Neutral Citation Number: [2025] EAT 180

Case No: EA-2024-000239-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 December 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR T TAMPONI

Appellant

- and –

MEDEQUIP ASSISTIVE TECHNOLOGY LTD

Respondent

- -
- -

The **Appellant** in person
James Laddie KC (instructed by EEF Ltd t/a Make UK) for the **Respondent**

Hearing date: 21 October 2025

- -

JUDGMENT

SUMMARY

RACE DISCRIMINATION

The claimant in the employment tribunal appealed from the tribunal's decision dismissing his two complaints of direct race discrimination.

The appeal in respect of the first complaint was bound to fail, because the tribunal found that the conduct in question did not amount to subjecting the claimant to a detriment, and there was no appeal from that finding.

The appeal in respect of both complaints also failed, because the tribunal did not err in concluding that both complaints were presented out of time. There was no appeal from the tribunal's decision that it was not just and equitable to extend time.

The claimant is an Italian citizen, and therefore also a citizen of an EU member state and of an EEA member state. The first complaint related to a letter or letters written by the respondent because of what it understood, or believed, to be a change in the immigration status (post-Brexit) of employees including the claimant, and the effects of that change on the respondent's own position as an employer. The tribunal had not erred by concluding that the writing of those letters was not, in the requisite sense, because of the claimant's nationality, but was because of the change in his immigration status and the associated introduction of a new settled-status scheme for which he was eligible.

HIS HONOUR JUDGE AUERBACH:

Introduction and the Facts

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent. In a decision arising from a full merits held hearing at Croydon, the tribunal (EJ Reed, Ms J Jerram and Mr C Rogers) dismissed complaints of direct race discrimination during employment, and of unfair dismissal by reason of protected disclosures, but upheld a complaint of ordinary unfair dismissal. The claimant appealed. Three grounds, all relating to direct race discrimination, were permitted to proceed to this full appeal hearing.

2. The factual background, so far as relevant to this appeal, and which I take from the tribunal's decision, or documents that were before the tribunal, is, in summary, as follows.

3. The respondent provides medical devices to assist disabled persons living at home. The claimant is an Italian national and is therefore also a national of an EU member state, and of one which is part of the European Economic Area (EEA). He was employed by the respondent as a warehouse operative / cleaner from November 2017.

4. In November 2020 the respondent sent a letter in the same terms to the claimant and other EU-national employees. It was dated 12 November but the claimant received it on 19 November 2020. His copy was handed to him by the Logistics Manager, Tim McNicholas.

5. The letter noted that the Brexit transition period was coming to an end and new rules would apply from 1 January 2021. It suggested that EU, EEA or Swiss citizens could apply to the EU Settlement Scheme (EUSS) to protect their right to live and work in the UK. It provided links to a Government website. The letter suggested that the respondent was required to ensure that employees who might be affected had applied, or were applying, for settled status. It asked recipients to submit proof of having applied for, or of having, settled status, to their manager, by 15 January 2021. It noted that failure to provide documentation

confirming their right to work in the UK by that date might place their continued employment at risk. I will call that the first settled-status letter.

6. The claimant's job tasks included the processing of medical devices returned to the respondent's depot, and which might require cleaning and/or repairing before they could be reused. Following the onset of the pandemic it became necessary to identify returned items that could present a Covid-infection risk and would require special treatment or processing.

7. On 26 January 2021 the claimant decided that a number of bath lifts which had been returned from users with Covid should be scrapped, that is to say, destroyed on the basis that they could not be cleaned and then made available to another user. One of the claimant's colleagues, Mr Nuttman, disagreed with his decision and reported it to Mr McNicholas.

8. Mr McNicholas conducted an investigation. He concluded, in a report of 29 January 2021, that the claimant had acted wrongly, because, had he investigated the position, he would have found that the items had already been decontaminated. Mr McNicholas also considered that, as the claimant, for his part, believed that there had been a breach of Covid policy, he, the claimant, had been wrong not to report it. Mr McNicholas recommended a formal disciplinary hearing. A further related disciplinary charge was subsequently added, to the effect that the claimant had not processed these returned items for charging for reuse.

