in support of it at the hearing. Further, indeed, the conclusion of the

A Court of Appeal in that case was that the Tribunal had not been under any proactive duty to seek clarification of why that complaint had not been addressed and whether it was still maintained.

B 74. I conclude there was no error by the Tribunal in the present case not construing the claim form as including whistleblowing complaints, nor by failing proactively to raise the possibility of adding such complaints to those of victimisation, whether indeed at the prior case management hearing or at the full merits hearing. Ground 5 therefore fails.

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75. Ground 7 is a generalised complaint that the decision as a whole is not *Meek* compliant. Ms Prince referred to certain points that she had already made earlier in support of other grounds,

D and also criticised the very brief section of the Tribunal's decision on the law, merely referencing three sections of the **2010 Act** without setting them out, and citing no authorities at all. She also criticised what she said was the overall brevity of the decision.

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76. The Tribunal's account of the law was, I agree, unsatisfactorily brief. But this does not point to any errors of law in the substantive decision beyond those that I have, for other reasons, found. There are no other freestanding points in this ground, and I do not think the generalised

F complaint of lack of *Meek*-compliance otherwise affects the outcome in relation to those grounds of appeal that I have already indicated have not succeeded. I therefore dismiss ground 7.

Outcome

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77. Accordingly, I will direct remission to consider the particular complaints of harassment related to both sex and race, on the occasion when the second respondent is alleged to have made the "white girls, especially from Poland" remark; and whether, depending on the Tribunal's

H conclusion on that complaint, that affects its view of whether the two other incidents that it has found involved harassment related to sex, were also related to race.

(After further submissions on remission)

78. This is not a case where there is a suggestion that, if the issues requiring remission were entrusted to the same Tribunal, they would not be able to approach the matter fairly and objectively. Nor is it a second-bite type of case, because the Tribunal simply has not addressed those aspects in relation to which the appeal has succeeded. Ms Prince's reasons for wanting remission to be to a different panel are essentially pragmatic. She is concerned that there will be a delay in getting the same Tribunal panel together, and she notes that two years have already passed, so the same panel will not have the advantage of matters being fresh in their minds.

79. However, I think it is desirable to have this matter return to the same panel if possible, because, despite the fact that two years have passed, I suspect that they will retain some familiarity and recollection of this case. Certainly, they will be reminded of it by reading their own decision. It is possible they may still have access to their own notes of evidence, and will have that advantage over a new panel coming to the matter. This point is within a fairly narrow scope, but it also may call for them to consider the findings they have already made about the two incidents that they found amounted harassment related to sex, and make additional findings about them. That is another reason why it is desirable for the same panel to consider it if possible.

80. I do appreciate the concerns about delays, particularly with the backlog in Employment Tribunals at the moment for reasons that are no one's fault, but that is a general problem. It is not necessarily the case that it is going to be harder to get these three particular individuals together. I do not know if there are any particular issues of availability. My direction is that the remitted issues should return to the same panel so far as possible.