EMPLOYMENT TRIBUNALS

Claimant: Mr S Corby

Respondent: Advisory, Conciliation and Arbitration Service

Heard in Leeds

On: 4, 5, 6 and 7 September 2023, 15, 16, 17, 18 and 19 April 2024 (15 and 19 April in chambers)

Before: Employment Judge Ayre
Ms BR Hodgkinson
Mr M Taj

Representation

Claimant: Mr J Holbrook, counsel
Respondent: Mr A Tinnion, counsel

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that:

1. The claim for victimisation is dismissed upon withdrawal.

2. The remaining claims were presented out of time and it would not be just and equitable to extend time.

3. The claim for direct discrimination because of religion or belief is not well founded.

4. The claim for harassment related to religion or belief is not well founded.

REASONS

The Background

1. On 23 September 2022 the claimant issued this claim following a period of early conciliation that started on 2 August 2022 and ended on 13 September 2022. The claim form included complaints of discrimination on the grounds of religion and belief.

2. The claim arises from eight posts that the claimant made on the equality and diversity page on the respondent's intranet, Yammer, between 3 and 29 June 2021. Four colleagues of the claimant raised a complaint about the posts, and the claimant was instructed to remove them. A grievance investigation took place and the complaints about the posts were not upheld. It was recommended that the claimant and the complainants take part in mediation, but the claimant declined.

3. The claimant subsequently discussed the situation with the Daily Telegraph and GB News. He was subjected to a disciplinary process as a result, the outcome of which was a twelve month final written warning.

4. A Preliminary Hearing took place on 14 February 2023 before Employment Judge Arullendran. At that hearing there was a discussion about the claims that the claimant is bringing, which were clarified as being ones of direct discrimination, harassment and victimisation, and case management orders were made. Judge Arullendran decided that all issues, including questions of time limits, would be dealt with at the final hearing. Claimant's counsel was asked during the Preliminary Hearing whether the claimant was bringing a whistleblowing complaint and said that he was not.

5. On 13 May 2023 the respondent applied for an anonymity order and/or a restricted reporting order under rule 50(3)(b) and (d) of the Employment Tribunal Rules of Procedure 2013 ("**the ET Rules**"). The respondent attached to its application statements from the four individuals who had raised complaints about the claimant's posts. Those statements were not however copied to the claimant's solicitor and, as a result, were not considered by the Tribunal.

6. The application was considered on the papers by Employment Judge Shepherd. In a decision dated 2 August 2023 and sent to the parties on 16 August 2023,Employment Judge Shepherd refused the respondent's application "at this stage". His judgment contained the following reasons:

"…*9. The four individuals for whom the respondent applies for anonymity to be provided are not parties to this case. I understand that they are not going to be called to give evidence. The claimant can still put his case against the respondent and contest any evidence presented by the respondent. I see no reason why the anonymisation of the four complainants in the hearing bundle will interfere with the right to a fair trial or the principle of open justice.*

10. There is no clear and coherent evidence that harm will be done by reporting the

names of the four employees who made the complaints. However, I am of the view that this is an issue which can be considered by the Tribunal at the final hearing when the evidence is heard and that Tribunal can determine whether the names should be included in any written judgment."

The hearing

7. The hearing took place in Leeds in two parts, the first took place over four days in September 2023, the second over five days in April 2024. Prior to the start of the second part of the hearing in April 2024, Tribunal Tweets applied for permission to live tweet the hearing, and for the hearing to be converted to a hybrid hearing as a reasonable adjustment for its journalists with disabilities. Their application was granted. The second part of the hearing was therefore a hybrid hearing with observers attending via CVP. Tribunal Tweets had permission to live tweet the hearing.

Documents

8. There was an agreed bundle of documents running to 1021 pages, an agreed chronology and an agreed cast list, for which we are grateful. Mr Holbrook submitted a written opening statement. Both parties submitted written closing submissions, which were supplemented by oral submissions.

9. At the start of the hearing the claimant sought to rely upon an additional bundle of documents, referred to as 'Bundle C', which ran to 77 pages and which was sent to the Tribunal and the respondent's representative on 22 August 2023. The respondent did not object to the introduction into evidence of Bundle C, and it was so admitted.

10. On 16 April 2024 the claimant sought to introduce a further additional bundle, running to 13 documents. The respondent did not object to 9 of those documents being introduced into evidence, and the claimant subsequently indicated that he did not wish to rely on the remaining four. The additional bundle was admitted into evidence.

Witness evidence

11. We heard evidence from the claimant and, on behalf of the respondent, from:

    1. Louise Lenton, Head of Advice Services and former Area Director for the East Midlands;

    2. Julie Dennis, Head of Inclusive Workplaces Policy and former Head of Diversity and Inclusion;

    3. Daniel Ellis, People Director; and

    4. Fiona Williams, former Director for North of England and East Midlands.

Applications made during the course of the hearing

12. There were a number of preliminary issues that were dealt with at the start of and during the course of the hearing.

13. At the start of the hearing Mr Holbrook indicated that the claimant was pursuing applications made in writing on 22 August 2023 for:

    1. Permission to amend his claim;

    2. Permission to introduce a supplementary witness statement; and

    3. Specific disclosure.

14. The parties were asked to make representations as to the order in which we dealt with those applications. Having considered those representations, it was the unanimous decision of the Tribunal that we should consider first of all the applications to amend the claim and for permission to introduce a supplementary witness statement. Those issues were considered and decided on the first day of the hearing.

Application to amend the claim

15. At the start of the hearing the claimant applied to amend his claim to:

    1. Add another four allegations of direct discrimination;

    2. Make an additional allegation of harassment;

    3. Include new allegations against the four individuals who raised a grievance about the claimant, and an argument that the respondent was responsible for their actions under section 109 of the Equality Act 2010;

    4. Include specific allegations of whistleblowing detriment under section 47B of the Employment Rights Act 1996; and

    5. Seek new remedies, including three recommendations, a declaration of unlawful conduct in relation to the disciplinary proceedings and final written warning, compensation for personal injury and aggravated damages.

16. Both parties made detailed submissions in relation to the application to amend. The respondent opposed the application save in relation to the majority of the amendments sought in relation to remedy.

17. It was the unanimous decision of the Tribunal that the application to amend the claim should be refused for the following reasons:

    1. The nature of the amendment that the claimant sought to make, which was not just a relabelling of existing claims, but involved the making of substantive new factual and legal allegations and a considerable expansion of the claim. The number of direct discrimination allegations, for example, were being more

than doubled.

2. The amendments included allegations of discrimination against additional individuals who have not previously been the subject of discrimination allegations in their personal capacity, were not in attendance at the hearing and not on the respondent's list of witnesses.

3. If the amendments were allowed there would be a substantial new line of factual enquiry and new evidence required. It would not be possible to deal with the amended claim during the four day hearing that, at the time the application was made, was the allocated hearing time. We would lose the allocated hearing that had been listed for some time as the respondent would have to have the opportunity to file an amended response, and there would then need to be additional disclosure and witness evidence.

4. Allowing the amendments would result in a much longer hearing, additional cost and delay.

5. The application to amend was made very late, just two weeks before a final hearing that has been in the diary since the Preliminary Hearing in February 2023. The purpose of that Preliminary Hearing was to discuss and identify the claims and issues. This is a claimant who, as an ACAS conciliator has knowledge of employment law, and who has had advice from the very outset, initially from the trade union Affinity, then from the Free Speech Union and subsequently from Mr Holbrook. The claimant has never been a litigant in person.

6. The claimant has already been allowed to amend his claim once and has also clearly considered previously whether to bring a whistleblowing claim and decided not to. At the Preliminary Hearing on 14 February 2023 the claimant, on the advice of Mr Holbrook, chose not to pursue a whistleblowing claim.

7. The Tribunal has to consider the interests of both parties, not just the claimant.

8. With the exception of one new allegation of direct discrimination, all of the facts giving rise to the new allegations that the claimant is seeking to make were in the claimant's knowledge if not by the time he presented his claim, then certainly by the time of the Preliminary Hearing. There has been no suggestion of new evidence coming to light.

9. All of the new allegations have been made out of time, most of them many months out of time. The claimant is an ACAS Conciliator whose role involves advising on time limits. He has been represented throughout these proceedings. Lack of knowledge of his advisors does not excuse a delay in presenting complaints.

10. The practical consequences of allowing the amendment would be a significant expansion of the proceedings, a longer hearing and delay, in that it would not be possible to proceed with the hearing in September 2023. It would not be possible to have a fair hearing that week. There would be substantial additional costs for the parties, one of whom is a public body.

11. Refusing the amendment would not prevent the claimant from having a fair trial of his original claim, as set out in his claim form and previously amended. Allowing it would result in hardship to the respondent in terms of significant additional cost and delay, and difficulties with witness evidence as some of the additional witnesses that the respondent would need to call are no longer employed by the respondent.

18. For the above reasons the application to amend the claim, made on 4 September 2023 was refused save in relation to the application to amend to include a personal injury claim and the amendments that were not opposed by the respondent. By agreement, the Tribunal would not be dealing with remedy at this hearing, so there was no prejudice to the respondent in allowing these amendments. That amendment and the amendments which are not opposed by the respondent (namely those set out at paragraphs 26, 27, 28, 35(iii) and 36 of the Re-amended Statement of Case) are allowed.

Further application to amend the claim

19. After lunch on the third day of the hearing the claimant applied to amend his complaint of direct discrimination to rely upon five named comparators, in addition to the hypothetical comparator previously pleaded. The respondent opposed the application.

20. Both parties were given the opportunity to make submissions in relation to the application to amend and the Tribunal then adjourned to make its decision.

21. It was the unanimous decision of the Tribunal that the application to amend the claim was refused, for the same reasons as the earlier application. In addition, the Record of the Preliminary Hearing on 14 February 2023 shows that there was a discussion about comparators at that hearing, and an Order was made that the claimant should provide the names of the comparators to the Tribunal and the respondent by 28 February 2023. The claimant had not complied with that Order.

Application to introduce a second witness statement for the claimant

22. On 4 September 2023 the claimant applied for leave to introduce a supplemental witness statement running to 50 paragraphs and almost 12 pages. Much of the statement was in support of the new whistleblowing allegations that the claimant was seeking to make as part of his amendment application.

23. The only part of the second witness statement which is relevant to the issues that the Tribunal will have to determine are paragraphs 2 to 7 which provide clarification

of the claimant's philosophical beliefs. Paragraphs 40-42 are relevant to the claimant's claim for personal injury damages which will only be considered at remedy stage. It was the unanimous decision of the Tribunal that paragraphs 2 – 7 and 40-42 of the statement should be admitted into evidence, as they would, in the Tribunal's view, be helpful in determining the question of whether the claimant's beliefs are protected by the Equality Act and, if required, whether to award damages for personal injury. The respondent will have the opportunity to cross examine the claimant on this new evidence, so there is no prejudice to the respondent in admitting it.

Application for specific disclosure

24. On the second day of the hearing the Tribunal considered the claimant's application for specific disclosure, which Mr Holbrook indicated, at the end of the first day of the hearing and in light of our findings on the application to amend, was limited to an application for disclosure of the claimant's personnel file and for the respondent's Data Retention Policy.