9. There was a disciplinary hearing before a depot manager, Gary Kilduff, on 2 March 2021. At the end of the meeting Mr Kilduff announced his conclusion that the disciplinary charges should be dismissed. He concluded that the claimant's decision to scrap the bath lifts had been a reasonable one in all the circumstances. As the claimant was not the only employee to have been aware of a potential breach of Covid policy, it would be wrong to single him out for disciplinary action in failing to raise his concern. Mr Kilduff also concluded that, as the items were properly scrapped, there was no failure to recharge them.

10. On 2 March 2021 the claimant raised a number of grievances. These included that an HR Business Partner, Aditi Dave, had intentionally failed to verify that investigations and meetings conducted by Mr McNicholas were fair, and that both she and Mr McNicholas had provided him with partial, contradictory and sometimes wrong information. He described this as a "nasty form of discrimination" in that he was the only employee being disciplined for a failure to report a suspected breach of Covid precautions, when other employees also had not informed management of the issue.

11. That led to a grievance meeting before Mr Kilduff on 22 March 2021. He concluded that Ms Dave had acted properly and had not contributed in any way to the claimant having been "singled out". The complaint against Mr McNicholas was also rejected. A complaint against Mr Nuttman was withdrawn. The claimant was notified of Mr Kilduff's conclusions by letter of 12 May 2021. An appeal was considered by Ben Williams at a meeting on 30 June 2021. He rejected it in a letter of 7 July 2021, concluding that, while there were areas that could have been improved, Ms Dave and Mr McNicholas had both acted in good faith.

12. On 9 March 2021 the respondent wrote again to employees who were EU, EEA and Swiss nationals, as a follow-up to the first settled-status letter. The letter reiterated that recipients may need to protect their rights to live and work in the UK by applying to the EUSS. It stated that the deadline to do so was 30 June 2021, and gave guidance. It stated that, while the respondent did not require proof of application or a visa document before 30 June, from 31 July "employers will be expected to check whether Europeans hold a right to work in the UK, including through the EUSS". It stated that an employee who did not apply on time "may be considered illegal in the UK", which might place their continued employment at risk. I will call that the second settled-status letter.

13. On 10 May 2021 the claimant, in common with a number of other employees, was

asked to renew his DBS check. This led to various exchanges in which the claimant sought, and was provided with, further information about that request, including by way of a letter from Ms Dave. The claimant did not comply with the request. That led to a disciplinary hearing on 25 May 2021 before Neil Harris, Operations Manager, Suffolk. At the conclusion of the meeting, following an adjournment, the claimant was summarily dismissed. That was confirmed in writing that day. An internal appeal was unsuccessful.

14. Following ACAS Early Conciliation, which began on 17 August and ended on 28 September 2021, the claimant presented his claim form on 15 October 2021.

The Tribunal's Decision

15. The unfair-dismissal complaints are not the subject of the live grounds of appeal, so I can set out their outcome briefly. In summary, the tribunal found that the claimant had made some protected disclosures. However, none of the communications on which he relied as such disclosures had any impact on the dismissal. The sole reason for dismissal, and rejection of the internal appeal, was the claimant's refusal to undergo a DBS renewal check, contrary to managerial instruction, which was a reason related to conduct. However, for reasons that it set out, the tribunal went on to conclude that the dismissal was unfair.

16. At [3] the tribunal noted that, in accordance with previous directions, the respondent had produced, and sent to the claimant, a draft list of issues. At the start of the hearing the claimant indicated that he did not agree with that list. But, following discussion, he agreed that it accurately identified the issues in dispute. The tribunal then set out those issues at [4].

17. It had been identified at a preliminary hearing that the complaints of direct race discrimination related to two alleged acts, which were expressed as follows:

> **"1. having been instructed to provide information about his application for EUSS by 15.01.2021 and warned about his continuous employment; and**
>
> **2. having been subjected to less favourable treatment when singled out and disciplined for allegedly putting some other individuals' safety at risk by not**

reporting a breach of the Respondent's own C-19 protocol.

