

Neutral Citation Number: [2025] EAT 95

Case No: EA-2023-001266-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 July 2025

HIS HONOUR JUDGE JAMES TAYLER

Between :

MR J LOGO

Appellant

- and -

(1) PAYONE GMBH
(2) MR S SCHRADER
(3) MR A BOYENS

Respondents

KATE BALMER (Instructed through Advocate)
DEE MASTERS (Instructed by Orrick, Herrington & Sutcliffe (UK) LLP) for the **Respondents**

Hearing date: 3 June 2025

JUDGMENT

SUMMARY

RACE HARASSMENT

The Employment Tribunal erred in law in its analysis of one complaint of harassment and in holding that two other substantiated complaints of harassment were out of time.

HIS HONOUR JUDGE JAMES TAYLER:

Introduction

1. This appeal raises questions about the terms “related to” and “effect” in a complaint of harassment under s 26 **Equality Act 2010** (“**EQA**”) and whether the Employment Tribunal erred in law in finding that two substantiated acts of harassment were out of time.
2. I shall refer to the parties as the claimant, the respondent (used to refer to the first respondent) and Mr Schrader (the second respondent).
3. This appeal is against a judgment of the Employment Tribunal after a hearing on 23 to 27, 30 & 31 January and 1 & 3 February 2023; 24 April 2023 (submissions) and 25 & 26 April (discussion in chambers). The judgment and reasons were sent to the parties on 15 September 2023.
4. The claimant brought numerous complaints the substantial majority of which were dismissed. This appeal concerns three complaints of harassment. The Employment Tribunal held that one complaint was not established and that two substantiated acts of harassment were out of time.

Factual Background

5. The respondent is a European business that facilitates online payment and mobile points of sale. The claimant commenced employment with the respondent on 16 November 2016 as a New Accounts Manager UK for Medium and Large Accounts. The respondent had a small presence in the UK.
6. The claimant describes himself as Black British.
7. The claimant presented his claim to the Employment Tribunal on 16 March 2021.

The Law

Harassment

8. Section 40 of the **EQA** renders harassment of employees unlawful:

40 Employees and applicants: harassment

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

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

(b) who has applied to A for employment.

9. Section 26 **EQA** provides:

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.[emphasis added]

10. It is often helpful to break a complaint of harassment into its constituent parts:

10.1. the Employment Tribunal should identify the “*conduct*” that A “*engages in*”

10.2. the “*conduct*” must be “*unwanted*”

10.3. the “*conduct*” must be “*related to*” a relevant protected characteristic

10.4. the “*conduct*” must have the “*purpose*” or “*effect*” of “*violating B’s dignity*”, 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

10.5. if the “*conduct*” has the “*purpose*” of “*violating B’s dignity*” harassment is established

10.6. if the conduct does not have the “*purpose*” of “*violating B’s dignity*” in deciding whether it has that “*effect*”, the Employment Tribunal **must** take account of the

“*perception of B*”, the “*other circumstances of the case*”, **and** “*whether it is reasonable for the conduct to have that effect*”

11. A number of the components relevant to this appeal merit further analysis.

“*conduct*”

12. It is the conduct of A that must be related to the relevant protected characteristic:

Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40:

9. It is important to note that it is the “conduct” that must be “related to” the protected characteristic. Thus, if it is asserted that a failure properly to investigate a grievance alleging discrimination constitutes harassment it is not sufficient that the grievance was related to the protected characteristic, the failure properly to investigate the grievance, which constitutes the conduct, must be related to the protected characteristic.

“*related to*”

13. In **Bakkali v Greater Manchester (South) t/a Stage Coach Manchester** [2018] I.C.R. 1481

Slade J noted the change in wording from predecessor legislation that had required that the treatment be on grounds of race:

31. In my judgment the change in the wording of the statutory prohibition of harassment from unwanted conduct “on grounds of race” in section 3A of the *Race Relations Act 1976* (as inserted by regulation 5 of the *Race Relations Act 1976 (Amendment) Regulations 2003* (SI 2003/1626)) to “unwanted conduct related to a relevant protected characteristic” affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. **Conduct can be “related to” a relevant characteristic even if it is not “because of” that characteristic.** It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. **However, “related to” such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour.** As Mr Ciumei submitted, “the mental processes” of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place.

14. The term *related to* has been discussed in a number of recent authorities. In **Tees Esk Wear Valleys NHS Foundation Trust v Aslam & Anor** [2020] IRLR 495 HHJ Auerbach held:

25. 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. [emphasis added]

15. In **Blanc de Provence Ltd v Ha** [2023] EAT 160, [2024] I.R.L.R. 184 I noted:

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.** [emphasis added]

16. In **Carozzi v University of Hertfordshire** [2024] EAT 169, [2025] I.R.L.R. 179 I stated:

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. ...