25. At the start of the second day of the hearing Mr Tinnion told the Tribunal that the respondent's Data Retention Policy had been disclosed to the claimant, and Mr Holbrook confirmed that was the case. The claimant's application for disclosure was therefore limited to an order for disclosure of the claimant's personnel file.

26. Having heard submissions from both parties it was the unanimous decision of the Tribunal that the respondent should be ordered to disclose to the claimant the two documents on the personnel file that are relevant to remedy, but that the respondent should not be ordered to disclose the entirety of the claimant's personnel file. The claimant had not identified any documents within the personnel file that appear to be relevant to the issues that the Tribunal has to determine. We accepted the submissions made by the respondent's representative, as an officer of the court, that a search for relevant documents in the personnel file has been carried out and none have been found.

27. We were concerned about the practical implications of ordering disclosure of the personnel file, as the claimant and his representative would need time to consider the file, which could result in delay to the hearing.

Application for anonymity

28. At the start of the hearing in September 2023 Mr Tinnion indicated that the respondent would not be renewing its application for an anonymity order, that application having previously been refused by Employment Judge Shepherd in an Order dated 2 August 2023 and send to the parties on 16 August 2023.

29. At the start of the hearing on 16 April 2024 however, in response to additional documents that the claimant wished to introduce into evidence, Mr Tinnion made an application for an interim anonymity order covering the four complainants who had raised a grievance about the claimant. In support of his application Mr Tinnion

argued that the four individuals were neither parties nor witnesses in the proceedings, and nothing about the complaints or the identity of the complainants required them to be identified in order for the claimant to put his case. He was concerned about the risk of harm to the four individuals if they were publicly identified, particularly in light of the fact that the hearing was now being live tweeted, although he did not have any evidence of actual harm.

30. The claimant opposed the application on three grounds. Firstly that it would be wrong in principle to grant the application as there was no evidence of the kind of harm that would be necessary to justify an interference with the principle of open justice, secondly that it was necessary for the complainants to be named and thirdly that the application was made too late.

31. It was the unanimous decision of the Tribunal that the application for an interim anonymity order should be refused. The principle of open justice is fundamental, and any interference with that principle should be the exception rather than the rule. Although the Tribunal was not persuaded that the identity of the individual complainants is relevant to the issues that the Tribunal will have to determine, the threshold for interfering with the principle of open justice had not, in our view, been met.

32. A Tribunal can only make an anonymity order if it considers it is in the interests of justice or necessary to protect the rights of an individual under the European Convention on Human Rights ("the ECHR"). In considering whether to make an order the Tribunal must give full weight to the principle of open justice and to the right to freedom of expression. It would not, in the view of the Tribunal, be in the interests of justice to make an anonymity order, and there was no evidence before us of any breach of the Convention rights of any of the individuals concerned. The respondent was on notice, from the Order made by Employment Judge Shepherd on 2 August 2023, that his view was that "*there is no clear and coherent evidence that harm will be done by reporting the names of the four employees who made the complaints*" and has had the opportunity to adduce such evidence. It has not done so. There is, in the Tribunal's view, no reason to reach a different conclusion to that reached by Employment Judge Shepherd.

33. On 2 August 2023 Employment Judge Shepherd directed that the question of whether to include the names of the four complainants in the written judgment should be decided by the Tribunal at the final hearing. It is the unanimous decision of the Tribunal that there is no need to name the individuals. Their identity is not relevant to the issues that we have to decide, and as a general principle the Tribunal will only make findings of fact on relevant issues.

Preliminary issue

34. By consent, the question of whether the claimant's beliefs fall within section 10(2) of the Equality Act 2010 was dealt with as a preliminary issue during the first part of the hearing. In a judgment delivered orally to the parties on 6 September 2023 and subsequently confirmed in a written judgment dated 11 September 2023, the Tribunal

found unanimously that the claimant's beliefs on race and racial equality fall within section 10(2) of the Equality Act 2010 and are a protected philosophical belief, but the claimant's views on sex and feminism do not.

35. The claimant has appealed the Tribunal's decision in relation to his views on sex and feminism. The appeal was ongoing at the time of the second part of the hearing in April 2024. Both parties agreed that the outcome of the appeal would not affect the substantive issues that the Tribunal has to determine, and by consent it was agreed that the hearing would proceed notwithstanding the appeal.

Issues

36. Prior to the hearing the parties had agreed a draft list of issues.

37. At the start of the hearing Mr Holbrook withdrew the complaint of victimisation and, by consent, that claim is dismissed upon withdrawal. By agreement, questions of remedy were reserved to another date and not considered during this hearing.

38. In final submissions Mr Holbrook withdrew the allegations relating to the disciplinary process conducted by the respondent in February 2022 after the claimant spoke to the press, and which resulted in the issuing of a final written warning to the claimant.

39. The issues that fell to be determined were the following:

Time limits

40. Given the date the claim form was presented and the date of early conciliation, any complaint about something that happened before 3 May 2022 may not have been brought in time.

41. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? This involved considering:

    1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

    2. If not, was there conduct extending over a period, at the end of which there was a timely complaint?

    3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? This involved considering:

        i. Why were the complaints not made to the Tribunal in time; and

        ii. In all the circumstances, would it be just and equitable to extend time?

Are the claimant's beliefs protected by the Equality Act 2010

(This issue was determined during the first part of the hearing in September 2023 and set out in a separate judgment)

42. Did the claimant hold a religious or philosophical belief falling within section 10(2) of the Equality Act 2010? The claimant alleged that his philosophical belief is a challenge to critical theory in general and, on the issue of race, a belief in the importance of character over race that:

    1. The 'woke' or 'critical theory' approach to racism is misconceived in that its belief in structural racism is divisive because it sees white people as a problem that can result in separatism, segregation and ethnocentrism;

    2. The better approach is that of Martin Luther King which desires a society where people are judged by the content of their character rather than the colour of their skin, and which emphasises what people of all races have in common;

    3. It is unhelpful to view social problems through feminist eyes, such as the view that high male suicide rates are unimportant.

43. Are the claimant's views:

    1. A belief, i.e. more than a view or an opinion?

    2. A belief on a weighty and substantial aspect of human life and behaviour; and

    3. Worthy of respect in a democratic society?

    (The respondent admitted that the claimant's views are genuinely held).

Direct Discrimination because of religion or belief

44. Did the respondent do the following:

    1. On or around 16 August 2021 did the respondent instruct the claimant to remove from its intranet eight posts that he had posted between 3 and 29 June 2021?

    2. On 10 September 2021 did Louise Lenton of the respondent inform the claimant that after considering a complaint from four staff members, it was necessary to address this complaint through the formal grievance resolution process? In doing so did she fail to consider the complaint lawfully and/or fail to realise that the complainants were using their philosophical beliefs to try and silence the claimant's philosophical beliefs?

    3. On 20 January 2022 did Jennifer Williams of the respondent inform the claimant that because the four complainants had appealed against the

dismissal of their grievance, any decision regarding the reinstatement of Yammer posts would not be made until the appeal had concluded?

4. On 17 March 2022 did Fiona Williams tell the claimant that he could not repost the eight posts, providing an explanation that was 'incoherent and unlawful'?

45. Was that less favourable treatment? The claimant relied upon a hypothetical comparator (his application to amend his claim to rely upon actual comparators having been refused). Was the claimant treated worse than someone else was or would have been treated?

46. If so, was it because of the claimant's protected belief?

Harassment related to religion or belief

47. Did the respondent do the following:

    1. On or around 16 August 2021, inform the claimant that a complaint had been made?

    2. On or around 16 August 2021, instruct the claimant to remove eight posts temporarily?

    3. On 10 September 2021 begin a formal grievance process?

    4. Conduct a formal grievance investigation during which the claimant was:

        i. Invited to a formal investigation meeting on 20 September 2021;

        ii. Asked to address four pages of complaints which were repeated by the investigating officer and which gave official sanction to the complainants' 'woke and politically motivated complaints';

        iii. Told that the complainants considered that the claimant:

            1. Holds racist views;

            2. Shares the characteristics of those who join racist and fascist groups;

            3. Was engaging in behaviour that was intimidating, racist and bullying;

            4. Had a deep-rooted hatred towards black and minority ethnic people; and

            5. Was 'trying to force his view on us'?

    5. On 25 October 2021, after dismissing the complaints, did Louise Lenton of the

respondent recommend that the claimant and the complainants should consider mediation. Did the respondent make no finding that the complainants had acted politically or unlawfully in seeking to silence the claimant's philosophical beliefs and/or imply that the claimant was partly responsible for the complaint?

6. On 17 March 2023 instruct the claimant to remove his eight posts permanently?

7. Fail to conduct a formal investigation in a fair and reasonable manner by failing to:

    i. Formulate a charge which would have established succinctly in a sentence or two the basis for the alleged impropriety;

    ii. Summarise the relevant facts that were said to give rise to the charge;

    iii. Conclude the process in a timely fashion, by failing to dismiss the complaint until 25 October 2021?

48. If so, was that unwanted conduct?

49. Did it relate to the claimant's protected belief?

50. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

51. If not, did it have that effect? This involves considering the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Findings of fact

52. We make the following findings of fact on a unanimous basis.

53. The claimant was employed by the respondent as an individual conciliator. He was initially employed as a grade 11, and subsequently a grade 10 Customer Service Officer. In September 2019 he was promoted to a temporary role as a grade 9 Good Practice Services Trainer. From September 2020 onwards he was employed as an individual Conciliator at grade 10.

54. The claimant was based in the respondent's Leeds office but also worked from home.

55. The respondent is a non departmental public body whose responsibilities include the resolution of workplace disputes. It operates an internal intranet known as Yammer, which is used as an internal collaboration and communication tool and which includes a Diversity and Inclusion section. Employees are able to write posts on Yammer which other employees can see.

56. The respondent has a policy on the use of Yammer, known as the Yammer Usage principles. These principles include the following:

"*Being respectful and professional is important to all of us; the tips below will help us all make sure that we get it right for each other.*
Consider if your post is:

- *Fair, kind and human?*
- *Including everyone, regardless of difference?*
- *Collaborative and supporting our common goal?*
- *Honest and treating people with respect?*

The following HMRC and Civil Service Guidelines apply to all Yammer posts:

- *HMRC Acceptable Use policy*
- *Conduct and Behaviour at work*
- *Policy and Guidance on Personal use of Social Media*
- *Civil Service Code…*

Inappropriate use of Social Media, including Yammer, can be a disciplinary issue.
Examples of inappropriate social media use include:

- *Bullying/harassment…*
- *Posting offensive comments which are inconsistent with …. Standards and values and/or the Civil Service code….*"

57. The claimant posted on Yammer on a number of different occasions. In April 2021 the respondent's Race Network Secretary complained to the claimant's line manager about a comment written by the claimant on a post she had made about Stephen Lawrence Day. In the post the Race Network Secretary wrote that both BAME staff and allies were welcome to join the Race Network, that they should indicate whether they are joining as a BAME member of staff or as an ally, and that in the future there would be certain spaces that were for BAME staff only, and certain spaces for allies only.