18. In respect of complaint 1, the tribunal noted that the respondent accepted that it asked all EU nationals, including the claimant, for information on their settled status under the EUSS scheme. The claimant accepted that he had not provided that information. The tribunal identified the respondent's case as being that the appropriate comparator was "a non-Italian national who is also an EU citizen." The claimant's case was that the appropriate comparators were "all the Respondent's workers and employees with a not time-limited right to work, that were not identified by the Respondent as being eligible for a post-employment right-to-work check, and not instructed to provide information about their status."

19. In relation to complaint 2 the tribunal described the issues in the following way:

> **"3. Was the Respondent's decision to single out the Claimant and discipline only him for allegedly failing to notify the depot's management of a possible C-19 contamination a discriminatory act? If so, was the Claimant singled out because of a protected characteristic, namely race? If not, was he singled out because of a protected characteristic of the comparators, namely UK citizenship, that he did not share?**
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> **4. In respect of this second alleged discriminatory act, the Claimant compares himself to three UK national employees with whom he was working and whom the Respondent did not decide to discipline."**

20. In the course of its self-direction as to the law, the tribunal stated at [138]:

> **"In this case the claimant relies on the protected characteristic of race and, in particular, that he was an EU citizen, but not a British National."**

21. The tribunal also said at [147]

> **"147. The protected characteristic of 'race' is defined at s9 of the Equality Act 2010. It includes colour, nationality and ethnic / national origins. The Supreme Court in *Onu v Akwiwu* [2016] IRLR 719 concluded that there is a distinction between immigration status and race. This is because they are related but not coterminous characteristics. Members of the same race do not invariably have the same immigration status within the UK. This is most self-evident in relation to colour. But it is also true in relation to nationality or national origin since different people with the same nationality do not invariably share the same immigration status within the UK. The Supreme Court therefore concluded that less favourable treatment on grounds of immigration status does not amount to direct race discrimination."**

22. In its conclusions in relation to race discrimination the tribunal found, in respect of

complaint 1, that the respondent did request information of the claimant as alleged, and did warn him that his continued employment might be at risk. But it concluded at [211] that the communications around settled status were "**not a detriment**". They were "**entirely innocuous**" and it was "**not a detriment to communicate in this way**" with the claimant.

23. The tribunal continued:

> **"212. If Mr Tamponi had been singled out in some way or subjected to hostile or badgering communication in some manner, that might have amounted to a detriment. But that was simply not the nature of the communication that took place. The respondent sought to inform its employees as to its understanding of their immigration position, give guidance about the appropriate steps they would need to take and request that it be kept informed. The references to continued employment being at risk were not threats from Medequip, but an explanation of the potential risks if an employee lost their right to work in the UK as a result of the changes arising from Brexit.**
>
> **213. Mr Tamponi has criticised the account of the law provided by the respondent. The Tribunal has not considered these criticisms in detail, because in its view they take the matter no further. Even if the respondent was mistaken in the detail of the advice it gave, an attempt in good faith to give advice of this nature does not become a detriment by reason of such an error. Even if some of the detail could be criticised, the fundamental message: that employees working in the UK pursuant to EU rights were likely to need to make an application for settled status in order to retain those rights was correct."**

24. As to whether this conduct was because of the claimant's race the tribunal said [215]:

> **"It is plain that the communications about EU settled status occurred because of Mr Tamponi being an EU National. In context, however, this was in connection to his immigration status as an EU National; not his nationality or national origin separate to its consequences for his immigration status. Following the Supreme Court's guidance in *Onu* therefore, the Tribunal concluded that this was not because of his race."**

25. In relation to complaint 2 the tribunal found that the respondent did subject the claimant to a disciplinary process relating to the scrapping incident. That was "self-evidently" a detriment. As to whether this was because of race, the tribunal concluded:

> **"216. In relation to subjecting Mr Tamponi to a disciplinary process, the Tribunal concluded that this had nothing to do with his race or his immigration status.**
>
> **217. In relation to disciplinary action relating to the January 2021 scrapping incident, the Tribunal accepted Mr McNicholas' evidence that he had begun his investigation because he had received a complaint from Mr Nuttman. The Tribunal also concluded that his investigation was carried out honestly. Mr McNicholas' decision to conduct the investigation and its outcome was all made in good faith. It was not, as Mr Tamponi argued, an attempt to scapegoat or retaliate against him.**
>
> **218. In relation to the fact that Mr Tamponi was subject to a disciplinary process in**

> **relation to his failure to report a breach of the Covid procedures, when other employees were not, the Tribunal concluded that this was unrelated to his race. It arose from a number of unrelated factors. The issue of Mr Tamponi's conduct had been raised with Mr McNicholas by Mr Nuttman and he acted on that basis. No similar complaint or issue had been raised in relation to other employees. The other employees told Mr McNicholas during his investigation that they did not believe there had such a breach. This was a significantly different position to Mr Tamponi's. Finally, other employees were not facing a separate disciplinary charge. The Tribunal concluded that these significantly different circumstances were the cause of the difference in treatment, which was unrelated to Mr Tamponi's race.**
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> **219. Even if the Tribunal had accepted Mr Tamponi's evidence that Mr McNicholas and Ms Dave had been motived by dislike of him or that their actions had been unreasonable, that would not have been sufficient to reverse the burden of proof. The Tribunal did not consider that any of the evidence suggested that their opinion of Mr Tamponi or their actions was influenced in any way by his race. There was no 'something more' as required by Madarassy v Nomura International.**
>
> **220. The Tribunal rejected Mr Tamponi's argument that the Tribunal should draw an inference from the communications around EU settled status. As set out above the Tribunal concluded that these were innocuous and could not support any such negative inference."**

26. Finally, under the heading "time limits" the tribunal said this:

> **"221. The ACAS Early Conciliation period was between 17th August 2021 to 28th September 2021. The claim was lodged on 15th October 2021. This means that the claims of race discrimination were brought outside the statutory time limit. Given the findings of above and that Mr Tamponi has not presented any good reason for the delay in bringing his claims, the Tribunal concluded that it was not just and equitable to extend time."**

The Grounds of Appeal, Discussion, Conclusions

27. As in the employment tribunal, the claimant is a litigant in person in the EAT. His notice of appeal contained 25 numbered grounds. Of these, grounds 1, 2 and 5, only, were permitted to proceed to a full appeal hearing. In the run-up to this hearing I granted an application by the claimant to make a small clarifying amendment to ground 5.

28. It is convenient to start with ground 5. As amended, this is expressed as follows:

> **"It's neglected the fact that, in regard to the first act that I allege as discriminatory, the Respondent has never managed to readdress it and act on it, and, in regard to the second, the decision by Gary Kilduff was made and communicated to me on 20.05.2021: having started the ACAS conciliation process on 17.08.2021, three months less three days later, and having submitted my ET1 form well within the one month extension following the issue of the ACAS certificate, my RRD claim could not have been out of time."**

29. As I have recorded, the tribunal concluded that both complaints of race

discrimination were presented outside of the primary time limit, and that it was not just and equitable to extend time. This ground challenges the first of those conclusions.

30. As I have set out, there were two complaints of direct race discrimination before the tribunal. The first, as described in the agreed list of issues, related to the first settled-status letter, of November 2020, although at points in the discussion later in its decision the tribunal appears to be referring to both the first letter and the second letter, sent on 9 March 2021.

31. The second complaint related to being "singled out and disciplined" for not reporting a suspected concern about breach of Covid safety protocol. In ground 5 reference is made to a decision of Gary Kilduff made and communicated on 20 May 2021. The claimant told me that he was intending, there, to refer to Mr Kilduff's decision on his grievance, which the tribunal found was sent by letter on 12 May 2021. The claimant told me that he had in fact only been sent the letter on 20 May 2021. However, he fairly accepted that he had not sought a correction from the tribunal, or produced evidence to it to support that contention.

