

Neutral Citation Number: [2026] EAT 118

Case No: EA-2024-000169-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 August 2026

Before :

MARCUS PILGERSTORFER KC

DEPUTY JUDGE OF THE HIGH COURT

Between:

JOHNSON AND JOHNSON MEDICAL LIMITED

Appellant

- and -

TOLULOPE FAYOKUN

Respondent

Paras Gorasia and Cormac Devlin (instructed by Squire Patton Boggs (UK) LLP) for the **Appellant**

Lawrence Davies (solicitor at Equal Justice Limited) for the **Respondent**

Hearing date: 28 April 2026
Written submissions: 30 April 2026

JUDGMENT

SUMMARY

Race Discrimination; Jurisdictional/Time Points

The claimant, who was born and raised in Nigeria before moving to the United Kingdom, brought numerous complaints before the Employment Tribunal arising from her employment with the respondent. The Tribunal dismissed the majority of those claims but upheld three interrelated complaints of direct race discrimination. It found that the claimant had been subjected to a profiling exercise based on a generic Nigerian profile; that the profiling exercise had been used in discussions with her concerning the way in which she was being managed; and that comments had been made linking the respondent's treatment of the claimant to stereotypical Nigerian traits. The Tribunal extended time for those complaints to be presented on the just and equitable basis.

Held, allowing the appeal in part:

1. The appeal against the findings of direct race discrimination was dismissed. The Tribunal did not reach a perverse conclusion. It gave adequate reasons for its factual findings. It further did not err in law by failing to construct a hypothetical comparator or in relation to the comparative exercise. The Tribunal was entitled to focus on the reason for the treatment and to conclude that the profiling exercise was carried out because of the claimant's race. *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, *Law Society v Bahl* [2003] IRLR 640 and *Amnesty International v Ahmed* [2009] ICR 1450 applied.
2. The appeal against the extension of time was allowed. The Tribunal failed to consider the extent of, and reasons for, the delay in presenting the claims. *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 and *Concentrix CVG Intelligent Contact Ltd v Obi* [2023] ICR 1 applied. The issue was remitted to the same Tribunal for reconsideration.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This appeal concerns the legal consequences of a manager attributing to an employee a generic Nigerian working profile and then using that profile in the course of managing her. The Respondent’s position was that the purpose of the exercise was an attempt to understand different working styles and to improve communication. The Tribunal found, however, that the Claimant had been subjected to direct race discrimination: only she had been aligned with the Nigerian profile which contained lazy stereotypes, the profile was actively used in managing her, and she was told that her “Nigerian traits” explained matters adverse to her working relationships. The appeal raises two distinct questions: whether the Tribunal’s findings on direct race discrimination disclose an error of law, and whether its decision to extend time for those complaints can stand.

Background

2. The judgment appealed is that of the Employment Tribunal sitting at Reading comprised of Employment Judge Gumbiti-Zimuto and members Mrs A Brown and Mrs F Betts. I shall refer to the parties as they were before the Tribunal below. The judgment was reached after a hearing held on 6 to 17 February 2023 and 10, 11, 15 and 16 August 2023. The Claimant represented herself and Mr Gorasia and Mr Devlin of Counsel represented the Respondent. The judgment is dated 15 December 2023 and was sent to the parties on 3 January 2024.
3. On 17 July 2019, the Claimant presented a large number of claims to the Tribunal. They were:
 - a) Unfair dismissal;
 - b) Direct disability discrimination;
 - c) Discrimination arising from a disability;
 - d) Failure to make reasonable adjustments;
 - e) Victimisation;

- f) Harassment;
- g) Direct religious belief discrimination; and
- h) Direct race discrimination.