58. The claimant objects to racial segregation and in his comments on the post he asked questions about and made criticisms of that approach. The Race Network Secretary was upset by the claimant's comments and a few days later the claimant's line manager spoke to the claimant about taking the post down because it had upset the Race Network Secretary. After the discussion between the claimant and his line manager however, it was agreed that the claimant would not have to take the post down, but that instead he would send an email to the Race Network Secretary apologising for any upset he had caused.

59. In that email, which was dated 23 April 2021, the claimant wrote:

"*It has been fed back to me that my comments on Yammer earlier may have led to you feeling upset. For this I am sorry and I can assure you it was not my intention.*

However, I do feel that I have some valid questions in relation to separatism and

potential consequences of forming sub-groups based on racial exclusivity. Ultimately, my concern is that this is not helpful or productive and certainly not something that ACAS should be sanctioning…."

60. Shortly after this incident the claimant also sent an email to the facilitators of the ACAS Race Network with information about his approach to race, which is based on the teachings of Martin Luther King and which is contrary to Critical Race Theory ("CRT"). He forwarded the email to Susan Clews, the respondent's Chief Executive, who replied that she could see how the information he had sent to her fitted in with the respondent's diversity and inclusion goals.

61. In May 2021 the claimant had a positive discussion with Henicka Uddin, who is the respondent's Race Champion. Ms Uddin told the claimant that his posts and ideas were a welcome contribution to the conversation about race, and that she had liked and commented very positively on a number of his posts. She encouraged the claimant to continue posting on Yammer because she saw him as making a positive contribution to the debate.

62. The claimant suggested in his evidence to the Tribunal that the respondent's decision makers were only interested in listening to a one sided CRT approach to race. We find that was not the case. The respondent's Chief Executive responded positively when the claimant sent her information about his views on race. The respondent's Race Champion commented positively on his posts and encouraged him to continue posting and Julie Dennis, who was at the time the respondent's Head of Diversity and Inclusion, told the Tribunal that the information sent to her by the claimant resonated with her own views.

63. We do not find that the respondent was only interested in listening to a one sided CRT approach to race. Rather, on the evidence before us we find that those at senior level welcomed and encouraged the claimant's contribution to the debate about race and race discrimination.

64. Not all of the claimant's colleagues shared his views however, and there were some members of staff who supported the Black Lives Matters movement and a Critical Race Theory approach to race. Both the claimant and these colleagues shared a common goal – the elimination of race discrimination. Where they disagreed was on the best ways of achieving that goal.

65. In June 2021 the claimant made 8 posts on Yammer which were subsequently objected to by some of his colleagues. The first post was about Howard Thurman, a black man who the claimant described as a 'theologian, philosopher, civil rights and social justice leader' who, the claimant said, "*railed against separatism and segregation*".

66. The second post contained a link to an article about interracial couples. The third post contained a link to an article entitled "*Poorer white pupils let down and neglected – MPs*". The fourth contained a quote from Chimamanda Ngozi Adichie, a Nigerian writer. The fifth post contained a link to and comments on an article entitled "*The*

Free Speech Crisis Runs Deeper Than You Think". The sixth contained a poem by Ayishat Akanbi called "*The Problem with Wokeness*". The seventh contained comments by the claimant that he had "*no time for separatism, segregation, racial exclusivity and ethnocentrism*" and a link to an event held in the US known as 'Loving Day'.

67. The final post was a link to an article entitled "*Time to Stop Using Suicide for political Point-Scoring*" in which a feminist writer "*caused outrage recently when she callously dismissed the problem of male suicide…*".

68. On 5 July 2021 a senior trade union representative from the PCS union, wrote to Julie Dennis raising concerns about the content of one of the above posts on Yammer. At the time the representative was a member of the respondent's Diversity and Inclusion forum, and lead for the respondent's trade unions on diversity issues. She is black and worked for the respondent in London. She wrote to Ms Dennis that:

"*I am very concerned about this negative and incorrect comment about Black Lives Matters on the acas yammer….*

This is an example of how the workplace can become a hostile environment from the perspective of race with comments like this thrown about.

In addition the comment on religion … inappropriate… and does not take into account other religions and those who do not practice or follow a faith…"

69. Julie Dennis reviewed the post in question and then took advice from the Head of Employee Relations on how to respond. She also asked Henicka Uddin to look at the post. Neither Julie Dennis nor Henicka Uddin could see anything overtly offensive in the post but Ms Dennis was concerned that as a white woman, she might not have appreciated all of the angles, and it was clear to her that the complainant's perception was that the post was offensive.

70. The complainant wrote to Ms Dennis in more detail on 6 July. In that email the complainant referred to and included links to all 8 of the above Yammer posts made by the claimant and set out her concerns in relation to each post. She included the following comments:

"*….this would also suggest he opposes black/BME structures in workplaces and unions – including the forums we have for race equality in acas.*

He seems to have no understanding about positive action or self determination.

As such this post, allowed on the yammer site, in my view creates a hostile environment for black and minority ethnic workers….

I think his comments and post are very damaging….

Absolutely astonishing and disgusting and insulting that he thinks those of us with

lived experience of racism are bullying people by sharing our experiences…

I am concerned for any BME staff who may work directly with him and how this could create an unsafe environment….

….to imply that those of us who say black lives matter because we want equality and to live free of abuse and threats to our lives are against MLK is nonsense – I know hundreds of people including myself who love MLK and also support the BLM movement….

I feel his posts are intimidating, racist and bullying.

He has dominated this section on yammer, and appears to have an agenda….

I would like my email taken as a formal complaint. I have had others raise concerns with me who are PCS members and his comments have upset them too…

I find his posts disturbing and upsetting and if they are left on the site and left unchallenged it sends a message that Acas is not a safe place for racialised workers and it is not safe to speak out….

His posts are racist and constitute harassment and bullying on race grounds…."

71. The complainant asked Ms Dennis to treat the complaint that she had raised as a collective complaint from herself and three other employees of the respondent. All four of those who complained are black and worked at the time in the respondent's London office. None of them had ever met the claimant.

72. Julie Dennis arranged a meeting with the four complainants to try and resolve their complaint informally. The meeting took place on 21 July 2021 by Microsoft Teams. During the meeting all four complainants were angry and upset and concerned that the posts they had complained about were still visible on Yammer. Ms Dennis came away from that meeting with the view that the complainants were genuinely upset by the claimant's posts, and that they genuinely believed in what they were saying about them.

73. Ms Dennis' aim in holding the meeting on 21 July was to better understand the complaints that the complainants were making and why they found the posts offensive. She also wanted to try and find an informal solution to the complaints, particularly because she knew the claimant personally and did not believe that he held racist views.

74. The complainants were not however willing to resolve matters informally and insisted that their collective complaint be treated as a formal grievance.

75. During the meeting the complainants said that they were really worried about the impact the posts would have on members of staff and that people may feel it was not safe to speak up if their ideas were different to those of the claimant. They appeared

to Ms Dennis to have a genuine fear that the claimant's posts could deter people from participating in the debate on issues of race.

76. Ms Dennis asked the complainants what they wanted by way of resolution to the situation. They asked for the posts to be taken down and for an investigation to be carried out, including into the claimant's intention behind the posts. They also raised concerns about two other colleagues who had liked and commented on the claimant's posts.

77. After the meeting the claimant spoke to Dan Ellis, the respondent's People Director, about taking the posts down. Ms Dennis' view was that, whether or not the posts were objectively offensive, the complainants were genuinely upset and offended by them and they should therefore be taken down. Mr Ellis agreed. He also looked at the posts and did not find them offensive or racist. He formed the view however that given that the four individuals were genuinely very upset and concerned by the posts, the content of the posts did not matter, and they should be taken down, initially on a temporary basis.

78. The approach taken to the claimant's posts in asking him to remove them, was the same approach that had been taken by the respondent in other cases where employees had complained that they found Yammer posts offensive. Ms Dennis personally was aware of other cases in which posts had been taken down because they had upset people, irrespective of whether the posts were objectively offensive.

79. Only the individual who has made the post on Yammer is able to take it down. Ms Dennis spoke to Fiona Williams, the Area Director for the claimant's area, and asked her to ask the claimant's line manager, Alison Frosdick, to arrange for the claimant to delete the posts. On 21 July Julie Dennis emailed Fiona Williams and asked her to ask Alison to speak to the claimant about taking the posts down. Fiona Williams replied the following day to say that Alison would speak to the claimant, but that he was off sick at the time.

80. The claimant returned to work from sickness absence on 16 August 2021. Alison Frosdick called him that day and asked him to remove the posts. The claimant asked why he was being asked to remove them and Ms Frosdick replied that she did not know but would send him a document that showed the 8 posts. Ms Frosdick then sent the claimant an email detailing the posts he had been asked to temporarily take down. The claimant replied that he was surprised and asked if any explanation had been given as to why the posts were to be suspended. Ms Frosdick responded that the information she had was that there would be conversations with those who had raised their concerns about why they felt the way they did about them, and that she had asked to see if there was any further information that could be provided to the claimant.

81. The claimant deleted the posts on 16 August as requested, and they have never been reactivated or reposted.

82. On 29 July 2021 the original complainant, who was the spokesperson for the group,

sent in a formal written grievance about the 8 posts to Julie Dennis, using the respondent's formal collective grievance notification form. The formal grievance repeated the concerns that had been raised previously both in writing and during the meeting on 21 July.

83. On 4 August 2021 Louise Lenton, who was at the time Area Director for the East Midlands, was asked to hear the collective grievance. She agreed to do so. On 13 August she wrote to the lead complainant acknowledging the grievance and inviting the complainants to a grievance meeting on 25 August. The meeting had to be postponed because some of the complainants were not available on the 25 August. It took place on 8 September 2021. The four complainants were accompanied by a trade union representative at the meeting.

84. The grievance meeting lasted more than two hours. During that meeting Ms Lenton asked the complainants what they found offensive about the 8 Yammer posts. She formed the view that they were 'incensed' by what they perceived the claimant to be saying. They told her that they believed that the claimant:

    1. Was against BME employees coming together to discuss concerns about race;

    2. Had problems with the respondent's Race Network;

    3. Wanted to play down lived experience of racism and had an agenda;

    4. Was acting like he was superior; and

    5. Was saying that 'they' shouldn't speak.

85. As a result of what the complainants said and how they behaved during the meeting, Ms Lenton formed the view that they were genuinely aggrieved by the posts, that they were very angry, and also that they were fearful. They told Ms Lenton that they had been subject to fascist and right wing abuse previously that was linked to what the claimant had said. They said that they did not feel safe working in ACAS with the claimant there and were concerned about other individuals working with him. One of them said that they were worried that if the claimant was bold and brave enough to post on Yammer then he may be bold and brave enough to attack black and minority ethnic individuals. Ms Lenton formed the view that they had a genuine reaction to the posts and felt very strongly about them.

86. Louise Lenton also formed the view that she needed to speak to the claimant next to get his version of events. She was aware that the claimant had suffered from poor mental health, and rather than writing to him out of the blue, she contacted Fiona Williams and asked that the claimant be given prior notice by his line management that she would be writing to him, to minimise the impact on him.

