Neutral Citation Number: [2024] EAT 169

Case No: EA-2021-001266-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Buildings, Fetter Lane, London
EC4A 1NL

Date: 9 October 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

Between:

MISS E CAROZZI

Appellant

- and –

(1) UNIVERSITY OF HERTFORDSHIRE
(2) MS A LUCAS

Respondents

The Appellant appeared in person
Mr T Sheppard (instructed by Mills & Reeve LLP) for the **Respondent**

Hearing dates: 8 - 9 October 2024

JUDGMENT

SUMMARY

Harassment

The Employment Tribunal erred in law in its analysis of what the term "related to" means in the definition of harassment and in its analysis of a complaint of victimisation. Grounds of appeal asserting procedural bias and unfair treatment failed.

His Honour Judge James Tayler:

Introduction

1. The key issues in this appeal are the correct approach to analysing claims of harassment and victimisation.

2. The appeal is against a judgment of the Employment Tribunal, Employment Judge Hyams sitting with lay members, which was heard on 21 to 25 and 28 to 30 June, on 1 July and in chambers on 15 July 2021. The judgment was sent to the parties on 10 August 2021. The claimant brought two claims that were heard together in the Employment Tribunal.

3. The claimant was employed by the respondent with a six-month probationary period that was extended on two occasions, and had not been completed when she resigned from her employment. The claimant brought a claim in the Employment Tribunal making complaints of constructive dismissal, direct race discrimination because of her Brazilian nationality or Jewish ethnic origin, direct religious discrimination, harassment, and victimisation.

4. The claim that the Employment Tribunal had to determine was complex. There were multiple allegations, including 36 separate complaints of detrimental treatment. It is difficult to manage a claim with such a large number of complaints. It is regrettable that in many claims the core issues become obscured because so many subsidiary allegations are made. It is often best to focus on the strongest points, If the strongest complaints fail, it is unlikely that the less promising will succeed. Even in claims of discrimination, where it generally is important to consider overall treatment, it is important to concentrate on the most significant events.

5. The claimant submitted a very lengthy notice of appeal (220 paragraphs over 73 pages). The appeal was initially considered on the sift by HHJ Auerbach who concluded that most of

the grounds were unarguable, but that a limited number of grounds should be considered at a preliminary hearing.

6. The preliminary hearing was held before Judge Stout. The grounds were reduced to 17. The claimant was permitted to rely on her skeleton argument in place of the original grounds of appeal. Judge Stout permitted three aspects of the appeal to proceed. The first concerns the Employment Tribunal's treatment of the complaint of harassment concerning the claimant's accent. The second was a single ground challenging the dismissal of a complaint of victimisation. The final part is made up of grounds alleging procedural bias or unfair treatment of the claimant by the Employment Tribunal. The other grounds were not permitted to proceed so are not before me in this appeal. The claimant in her skeleton argument made submissions that fall outside the grounds that were allowed by Judge Stout. I have only determined the specific grounds that were permitted to proceed. I shall deal with the three aspect of the appeal separately, including my analysis of the law and conclusions on the grounds of appeal.

The approach of the EAT

7. In considering the appeal I have had regard to the well-known principles concerning appeals to the EAT reiterated in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016. The respondent particularly relied on paragraph 58:

> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles

> whose application forms a significant part of its day to day judicial workload.

8. I also had regard to paragraph 57 of **Greenberg**, and the well-known proposition of Mummery LJ, in **Fuller v The London Borough of Brent** [2011] EWCACiv 267, [2011] I.C.R. 806, that the reading of an Employment Tribunal decision must not be so fussy that it produces pernickety critiques. It is important to avoid over-analysis of the reasoning process or be hypercritical of the way in which a decision is written. One should not focus too much on particular passages or terms and phrases to the neglect of the decision read in the round.

9. It is important that the reasons of an Employment Tribunal are sufficient for the party that wins or loses to know why. That is the extent of the obligation to give reasons: **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601; [2021] ICR 695 [29-31, 64].

Harassment

10. Section 26 of the **Equality Act 2010** ("**EQA**") defines harassment:

> 26 Harassment
>
> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> ...
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are –

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

11. There are a number of components in a complaint of harassment. A must have engaged in unwanted conduct; that conduct must be related to a relevant protected characteristic; the conduct must have the purpose or the effect of violating the dignity of B, or creating an intimidating hostile, degrading, humiliating or offensive environment for B. I will refer to "violating dignity" compendiously to include creating an intimidating, hostile, degrading, humiliating, or offensive environment.