4. The Tribunal dismissed the majority of those complaints, however it upheld three interrelated allegations of direct race discrimination. It is those three allegations of race discrimination that form the subject matter of this appeal. The three allegations were numbered (iii) to (v) before the Tribunal, and I shall adopt the same way of referring to them on this appeal. They were that Alessandra Toro, the Respondent's Director for Strategic Insights and Analytics, had treated the Claimant less favourably because of her race by:

- (iii) Carrying out a racial profiling exercise on the Claimant in March 2018;
- (iv) At a one-to-one meeting on 19 April 2018, using the profiling exercise to justify a negative pattern of behaviour towards the Claimant; and
- (v) Commenting to the Claimant that the way she (Ms Toro) was treating the Claimant was due to stereotypical traits of Nigerians.

5. For the purposes of those claims, the Claimant relied on being of African ethnicity and dual British and Nigerian nationality. The Tribunal recognised that the three allegations were presented to it out of time but extended time on the just and equitable basis. Otherwise the Tribunal dismissed the Claimant's complaints, including her other allegations of direct race discrimination. A remedy hearing was listed at which the Claimant's losses flowing from the discrimination found were to be assessed, including any in relation to personal injury.

6. The Respondent appealed advancing 7 grounds of appeal. HHJ James Tayler considered the appeal on the sift and considered there were no reasonable grounds for bringing the appeal. The Respondent made an application under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as amended) and Judge Susan Walker KC (hon) permitted a number (but not all) of the grounds to proceed. Retaining the

numbering from the grounds of appeal, those permitted to proceed were Grounds 1, 3, 4, 5, 6(ii) and 7. Grounds 1, 3 and 4 concern the findings of race discrimination. Grounds 5, 6(ii) and 7 concern the Tribunal's decision to extend time. The Claimant has not challenged the Tribunal's judgment whether by appeal or cross-appeal.

7. Before me, Mr Gorasia and Mr Devlin continued to represent the Respondent. The Claimant was represented by Mr Davies.

The Facts

8. Although the judgment below is lengthy, the factual background relevant to the appeal can be set out in short compass.
9. The Claimant was born in Nigeria and lived there until 2007. She then relocated to the UK. On 27 April 2017, the Claimant commenced work for the Respondent. She was employed as a Senior Manager, Global Strategic Insights. When her employment started, and at the times material to the allegations appealed, the Claimant reported to Alessandra Toro, the Director for Strategic Insights and Analytics. Ms Toro had been involved in the recruitment process which resulted in the Claimant's employment, and she had made the decision to hire the Claimant. The Tribunal found that Ms Toro was aware that the Claimant had been born and raised in Nigeria, and that she had previously worked there before moving to the UK in 2007.
10. Ms Toro and the Claimant initially had a good relationship. Issues arose around the time of the Claimant's annual performance appraisal. On 15 February 2018, the Claimant emailed Ms Toro to say that she was snowed under with multiple priorities. A meeting then took place and the Claimant's workload was discussed. The Claimant's evidence was that she had been working around the clock and that this was taking a toll on her. She said she could not take on more work. The Claimant alleged Ms Toro responded by scolding her for not refusing several project requests. Ms Toro recalled the meeting differently. She told the Tribunal that during the meeting they had discussed the Claimant's workload

priorities and had gone through her various tasks. Amongst other things, Ms Toro said she had assisted the Claimant to prioritise her tasks and had told her she should feel empowered as a senior manager to decline meeting invitations as long as she explained the reasons for doing so. Ms Toro's position was that the Claimant said she felt much more comfortable about her workload after the meeting and Ms Toro had encouraged her to raise workload concerns in the future.