87. Ms Lenton then wrote to the claimant on 10 September to invite him to a meeting on 20 September via Microsoft Teams. In the letter she told the claimant who had made

the complaint about him, that the complaint was being dealt with under the respondent's grievance resolution policy, and that the complaint was that he had "*made offending and discriminatory posts on yammer*". She advised him of his right to representation and reminded him that the investigation should be kept confidential and not discussed with anyone unless it was necessary to do so in connection with the investigation.

88. The letter was sent by email, and in the covering email Ms Lenton emphasised that at this point she had only seen the statement made by the complainants and that her summary of their complaint was in no way a judgment on the merits of the complaint, but merely for information.

89. On 13 September 2021 the claimant's trade union representative, Emma Stopford of Affinity, wrote to Dan Ellis on the claimant's behalf. In her email she complained that the claimant had not been given enough information about the complaint that had been made, indicated that he did not have enough information to be able to prepare adequately for the meeting with Ms Lenton, and asked that he be provided with a copy of the grievance.

90. She also asked that, because the claimant was suffering from stress and anxiety, he be permitted to answer any questions in writing, rather than in a meeting.

91. Mr Ellis replied to Ms Stopford the following day providing the information requested by her with the exception of a copy of the grievance, which he explained it was not normal practice to provide. He wrote that the respondent's preference would be to discuss the complaints with the claimant in a meeting, but that if written statements were the claimant's preferred approach the respondent was happy to accommodate that to enable the claimant to participate in the process. Mr Ellis' view was that dealing with the issues in a meeting could be more expedient as it would avoid the need for any follow up questions.

92. On 15 September Emma Stopford replied to Dan Ellis thanking him for accommodating the request for written representations and stating that she and the claimant appreciated that. She asked again for more information about what the concerns were in relation to each of the Yammer posts.

93. On 8 September 2021 the claimant raised a grievance of his own. On 15 September 2021 Dan Ellis wrote to the claimant's trade union representative Emma Stopford and asked her "*Are we able to adopt an informal route to possible resolution or would Sean prefer to follow our grievance process?*" The following day Ms Stopford replied indicating that the claimant was not interested in informal resolution of his complaint, "*Sean will be pursuing his grievance and, in the circumstances, it would be most appropriate to conduct a formal process.*"

94. The respondent respected the claimant's wishes that his grievance should be dealt with formally rather than informally and a formal grievance investigation was carried out.

95. On 22 September 2021 Louise Lenton wrote to the claimant by email, copying in his union representative and HR. In the email she wrote that:

"*…As per your request and instruction from Emma Stopford, I have attached the questions that I would have asked you in a face to face meeting. Could you please provide your response by Wednesday 6th October 2021.*

As per ACAS policy it is not my intention to provide a copy of the grievance in full. However to enable you to understand the basis of the grievance and answer the questions in a full and fair way, I have added extracts of the grievance into the body of the attached questions.

If you need to clarify any of the questions please get in touch…."

96. Attached to Ms Lenton's email was a three page document containing links to the Yammer posts, summarising the concerns raised by the complainants about each post, and asking the claimant questions about the posts. The document contained the following quotes of comments made by the complainants:

"*Wokeness is repeatedly used by people who hold racist views to put down those who speak out about racism and equality. Often those who use it are part of racist and fascist groups and who hold racist views*"

"*I feel his posts are intimidating, racist and bullying*"

""*He….demonstrates a deep-rooted hatred towards black and minority ethnic people who challenge racism, organise in black structures and safe spaces and mobilise against racism and he says that our lived experiences are invalid, and his opinion and thinking are what matters….*"

"*I am concerned that Sean holds racist views….*"

"*He is trying to force his view on us through his series of posts but no interest at all on any alternative view and thinks he is superior and more important than those of us with lived experience of racism*"

97. All of the concerns raised in the document sent to the claimant by Louise Lenton on 22 September 2021 were taken directly from the written collective grievance submitted by the complainants.

98. The claimant prepared a detailed response to the questions sent to him by Ms Lenton. He wrote a 12 page statement which he sent to Louise Lenton on 28 September 2021. In his statement he strongly refuted the allegations made about his posts. He wrote, amongst other things that:

"*I do not oppose "black / BME structures in workplaces and unions" and I wholeheartedly support Acas having a Race Network. I believe that all organisations, including Acas, should take active steps to ensure that workplaces are free from*

discrimination and bias. However, the Race Network should be inclusive and representative of the whole Acas workforce."

"*My wife and sons are black; if there was a group that only I could join because I have white skin, from which my wife and sons would be excluded because of their skin colour, I would find this abhorrent….Why should I be excluded from trying to promote race equality purely because of the colour of my skin?*"

"*I have experienced racial bigotry from a young age directed at me, my extended family, my children and friends of various ethnic backgrounds. This has been in the form of verbal abuse, physical violence and discrimination in education, employment and my social life. I'm opposed to all forms of racial bigotry*"

"*It's a fundamental principle of a democratic society to be able to share different views, insights and experiences in debate, provided it's done respectfully"*

"*I find it extremely insulting and upsetting that the complainants have sought to label me as a racist and a fascist with absolutely no justification for doing so"*

"Are the complainants not "totally opinionated"? Are they not seeking to silence me by raising this grievance"

"My posts are very obviously not "intimidating, racist and bullying"

"I think it is highly inappropriate for the complainants to make such hurtful and defamatory comments about me that are totally unfounded….I would like you to confirm what action Acas is taking to prevent my name and reputation from being damaged by these totally unjustified assertions. You have a clear duty of care towards me"

"I am not a racist. I have my own 'lived experience' of racism, having watched my family and friends suffer"

"The grievance that has been raised about me should not be upheld and no further action should be taken against me."

99. As part of her grievance investigation, Louise Lenton also contacted Henicka Uddin and one of the claimant's colleagues who had liked and commented on the claimant's posts, for their comments.

100. Having concluded her investigation, Louise Lenton decided not to uphold the collective grievance. On 21 October she wrote to the complainants apologising for the delay in delivering her decision. She provided the complainants with a summary of and quotes from the claimant's response to the grievance and wrote that:

"*Having reviewed all the information gathered during the grievance process, I have found no corroborating factual evidence to support either account, therefore I am unable to make a finding on what was posted by Sean Corby or how these posts*

were interpreted by yourselves.

However, given the clarity and consistency of both accounts, it is apparent that parties involved have varied views therefore I can conclude that both parties have a different point of view on a very sensitive topic and it transpired during the grievance process that these views are held in their own genuine belief. Whilst I appreciate that this does not clear the matter up, but what it does is allow for, is the genuine belief of both parties to be portrayed….

I am unable to find any evidence which implies that Sean was instructed to cease posting, but in fact, there are clear indications and suggestion confirming that Sean Corby made considerable efforts to check if he should continue posting on Yammer which Henicka approved following her detailed assessment….

On balance I conclude that:

1. *There was no substantial evidence to indicate that there has been a fundamental breach of the Yammer Policy by Sean Corby and that the thorough investigation established no such facts. ….*

2. *There was no substantial evidence that Acas is not a safe place for racialised workers and that it is not safe to speak out.*

3. *There was no substantial evidence that any black and minority ethnic people working in Acas or within the vicinity of Sean Corby would be at risk from him in any way,*

Therefore, I can confirm that these elements of your grievance are not upheld…."

101. Ms Lenton also recommended that the Yammer Usage Policy should be reviewed, and suggested mediation between the complainants and the claimant.

102. On 25 October 2021 Ms Lenton wrote to the claimant informing him of her decision on the grievance. Her letter was in substantively the same terms as the letter sent to the complainants.

103. On 26 October Emma Stopford wrote to Louise Lenton on the claimant's behalf indicating that the claimant was not willing to engage in mediation because he had not done anything wrong. She wrote that "*I think it would be unwise to bring two parties together, in a four to one situation, where both parties hold such opposing views*".

104. Louise Lenton replied to Emma Stopford on 28 October in an email in which she explained more about the mediation process and that mediation is not about deciding who was right and wrong. Ms Lenton's evidence to the Tribunal, which we accept, is that she joined the respondent as a conciliator and mediator and that she believes in the benefits of mediation. She understood that her decision not to uphold the grievance would not resolve the issues either for the four complainants or for the

claimant, and that, at a time when they felt comfortable and ready, mediation might be a way forward so that they all felt comfortable within the workplace. She thought that mediation may have helped all parties to understand that they are all fighting racism and that, if the complainants had got to know the claimant, they would have seen that there was no bullying or racist intent on his part, and that it would have resolved the issue. Those were the reasons why Ms Lenton suggested mediation.

105. The claimant was not willing to engage in mediation and Ms Lenton did not take the suggestion of mediation any further.

106. After receiving the outcome of the grievance, the claimant asked if he could reinstate his Yammer posts. His trade union representative also raised this on his behalf. On 7 January 2022 she sent an email to Jennifer Williams in HR asking for confirmation that the respondent had no objection to the posts being reinstated. On 20 January 2022 Ms Williams replied to the request. She sent an email to the claimant's trade union representative in which she stated that an appeal had been raised against the collective grievance outcome and that any decision regarding the reinstatement of Yammer posts would not be made until the appeal had concluded.

107. The complainants appealed against the decision of Louise Lenton not to uphold their grievance. Robert Johnson, Director of the Wales and West Midlands region, met the complainants on 22 February 2022 to hear their appeal. On 10 March 2022 he wrote to them informing them of his decision. He apologised for the delay, which he said was due to a health issue. Mr Johnson found that, having considered carefully the nature of the Yammer posts, and the evidence before Louise Lenton, it was reasonable for her to reach the decision that she did. The appeal was not upheld.

108. After the conclusion of the grievance appeal, consideration was given as to whether the claimant should be allowed to reinstate the 8 Yammer posts. Dan Ellis, having discussed the situation with the Head of Employee Relations, who told him that the complainants remained very aggrieved, formed the view that although, objectively, the posts were not offensive, there was a group of employees who felt very strongly that they were offensive, and on whom the posts had had a significant impact.

109. Mr Elis was also concerned about ongoing disruption to the workplace if the posts were reinstated. He therefore decided that, in the interests of maintaining a harmonious working environment and enabling all involved to focus on their work, the posts should not be reinstated. There was precedent in ACAS for Yammer posts that have been considered offensive by other employees being taken down even if they are not objectively offensive.

110. Fiona Williams was asked to let the claimant know that he would not be allowed to reinstate his posts. On 17 March 2022 she sent the claimant an email in which she wrote:

"*I have been asked to communicate the outcome of the appeal against Louise*

Lenton's decision on the grievance raised in relation to your Yammer posts. I understand that you want this in an email in the first instance, rather than me calling you.

The Appeal Manager has not upheld the appeal against Louise Lenton's decision previously communicated.

Whilst there is no right not to be offended the organisation cannot form a view on individual's perceptions to posts. None the less offence was taken. In view of this, the Appeal Manager has acknowledged the impact your posts had on the complainants. The decision has been taken by the organisation therefore that it would not be appropriate to allow those posts to be reposted on Yammer.

In line with all internal procedures a lesson learned exercise will be completed and a review of the Yammer guidance."

111. The claimant replied thanking Ms Williams for her email.

112. The claimant is an ACAS Conciliator who has knowledge of employment law and of time limits for bringing Employment Tribunal claims, including discrimination claims. One of the matters which ACAS Conciliators regularly advise potential claimants on is time limits.