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. [emphasis added]

“a relevant protected characteristic”

17. The equivalent provisions in some of the predecessor legislation to the EQA required that the unwanted conduct be related to a protected characteristic of B, the person asserting harassment. Section 4A **Sex Discrimination Act 1975** referred to a person subjecting a woman to harassment if “on the ground of her sex, he engages in unwanted conduct that has the purpose or effect” of violating dignity etc. Such a connection to a relevant protected characteristic of B is not required on the wording of section 26 EQA.

18. Section 14 **Equality Act 2006** (“EQA 2006”) permits the ECHR to issue a code of practice in connection with any matter addressed by the EQA. Section 15 **EQA 2006** provides that a code so issued “shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant”. Paragraph 7.10(b) of the Equality and Human Rights Commission (“EHRC”) Employment Code of Practice includes the following:

Protection is provided because the conduct is dictated by a relevant protected characteristic, whether or not the worker has that characteristic themselves. This means that protection against unwanted conduct is provided where the worker does not have the relevant protected characteristic, including where the employer knows that the worker does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations: ...

- The worker is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

- **The unwanted conduct related to a protected characteristic is not directed at the particular worker but at another person or no one in particular.**
- The unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic. [emphasis added]

19. This again emphasises that the protected characteristic need not be that of the person alleging harassment.

20. In **Tees Esk HHJ Auerbach** stated:

21 Thirdly, **although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient.** The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. [emphasis added]

“purpose”

21. A’s purpose must be to violate the dignity of B. It follows that if A is unaware of any possibility that B will know about the conduct it cannot have had the purpose of violating B’s dignity. Where A is reckless as to whether dignity may be violated by their conduct, and B’s dignity is violated, but A did not have the purpose of violating the dignity of B, any complaint by B will come under the *“effect”* limb.

“effect”

22. In deciding whether unwanted conduct has the effect of violating dignity the Employment Tribunal must take into account the perception of B, which is a subjective factor, the other circumstances of the case, which appears to be broadly objective *and* whether it is reasonable for the conduct to have that effect, which is an objective test. It is an oddity that conduct that in the genuine perception of B violated B’s dignity will be treated as not having that effect if it was not reasonable for the conduct to have that effect. More naturally in such circumstances one might have expected the conduct to be treated as having had the subjective effect of violating B’s dignity but liability would be excluded because it was not reasonable for it to have had that effect. Anyhow, the provision is worded as it is and must be construed accordingly.

“violating dignity”

23. For treatment to constitute harassment it must violate B’s dignity. Employees are expected to demonstrate a reasonable level of robustness: **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 EAT and **Grant v HM Land Registry** [2011] EWCA Civ 769, [2011] ICR 1390 CA.

Time limit

24. Section 120 **EQA** permits an employee to bring a complaint:

120 Jurisdiction

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

25. Section 123 **EQA** provides that:

123 Time limits

(1) Subject to section 140B **proceedings on a complaint** within section 120 **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**. [emphasis added]

26. Section 140B **EQA** permits an extension of time where ACAS early conciliation is undertaken in certain circumstances not relevant to this appeal.

27. In **Jones v Secretary of State for Health and Social Care** [2024] EAT 2, [2024] IRLR 275 the EAT suggested that the common practice of relying on the comments of Auld LJ at paragraph 25 of **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are “exercised strictly” in employment cases and that a decision to extend time is the “exception rather than the rule” out of context, as if they were principles of law, should cease. The proposition of law for which **Robertson** is authority is that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds. Our judgment upholding the decision of an Employment Tribunal not to extend time was overturned by the Court of Appeal on the basis that we should have concluded that the decision of the Employment

Tribunal was perverse, but our approach to the law was not criticised: **Jones v Secretary of State for Health and Social Care** [2024] EWCA Civ 1568, [2025] I.C.R. 738. Bean LJ summarised the key authorities:

27. The EAT referred to the well-known judgment of Auld LJ in *Bexley Community Centre (trading as Leisure Link) v Robertson* [2003] IRLR 434, at paras 23–24 :

“If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers that is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine ... **The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision.**”

28. In *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 , Wall LJ at para 24 said that Robertson emphasises the wide discretion which the ET has. Sedley LJ said at para 31:

“**There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.** In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen in relation to the power to enlarge the time for bringing ET proceedings.”

29. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 Leggatt LJ, with whom I agreed, said:

“18. First, **it is plain from the language used (‘such other period as the employment tribunal thinks just and equitable’)** that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980 , section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corp v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] ICR 800, para 33 . The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998 : see *Dunn v Parole Board* [2009] 1 WLR 728, paras 30–32, 43, 48 ; and *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, para 75 .