11. On 20 March 2018, the Claimant and Ms Toro attended a 'Strat Plan Workshop'. They co-presented one session and the Claimant presented a second. The Tribunal found that there was disagreement between the two about the lead up to this workshop. The Claimant's position was that she and Ms Toro attended 'Strat Plan' preparation meetings after which they had debrief meetings to discuss next steps. The Claimant alleged those meetings were a forum for Ms Toro dressing her down and the sessions became abusive. She said Ms Toro criticised the manner of her speech, her mannerisms and her body language and generally how she came across. According to the Claimant, Ms Toro had said that she was trying to help because many colleagues found the Claimant's mannerisms offensive and therefore did not like her. The Claimant described Ms Toro saying that the Claimant could not see herself, and so it was up to her to tell her how she came across. Ms Toro maintained that this was untrue. She said she never subjected the Claimant to such criticism. She said she did not criticise the Claimant's mannerisms or identity; she only provided feedback about how she collaborated and communicated with others when she was under stress and during projects where she did not feel comfortable.
12. In April 2018, Ms Toro, the Claimant and others went on a work trip to Jacksonville in Florida. When they got back, a one-to-one meeting took place on 19 April 2018. Again the Claimant and Ms Toro gave different accounts of this meeting to the Tribunal. The Claimant told the Tribunal that at the start of the meeting, she told Ms Toro that she wanted to discuss the breakdown in their communication and relationship. According to the Claimant, Ms Toro replied saying "*I know I've been poking you*" and then explained that she had researched Nigeria and realised that she, Ms Toro, was different from Nigerians in many ways. The Claimant said that Ms Toro then went through a document she was holding (which the Claimant referred to as a 'racial profiling document') and made numerous comments about

the differences between her (Ms Toro) and Nigerians, including that Nigerians do not keep to time, saying *“I’m different from Nigeria”*. The Claimant’s evidence was that Ms Toro told her that the negative Nigerian traits explained in the document were the reason she had been treating the Claimant in the manner she had done so before the meeting, and that she would continue to treat the Claimant differently going forward. The Claimant said she was very upset, and took the document with her as she left the meeting. The Claimant went on to say that over the next four weeks Ms Toro verbally abused her and reminded her that the *“negative Nigerian traits”* were the reason colleagues did not want to work with her. The Claimant’s case was that the use of the racial profiling document fatally poisoned the Claimant’s view of her relationship with Ms Toro.

13. Ms Toro gave a different account. She said that after the Claimant had made reference to the two of them not communicating appropriately, she had shown the Claimant a Berlitz report. I pause there to record that it was common ground before me that the profiling document created by Ms Toro in fact consisted of three parts: (i) a British Council document concerning working with Nigeria; (ii) a Berlitz “User to Country Gap Analysis Report”; and (iii) a Nigeria “Managing” document.
14. Returning to Ms Toro’s account, Ms Toro denied she had engaged in racial profiling. Rather, she said she was a certified trainer for Berlitz ‘cultural fluency’ which was designed to support people from different cultures to work together, and to understand more easily different cultural preferences in terms of working. She told the Tribunal the tool looked at working cultures in various countries. Ms Toro explained that after a difficult conversation with the Claimant she had used the tool to make a comparison between herself, the Claimant and others.
15. The Tribunal rejected Ms Toro’s suggestion that she had made a comparison between herself and others at the material time. The Tribunal found such comparisons were carried out by Ms Toro at a later date. At §§29-30 the Tribunal said this:

“29... The claimant was identified as Nigerian for the purposes of the profile because Alessandra Toro

thought that was how the claimant identified her working style. Alessandra Toro states: "I found the reports obtained through this process to be helpful to me; for example, the fact that the Nigerian working profile was "fluid" was in contrast to my personal "fixed" preferences... meaning that whereas I see deadlines as fixed and set in stone, this indicated to me that I should not adopt or assume the same approach with someone who identified with a Nigerian workstyle. In addition, the report assisted me in understanding that in contrast to my direct approach, the Claimant's preference (and the preference of my other direct reports) was an indirect approach... and so I identified that I could try and scale back my approach to bridge the gap between myself and my direct reports.

30. The claimant was the only person with whom these reports were shared. This took place in the meeting after the Jacksonville trip during which the claimant was given feedback about a number of matters that arose during the trip..."