113. The claimant was, throughout the matters which are the subject of this claim, represented by Emma Stopford of the trade union Affinity. In his witness statement he stated that she had been 'exceedingly helpful' but had not advised him to issue a claim. The claimant was clearly aware of his right to bring a complaint to an Employment Tribunal because on 6 January 2022 (well before the expiry of the three month time limit) he raised the issue with Emma Stopford. He also spoke to a case worker at the Free Speech Union in January 2022.

114. On 6 January 2022 Emma Stopford wrote to the claimant saying that "*At the moment I don't believe you have a case for the Employment Tribunal.*" The claimant replied the same day, asking Ms Stopford "*do you not believe we have basis for a discrimination or harassment claim based on Race and Philosophical belief? I have certainly been discriminated against on this basis but of course demonstrating that to a judge is the challenge."* Ms Stopford replied suggesting that the claimant speak to the Free Speech Union about whether they would arrange a legal opinion for him and expressing her personal view that "*it would be difficult to run such a claim (based on current circumstances) because ACAS investigated but took no action against you. As I said before, that in itself was a victory.*"

115. These findings of fact are made on the basis of documents contained within the agreed bundle for the final hearing, in respect of which the claimant has clearly waived any privilege.

116. The reasons given by the claimant for not issuing his claim sooner were, in summary, that:

1. He had been discouraged by Affinity from bringing a claim; and

2. There was a breakdown in relations between Affinity and the Free Speech Unit.

117. The claimant formed the view at the time of the alleged acts of discrimination and harassment that they were unlawful. This is not a case in which new facts came to light at a later stage which caused the claimant to believe he had been discriminated against. He gave evidence that he had wanted to bring a claim earlier and had suggested it on several occasions to Emma Stopford and the Free Speech Unit. In fact he first considered bringing a claim on August 16th, 2021. He formed the view at that time that he was being discriminated against.

The law

Time limits

118. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(b) such other period as the employment tribunal thinks just and equitable.*

119. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) Failure to do something is to be treated as occurring when the person in question decided on it.*"

120. By virtue of section 140B of the Equality Act 2010, ACAS early conciliation will normally extend time, but not in cases where the early conciliation itself starts more than three months after the last act of alleged discrimination.

121. Tribunals have a wide discretion as to whether to extend time (***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*** and ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640***) but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time.

122. In ***Polystar Plastic Ltd v Liepa [2023] EAT 100*** the EAT held that, whilst there is no formal burden of proof when it comes to determining whether it would be just and equitable to extend time, if a claimant applies for an extension of time, he has to show that the extension would be just and equitable. This is in line with the general principle that it is for a party asserting a matter to establish it. In ***Abertawe Bro Morgannwg*** however, the Court of Appeal held that there is no requirement that the

Tribunal be satisfied that there was a good reason for the delay, nor any general principle that time cannot be extended in the absence of an explanation by the claimant.

123. When deciding whether to exercise its discretion to extend time, the Tribunal can take into account anything that it considers relevant. Factors that may (but will not always – see ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23***) be relevant include:

1. The length of and reasons for the delay in presenting the claim;
2. The extent to which the cogency of the evidence is likely to be affected by the delay;
3. The extent to which the respondent cooperated with any requests for information;
4. How quickly the claimant acted when he knew of the facts giving rise to the claim; and
5. The steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

124. The Tribunal may consider the merits of the case (***Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 1342)***, the prejudice that would be suffered by either party if the application for an extension of time were to succeed or fail, and the practical consequences of allowing or refusing an extension of time.

Burden of proof

125. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

> "*(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…"*

126. There is therefore in discrimination cases, a two-stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205***) which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to.

127. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the

treatment. This two-stage burden applies to both of the types of discrimination complaint made by the claimant.

128. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

129. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263,*** that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

130. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lord Browne-Wilkinson recognised that discriminators 'do not in general advertise their prejudices: indeed, they may not even be aware of them'.

131. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

132. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

133. Unreasonable behaviour is not evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference of discrimination (***Anya v University of Oxford & anor [2001] ICR 847***).

134. In harassment cases the shifting burden of proof rules will apply in particular where the conduct complained of is not obviously discriminatory, and the Tribunal has to consider whether the reason for the conduct is related to the protected characteristic relied upon by the claimant – in this case his philosophical beliefs.

Direct discrimination

135. Section 13 of the Equality Act provides that:

> "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*

136. Section 23 of the Equality Act deals with comparators and states that:

> "*there must be no material difference between the circumstances relating to each case."*

137. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:

1. Was there less favourable treatment?
2. The comparator question; and
3. Was the treatment because of a protected characteristic?

Harassment

138. Under section 26 of the Equality Act 2010:

> "(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."*

139. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

a. Was the conduct complained of unwanted:
b. Was it related to nationality; and
c. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724.

140. In ***Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

Human Rights Act and the European Convention on Human Rights (ECHR)

141. Section 3(1) of the Human Rights Act 1998 provides that:

> "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."*

142. Section 6(1) of the Human Rights Act states as follows:

> "*It is unlawful for a public authority to act in a way which is incompatible with a Convention right."*
>
> By virtue of section 6(3), 'public authority' is defined as included "*a court or tribunal*".

143. Article 9 of the European Convention on Human Rights (Freedom of thought, conscience and religion) provides that:

> "*1. Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."*

144. Article 10 of the European Convention on Human Rights (Freedom of expression) provides that:

> "*1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

145. Article 14:

"*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status,*"

Submissions

Respondent

146. The submissions of the parties is summarised briefly below. The fact that a point made in submissions is not referred to below does not mean that it has not been considered.

147. Mr Tinnion submitted, in summary that:

1. The respondent had allowed the claimant to post on Yammer and his posts would probably have remained there but for the complaints by his colleagues;

2. All employees have a fundamental right to make a complaint at work;

3. The respondent had an obligation to consider the grievance raised about the posts. Allegations of racism are serious and must be treated as such. The respondent would have been in breach of its obligations towards the complainants had it ignored their complaints or summarily dismissed them as ill founded;

4. The respondent needed to investigate the posts to determine whether there was any merit in the complaint made;

5. The respondent has a legitimate interest in achieving a harmonious workplace, and that is why the claimant was not allowed to reinstate the Yammer posts;

6. Nothing the respondent did had the purpose of harassing the claimant;

7. It was unreasonable of the claimant to perceive the respondent's actions as violating his dignity or creating an unlawful environment for him;

8. There is no authority (and no requirement in the ACAS Code of Practice on Disciplinary and Grievance matters) for the proposition that when conducting a grievance process there should be a preliminary assessment or screening by the grievance hearer. A grievance hearer is not required to 'push back' against those who raise grievances, but rather should keep an open mind until the grievance has concluded.

9. The claimant's protected philosophical beliefs formed the background context to the case but were not the reason for the respondent's conduct at any stage.

148. Mr Tinnion further submitted that the claims were presented between 3 and 10 months' late, and it would not be just and equitable to extend time. He also argued that the allegations of direct discrimination and harassment were not put directly to the respondent's witnesses and that, as a result, the points could not be made in submissions (***EPI Environmental Technologies v Symphony Plastic Technologies [2004] EWHC 2945***). The claimant has not, in Mr Tinnion's submissions, asserted any positive case that the reasons given by the respondent's witnesses for their behaviour were not the true reasons.

149. In relation to the claimant's arguments on human rights, Mr Tinnion submitted that:

1. The Tribunal has no jurisdiction to determine claims for beach of the European Convention on Human Rights;

2. The facts in this case are very different to those in ***Higgs v Farmor's School and The Archbishops' Council of the Church of England [2023] ICR 1072*** and the legal analysis in ***Higgs*** is not a full statement of the law.

3. The claimant had no ECHR rights to post on Yammer because the Yammer platform is owned and operated by the respondent.

4. Removing the posts from Yammer was a proportionate and reasonable means of achieving the legitimate aim of taking down posts which other employees genuinely felt were racist and avoiding further harm and disruption in the workplace.

<u>Claimant</u>

150. Mr Holbrook submitted that the complaints made about the claimant's posts were irrational, intolerant and harassing and should have immediately been treated as such by the respondent. A lawful consideration would, he says, have required the respondent to dismiss the complaint before notifying the claimant of it. Mrs Lenton realised or should have realised that the complainants were using their philosophical beliefs to try and silence the claimant's philosophical beliefs.

151. The respondent had, in Mr Holbrook's submission, failed to appreciate the legal framework that applies to discrimination on the grounds of protected beliefs, and its

approach was informed by the erroneous view that it could restrict the claimant's rights because his expressed beliefs had caused others distress.

152. The relevant legal framework, in Mr Holbrook's submissions, is set out in ***Higgs*** and can be summarised as follows:

1. Freedom of speech, particularly political speech, is so important that the basis for restricting it is so narrow that the mere causing of offence is not a sufficient ground to restrict it;

2. In direct discrimination cases where a respondent alleges that it did not act because of the claimant's beliefs, the Tribunal must consider whether:

    i. The basis for restricting the freedom of speech was prescribed by law, so that the claimant could foresee the consequences of his speech;

    ii. The restriction was necessary for the protection of the rights and freedoms of others; and

    iii. The restriction was proportionate having regard to the fundamental right to engage in political speech.

153. The rights under Articles 9 and 10 of the ECHR are, Mr Holbrook submits, foundational in a democracy and limitations of those rights are to be narrowly drawn. Any restrictions on political speech should, he says, be rigorously examined. If the tests of prescription, legitimate aim and necessity are satisfied, a proportionality assessment is required.

154. Mr Holbrook argues that in this case, the claimant's political speech was protected and the respondent acted unlawfully because its infringement of his rights was not prescribed and, even if it had been, did not address a legitimate aim which met a pressing social need.

155. In support of his submissions Mr Holbrook referred us the following cases:

Page v NHS [2021] EWCA Civ 255
Sahin v Turkey (2007) 44 EHRR 5
Omooba v Michael Garrett Associates Ltd (t/a Global Artists) and Leicester Theatre Trust Ltd 2024 EAT 30
Handyside v UK (1979-80) 1 EHRR 737
R (ex parte Prolife Alliance) v BBC [2004] 1 AC 185
Vajnai v Hungary [2008] ECHR 1910
Eweida and others v United Kingdom [2013] ECHR 37
Harry Miller v The College of Policing [2021] EWCA Civ 1926
Vogt v Germany (1996) 21 EHHR 205
Bank Mellat v HM Treasury (No 2) [2014] AC 700
Sougrin v Haringey HA [1992] ICR 650
Hale v Brighton & Sussex Hospitals UKEAT/0342/16

Tait v Redcar Borough Council UKEAT/0096/08/ZT

156. In belief discrimination claims it may, in Mr Holbrook's submissions, be artificial and unnecessary to construct a hypothetical comparator, and the Tribunal may need to focus simply on the reason why the respondent acted as it did. Sections 13 and 26 of the Equality Act 2010 should be interpreted and applied in a way that is compatible with Articles 9 and 10 of the ECHR.

157. In relation to time limits, Mr Holbrook submitted that there was a continuing act of discrimination and, in the alternative, that it would be just and equitable to extend time.