“19. That said, **factors which are almost always relevant** to consider when exercising any discretion whether to extend time are: (a) the **length of, and reasons for, the delay** and (b) **whether the delay has prejudiced the respondent** (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

“20. The second point to note is that, **because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal’s exercise of its discretion on an appeal.** It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. **It should only disturb the tribunal’s decision if the tribunal has erred in principle—for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant—or if the tribunal’s conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable:** see *Bexley Community Centre (trading as Leisure Link) v Robertson* [2003] IRLR 434, para 24 .” [emphasis added]

28. In **Abertawe Bro Morgannwg University Local Health Board** Leggatt LJ firmly rejected an argument that in order to exercise the discretion to apply a time limit in excess of three months there must be a good excuse for any delay:

25. I cannot accept that argument. As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it “thinks just and equitable” is clearly intended to be broad and unfettered. **There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.** Nor do I consider that the original decision of the Employment Appeal Tribunal went any further than that. The error identified by Langstaff J, as I read his judgment, was that the tribunal had failed to give any consideration at all to the reason for the delay in bringing the claim and had therefore failed to have regard to a relevant factor. **I agree, however, with Judge Shanks** in para 27 of his judgment given on the second Employment Appeal Tribunal appeal that **Langstaff J was not**

“intending to suggest that if a claimant gives no direct evidence about why she did not bring her claims sooner a tribunal is obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended.” [emphasis added]

The Role of the EAT

29. 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 decision of an Employment Tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. An Employment Tribunal is not

required to identify all the evidence relied on in reaching its conclusions of fact. It is not legitimate for the EAT to assume that a failure by an Employment Tribunal to refer to evidence means that it was not taken into account. The Court of Appeal held at 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.

The decision of the Employment Tribunal

The Black Face Incident - 18 November 2016

30. The Employment Tribunal made the following findings of fact:

The 'black face' incident ...

125. R1's Christmas party took place on 18 November 2016. At that time Miss Ganswindt job was the Customer Service Agent for the UK & Republic of Ireland. ...

128. The claimant's recollection (set out in his paragraphs 15 and 16) is that there was a conversation during which Miss Ganswindt and another customer care colleague asked whether he was dressing up for the evening event. The claimant states that he confirmed his attendance and asked Miss Ganswindt if she was attending and whether she was following any theme. He states that she refused to confirm whether she would be dressed in any theme and burst into laughter (C - para.16).

129. According to Miss Ganswindt, the slogan of the event was Oscar Night (AG para.6) **Miss Ganswindt, who is white, attended the event dressed as the character played by Whoopi Goldberg in the Sister Act films.** A photograph of her at the event (C:1485) shows her together with a colleague dressed as Princess Fiona from Shrek.

130. The claimant describes his experience of attending this event in para 19 to 24 of his statement. **He describes experiencing an immediate rush of anxiety when he saw the person he later realized to be Ms Ganswindt in black face paint.** He observed some employees laughing at him and felt very isolated as the only person of black and minority ethnic background in his immediate vicinity particularly when he was only a few days into his induction with a new employer in a foreign country. In his paragraph 22 he explains that the association he immediately felt between seeing Miss Ganswindt dressed in black face and the dehumanization of Black people caused him to suffer a panic attack. He went into a toilet cubical to recover. ...

133. **We do not criticize him for not complaining.** ...

138. We accept her evidence that she choice the costume before she met the claimant so she was not aware that he was Black or that he would be present. ...

140. One of the difficulties when an allegation is raised for the first-time years after the event is that one party or possibly both parties have not had cause to recall the details until relatively recently. The claimant bases his allegation that Miss Ganswindt deliberately sought to humiliate him or create an offensive environment for him on her having laughed and been unforthcoming when he asked about whether there was a theme for the event. These are details that Miss Ganswindt does not recall. [emphasis added]

31. The Employment Tribunal analysed the complaint:

395. As to LOI.4.a, the event happened. It is conceded by the respondent that this incident would amount to race related harassment on the basis of the unwanted conduct causing the harassing effect and we accept that it does. The claimant argued that this incident was harassment because Miss Ganswindt had the purpose of creating the harassing effect.

396. We refer to but do not repeat our discussion at paras. 134 to 142 in which we concluded that Miss Ganswindt dressed up in costume using black face paint not because she intended to harass the claimant, whom she had not met at the time she decided on her costume. We accept, after careful consideration, that she was genuinely unaware that a black British person would be likely to associate a white woman dressed as a black actress with offensive and demeaning portrayal of people based on race. [emphasis added]

32. The decision that the conduct did not have the purpose of violating the claimant's dignity is not challenged in the appeal. In analysing the purpose of the conduct the Employment Tribunal had regard to the difficulties caused by the passage of time. However, it was accepted by the respondent that the conduct occurred and constituted harassment because it had the effect of violating the claimant's dignity.

Dinner 19 June 2019

33. The Employment Tribunal made the following findings of fact:

FR leaving event

250. Mr Risch had left the company in 2019 to move to Worldline but, when the latter brought Ingenico in 2020, he transferred back to R1. During the interim, he was invited back for a leaving event which took place sometime after he had formally left.