12. Section 26 **EQA** deals with two possible situations: (1) conduct that has the purpose of violating dignity or (2) conduct that has that effect (but not the purpose). The provision allows for the possibility that A deliberately violates the dignity of B or A does so without that intention, but the conduct has the effect of violating B's dignity. Where the conduct has the effect but not the purpose of violating dignity, the Employment Tribunal is required to consider the perception of B, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

13. Complaints of harassment can be made about conduct that is related to a number of protected characteristics, including race. Race is defined by section 9 **EQA** to include colour, nationality, ethnic or national origins.

14. Section 26 **EQA** focuses on the dignity of the individual, and the right of a person not to have their dignity violated. It is a pragmatic provision that seeks to balance competing factors so that employees receive reasonable protection, having specific regard to their perception of the conduct, but without expecting an unrealistic standard of workplace conduct from their

colleagues. Employees can be expected to demonstrate a degree of robustness, as was emphasised by the decisions of the Court of Appeal in **Grant v HM Land Registry & Anor** [2011] ICR 1390 and **Richmond Pharmacology v Dhaliwal** UKEAT [2009] ICR 724.

15. The conduct must be unwanted and be related to a relevant protected characteristic. The requirement that the conduct be related to a protected characteristic is different to the requirement in a claim of direct discrimination that the treatment is because of a protected characteristic. The term "related to" is designed to cover all forms of conduct that, properly viewed, has a relationship to the protected characteristic. The issue was considered by HHJ Auerbach in **Tees Esk Wear Valleys NHS Foundation Trust v Aslam & Anor** [2020] IRLR 495.

> Nevertheless, there must be still**, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question**, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, **the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic**, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.'

16. In **Blanc de Provence Ltd v Ha** [2023] EAT 160, [2024] I.R.L.R. 184, I noted that conduct can be related to a protected characteristic where it is done because of the protected characteristic, but that is by no means the only way that conduct can be related to a protected characteristic.

> 31. It is clear that the test of whether conduct is 'related to [sex]' is different to that of whether it is 'because of [sex]' as is required to make out a claim of direct sex discrimination. The term 'related to [sex]' is wider and more flexible than 'because of [sex]'. Conduct could be found to be 'related to [sex]' where it was done 'because of [sex]', but that is

> not a requirement. So, for example, if A subjects B to unwanted conduct with the purpose of 'creating an intimidating environment for B' in circumstances in which it is established that A would not have subjected a man to the same conduct, that would establish that the conduct was 'related to [sex]'. But there are many other ways in which conduct could be 'related to [sex]' such as where there is conduct that is inherently sexist such as telling sexist jokes.

17. I consider that the term "related to" is designed to have a relatively broad meaning. The harassment provisions are designed to be pragmatic, balancing the interests of employees against those of their employer and colleagues who may be accused of harassment. That balance is not achieved by applying a limited meaning to the words "conduct related to a protected characteristic". The limitations are that the conduct must be unwanted and it must have the purpose or effect of violating dignity. Where the conduct has that effect, but not that purpose, the Employment Tribunal will go on to consider the perception of B, the other circumstances and whether it is reasonable for the conduct to have that effect. Employers and employees can be expected to take greater care in how they speak and behave at work than they might in their social life. While it is in no-one's interest that colleagues should constantly be walking on egg-shells, it is also important that proper protection is provided against violation of dignity at work.

18. The Employment Tribunal quoted section 26 **EQA** and explained its understanding of what is meant by "related to."

> 16 We return to what constitutes harassment within the meaning section 26 below, after considering the meaning of the words 'conduct related to a relevant protected characteristic'. In order to do the latter, it is helpful to consider the effect of section 13 of the EqA 2010, which of course was a central provision in this case. Section 13 provides:
>
> > '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.'
>
> 17 The manner in which that section needs to be applied, given section 136 of the EqA 2010 (to which we refer in paragraphs 21-23 below), is now well-established. **It may be thought that there is a fundamental**

difference between sections 13 and 26 of the EqA 2010, in that they use different operative words: 'because of a protected characteristic' in section 13 and 'unwanted conduct related to a relevant protected characteristic' in section 26.