Conclusions

158. The following conclusions are reached on a unanimous basis, having considered carefully the evidence before us, the submissions of both parties and the relevant legal principles.

Time limits

159. The last act of discrimination complained of by the claimant is that on 17 March 2022 Fiona Williams told him that he would not be allowed to reinstate the Yammer posts that he had been told to take down.

160. The claimant started early conciliation on 2 August 2022 and obtained his early conciliation certificate on 13 September 2022. He presented his claim on 23 September 2022.

161. The 'primary' time limit for presenting the claim expired on 16 June 2022, three months after the last alleged act of discrimination. The claimant did not start early conciliation until approximately six weeks after that date, and as a result he does not get the benefit of any extension of time as a result of the early conciliation process. He presented his claim on 23 September 2022, approximately 6 months after the last act complained of and approximately 3 months after the expiry of the time limit.

162. As all of the complaints of discrimination are out of time, we have considered whether it would be just and equitable to extend time, reminding ourselves that we have a general discretion and wide power to do so.

163. The claimant was an ACAS conciliator who not only knew about the possibility of presenting a claim of discrimination to the Employment Tribunal, and of the three month time limit for doing so but was also considering a possible claim from August 2021. His evidence to the Tribunal was that he formed the view in August 2021, when he was first asked to take the Yammer posts down, that he was being discriminated against, and yet he did not issue proceedings until more than a year later. The claimant did not therefore act promptly when he knew of the facts giving rise to the claim.

164. In addition to being aware of his rights and of time limits, the claimant also had the benefit of advice. The claimant gave evidence that he spoke to both his trade union representative and to the Free Speech Union about the possibility of bringing a claim on several occasions prior to the expiry of the time limit. He chose, however, having received advice, not to issue a claim but to wait.

165. This is not a case in which there were new facts or new evidence that came to light after the expiry of the time limit which would have caused the claimant to think he may have a claim. Rather, it was clear from the claimant's evidence that he knew of his right to bring a complaint of discrimination and was considering doing so from as early as 16 August 2021, the date that the claimant alleges unlawful discrimination first occurred.

166. The decision not to issue proceedings was, we find, an informed choice, made by an educated individual with better knowledge than most people of the time limits for presenting discrimination claims.

167. The length of the delay in issuing proceedings was significant in this case. It was not a few days, but rather a matter of months. The reasons given by the claimant for the delay were firstly that the claimant was relying on advice from his trade union Affinity and from the Free Speech Union, and secondly that there was a breakdown in relationships between those two organisations which resulted in a delay in instructing counsel to advise on the potential proceedings.

168. Neither of those explanations in our view make it just and equitable to extend time. There was no evidence before us to suggest that the claimant was not capable of contacting ACAS to begin early conciliation himself – as a Conciliator he is familiar with the process and with the importance of time limits. Negligence of advisors, if indeed there was any, may be a factor when considering whether it would be just and equitable to extend time, but not in our view in a case like this, involving a claimant who is very familiar with time limits, and is employed in a job which involves advising members of the public on those very time limits. The claimant presented at Tribunal as an intelligent and articulate individual who is able to understand, express and assert his rights.

169. There was no medical evidence before us to suggest that the claimant was not able to submit his claim earlier because of health issues, and indeed the claimant did not suggest in his witness statement that health was the reason for the delay. There was evidence before us that the claimant was in regular contact with his trade union representative and also talked to the Free Speech Unit. He was therefore able to take advice from different sources. He also began early conciliation and issued proceedings. There was therefore in our view no medical reason why the claimant could not issue proceedings sooner.

170. Mr Holbrook submitted that, since the final hearing has taken place, it is clear that 'any modest delay' in issuing proceedings has not put the respondent at a disadvantage, and that justice requires that the claim is determined on the merits. Whilst we accept that the final hearing has taken place, it does not necessarily follow

in our view that the respondent would not be disadvantaged if time were to be extended. If time is extended in a claim, then a respondent could face an adverse finding of discrimination, which it may not otherwise face, and that would undoubtedly amount to a disadvantage. Nor can it be said that the delay was 'modest', as Mr Holbrook suggests. The delay was of a matter of months, not days or even weeks.

171. In this claim a decision was taken at case management stage to deal with time limits at the final hearing. Time limits are often dealt with at final hearings in discrimination claims once all of the evidence has been heard. There is no presumption that just because the evidence has been heard time will be extended.

172. Whilst recognising our wide discretion to extend time, we are not persuaded in this case, on the evidence and submissions of the claimant in relation to time limits, that it would be just and equitable to extend time. For the reasons set out above, we find that the claim is out of time, and that it would not be just and equitable to extend time.

173. It would have been open to us, in light of our conclusions on the question of time limits, not to consider the merits of the claim. Notwithstanding this and given the fact that we have heard evidence and submissions on the substantive claim, we have considered what our findings would be on the merits and set these out below.

Direct discrimination

174. This is a case in which the claimant relies heavily on his Convention rights to freedom of speech and of thought, conscience, and religion; and in which the respondent relies on the statutory provisions contained in sections 13 and 26 of the Equality Act 2010.

175. Whilst the starting point for this claim is the wording of section 13 and 26 of the Equality Act, we are obliged, by virtue of sections 3 and 6 of the Human Rights Act, to interpret sections 13 and 26 compatibly with the rights granted by the ECHR.

176. We accept Mr Holbrook's submission that the rights granted by articles 9 and 10 of the ECHR are foundational in nature (***Sahin v Turkey***). In ***Higgs v Farmor*** the Honourable Mrs Justice Eady DBE, President of the EAT, commented that:

"*39. Before restrictions to the right to freedom of religion or belief are weighed, the essential nature of the right has to be recognised. The first question is, therefore, whether the conduct complained of involves any limitation on the claimant's article 9 rights. That, in turn, requires an assessment as to whether the actions of the claimant (that is, the actions that caused the response complained of) amount to a manifestation of religion or belief. As the European Court of Human Rights made clear in* ***Eweida and ors v United Kingdom*** *(2013) 57 EHHR 8:*

> *"82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus,*

for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of art.9(1). In order to count as a "manifestation" within the meaning of art.9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the application to establish that he or she acted in fulfilment of a duty mandated by the religion in question."

40. Whether or not there is the requisite link between the act in issue and the relevant belief will be a matter for the ET to assess, although its task may not always be straightforward….

41. If the claimant's actions have a sufficiently close and direct nexus to an underlying religion or belief, any limitation would need to be such as is prescribed by law and necessary, in one of the ways identified under article 9(2)…."

177. We also accept Mr Holbrook's submission that the right to freedom of expression, and in particular, freedom of political speech, is fundamental in a democracy and that restrictions on this freedom "*need to be examined rigorously by all concerned, not least the courts…*" (***R (ex parte Prolife Alliance v BBC [2004] 1 AC 185***). The right to freedom of speech in Article 10 is, however, a qualified one and is not entirely unrestricted. In ***Overd and ors v Chief Constable of Avon and Somerset Constabulary [2021] EWHC 3100***, Linden J commented that:

"*[Counsel for the claimants] referred on a number of occasions to the officers in this case having a 'positive duty' to protect the speaker's Convention rights even where what they say is unpopular or offensive. That may be true, as far as it goes. But as those rights are qualified any such duty does not mean, as he appeared to contend, that police officers must <u>always</u> side with the speaker in such a case and must always ensure that they are able to say what they wish to say. It does, however, mean that any action which they take to inhibit the speaker's freedom of expression must be 'justified'… and proportionate. Moreover, these provisions must be applied having regard to the importance of the relevant rights, and the justification for any infringement must therefore be convincing…*"

178. If an individual's rights under Articles 9 and 10 are restricted, then the restriction must be 'prescribed in law' (such that the claimant could foresee the potential consequences of his conduct), concerned with the pursuit of a legitimate aim, and necessary in a democratic society. (***Higgs v Farmor***, para 51). The Tribunal must consider the proportionality of the interference with the Convention rights. It is helpful to consider the following paragraphs of the judgment in ***Higgs v Farmor*** :

"*94. … within the employment context, it may be helpful for there to at least be some mutual understanding of the basic principles that will underpin the approach adopted*

when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.

(1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.

(2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.

(3) Whether a limitation or restriction is objectively justified will always be context-specific…

*(4) It will always be necessary to ask (per **Bank Mellat**): (1) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective, (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter."*

179. In reaching our conclusions on the direct discrimination allegations, we have also considered the judgment in ***Page***, in which LJ Underhill held that, in relation to complaints of direct discrimination:

"*68. I start with a point which is central to the analysis on this issue. In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it: see para. 29 above. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting…"*

180. The protected characteristic (in this case the claimant's protected belief) does not have to be the sole or principal reason for the respondent's treatment of the claimant), but it must be a 'significant cause' of the treatment.

181. There are four allegations of direct discrimination before us:

1. The instruction to remove the eight Yammer posts on 16 August 2021;

2. Louise Lenton telling the claimant on 10 September 2021 that, after

considering a complaint from four staff members, it was necessary to address the complaint through the formal grievance resolution process;

3. On 20 January 2022 Jennifer Williams telling the claimant that because the four complainants had appealed, any decision regarding the reinstatement of the posts would not be made until the appeal had concluded; and

4. On 17 March 2022 Fiona Williams telling the claimant that he could not repost the eight posts, providing an explanation that was 'incoherent and unlawful'.

182. The respondent admits that all of the above acts took place, with the exception of the allegation that Fiona Williams provided an explanation on 17 March 2022 that was 'incoherent and unlawful'.

183. In light of the evidence before us and the admissions made by the respondent, we have no hesitation in finding that the above conduct did take place, save in relation to the allegation that the reasons given by Fiona Williams for the posts not being reinstated was incoherent and unlawful. The reason given by Fiona Williams for not reinstating the posts, in the email she sent to the claimant on 17 March, was that offence was taken to the posts, and the appeal manager acknowledged the impact that the claimant's posts had on the complainants. This was consistent with the evidence given by Mr Ellis, who made the decision that the posts should not be reinstated, that although the posts were not objectively offensive, if he saw behaviour which was having an impact on colleagues, he would ask for that behaviour to stop. He wanted to avoid any further disruption in the workplace.

184. The claimant submitted that the reasons given by Ms Williams were incoherent because she accepted in her email that there is no right not to be offended, whilst then concluding that offence being taken (in the absence of any basis for finding that any of the posts were objectively offensive) was a basis for denying the claimant what he described as 'his fundamental rights'.

185. The reasons given were in our view neither incoherent nor unlawful. An employer has a duty of care to all of its employees, and where there is behaviour in the workplace that genuinely upsets a group of employees, as is the case here, it is not in our view unreasonable or unlawful for an employer to take steps to prevent that behaviour continuing. At no point has any restriction been placed on the claimant's ability to post on Yammer, other than in relation to the 8 posts which all those in the respondent's management who had met the four complainants, concluded had genuinely offended them.