16. A further one-to-one meeting took place on 30 April 2018. On that occasion, Ms Toro raised with the Claimant one of the considerations arising under the Respondent's appraisal system. The system invited managers to analyse feedback under headings of 'the what' (viz what an employee was achieving) and 'the how' (viz how she was achieving it). On 30 April 2018, Ms Toro told the Claimant there were problems with the 'how' aspects of her performance. The Tribunal recorded that the Claimant said she was told that this had come from Pavi Gupta, Senior Director Global Strategic Insights, who wanted to have 360 degree feedback to uncover the problems with the Claimant's 'how'. The Claimant told the Tribunal that during the meeting Ms Toro made reference to her *"negative Nigerian traits"*.
17. Further one-to-one meetings were held on 10 and 14 May 2018. The Claimant again told the Tribunal that Ms Toro made reference to her *"negative Nigerian traits"* when discussing the request for 360 degree feedback.
18. On 21 May 2018, the Claimant wrote to Ms Toro ahead of her next one-to-one meeting saying that she was not keen to share her feedback and that Ms Toro had criticised her to the extent she was dreading meeting as she felt certain there would be another attack on her personal identity or work. She listed a number of matters which she said had had a traumatic impact on her, including that Ms Toro had made reference to stereotypes of Nigerians, to the Claimant acting in a 'human way', and to the Claimant being an 'African lioness'. The Tribunal concluded that it would have been clear to all concerned that the Claimant was complaining about discrimination on racial grounds and this led to Ms Toro not feeling

comfortable about having the one-to-one conversation with the Claimant. Ms Toro contacted Mr Gupta and asked him to attend the meeting.

19. The meeting went ahead later on 21 May 2018. It was attended by Mr Gupta as well as the Claimant and Ms Toro. Mr Gupta took charge of the meeting and said the Claimant was wrong that there was hostility, harassment or discrimination directed towards her by Ms Toro. Whilst the Claimant said that the racial profiling document was not discussed, Ms Toro's evidence was that the Claimant had complained about the cultural navigator profiling exercise and her compensation package. Mr Gupta told the Tribunal that the Claimant did not raise allegations of race discrimination.
20. A further one-to-one meeting took place on 24 May 2018. In the period afterwards, Ms Toro told the Tribunal that her relationship with the Claimant was good. The Claimant, by contrast, considered that Ms Toro had become cold, had shut her out, and was reluctant to communicate and interact with her. The Tribunal considered that in fact nothing very much changed between the Claimant and Ms Toro because *"by the end of June [Ms Toro] states that the claimant's attitude towards her was such that she was considering making a complaint"* (§41).
21. Thereafter, in June 2018, Kyle Conway became the Claimant's line manager. The remainder of the chronology can be dealt with more succinctly. The Claimant raised a grievance on 1 and 8 August 2018 raising racial *"abuse and bias"* by Ms Toro. This was investigated and an outcome communicated on 27 September 2018. The grievance was not upheld. The Respondent concluded that the cultural country profiling analysis carried out by Ms Toro was focused on workplace styles in Nigeria.
22. On 1 October 2018, the Claimant began a period of sickness absence, reporting that she was suffering from work related stress. She returned on 23 October 2018. After receiving her year-end review on 19 February 2019 (with a rating of 'Fully Meets/Partially Meets' expectations), on 21 February 2019 she went off sick again. She submitted fit notes throughout her absence. The Claimant was offered an occupational health referral but this was not taken up and so on 7 November 2019, the Respondent

invited her to a formal capability meeting. The Claimant asked to participate through written submissions and this was accommodated and the submissions were sent on 27 November 2019. By letter of 10 January 2020, the Claimant was dismissed for capability. The Claimant appealed, but the appeal was refused.

23. On 17 May 2019, the Claimant approached ACAS for early conciliation (“EC”). The EC period ended on 16 June 2019. After an EC certificate was issued, the Claimant presented her claim to the Tribunal on 17 July 2019.