18 **There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of those different words. It shows that only rarely will a claim of harassment add anything to a claim of discrimination**. By way of illustration, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, **a mental element is required in a claim of harassment as much as in a claim of direct discrimination**. The approach which we needed to take here when applying section 26(1) of the EqA 2010 was shown by paragraphs 108-109 and the opening part of paragraph 110 of Underhill LJ's judgment. That passage is as follows:

> Harassment
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> 108. Mr Carr [counsel for the claimant] submitted that, even if the employed officials' conduct could not be said to be "because of" the Claimant's sex, it was on any view "related to" it within the meaning of section 26. I have already explained at paras 96-98 above why that language does not cover cases of third party liability; and for the reasons given at para 104, the present claim is, on the ET's reasoning, in substance such a case. If the employed officials, and through them the union, are to be liable for harassing the claimant because of their failure to protect her from the harassment of the lay officials, and (in the case of Mr Kavanagh) for transferring her, that can only be because of their own motivation, as to which the tribunal made no finding.
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> 109. Mr Segal [counsel for the respondent employer, the union] sought in his post-hearing submissions to distinguish between a situation where an employer was "culpably inactive knowing that an employee is subjected to continuing harassment (as on the facts of the *Burton* case)" and one where he was "culpably inactive without [any such knowledge]"; and to show that the employment tribunal's findings established that the case was in the latter category. I am not sure of the relevance of the distinction; but since we did not hear oral submissions on it I prefer to say no more than that, on the law as I believe it to be, the employer will not be automatically liable in either situation. I repeat, to avoid any possible misunderstanding, that the key word is "automatically": it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.
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> Conclusion

> 110. For those reasons I agree with the appeal tribunal that the reasoning of the employment tribunal was flawed. It found the union liable on the basis of the acts and omissions of the employed officials without making any finding as to whether the claimant's sex formed part of their motivation. [emphasis added]

19. At paragraphs 24 through to 27, under the heading "Harassment in practice", the Tribunal directed itself to the authorities that deal with what is meant by a violation of dignity and noted expectation of reasonable robustness on the part of the employee.

20. The Employment Tribunal then, in a passage under the heading "The possible effect on a claim of direct discrimination or harassment of criticising an employee's accent", noted that mocking a racial characteristic, such as mocking and mimicking a national accent is analogous with overtly racial abuse.

> Harassment
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> 31 *Sheffield City Council v Norouzi* [2011] IRLR 897, the EAT (Underhill P presiding) considered an appeal against a finding in favour of a claim of harassment and indirect race discrimination made by an Iranian claimant who had worked (as the headnote stated) 'as a residential social worker at a small home for troubled children between the ages of 11 and 15'. The headnote continued:
>
> > 'One of the children ("A") was often abusive and offensive to the staff and was regularly offensive to the claimant on racial grounds. There were a number of incidents in which she made such comments as that he should go back to his own country and, on one occasion, that she wanted to blow up the whole of Asia and all Asians. She mocked and mimicked his accent on most of the shifts when he worked with her.'
>
> 32 The EAT dismissed the appeal. At the end of paragraph 33 of its judgment, the EAT said this:
>
> > 'To mock a racial characteristic seems to us plainly analogous with overtly racial abuse.'

21. The Tribunal returned to the question of what is meant by "related to" at a number of points. In paragraph 107 the Employment Tribunal analysed a meeting at which specific

comments had been made about the claimant's accent and returned to the analysis of the decision of the Court of Appeal **Nailard**:

> 107. The claimant relied on the parts of that email which referred to her accent as if they were evidence of discrimination because of her race which, by implication and as a matter of logic, had to mean her Brazilian national origin or (if it was different) her nationality. **We came to the clear conclusion that the references made by Mrs Lucas during the meeting of 20 April 2018 (and, in fact, at all other times) to the claimant's accent had nothing whatsoever to do with the claimant's race in the sense that the motivation (in the sense discussed by Underhill LJ in the paragraphs of his judgment in *Unite the Union v Nailard* to which we refer in paragraph 18 above) for making them was in no way or to no extent the claimant's race**. They were all to do with the claimant's intelligibility or comprehensibility when communicating orally. [emphasis added]

22. At paragraph 242, in analysing the complaint in respect of the extension of the claimant's probationary period, the Employment Tribunal again set out its view of what is meant by "related to a protected characteristic".

> 242 We were completely satisfied that Mrs Lucas' stance on 26 March 2018 which was the subject of complaint in paragraph 1 of the Schedule was the result of a genuine perception of the claimant's strengths and weaknesses in the post in which she was a probationary employee, which was in fact objectively justified but was in any event in our view **completely untainted by discrimination because of the claimant's race or religion. It was also, as a consequence, not conduct which was in any way related to either of those protected characteristics**.