186. We therefore find that the reasons given by Fiona Williams on 17 March 2022 were neither incoherent nor unlawful.

187. We have considered, in line with the guidance in ***Eweida***, whether the claimant's posts on Yammer were a manifestation of his protected beliefs. We find that in seven of the posts the claimant was clearly expressing his beliefs about race and racial equality which we have found to be protected beliefs. The posts were a direct

expression of those beliefs, and closely linked to them. Article 9 is therefore engaged in relation to the posts about race and racial equality. It is not engaged in relation to the last of the posts, namely the one about male suicide, because we have found that the claimant's views on sex and feminism are not a protected philosophical belief falling within section 10(2) of the Equality Act 2010.

188. We do not accept Mr Tinnion's submission that the claimant had no Convention rights to post on Yammer because the Yammer platform is owned and operated by the respondent. Whilst we recognise that Yammer had a limited audience, namely employees of ACAS, we cannot accept that Convention rights do not apply in these circumstances. We are required to consider them when interpreting sections 13 and 26 of the Equality Act 2010, irrespective of the breadth of the audience. We do however recognise that by asking the claimant to take down posts on a private platform, there was less of an interference with the claimant's rights under Articles 9 and 10 of the ECHR than had the claimant been asked to take down posts on a platform that was more widely available.

189. The respondent's actions were the result of complaints by four black employees who considered the posts to be discriminatory and offensive and who raised a collective grievance about them. As part of their complaints they suggested that the claimant's posts were infringing the rights of others to speak out. In her email to Ms Dennis on 6 July the lead complainant wrote that leaving the posts on the site "*sends a message that Acas is not a safe place for racialised workers and it is not safe to speak out*". During the grievance meeting with Ms Lenton the complainants said that they believed the claimant was saying 'they' shouldn't speak. It was not therefore just the claimant's right to express his beliefs that was called into play in this case.

190. The respondent could not ignore the complaint made by the four complainants. It was an extremely serious complaint, in which allegations of race discrimination, harassment and bullying were made. The complaint was raised by not one but four employees, one of whom was the diversity lead for the respondent's trade unions.

191. The respondent's response to the complaint was, in our view, an entirely reasonable and appropriate one. Ms Dennis, to whom the complaint was made, took advice from the respondent's Head of Employee Relations and Race Champion, and then arranged a meeting with the complainants. The purpose of that meeting was to try and resolve the complaint informally. The complainants were not willing for their complaint to be treated informally and insisted that it be considered as a formal grievance.

192. In these circumstances, it would not have been appropriate in our view for the respondent to do as the claimant suggested and dismiss the complaint out of hand, without formally investigating it. To do so would have been a breach of ACAS' own Code of Practice on disciplinary and grievance procedures, which provides that if it is not possible to resolve a grievance informally, employers "*should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.*"

193. Dismissing the grievance at the initial stage without investigating it could also

have been in breach of the implied term that employers must "*reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance*" (***WA Goold (Pearmak) Ltd v Mr JC McConnell & anor [1995] IRLR 516***). Moreover, in ***Reed & anor v Stedman [1999] IRLR 299*** it was held that a failure to investigate allegations of harassment amounted to a breach of contract by the employer.

194. As an aside, we note that the claimant, when he raised his grievance, insisted on his grievance being treated formally, and did not want it to be treated informally. The respondent respected his wishes, just as it respected the wishes of the four complainants to have their grievance dealt with formally.

195. When dealing with the grievance about the claimant's posts it is clear that the respondent was sensitive to the needs of the claimant. Ms Lenton took steps to ensure that the claimant did not receive emails from her out of the blue. When the claimant, through his trade union representative, asked for details of the complaint, these were provided. When the claimant asked not to attend a meeting but to provide a written response to the complaint, this was accommodated.

196. At no point did anyone within the respondent's management including those involved in dealing with the grievance about the Yammer posts criticise the claimant or his beliefs or suggest that he should stop posting. The respondent's Race Champion had encouraged him to continue posting shortly before the posts that led to the grievance, and there was no evidence before us to suggest that her advice to the claimant changed after the grievance. The claimant's views and his contribution to the debate about race discrimination appear to have been welcomed by those in managerial positions at the respondent.

197. Importantly, in this case, the grievance about the posts was not upheld, either at the initial stage or on appeal.

198. The only restriction that was placed on the claimant's right to express his protected beliefs was that he was asked to take eight posts down and then not to re-post them. No one sought to prevent him from making further posts on Yammer, which he remained free to do. No one within management criticised his beliefs or suggested that he should no longer express them.

199. Whilst we accept that asking the claimant to take the posts down and keep them down could be seen as an interference with his Article 9 and 10 rights, those rights are qualified rights. It is clear from the Yammer Usage principles that there is not an unrestricted right to post on Yammer. The principles clearly state that inappropriate use of Yammer can be a disciplinary issue, and give as examples of inappropriate use, bullying, harassment and offensive comments. Those who post on Yammer therefore, are, or should, be aware that their right to post is subject to compliance with the Yammer Usage principles. It is not an unrestricted right.

200. We are not persuaded that informing the claimant that the complaints would be dealt with through the formal grievance process was an interference with the

claimant's Article 9 and 10 rights. Even if it were, however, the claimant would have known as an ACAS Conciliator, that employers are required to treat formal grievances seriously and would therefore have had an expectation that if a formal grievance was raised about his behaviour at work, it would be dealt with under the respondent's formal grievance procedure.

201. By asking the claimant to take the posts down on 16 August 2021, informing him on 20 January 2022 that any decision regarding the reinstatement of the posts would not be made until the appeal had concluded, and by telling the claimant on 17 March that he could not repost the posts, the respondent was seeking both to protect the rights of others who genuinely believed that they were discriminatory and offensive, and to try and avoid further harm and disruption in the workplace. By telling the claimant on 10 September that it was necessary to deal with the complaint through the formal grievance process, the respondent was seeking to comply with its legal obligation as an employer to deal with grievances properly. The respondent's actions were at all times concerned with protecting the rights and freedoms of others – specifically the right to have a grievance heard (a right which the claimant also made use of when he raised a grievance and insisted that the grievance be treated formally rather than informally).

202. The action taken by the respondent, that the claimant alleges amounts to direct discrimination, was in our view necessary for the protection of the rights and freedoms of the complainants, given the nature of the concerns they had raised, how genuinely upset they were by the posts, and the respondent's obligation to deal with their grievance properly. Asking the claimant to remove the posts was in our view a reasonable and proportionate step for the respondent to take.

203. Applying the tests in ***Bank Mellat***:

    1. The objective that the respondent was seeking to achieve was to remove posts that other employees genuinely believed were racist and were distressed by and avoid further harm and disruption in the workplace. This is in our view a sufficiently important objective to justify the limited restriction on the claimant's Article 9 and 10 rights.

    2. Based on the evidence before us, it is clear that the limited restrictions placed by the respondent on the claimant's Convention rights were clearly connected to those objectives.

    3. There was, in our view, no less intrusive step that the respondent could have taken to achieve those aims. The claimant was initially not told to take the posts down permanently, and the situation was kept under review whilst the grievance process was ongoing. It was only at the conclusion of the grievance process that a decision was taken that the claimant should not be allowed to repost them. By that stage the respondent knew what disruption had been caused by the posts, and that the grievance and appeal process had not resolved the issue. The claimant did not suggest any less intrusive steps that could have been taken by the respondent to achieve its objectives, and we

find, on the evidence before us, that there were none.

4. Finally, we have balanced the severity of the limitations placed on the claimant's Convention rights against the importance of the respondent's objectives. The limitations placed on the claimant's Convention rights were not significant. He was merely told to remove 8 posts from the respondent's internal intranet page. The claimant was not prevented from posting on Yammer generally or from expressing his views publicly. There was no criticism of him by the respondent's managers, and the grievance against him was not upheld.

204. Taking all of the above into account, we are satisfied that the respondent's actions were proportionate in the circumstances.

205. We have then gone on to consider, in relation to each of the four allegations of direct discrimination, whether they amount to less favourable treatment and, if so, whether it was because of the claimant's protected belief. The claimant relies in relation to each of the allegations on a hypothetical comparator, although we accept Mr Holbrook's submissions that, in a case such as this, the Tribunal may need to focus on the reason why the respondent acted as it did.

206. We find that the correct hypothetical comparator on this case is an employee who did not share the claimant's protected beliefs and who made posts on Yammer that offended other employees and caused four colleagues to raise a grievance.

207. We have considered why the respondent took the action that it did, reminding ourselves that discriminators rarely admit to discriminating and that, for that reason, we have the power to draw adverse inferences against an employer. There is, however, no evidence before us from which we could draw an adverse inference against the respondent. On the contrary, there was evidence that the Race Champion encouraged the claimant to continue posting on Yammer as she welcomed his contribution to the debate, and that others were interested in and sympathetic to his protected beliefs. ACAS' Chief Executive responded positively when the claimant shared his views on race with her, and the claimant's views 'resonated' with ACAS' Head of Diversity and Inclusion. Mr Holbrook failed to put to the respondent's witnesses the claimant's case that their conduct was because of or related to protected beliefs.

208. We find that the reason why the respondent instructed the claimant to remove the posts on 16 August 2021 was because a complaint of a most serious nature had been made about them by four employees who the respondent genuinely, and with good reason, believed were extremely upset by the posts. The complaint made clear that the four complainants felt that their right not to be discriminated against in the workplace had been infringed, and that the claimant's posts were also deterring others from speaking up in the workplace about issues of race. The respondent had a duty of care to these complainants, as well as to the claimant, and could not ignore the complaints that had been made. This is particularly so given the nature of the respondent, as a public sector body with responsibility for resolving disputes in the

workplace and publishing national guidance on dealing with grievances.

209. We are satisfied that a hypothetical comparator who had posted comments on Yammer which were not related to a protected belief and which other employees had complained about would have been treated in the same way. We accept the respondent's evidence that other employees had been asked to take posts down when colleagues had been offended by them. A hypothetical comparator would therefore have been treated the same way as the claimant was.

210. The respondent has provided an explanation and evidence, which we accept, showing a non-discriminatory reason for asking the claimant to take the posts down and then not permitting him to repost them. It cannot in our view be said that the instruction to take and keep the posts down was either because of or, for the purposes of the harassment claim, related to the claimant's protected belief.

211. The second allegation of direct discrimination relates to Louise Lenton informing the claimant on 10 September 2021 that it was necessary to address the complaint through the formal grievance process. The claimant alleges that in doing so she failed to consider the complaint lawfully and/or failed to realise that the complainants were using their philosophical beliefs to try and silence the claimant's philosophical beliefs.

212. On the evidence before us, we find that there was nothing unlawful or inappropriate in the way in which Louise Lenton considered the complaint that had been raised. Nor was there any evidence to support the claimant's assertion that the complainants were trying to 'silence' the claimant. To the contrary, they seemed to be concerned that he was trying to 'silence' the views of others by making them afraid to speak out. By the time Louise Lenton wrote to the claimant on 10 September, both she and Julie Dennis, who has considerable experience in discrimination issues, had spent considerable time with the complainants listening to their complaints. Having done so, both had formed the view that the complainants genuinely believed in what they were saying, and genuinely believed that the claimant's posts were offensive and discriminatory.

213. Mr Holbrook submitted that the respondent should not even have told the claimant about the complaint but dismissed it out of hand and/or dealt with it informally. We do not accept this submission. Complaints of discrimination are serious and should be treated as such. Ms Dennis had tried to encourage the complainants to resolve matters informally, but they refused to do so, and insisted on raising a formal grievance, which they were entitled to do.