Direct Race Discrimination

The Tribunal’s Findings in relation to allegations (iii) to (v)

24. Between §§142-145, the Tribunal set out a number of self-directions of law which are not challenged on this appeal. Thereafter, the Tribunal addressed the three material allegations together from §§157ff.

Given the centrality of this analysis to the Grounds of Appeal, I set it out in full:

“(iii) Alessandra Toro carrying out a racial profiling exercise in March 2018.

(iv) On 19 April 2018, Alessandra Toro using the profiling exercise to justify a negative pattern of behaviour towards the claimant.

(v) Alessandra Toro commenting to the claimant that the way she was treating the claimant in certain way was due to the stereotypical traits of Nigerians.

157. This is accepted by Alessandra Toro, save that she objects to the description of racial profiling and prefers to describe it in the following terms:

“The claimant has referred to the profiling as racial profiling however this is not a correct description of the profiling tool. Rather than looking at race, the tool looks at working cultures in various countries; e.g. the tool will describe working preferences for those culturally aligned with working styles in the UK which might be the correct profile for UK nationals but also foreign nationals working in the UK. In order to use the tool, you do no[t] need to know the race or ethnicity of a colleague but rather know which country they align their working style with the most.”

158. Alessandra Toro did use the profile she obtained on the claimant; “I used the Nigerian profile for the claimant rather than the United Kingdom one because, whilst it was the case that the claimant was currently working in the United Kingdom, she had often referred t[o] her working practices being influenced from her childhood in Nigeria and her time working there with Procter and Gamble.” The purpose was so that Alessandra Toro could ‘flex’ her ‘workstyle preferences.

159. The claimant states that she was told about the profiling document by Alessandra Toro during

the course of a one to one meeting during which Alessandra Toro spent 2 or 3 minutes speaking about the profiling document (p3152-3185). The claimant says that the document contained generalisations about Nigerians and referred to stereotypes such as Nigerians “not keeping time”. The claimant also complains that speaking about the profile Alessandra Toro referred to the document as setting out differences between her and the claimant with comments like, “I’m fixed you are fluid”, “I’m different from Nigeria”. The claimant also states that Alessandra Toro said that the negative traits in the document were the reason why she had been treating the claimant in the manner that she had been treating her. The claimant states that Alessandra Toro spoke in a negative manner referring to ‘Nigerian traits’ and stereotyped the claimant with these negative ‘Nigerian traits’ which she stated were the reason why colleagues don’t want to work with the claimant.

160. The claimant discussed the profiling issue with Pavi Gupta and Alessandra Toro on 21 May 2018 when Pavi Gupta says that the claimant was complaining that Alessandra Toro had been “insensitive to her in conducting a profiling exercise”. Pavi Gupta states that he did not consider that it was an issue of race discrimination.

161. The claimant discussed the issue of the profiling document in her grievance and stated that she “suspected Alessandra of racism, was furious but had to put brave face.” In the grievance the claimant made it clear that she considered that Alessandra Toro had made racial comments, one of the matters she complained of in the grievance was reference to the “African lioness” comment. In the grievance the respondent found that the “African lioness” to be “inconclusive”. As to the profiling issue the grievance found that this was not company policy or procedure, that the document was specifically focused on workplace styles of Nigeria. It was found that while Alessandra Toro went outside company policy by carrying out the analysis, but she had the right intentions in doing so, while this allegation was not upheld as part of the grievance it was stated that “I will ensure that this kind of profiling analysis does not take place in the future as it is not how the company operates.”

162. The Tribunal find that the claimant was subjected to a detriment as a result of the profiling exercise. It aligned the claimant with a Nigerian workstyle in a manner which contained some lazy stereotypes such as references to “African time”, and which the claimant found to be insensitive and upsetting. The manner in which this profiling exercise was communicated to the claimant involved Alessandra Toro stating to the claimant that the differences between their working styles “this is why I have been poking you”. In communicating the findings of this document, it was stated to the claimant that she possessed “Nigerian traits”. We are satisfied that the claimant could reasonably consider that she was disadvantaged in the workplace by reason of being told that this exercise had been carried out and was being actively used to manage her.