23. The Employment Tribunal placed considerable emphasis on what was said by the Court of Appeal in **Nailard**. In **Nailard** the question before the Court of Appeal was whether a failure to investigate a grievance alleging sex discrimination was itself related to the protected characteristic of sex and so constituted harassment. The case was not about harassment in the more typical circumstances in which a complaint is made about words spoken to, or behaviour towards, an individual, and whether that conduct is related to a protected characteristic.

24. I consider that the Employment Tribunal erred in law in its approach to the concept of treatment related to a protected characteristic. On a fair reading of the judgment, the

Employment Tribunal required that there must be a mental element so that, essentially, the treatment is because of the protected characteristic. At paragraph 18 the Employment Tribunal stated in terms that a mental element is required in a claim of harassment as much as in a claim of direct discrimination. The Employment Tribunal made a similar point at paragraph 107. The Employment Tribunal erred in law in that analysis. There is no requirement for a mental element equivalent to that in a claim of direct discrimination for conduct to be related to a protected characteristic. Treatment may be related to a protected characteristic where it is "because of" the protected characteristic, but that is not the only way conduct can be related to a protected characteristic, and there may be circumstances in which harassment occurs where the protected characteristic did not motivate the harasser.

25. Take, for example, a person who unknowingly uses a word that is offensive to people who have a relevant protected characteristic because it is historically linked to oppression of people who have the protected characteristic. The fact that the person, when using the word, did not know that it had such a meaning or connotation, would not prevent the word used being related to the protected characteristic. That does not necessarily mean the person who used the word would be liable for harassment, because it would still be necessary to consider whether the conduct violated the complainant's dignity. If the use of the word had that effect but not that purpose, the Employment Tribunal would go on to consider the factors in sub-paragraph (4) of section 26 **EQA**. That said, there could be circumstances in which, even though a word was used without knowledge of the offensive connotations, having considered the factors in sub-paragraph (4), the perception of the recipient, other circumstances and whether it is reasonable for the conduct to have that effect, the use of the word would nonetheless amount to harassment under section 26 **EQA**.

26. An accent may be an important part of a person's national or ethnic identity. Comments about a person's accent could be related to the protected characteristic of race. Criticism of such an accent could violate dignity. Obviously, that does not mean that any mention of a person's accent will amount to harassment. Consideration would have to be given in any case to whether a comment about an accent was unwanted, related to race and to the other elements of section 26 **EQA**; such as whether the conduct had the purpose or effect of violating dignity.

27. Accordingly, the appeal is upheld in respect of the complaints of harassment insofar as those complaints were about the claimant's accent. It was that element of the harassment appeal that was permitted to proceed by Judge Stout.

28. There was one matter that caused me concern in respect of this part of the appeal. At paragraphs 273 to 274, the Employment Tribunal suggested that it had gone on to conclude that if the conduct had the effect of violating dignity, but not the purpose, it would not be reasonable for the conduct to have that effect. However, that was not a matter relied upon in the respondent's answer. It was not suggested in submissions that it was an answer to this part of the appeal. I have taken a strict approach to what grounds of appeal were permitted to proceed and consider it is appropriate to adopt a similar approach to the response to the appeal. I also consider that the erroneous approach that the Employment Tribunal adopted to harassment is so significant that all of the decisions in respect of the complaint concerning the claimant's accent are unsafe and require redetermination.

Victimisation

29. The next ground of appeal challenges the dismissal of one complaint of victimisation. Victimisation is prohibited by Section 27 **EQA**:

> 27. **Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

30. The Employment Tribunal directed itself by reference to that section and the decisions of the House of Lords in **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL48, [2001] I.C.R. 1065 and **St Helens Borough Council v Derbyshire & Ors** [2007] UKHL 16, [2007] I.C.R. 841.

31. The Employment Tribunal determined a complaint that Karen Withers refused to provide notes of a meeting with the claimant and suggested that she could not remember what was discussed. At paragraph 348 the Tribunal concluded that Ms Withers, knowing that the notes included complaints that might give the claimant "ammunition", decided against providing them, although she was aware that they were disclosable in Employment Tribunal proceedings. At paragraph 349, the Tribunal concluded that she would have done the same with

any other employee who had indicated an intention to make a claim such as one of constructive dismissal, that did not include a claim of a breach of the **EQA**. The Employment Tribunal dismissed the complaint on that basis.