251. When the claimant started his claim he alleged (para.16.8 - A:51) that Mr Risch attended a dinner in Frankfurt with the claimant and "made a crude 'joke' over dinner, the punchline of which involved a black man having sexual intercourse

with an animal.” This was the allegation responded to (A:68 at para 3.14.7) where it was simply denied and the respondents stated that “the claimant has failed to particularize this allegation and it is, in any event, out of time”. **It was covered in a limited way in Mr Risch’s para.16 where he recalled the dinner but did not recall speaking to the claimant making any jokes to him or making a joke of that kind.**

252. The claimant’s statement evidence about this incident was contained in para 164 onwards. He describes the table and who was sitting in various spaces including where Mr Risch was sitting. **He describes much but not all of the conversation being in German and then an incident where Mr Risch was conversing in German with a named colleague and then burst out in loud laughter.** The claimant then alleges that “I looked over to him and stated words to the effect of ‘that must have been funny’ he stated the joke would be **difficult to translate in English, but it was about “black man fucking a rabbit”**. The claimant stated that he believed that this was something Mr Risch would genuinely be thought to be amusing but that the colleague looked alarmed and apologized later. This is a considerable amount of extra detail compared with the original allegation.

253. When Mr Risch gave evidence, he stated that he wished to make an additional comment about this allegation. He denied that there had been a joke on his part with regards to what the claimant was referring to. **He stated that, since making his witness statement, he has had another conversation with the colleague named by the claimant and, although Mr Risch himself had not recalled the conversation, the colleague had reminded him of it. Mr Risch evidence now was that at the dinner he had recounted to the colleague in question that in his new employment he had met a former colleague of them both who had told him about having to review adult material as part of a due diligence process. He says that it was this that he was relating to the colleague at the dinner party**

“it was no joke at all, but I was telling this colleague about the really bad stuff that she had to face when onboarding the merchants... well it was bad stuff like people having sex with animals for example and that is what is referred to in this paragraph.”

254. When cross examined about it he said **“I cannot [imagine] that this has ended up in bursting laughter. More shocking.”** He did however accept that the words alleged by the claimant were stated that night in German or in English.

255. We accept that words alleged were probably used. Mr Risch clearly struggled with his recall of this event. His initial recollection had simply been that nothing happened. Naturally, we expect people to come to Tribunal and, in the words of the oath or affirmation, tell “the truth, the whole truth and nothing but the truth” but we think it is to his credit that he volunteered this further information. His explanation for late recall is plausible. **The first time a comment it heard is the most memorable occasion – for the claimant,** that would have been at this event, for Mr Risch it would have been when the story was first relayed to him. If a long passage of time occurs before the individual has to remember the occasion, then their recall is likely to be worse, in our experience. We think that the event in June 2019 was therefore more likely to be memorable to the claimant than to Mr Risch. **It is not clear, even now, how much Mr Risch remembers himself rather than accepts on the basis of being reminded by the colleague.**

256. Given the claimant's modest German language skills, it is more likely than not that this comment was explained in English as well as in German. There is a coincidence in the claimant's account and the words Mr Risch accepts he used in German (although he was not clear about their use in English). It is such a striking and indeed shocking comment that it is unlikely that this was invented by the claimant. However, it appears that, as relayed to the claimant, it was deprived of the context – namely a story about what a colleague had experienced.

257. We think it is the sort of situation where although the adjective black to describe the man in the offensive material does not appear to have been an important part of the story that cannot reasonably have been apparent to the claimant. Furthermore, we think it probable that an adjective about colour would not have been used if the participant in the image was white. There can be no doubt that what was described as likely to offend. **We accept that the claimant was offended and felt demeaned as a black person. It was reasonable for that comment to have that effect.**

258. This incident is not referred to in the reasons for resignation given in We consider that the allegation that this will stay with him for the rest of his life is overstated as he didn't complain about it when he took the opportunity to complain about other instances.

259. **We consider the claimant's evidence at para.165 that Mr Risch laughed. We think the claimant inferred that a joke had been told from the laughter, but that description is not necessarily inconsistent with the R1 witnesses denying that they were telling a joke. People can laugh for more than one reason and Mr Risch now giving evidence long after the event is doing his best, but he is hampered by the difficulty of recalling it. We accept that there probably was laughter.** [emphasis added]

34. The Employment Tribunal analysed the complaint:

425. **For reasons we explain at para.256 above we accept that a comment about a black man fucking an animal probably was made at a dinner in around June 2019.** Given the claimant's modest German it is more likely than not that the comment was explained in English as well as in German. **He could quite easily (and reasonably) have been offended by this comment and felt demeaned as a black man hearing such a very offensive comment. As we explain above we think that it is hard to understand why the word black was included in the narrative because it is not at all a relevant detail** for the purpose of the description of the kind of offensive material that the former colleague had experienced. **We do not think that the adjective would have been used if the participant in the image was white and therefore this comment was related to race.**

426. It is unrealistic in a social setting to expect the claimant to explore what was meant more directly by something so obviously offensive. **The claimant says that the laughter meant that he believed that they found this actually funny. There may well have been laughter. This was not necessarily inconsistent with Mr Risch explaining in German something which was shocking and provoked nervous laughter and therefore not necessarily inconsistent with them denying that they were telling a joke. As we've explained we consider that Mr Risch has done the best he can to try and recollect the event but now he is hampered by being asked about it for the first time so long after the event.**

427. We have concluded that Mr Risch did not deliberately set out to offend or humiliate the claimant but, given the shocking nature of the comment, we accept that it did so. In all the circumstances, it is reasonable for the conduct to be regarded as having the harassing effect, the test of harassment is made out and the comment was related to race. It occurred in June 2019 and the question of jurisdiction therefore falls to be considered in due course. [emphasis added]

35. The Employment Tribunal also determined this complaint on the basis of effect rather than purpose. It was accepted that the comment was made and in the circumstances it is hardly surprising that the Employment Tribunal found that it had the prescribed effect. This did not turn on the evidence of Mr Risch.