32. In any event, as Mr Laddie KC correctly pointed out, whether the claimant was sent the grievance decision on 12 May or 20 May 2021, there was no complaint of direct race discrimination before the tribunal about *that* decision. Rather, the second complaint was about the claimant being "singled out and disciplined" for not reporting his concerns about a breach of Covid protocol. On the most generous construction, that would embrace the process of investigation by Mr McNicholas, his report recommending disciplinary charges, and the pursuit of those charges, up to and including the disciplinary hearing before Mr Kilduff on 2 March 2021, at which those charges were rejected by him.

33. On the basis that time for presenting the second direct race-discrimination complaint therefore began to run on 2 March 2021, the last day of the primary three-month time limit in respect of it was 1 June 2021. But the claimant did not begin ACAS EC until 17 August

2021, and did not present his claim form until 15 October 2021. On that basis, because the ACAS EC period began after the primary time limit had expired, it did not confer any extension of time, and the claim form was presented very substantially out of time.

34. In relation to the first direct race-discrimination complaint, even if it was treated by the tribunal as embracing the second settled-status letter, as well as the first letter, the date of the second letter was 9 March 2021. On the basis that time began to run then, the last day of the primary three-month time limit in respect of it was 8 June 2021. But, once again, as the ACAS EC process was begun after that date, it did not confer any extension of time, and the claim form was, in respect of that complaint, presented very substantially out of time.

35. The tribunal would therefore only have erred if it should have concluded that either or both of these complaints was about conduct which formed part of "conduct extending over a period" within the meaning of section 123(3)(a) **Equality Act 2010**, so that it fell to be treated as done at the end of that period, so that time began to run on a later date, being later than three months before the claimant began the ACAS EC process.

36. As to that, first I note that there was no dispute, and the tribunal found, that the complaints of unfair dismissal were in time. That is because the claimant was dismissed on 25 May 2021, he began ACAS EC within three months of that date, and he presented his claim form within one month of the date on which ACAS EC ended and the certificate was issued. However, there was no complaint of race discrimination in relation to the dismissal, and no error by the tribunal not linking the subject-matter of the race-discrimination complaints to the dismissal for time-limit purposes.

37. In relation to the first complaint, the claimant argued that the first settled-status letter wrongly required him to provide evidence of having applied for, or obtained, settled status, and that the respondent never subsequently took any proactive step to redress or correct that

error at any point prior to his employment ending. So, the claimant contended, that was continuing conduct for an indefinite period, right up to the date of his dismissal, and the complaint relating to it should therefore have been treated as in time.

38. Mr Laddie KC contended that the issuing of that letter was a discrete act which occurred, at latest, when the claimant received it, on 19 November 2020. Even if the first complaint is treated as also embracing the second letter, and the letters formed a continuing act, the period of that act still ended with the issue of the second letter on 9 March 2021.

39. My conclusions on this part of ground 5 are as follows.

40. First, the actual complaint, as framed and identified in the list of issues, was about the content of the first settled-status letter, and specifically about the fact that it required the claimant to provide information about having made an application for EUSS by 15 January 2021 and about its reference to the potential implications for his continued employment, which the claimant characterised as a threat.

41. However, there was no complaint about any alleged conduct on the part of the respondent by way of follow-up of that request, in the weeks that followed. As I have noted, although, as set out in the issues, there was not, in fact, a complaint about the second letter of 9 March 2021, later in the decision the tribunal referred to the "communications around settled status", and appears there to have been referring to both letters. But, even approaching the complaint as embracing both letters, and even if it might be said that the first letter gave rise to an ongoing requirement at *that* time for the claimant to produce some evidence of having made an application, or having had one granted, at its highest for the claimant, that period came to an end with the sending of the second letter, which indicated that "we currently do not require proof of application or the visa document".

42. At the very latest, time to complain in respect of either the first and/or the second

letter therefore began to run on the date of the second letter, 9 March 2021. As the claimant neither began ACAS EC nor presented his tribunal claim within three months of that date, the tribunal correctly concluded that this first complaint was out of time, whether it fell to be treated as a complaint about the first letter, or about both the first and second letters.