214. We note that the claimant himself, when he raised a grievance and was asked if he was interested in informal resolution, said no, and insisted on going through the grievance process. It is in our view inconsistent for the claimant to assert that different rules should have applied to the four complainants than were applied to himself.

215. The respondent did, through Julie Dennis' meeting with the four complainants, try

to resolve matters informally, but just as the claimant did with his grievance, these complainants insisted that their complaint be treated formally. The claimant was therefore treated the same as the four complainants in that all of them were afforded access to the formal grievance procedure when they indicated that they were not interested in informal resolution.

216. The respondent could not, in our view, reasonably ignore or dismiss the complaints made by the four complainants. They had the right to have their complaint considered.

217. The reason why Louise Lenton wrote to the claimant on 10 September 2021 was not because of or related to his protected beliefs, but rather was to inform the claimant about the grievance and invite him to a meeting to discuss it, in accordance with the respondent's grievance procedure.

218. We find that a hypothetical comparator, who had posted on Yammer posts which others found offensive and complained about, would have been treated in the same way.

219. The third allegation of direct discrimination was that on 20 January 2022 Jennifer Williams informed the claimant that because of the appeal against the grievance outcome any decision regarding reinstatement of the Yammer posts would not be made until the grievance appeal had been concluded. The email on 20 January was sent to the claimant's representative, but it is reasonable to conclude that the representative would have shared its contents with the claimant.

220. By the time that decision was taken, it was clear that the complainants were not happy with the outcome of the grievance and remained upset about the posts, as they had exercised their right of appeal. It was in the circumstances understandable that any decision on reinstatement was postponed pending the conclusion of the appeal process, and this is consistent with the respondent's wish to avoid further harm and disruption in the workplace. We find that a hypothetical comparator would have been treated in the same way as the claimant, and that the email on 20 January 2022 was not sent because of the claimant's protected beliefs.

221. The final allegation of direct discrimination related to Fiona Williams telling the claimant on 17 March 2022 that he could not repost the eight posts. This was a decision made by Dan Ellis after he had discussed the issue with the Head of Employee Relations. The reason he took that decision was because he was concerned about ongoing disruption to the workplace if the posts were to be reinstated, given that the complainants remained very aggrieved about the posts, notwithstanding that their grievance and appeal had not been upheld. Mr Ellis decided that the posts should not reinstated in the interests of maintaining harmonious working relationships. He was concerned that there were four employees who were distressed and angry about the posts who would have been detrimentally impacted by their reinstatement.

222. This decision was not made because of the claimant's protected beliefs, nor was

it related to those beliefs. Rather, the decision was taken for the reasons given by Mr Ellis in his evidence. Other employees had been asked to take down Yammer posts which others had found offensive, even if the posts were not objectively offensive, which is consistent with the respondent's approach to removing from Yammer posts which some employees found offensive so as to avoid disruption and promote a harmonious workplace. We have no hesitation in finding that a hypothetical comparator would have been treated in the same way that the claimant was.

223. For the above reasons we conclude that the complaints of direct discrimination are not well founded.

Harassment

224. When reaching our conclusions on the allegations of harassment, we have reminded ourselves that the concept of 'related to' the protected beliefs is wider than the 'because of' required for direct discrimination. The Tribunal can take account of the context in which the alleged harassment takes place. The Guidance on Sexual harassment and harassment at work issued by the Equalities and Human Rights Commission gives the following example (at paragraph 2.18):

"*A Muslim worker has a conversation with a colleague about so-called 'Islamic State' fighters. The worker relays to the colleague some comments made by a journalist about Islamic State fighters which are of a positive nature. Later that month the colleague approaches the worker and asks, 'Are you still promoting Islamic State?' the worker is upset at the allegation that he promotes Islamic State and brings a claim of harassment related to religion or belief. The tribunal finds that the colleague asked that question because of the worker's previous comments, not because the worker is a Muslim or because of anything related to the worker's religion. The question was therefore not harassment.*"

225. The Employment Appeal Tribunal has recently held, in ***Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40***, that the mishandling of a grievance about harassment or discrimination will not necessarily amount to harassment related to the protected characteristic in question, even if it violates the employee's dignity. There must be some connection on the facts between the protected characteristic and the failings in the grievance process in order for a complaint of harassment to be made out.

226. There are 7 substantive allegations of harassment before us. The first is that on 16 August 2021 the respondent told the claimant that a complaint had been made about him. The respondent does not dispute that this actually happened, and we find that it did. The reason the respondent did that was because a complaint had been made about the claimant, and it was in our view appropriate that the claimant be informed about it, particularly since he was being asked to take down the Yammer posts complained about. It was reasonable for the respondent to provide an explanation for this request.

227. It cannot be said that the decision to tell the claimant about the complaint was related to his protected belief. Rather it was because the complaint had been made and the respondent was providing an explanation to the claimant for its request to remove the posts from Yammer. There was no evidence before us to suggest that the decision to inform the claimant about the complaint was related to his protected belief, and nothing from which we could draw an inference that that was the case.

228. The second allegation of harassment relates to the instruction given to the claimant on 16 August 2021 to remove eight posts temporarily. This was also pleaded as an allegation of direct discrimination and, for the reasons set out above in our conclusions on the direct discrimination allegation, we find that this instruction was neither because of nor related to protected beliefs.

229. The third allegation of harassment is that on 10 September 2021 the respondent began a formal grievance process. We find on the evidence before us that the formal grievance process did not begin on 10 September 2021, but prior to that when the complainants sent in their formal grievance. What happened on 10 September was that the appointed grievance hearer, Louise Lenton, wrote to the claimant inviting him to a meeting to discuss the grievance. The reason she did this was to ensure compliance with the respondent's grievance procedure, the ACAS Code of practice on grievances, and to give the claimant the opportunity to respond to the complaint that had been made. It was not related to a protected belief.

230. The fourth allegation is broken down into three sub headings. The first is that the claimant was invited to a formal investigation meeting on 20 September 2021. We find that the claimant was initially invited to such a meeting, but that when his trade union representative informed the respondent that the claimant preferred to give answers in writing due to his health, the respondent agreed and did not insist on him attending the meeting. We also find that the reason the respondent invited the claimant to a meeting was to ensure it could properly investigate the formal collective grievance that had been made, which is good practice and in line with its legal obligations. It was not related to a protected belief.

231. The second part of the fourth allegation is that the claimant was asked to address four pages of complaints which were repeated by the investigating officer and which 'gave official sanction to' the complainants' 'woke and politically motivated complaints'.

232. We find that the claimant was sent a summary of the complaints that had been made. It ran to 3 pages rather than 4 and was sent firstly because the claimant's union representative had asked that the claimant be allowed to answer questions in writing rather than at a meeting; and secondly because the claimant's union representative had asked for more details of the complaint to be sent through and had complained that the allegations as set out briefly in the letter of 10 September were not sufficiently detailed for the claimant to be able to respondent. There was no evidence whatsoever to suggest that this conduct, which was a result of a direct request from the claimant's trade union representative, was related to a protected

belief. Rather it was to give the claimant the opportunity to respond to complaints that had been made about his posts. It cannot in our view be said that the respondent 'gave official sanction' to the complaints, it was merely informing the claimant about them and following its grievance procedure.

233. The third part of the fourth harassment allegation is, in summary, that the respondent told the claimant in some detail about the complaints that had been made. The respondent accepted doing this. The reason for this was to give the claimant the right of reply, so that he could respond to the complaints, which he subsequently did. His explanation was accepted by the respondent and the grievance was not upheld. It cannot be said that telling the claimant the complainants' complaints was related to protected beliefs. Rather it is good practice, when investigating a grievance about an individual's behaviour, to provide the individual with details of the complaint so that he can respond to it.

234. The fifth allegation of harassment is that on 25 October 2021, after dismissing the complaints about the claimant's Yammer posts, Louise Lenton recommended that the claimant and the complainants should consider mediation and made no finding that the complainants had acted politically or unlawfully in seeking to silence the claimant's philosophical beliefs and/or implied that the claimant was partly responsible for the complaint.

235. We find that the reason Louise Lenton suggested mediation was because she knew that the complainants were not satisfied with the outcome of the grievance and wanted to find a resolution to the situation. She is a trained mediator, who works for an organisation whose very purpose is the resolution of workplace disputes. She genuinely believed that mediation my help to resolve matters and that is why she suggested it. It was nothing whatsoever to do with protected beliefs, but rather was suggested with the very best of intentions, as a potential way of ensuring that both 'sides' felt comfortable in the workplace. Ms Lenton believed that mediation would enable everyone to rebuild a professional working relationship and gain a better understanding of each other's point of view.

236. We also find that Ms Lenton did not make any finding the complainants had acted politically or unlawfully, nor did she imply that the claimant was partly responsible for the complaint. She reached conclusions on the grievance that were, in the circumstances, not unreasonable, and in our view she tried to find a middle ground to bring the two sides together. It cannot be said that this was related to protected belief, rather the conclusions reached were ones genuinely reached on the evidence before Ms Lenton, and with a view to trying to bring the two sides together.

237. The sixth allegation of harassment was that the claimant was instructed on 17 March 2022 to remove his posts permanently, an allegation that was also pleaded as an allegation of direct discrimination. For the reasons set out in our conclusions on the direct discrimination allegations, we find that this instruction was not related to protected beliefs, but rather was because Dan Ellis wanted to avoid further disruption in the workplace and was of the view that posts which are offensive to

other employees should not be allowed to remain on Yammer.

238. The final allegation of harassment is that the respondent failed to conduct a formal investigation in a fair and reasonable manner by failing to

1. Formulate a charge which would have established succinctly in a sentence or two the basis for the alleged impropriety;

2. Summarise the relevant facts that were said to give rise to the charge; and

3. Conclude he process in a timely fashion, by failing to dismiss the complaint until 25 October 2021.

239. Dealing with each of these allegations in turn, we find as follows:

1. Ms Lenton did initially seek to formulate a 'charge' which established succinctly the basis for the alleged impropriety when she wrote to the claimant on 10 September informing him that the complaint was that he had made offending and discriminatory posts on Yammer. The claimant's trade union representative then complained that the claimant had not been given enough information about the complaint. Following that complaint Ms Lenton provided more detail about the complaint. The provision of further information about the complaint was in response to an express request for further information from the claimant's representative and was not related in any way to a protected belief;

2. Ms Lenton did seek in the email on 10 September to summarise the facts giving rise to the charge and then, when asked by the claimant's representative to provide more information, she did so. There was no failure by Ms Lenton to summarise the facts that were said to give rise to the charge; and

3. Whilst the grievance could have been concluded more quickly, the delay was not related to a protected belief. There was no evidence before us upon which we could have reached such a conclusion, and the suggestion that the time taken to conclude the grievance process was related to a protected belief was not put to the respondent's witnesses in cross examination.

240. For the above reasons, the complaints of harassment related to protected belief are not well founded.

241. In light of our conclusions above, it has not been necessary for us to consider whether the conduct complained of had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

242. The claimant's claims against the respondent therefore fail and are dismissed.

Employment Judge Ayre

Date: 23 May 2024