Time

36. Having found that these two acts of harassment were established the Employment Tribunal went on to determine whether the complaints in respect of them had been submitted in time.

37. The Employment Tribunal held of the timing of the complaints:

463. A claim based on LOI.4.a [the black face incident] should have been presented by 17 February 2017 and was actually presented on 16 March 2021 **nearly four years late**. A claim based on LOI.m.[the comment at the dinner] should have been presented around 10 September 2019 at the latest - if one assumes in the claimant's favour that the incident happened on 11 June 2018 (see the claimant's statement at para.163). In order to be in time, he should therefore have contacted ACAS or presented no later than 10 September 2019. He contacted ACAS on 6 February and therefore the claim based on this allegation is approximately **four months late**. [emphasis added]

The Time Cross-Appeal

38. The respondent pointed out that the Employment Tribunal made an error in the dates in relation to the comment at the dinner. The claimant agrees. The respondent correctly contends that paragraph 463 should be amended:

... A claim based on LOI.4m, should have been presented around on 10 September 2019 at the latest – if one assumes in the claimant's favour that the incident happened on 11 June 2018⁹ (see the claimant's statement at para. 163). ~~In order to be in time, he should therefore have contacted ACAS or presented no later than 10 September 2019.~~ He contacted ACAS on 6 February 2021 and Day B was on 18 February 2021 and therefore the claim based on this allegation is approximately 18 months late ~~4 months late~~.

The time determination

39. The Employment Tribunal went on:

464. **We consider that the respondent has suffered prejudice in relation to LOI.4.m because the way in which Mr Risch's evidence emerged itself demonstrates that his memory was adversely affected by the passage of time. He had no recollection of the meal or conversation at all and only was able to comment upon the allegation having consulted someone else.** It is entirely possible that his recollection would have been more extensive had the allegation been made in full detail in good time.

465. **So far as LOI.4.a is concerned the conduct complained of is not in dispute. The respondent advisedly accepted that it met the statutory test for harassment, subject to jurisdiction.** Furthermore, there is some photographic evidence to be relied on. Mrs Fischer's evidence about this event changed. The claimant contended that her credibility was powerfully affected by this. We've accepted however that Mrs Fischer had been to the event before and planned to go but had been unable to at short notice which is how she was confused.

466. **The change in her evidence shows how memory of an event can be affected by the passage of time. The claimant alleges that he was powerfully affected by this incident** (see his para 23 and 24) and has now named a relevant witness. Even if he was still in employment, the difficulties experienced by Miss Ganswindt and Ms Fischer in recalling the event and conversation before it show that he might also have problems recalling detail.

467. **The claimant relies on fear of losing employment if he raised the claims** at the same time about the respondent and we note his paragraph 26. **However there is no evidence that he had any basis for such a fear.**

468. Overall, **we do not think that the claimant has put forward a convincing explanation for the delay** in presentation of the claim based on either event. **He relies upon job and security and financial reasons which would undoubtedly have been matters to weigh in the balance when deciding whether to take action or not.** His claim to have been unaware of the process or lacking an English language employee handbook is not a sufficient explanation, in our view, for not taking action if he was as effected by it then as he now says. It may be understandable that a new employee in a new company not sure of the culture in the company who has family responsibilities does not take action about an event such as that described in LOI.4.a. **In our view that is, in essence, a judgement call that he was entitled to make. That does not mean that he is entitled years later to say that he should be able to bring an Employment Tribunal claim.**

469. The arguments on whether it is [just and equitable] to extend time raised by the claimant as set out in CSUB para 34 and following. Amongst these the claimant states he was fearful of losing employment by retaliatory action **but there has been no evidence of the risk of that being at all likely to come to pass and we do not consider it to objectively be demonstrated to be a reasonable fear.**

470. **Overall, we do not consider** it to be [just and equitable] to extend time for these two claims and the tribunal does not have jurisdiction to consider them. The claimant does not succeed on any heads. [emphasis added]

The Time Appeal

40. The claimant asserts:

7. As regards whether or not to extend time for the otherwise successful allegations - the tribunal failed to apply the correct law:

- a. Failed to undertake the necessary balancing exercise
- b. Failed to identify and take into account the prejudice to the Claimant
- c. Erred in its identification of prejudice to the Respondent; and/or
- d. Operated on the wrong basis that the Appellant had to satisfy the ET that there was a good reason for his not bringing a claim sooner

41. The Employment Tribunal briefly directed itself as to the relevant law. The Employment Tribunal referred to **Robertson v Bexley** and stated that “time limits are strict and are meant to be adhered to” but did not do so out of context because it was noted that the discretion is “broad” and that the Employment Tribunal should consider the “balance of hardship” of allowing or refusing an extension of time. The Employment Tribunal noted that an extension does not have to be “refused in every case where there is no evidence why the claim form had not been submitted sooner”. The Employment Tribunal noted that where there are a number of complaints “the forensic prejudice may not be the same in relation to all of them”. Overall I have concluded that the Employment Tribunal did not misdirect itself in law. Accordingly, I have reminded myself of the statement in **Greenberg** that I should be “slow to conclude that it has not applied those principles”.