43. The contention that there was an act extending over time was not advanced in relation to the second complaint. Rather, as I have discussed, the argument in relation to that complaint is that the tribunal should have treated time as beginning to run in respect of it on 20 May 2021. But, as I have discussed, that is not sustainable, because that was not, on any view, the date of the particular conduct that was actually the subject matter of this complaint. Time in relation to *that* conduct began to run, at the very latest, on 2 March 2021, when Mr Kilduff dismissed the disciplinary charges. Nor did the tribunal err by not treating that conduct as part of a continuing act together with the later conduct by Mr Kilduff of dismissing the claimant's grievance, as there was no complaint of race-discrimination in respect of the latter decision.

44. Finally, I note that the whole of this ground was to the effect that the tribunal had erred by concluding that the two race-discrimination complaints were presented outside of the primary time limit. There was no separate challenge to the tribunal's further decision, having so found, that it was not just and equitable to extend the time limit.

45. For, all of these reasons ground 5 fails. Because the tribunal did not err in concluding that both complaints were presented outside of the primary time limit, and there is no challenge to its decision that it was not just and equitable to extend time, that means that its decision to dismiss these complaints must stand, even if it erred in its conclusions about aspects of the merits of the first complaint (which are challenged by grounds 1 and 2). It follows that, because ground 5 has failed, this appeal must, in any event, be dismissed.

46. In addition, there is a further reason why, even if the tribunal erred in some way as alleged by grounds 1 and 2, that would still not affect the outcome in relation to the first direct race-discrimination complaint. That is because the tribunal found that the sending of the settled-status letters did not subject the claimant to a detriment. Detriment was an essential element of the legal wrong in this case. So that conclusion was, by itself, fatal to the complaint about the first settled-status letter, and, if the complaint extended to it, the second settled-status letter as well. There has been no appeal against that finding and conclusion by the tribunal. This is a further reason why, in any event, the tribunal's decision to dismiss the first complaint of direct race discrimination is not disturbed by this appeal.

47. Although, therefore, it is not necessary to the determination of this appeal, I will nevertheless, say something about grounds 1 and 2. They are in the following terms:

> **"1. It's mistaken the guidance in *Onu v Akwiwu* [2016] IRLR 719 SC and introduced the concept of an "immigration status as an EU National", failing to provide any detail about the nature, entitlements and limitations of this status, and the vulnerabilities that would derive from it.**
>
> **2. It's failed to consider that, even if there had been such a thing as an "immigration status as an EU employee", an appropriate comparator would have been a migrant employee with a different (non EU) nationality, given that there was not a neutral PCP."**

48. In argument, the claimant accepted Mr Laddie KC's point, that the reference at the end of ground 2 to a PCP was inapposite, as these were not complaints of indirect discrimination. But he maintained the ground, on the basis that the words at the end: "given that there was not a neutral PCP", should simply be treated as deleted.

49. I should next say a little more about the background and context.

50. In summary, there is no dispute that, prior to Brexit, citizens of any EU state had, by virtue of their citizenship, the right to live and work in the UK. As a result of Brexit this changed at the end of December 2020. Thereafter, citizens of EU states no longer had the right to live and work in the UK by virtue of their citizenship of such a state. However, the

EUSS was introduced, which offered a new route to retaining or obtaining such rights. Those who applied prior to 30 June 2021 also had their previous rights extended and protected, pending the final determination of their applications, or related appeals.

51. For good order, I note that the same change of status applied to EEA citizens and Swiss citizens, but nothing turns on that, as such. Although the first settled-status letter was said by the tribunal to have been written to the claimant "along with other EU employees", the tribunal said of the second letter, that the respondent wrote "*again* to EU, EEA and Swiss Nationals within its employ" (emphasis added); and there is nothing to suggest that the evidence was other than that all current employees believed to be affected by the changes received both letters. Hereafter I will, just for shorthand, refer to EU citizens.

52. Mr Laddie KC made the point that employers can be exposed to fines, if they employ persons who do not have the right to work, unless they can avail themselves of an applicable defence. The claimant made the point that, when the change came in, employers of existing EU employees were entitled to rely, as a defence, upon their existing status. So there was no need for the respondent, as it did in the first settled-status letter, to ask existing employees to produce evidence to it of having applied for, or obtained, settled status at that point.