32. In **Khan**, the House of Lords considered the relevant circumstances and the then necessary comparison in a victimisation complaint where a claimant was refused a reference because of ongoing proceedings in the Industrial Tribunal. The comparison was not with another employee making a similar type of complaint that did not amount to a protected act. The correct comparison was with another person who requested a reference, not with a person who requested a reference and had made a similar complaint that did not amount to a protected act. Lord Nicholls stated:

> 23 … The relevant circumstances are that, while employed, Sergeant Khan requested a reference when seeking new employment and his request was refused.
>
> 29 … Sergeant Khan was treated less favourably than other employees. Ordinarily West Yorkshire provides references for members of the force who are seeking new employment. …

33. Lord Mackay held:

> 40. … in my view the circumstances relevant for the purposes of any provision of this Act which are at issue in this case is the simple fact that Sergeant Khan is treated for the purposes of this Act as employed by the chief officer of the West Yorkshire Police at an establishment in Great Britain and that he is so employed and has made an application for the benefit of a reference.
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> 41. On this basis the other persons with whose treatment the treatment of Sergeant Khan must be compared are persons employed at the same establishment in Great Britain as Sergeant Khan, namely, in the West Yorkshire Police, and who have applied for a reference when seeking employment with another employer.

34. The point was made most explicitly by Lord Hoffmann:

> 49. The purpose of the statute is that a person should not be victimised because he has done the protected act. It seems to me no answer to say

> that he would equally have been victimised if he had done some other act and that doing such an act should therefore be attributed to the hypothetical "other persons" with whom the person victimised is being compared. Otherwise the employer could escape liability by showing that his regular practice was to victimise anyone who did a class of acts which included but was not confined to the protected act.
>
> 50. The requirement that doing the protected act must have been the reason for the less favourable treatment is adequate to safeguard an employer who acted for a different and legitimate reason. On the other hand, it will rightly provide no defence for an employer who can only say that, although his reason was indeed the doing of the protected act, it formed part of a larger class of acts to which he would have responded in the same way.

35. Furthermore **Khan** was a case decided under the **Race Relations Act 1976**, in which victimisation specifically provided for a comparison with others, whereas the victimisation provision in the **EQA** does not.

36. The correct question for the Employment Tribunal in this case was whether the decision not to provide the notes was to a material degree influenced by the fact that a complaint of unlawful discrimination had or might be made.

37. The Tribunal also concluded that the treatment could not be detrimental. **Derbyshire** makes it clear that the test for detriment is whether an employee might reasonably consider themselves to be disadvantaged in the workplace as a result of the treatment. While in **Khan** it was held that an employer taking reasonable steps to preserve its position in discrimination proceedings is not detrimental treatment of the potential claimant, the analysis of the Employment Tribunal in this case did not consider whether the parties thought that there were likely to be Employment Tribunal proceedings. The Employment Tribunal did not consider whether an employee who brings a grievance that might resolve issues with an employer, without the need for any tribunal proceedings, might reasonably consider themselves disadvantaged by not being provided with the notes of a meeting. Accordingly, I conclude that

the Employment Tribunal erred in law in determining this complaint of victimisation. The complaint is remitted for redetermination.

Bias or procedural unfairness

38. The final component of the appeal concerns a number of grounds asserting the appearance of bias or procedural unfairness on the part of the Employment Tribunal.

39. The claimant and her partner have provided witness statements. The original versions of the statements were not supported by a statement of truth or signed. Subsequently, signed statements with statements of truth have been produced. I do not place great significance on the fact that the original versions did not comply with these requirements because the error has been rectified. However, it is clear that the statements were made after the event and were based on limited notes taken at the time of the hearing.

40. The respondent has provided a witness statement from their solicitor. Typewritten notes from the hearing are annexed which, while not purporting to be verbatim, are the best record I have of what occurred at the hearing. The claimant herself referred to the notes when seeking to advance her arguments. I have also had regard to the responses from the Employment Judge and lay members.

41. I will deal firstly with the allegation that was set out in paragraph 145(g) of the claimant's skeleton argument in which it is asserted that on two occasions the Employment Judge labelled the claimant's evidence as "appalling". Having considered the totality of the evidence, I conclude on balance of probabilities that the Employment Judge did not used those words. I appreciate that the claimant strongly believes that the words were used, and that she has some support from her partner, but he accepts that while the hearing was taking place he was also involved in looking after their child. I consider it is inherently unlikely that if the word

was used, the respondents' solicitor would not have recorded it, and it would not be recalled by the Employment Judge or either of the members. I also consider that the claimant's brief note appears to be a comment rather than the actual word used. The context is that at the outset of the hearing, the Employment Judge expressed considerable scepticism about the complaint based on the claimant's accent, which resulted from a misunderstanding of the decision in **Nailard**. The claimant stated on a number of occasions during this hearing that the initial interaction with the Employment Judge led her to feel suspicious of his motives thereafter. On balance, I find that the term "appalling" was not used. I reject that ground of appeal.