42. Nonetheless I have concluded that the Employment Tribunal erred in law. The Employment Tribunal adopted an illogical approach to this limited part of its decision making. Section 123 **EQA** provides that proceedings on a complaint “may not be brought” after the end of the time limit. Therefore if it is held that a respondent will suffer substantial prejudice if a time limit greater than three months is applied that would be likely to be a good reason not to extend time and therefore not to determine the complaint. Yet in this case the Employment Tribunal decided that it could properly determine the complaints but then refused to extend time in substantial part because of prejudice that it suggested resulted from the delay. I have concluded that there was no real relevant prejudice identified by the Employment Tribunal and that its analysis was perverse.

43. The respondent admitted that the black face incident had occurred and that it constituted

harassment as a result of the effect it had on the claimant. The Employment Tribunal rejected the suggestion that Miss Ganswindt's conduct had that purpose and so her limited recollection did not cause any relevant prejudice to the respondent.

44. The Employment Tribunal did not expressly identify and take into account the prejudice to the claimant. There was obvious significant prejudice to the claimant in being denied a remedy for harassment that the Employment Tribunal found as a fact had occurred. The Employment Tribunal took account of the claimant's delay in making a claim. The Employment Tribunal did not decide that the claimant did not genuinely fear for his job if he brought a claim in the Employment Tribunal but decided that there was "no evidence that he had any basis for such a fear" and that it could not "objectively be demonstrated to be a reasonable fear" and so it was not persuaded that "the claimant has put forward a convincing explanation for the delay". None of these were requirements for an extension of time. The determination of the Employment Tribunal on the time limit issue in respect of the black face incident took account of an irrelevant factor, the supposed significant prejudice to the respondent, failed to take account of a relevant factor, the prejudice to the claimant and overall on the analysis of the Employment Tribunal fell outside the very wide ambit within which different views may reasonably be taken about what is just and equitable.

45. In respect of the comment at the meal on 19 June 2019 the Employment Tribunal also felt able to make a clear finding of fact that an extremely offensive comment was made and that it had the effect of violating the dignity of the claimant. Yet it went on to hold that a significant reason for refusing to apply a time limit in excess of three months was that Mr Risch's memory was adversely affected by the passage of time. However, Mr Risch's memory was not affected in a material sense because once reminded of the comment he recalled the context. Memory difficulty might have been relevant to the question of his purpose but once it was accepted that the highly offensive comment was made the limits of his recollection did not create any relevant prejudice in deciding whether the conduct had the effect of violating the claimant's dignity. The Employment Tribunal did not expressly consider the prejudice to the claimant of receiving no remedy for harassment that was found to have

occurred as a matter of fact and the Employment Tribunal adopted the approach that the claimant had to establish an objectively sound reason for delaying in bringing his claim. The decision of the Employment Tribunal on this issue cannot be supported for essentially the same reasons as the black face incident.

46. I have not concluded that there can only be one correct analysis of whether a time limit in excess of three months should be applied and so this issue will have to be remitted for redetermination.

Posting the Pure Blond advert on WhatsApp - 19 December 2020

47. The Employment Tribunal made the following findings of fact:

WhatsApp messages 3

342. On around **19 December 2020, Stefan Schrader, the second respondent, posted a video on the WhatsApp group of an advertisement for a brand of beer called Pure Blonde.** ... The claimant accepted the description put to him by counsel for the respondents who described **the advert as depicting a utopia of blonde people who make Pure Blonde beer who have been splattered in mud at the end of the advertisement.** ... **This image shows a group of young, toned, blonde people apparently waving. The front row have what appeared to be mud splats on them and one is holding a bottle of beer.** The claimant stated that the people had been ‘stained’ with mud but accepted that a lorry that turned up to collect the beer, drove away and splattered mud on them. He agreed that **the lorry driver opened a bottle of beer on leaving using a bird that was flying past him.** The claimant did not agree that it was meant to be a funny advert.