53. In **Onu v Akwiwu** and **Taiwo v Olaigbe** [2016] UKSC 31; [2016] ICR 756 both claimants were Nigerian citizens who had come to the UK on migrant domestic worker visas. Both were, in each case, vulnerable, because of their background financial circumstances, and because of the terms of their visas, which also made them dependent on their employers' support. However, in both cases their complaints of direct race discrimination failed, because employment tribunals held that the treatment of which they complained was not treatment *because of* their race – being their Nigerian nationality.

54. The Supreme Court upheld those decisions. In summary, that was because the

definition of "race" in section 9 **Equality Act 2010** does not include "immigration status"; and in neither of these cases could immigration status be treated as a pure proxy for nationality. The two were not "dissociable". The claimants were not treated as they were, because they were Nigerians, but because of their immigration status. If they had not been Nigerian, but had the same immigration status, they would have been treated the same way.

55. There was a good deal of argument before me about comparators in this case. I note in this regard that "race" as defined in section 9 **Equality Act 2010** includes "nationality" and embraces a "racial group" which is a group of persons "defined by reference to race". This means that being an Italian national is a protected characteristic, but so is being an EU national, and so is not being an EU national. The debate about comparators needs to be seen in that context, but, most importantly, in the context of what each of the claimant and the respondent contended was the *material* feature or features of the conduct being challenged.

56. In particular, at the heart of both of these grounds is the claimant's substantive contention that the present case is factually different from **Onu** and **Taiwo**, because, in this case, the employees who received the first and second letters were distinguished by nationality. All employees who were EU citizens (therefore not including UK citizens) received the letters, and none who were not EU citizens received them. He argued that, even though the letters were concerned with their immigration status, the two things were, in this case, dissociable. Although the claimant, who is not a lawyer, did not put it this way, his case appeared to me to amount to saying that this case was factually analogous, not to **Onu** and **Taiwo**, but to **James v Eastleigh Borough Council** [1990] UKHL 6; [1990] ICR 554.

57. My conclusions are as follows.

58. Firstly, I do see the force of the claimant's argument that this case is not, factually, precisely on all fours with **Onu** and **Taiwo**. Every case must turn on its own particular facts.

In those cases, had the employees been vulnerable holders of a migrant resident visa who were not Nigerian, they would have been treated the same way. In this case, had the claimant not been an EU national, he would not have been treated the same way.

59. However, neither do I consider this case to be factually analogous to **James**. In my judgment the tribunal properly found that the reason why both the first and the second settled-status letters were sent to the claimant (and to the other recipients) was because of what the respondent understood and believed to be a *change in their immigration status* and the associated new EUSS scheme (and, in the case of the first letter, a belief, albeit erroneous, that to protect its own position it needed the recipients to provide it with certain evidence).

60. It was that change in immigration status, and their associated eligibility for the new EUSS scheme, that distinguished the group who received the letter from non-recipients. If the respondent had any employees who were nationals of non-UK, non-EU countries, they did not get, or would not have got, the letters, because there was no change in *their* immigration status, and they were not eligible for the EUSS scheme. There was also no change affecting UK nationals. Although the change in immigration status itself only affected those of certain nationalities, the tribunal was entitled to hold that it was the change in status that was the operative reason for the treatment, not the individuals' nationalities.

61. The matter can be tested this way. The natural and logical inference from the content of the letters is that the respondent would have reacted in the same way, had there been *any* adverse change in the rules relating to visas or work permits, or available schemes, whether or not the change affected all those of a given nationality, or only some. It would have written to those who were (or were believed to be) in the affected group, based on its understanding (right or wrong) of how they, and/or it, as their employer, were affected.

62. I therefore consider that, while the fact that the change affected a defined group of

nationals, was part of the context, or factual circumstances, and could be said to be what lawyers call a "but for" cause of the respondent's actions, nationality, as such, was not an operative reason materially influencing the conduct. That was solely, and wholly, influenced by a change in immigration status, and the new scheme, and what the respondent understood or believed the consequences of that to be. I would therefore not uphold grounds 1 or 2.

Outcome

63. The appeal is dismissed.