42. The next complaint relates to an allegation that the claimant was interrupted when questioning the second respondent about an email relating to a Hanukkah event. This is dealt with at pages 149 to 151 of the note of the respondents' solicitor. While I can see that the Employment Judge asked a number of questions, I do not consider that there is anything in the questions that he asked that was improper or so disrupted the claimant's cross-examination that she did not have a fair opportunity to put her case. One of the claimant's complaints is that when referring to a document at page 1716 in the ET bundle, the Employment Judge asked a question. After answering the Employment Judge's question, the claimant returned to questioning the witness about the document. A judge always has a role in seeking to control cross-examination so that the proper focus is maintained. It is at times a difficult role. I cannot see that the Employment Judge went beyond the realms of legitimate intervention. I do not consider that the intervention gives the appearance of bias in the sense stated in **Porter v Magill** [2001] UKHL 67, [2002] 2 AC 357. I do not consider that a reasonably informed bystander would conclude that there was a real possibility of bias.

43. It is next asserted that the Employment Judge said: "Are you not passive aggressive?" to the claimant. The respondents' solicitor, while stating that he did not recall this comment,

quite properly noted that there is an entry in his note in which the Employment Judge used that term. The Employment Judge has, in a second response, having viewed that exchange at pages 21-22 of the solicitor's note, stated that the claimant was being questioned about whether her emails were confrontational. The question asked by the Employment Judge is recorded as: "You do not accept that you were passively aggressive?" The Employment Judge states that he considered that was the complaint being asserted by the respondent, although it had not been put in direct terms to the claimant. The Employment Judge stated he considered it appropriate to put the assertion in clear terms to the claimant who then responded: "Of course not", and the matter was not taken any further. I do not consider that the questioning was improper or that it gives an appearance of bias. The Employment Judge was seeking to ensure the assertion that he understood was being made by the respondent was put to the claimant, and that she had an opportunity to answer.

44. The final element relates to the interruption of cross-examination of Ms King. When Ms King was being asked about what she understood to be meant by an email that had been sent to her. The Employment Judge suggested it was a question that should be put to the person who sent the email, rather than the recipient. This is dealt with at paragraph 124 of the notes of the respondents' solicitor. I can see nothing improper in the point that the judge made. I do not consider that it raises a proper basis for a complaint that there is an appearance of bias. Accordingly,

45. I reject the grounds of appeal asserting appearance of bias and/or procedural irregularity.

Outcome and disposal

46. The race harassment ground of appeal concerning the claimant's accent and the one ground in respect of the complaint of victimisation have succeeded and will be remitted to the

Employment Tribunal. The question was whether it should be remitted to the same Employment Tribunal or a differently constituted panel. I have had regard to the principles set out in **Sinclair Roche & Temperley & Ors v Heard & Anor** [2004] IRLR 763.

47. I accept that there are factors in favour of a remission to the same Employment Tribunal. Proportionality and the passage of time might suggest that a remission to the same Employment Tribunal would limit the amount of additional work to be undertaken and result in a more speedy disposal of the matter. I also have no doubt about the professionalism of the Tribunal.

48. However, I consider that the comments made at the outset of the hearing by the Employment Judge demonstrated such a firm initial view that, while not sufficient to constitute bias, would cause a legitimate concern on the part of the claimant that the Employment Tribunal might, consciously or unconsciously, treat remission as an opportunity to take a second bite. Furthermore, the analysis of the term "related to" a protected characteristic was totally flawed because of a fundamental misconception of the proposition for which **Nailard** is authority.

49. On balance, I consider that the matter should be remitted to a differently constituted Employment Tribunal.

50. Case management will be a matter for the Employment Tribunal. However, it is important to bear in mind that the remission is limited in scope. It is not an opportunity to re-open matters that did not proceed in this appeal, or that were unsuccessful. It will require a careful analysis of which of the harassment complaints are about the claimant's accent and so might be related to race. The claimant may choose to focus on the most significant of those complaints. In addition, the remission is only in respect of one of the complaints of victimisation. It is important that the matter is dealt with in a proportionate manner.

51. The matter is remitted for the re-hearing of those complaints alone to a differently constituted Employment Tribunal.