343. The respondent’s case is that **the hair colour of the people in the advertisement is a play on that fact that it is a blonde beer.** The claimant stated that he did not see it as a joke but was offended by the pure blonde utopia depicted. In para.127 and following of his witness statement, the claimant explained his concern as being that the advert **appeared to promote an all-white utopia without any black or brown people and associated that with the ideology of Nazis “both historically and in the present day as it pertained to the ‘pure Aryan race’.”** The claimant has put in evidence a copy of the cover of a 1938 calendar to illustrate the point It was suggested to him in cross-examination that when he implies that such Nazi ideology was being circulated in the workplace and was highly concerned that it was posted by a German colleague in a predominantly German WhatsApp group he was stereotyping because he was eliding being German with being a Nazi.

344. He denied that, saying that was ludicrous. However we do think there is an element here of the claimant eliding being German with being a Nazi. Why else would it be relevant to state that it was posted by a German colleague? What otherwise would be ‘highly concerning’ that some of that nationality placed the post.

345. **When accepting that there was no negative depiction of black people in the advert the claimant said “there doesn’t have to be. It’s the omission of black people of ethnic minority people in the advert that sees pure blond and speaks to**

the Aryan race coming from a German group.” Based on this answer and his statement para.128 we have formed the view that the claimant would have been much less likely to make a connection with the Nazi ideology of the Aryan master race if this advertisement had not been posted by a German.

346. **When Mr Schrader was cross examined about it he said that he could not see that someone who was not white could be offended by this advert** and if he had thought that he definitely would not have shared it. While not denying that there was a Nazi ideology of the Aryan race of predominantly blonde people, Mr Schrader said it was simply the name of a beer and **he had interpreted the message of the advert completely differently** but did not see any links to the holocaust or African minorities in the advertisement.

347. **The claimant suggested that Mr Schrader did not answer the question about whether he was comfortable showing it to holocaust victim** for example, but we consider that he was open and honest in his answers and accept that he would not have posted it if he had thought people would be offended. The claimant said in his evidence that he had already had experience that Mr Schrader had made a comment (see para.270 above), **but we have found that to be based on a misunderstanding. We accept his evidence that he considered the advert to be humorous and did not see any potential for offence.** [emphasis added]

48. The Employment Tribunal analysed the complaint:

441. The Tribunal is unanimous that this particular allegation of race related harassment fails but there is split reasoning. **We all accepted that, as a matter of fact, R2 considered the advert to be humorous. Of course, this does not preclude it also being an act of harassment** but we all also accept that **he did not see the potential for offence and therefore conclude that his action did not have the purpose of creating the harassing effect.**

442. **The majority (NLMs Holford and Bhatt) see no connection with race in this post whatever and find that it is straightforwardly about a beer the name of which is Pure Blonde and the video contains blonde people in a pure world as a play on words because it is Pure Blonde beer.** NLMs Holford and Bhatt **not only accept Mr Schrader’s evidence that he thought it was humorous but do not see any connection with race at all. They consider it offensive for the claimant to have assumed that it was deliberate rather than thoughtless by Mr Schrader whom they accept did not see any possibility of causing offensive.**

443. **The minority (Employment Judge George) accepts that there is a play on words between an Australian beer called Pure Blonde and blonde hair.** However, her view is that is a connection with race because hair colour, like skin colour, is an aspect of race and, typically, blonde people are white. The attempt at humour appears to be to contrast the alleged **purity of the beer, the purity of the world they live in and the pure white of the clothing with the impurity of mud.** That latter point does not in the view of any of the tribunal members mean that the advert is connected with race.

444. **Judge George considers that the connection with race is tenuous and weak. Overall, there is a play on words between Blonde beer and blonde people and an attempt to use mild comedy to sell beer. Furthermore, in her view, the connection with race is not the connection contended for by the claimant which is that there**

is a connection with the Nazi ideology of the pure Aryan race.

445. **What the claimant is doing is reading into the advertisement that it is projecting a world which is a utopia because it is only occupied by white and blonde people and that is not an interpretation that any of the Tribunal agree is a reasonable one to take**, based on the description given to us of the advertisement.

446. **Notwithstanding their differing conclusions on whether the advertisement is related to race, the Tribunal is unanimous that it is not reasonable for the post to be regarded as having the harassing effect.** Judge George's reasoning is that, as Underhill LJ says in *Richard Pharmacology Ltd v Dhaliwal* it is **not every racially slanted adverse comment or conduct which violates a person's dignity**. The advert cannot reasonably be described as an adverse comment and is **not derogatory towards black people**. **The relationship with race is tenuous and weak and the presumption that offence was intended was itself based upon the nationality of the person posting the advert.** In those circumstances, given the mild attempt at humour, the Tribunal are unanimous that **it is not reasonable to regard Mr Schader's actions as having the harassing effect.**

447. As with the other WhatsApp messages, the unanimous view of the Tribunal is that, a post into a WhatsApp group which has both black members and non-black members treat all of them the same and there is no less favourable treatment. As above, we accept that **R2 himself did not see any connection with race in this advertisement. Overall, he was open and honest about his answers**, and we accept that he would not have posted it, if he had thought people would be offended. [emphasis added]

The Pure Blond Appeal

49. The claimant asserts:

1. As regards Issue 4(u) 'pure blond' – erred in law in holding that the Third Respondent did not contravene s26
2. As regards Issue 4(u) 'pure blonde' video failed to properly apply the law as regards 'related to':
 - a. operated on the basis that the sole consideration is the motivation of the individual allegedly concerned;
 - b. failed to consider the wider meaning of related to; and/or
 - c. failed to take into account the relevant context, let alone undertake the necessary 'intense focus on the context of the offending words or behaviour', including: it was sent in work WhatsApp group, sent by a white colleague, it was a historic video, the video was sent without explanation, the video went without comment and / or the other findings made including 4(a) / 4(m) / 4(n)
3. As regards Issue 4(u) 'pure blonde' video in deciding whether any conduct falling within sub-paragraph s.26(1)(a) has either of the proscribed effects under sub-

paragraph (1)(b), failed to apply the correct law, including failing: failing to ask the ‘subjective question’ and / or failing to take into account subjective factors.

4. As regards Issue 4(u) ‘pure blonde’ video in analysing the video for the purpose of the statutory test considered it out of context and / or in the context of its publication rather than as sent by Mr Schrader.

5. The finding of ‘no connection with race’ at §442 was perverse.

50. There were compound errors in the analysis of this complaint by the Employment Tribunal. It did not identify with sufficient care the *conduct* in respect of which complaint was made. The conduct was Mr Schrader’s circulation of a video, that depicted a “pure” “utopia” inhabited only by tones white blond-haired people, to a small work WhatsApp group, which included the claimant, a Black employee, with no explanation. The fact that the video was designed to be humorous and that Mr Schrader did not mean to cause offense did not mean that the conduct was not related to race. While it is clear that the advert is designed to play on the words “pure” and “blonde” in the name of the beer, it was necessary for the Employment Tribunal properly to analyse how the wordplay worked. It was contrasting different meanings of the word “pure” which in the name of the beer presumably refers to its pure ingredients but in the “utopia” must relate to the “purity” of the toned blond white people who are the sole inhabitants. The advertisers engaged in a risky form of wordplay. It was common ground between the parties that the driver who snatches a bird from the air to open a bottle of beer was white, brown haired and overweight. He spatters the toned white blond inhabitants of the utopia with mud as he drove off thereby debunking the suggestion that the beer is only for “pure” blond people. That does not alter the fact that the circulation of a video that depicts a utopia of white blond people who are “pure” is obviously related to race. It was perverse of the majority of the Employment Tribunal to find otherwise. It is not surprising that the claimant drew a parallel with Nazi ideology where a utopia is shown as inhabited by toned white people who are “pure”. If one asks the question what comes to mind if you think of a proposed utopia inhabited only by healthy toned white people who are “pure”, an obvious answer is the offensive concept of racial purity advocated by eugenicists such as the Nazis. It is equally obvious that the advert is not intended to support such ideology but to debunk any suggestion that pure blonde beer is only for pure blond

people, which is potentially relevant as to whether the conduct should be treated as having the effect of violating dignity. I have concluded that the only rational decision was that the conduct about which the claimant complained was related to race.

51. In analysing the effect of the conduct the Employment Tribunal was required to take account of the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have the effect of violating dignity. These are all factors that section 26 **EQA** states that the Employment Tribunal must take account of. The Employment Tribunal focussed on Mr Schrader's perception of the video being humorous and that he did not intend to offend (which was relevant to the "purpose" question) rather than on the perception of the claimant (which it was required to take account of as part of the "effect" question). The Employment Tribunal failed to take into account how the claimant felt as a Black person having the video sent to him and his immediate colleagues without any explanation. The majority went further and not only failed to assess how being sent the video by Mr Schrader made the claimant feel but suggested it was "offensive for the claimant to have assumed that it was deliberate rather than thoughtless". I can see no proper basis for that assessment. The minority stated that they accepted that Mr Schrader "did not see any possibility of causing offense". But that its not the test. The Employment Tribunal insufficiently took account of the circumstances of the case including to whom the video was circulated and the lack of any explanation for it. Circulating an advert that showed a utopia that was inhabited only by "pure" white blond people did not have to be "derogatory towards black people" for it potentially to have the effect of violating the claimant's dignity. I have concluded that the decision in respect of the effect of the conduct must be set aside. I do not accept that there can only be one answer once the necessary factors are taken into account because the advert that Mr Schrader circulated clearly appears to be debunking the analogy it set up between pure blonde beer and a utopia inhabited by pure white blond people. The "effect" issue shall be remitted to the Employment Tribunal for redetermination, including the time issue in respect of this allegation. The "purpose" issue is not remitted. It was not challenged in the appeal.

Disposal

52. I have had regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR. 763. The vast majority of the findings of the Employment Tribunal were not challenged in this appeal. The Employment Tribunal erred in its analysis of a small number of the complaints it had to determine. The issues raised by these complaints were not straightforward. The existing panel can be trusted to deal with the remission in accordance with their judicial oath and to take full account of this judgment. The existing panel will be best placed to deal with the causation issue (issue 15) which as the respondent points out was only assessed in relation to the harassment complaints that were upheld.