163. The evidence before us is that only the claimant was treated in this way by Alessandra Toro. We note that the document that the claimant was shown made no reference to any other nationality despite Alessandra Toro stating that she carried out similar analysis using other nationalities. This was not the case on the occasion that the profiling exercise was shared with the claimant.

164. The Tribunal has come to the conclusion that the claimant was in respect of the complaint about the profiling document subjected to a detriment and treated less favourably on the grounds of her Nigerian nationality.

165. This incident in our view polluted not only the claimant’s relationship with Alessandra Toro but her relationship with other colleagues as it was said to her that her ‘Nigerian traits’ adversely affected her working relationships with her colleagues who did not want to work with her. The effect of this

discriminatory act in our view continued to impact on the claimant. The claimant first complained about this issue in May 2018 and raised it during her grievance meeting in August 2018. The impact on the claimant of this issue was one of the factors that she continued to return to it clearly had a significantly adverse effect on her. The respondent is not in our view prejudiced in being able to address this issue in the evidence before us. We have concluded that it is just and equitable to extend time for the presentation of complaints in respect of this issue.”

25. The Respondent has been permitted to advance three grounds against these findings. I shall consider each in turn, starting with Ground 4, then Ground 1 and finally Ground 3.

Ground 4: Was it perverse of the Tribunal to find that Ms Toro “accepted” the allegations?

26. Ground 4 is that it was perverse for the Tribunal to have found that Ms Toro accepted the three allegations upheld by the Tribunal.

27. Mr Gorasia argued that the perverse finding was to be found at §157 of the judgment where, after setting out the three relevant allegations in a heading, the Tribunal said *“This is accepted by Alessandra Toro, save that she objects to the description of racial profiling and prefers to describe it in the following terms...”*. Mr Gorasia argued that the only factual allegation which Ms Toro accepted was that she had carried out a profiling exercise (although she did not agree it amounted to racial profiling). She had denied using the profiling exercise to justify a negative pattern of behaviour towards the Claimant, or that she had made comments about the Claimant’s ‘Nigerian traits’. I was referred to her witness statement in which she described those allegations as untrue (see §§30 and 32 of the witness statement). Mr Gorasia submitted that it was perverse for the Tribunal to have treated all three allegations as having been accepted by Ms Toro.

28. I do not consider that this ground is well founded.

29. It is important to read the Tribunal’s reasons in a fair-minded way and as a whole. They should not be subjected to overly forensic or technical analyses which are unduly critical or nit-picky in nature: see for example per Lord Hope in *Hewage v Grampian Health Board* [2012] ICR 1054 at §26.

30. The Tribunal dealt with the three allegations (iii) to (v) in one section of the judgment from §157ff. It started by reproducing the three allegations as a heading. The paragraphs which follow then deal with each of them. In my judgment, read fairly, §157 addresses the first of the three allegations. The Tribunal was recording that Ms Toro accepted that she had engaged in a profiling exercise in March 2018, but that she objected to the description of it as racial profiling. It is clear that this paragraph deals with the first of the three allegations because of its substantive content. The point the Tribunal made about Ms Toro objecting to the description of racial profiling is specifically about allegation (iii). The reference to “*This*” being accepted by Ms Toro was not, in my view, a statement that Ms Toro had accepted each of the three allegations the Tribunal was dealing with in this section of the judgment. The Tribunal well understood Ms Toro’s differing account of her interactions with the Claimant, and in particular the interactions at the 19 April 2018 one-to-one meeting and in the following weeks. It had set out the Claimant’s and Ms Toro’s account earlier in the judgment: see §§24-31 of the judgment.

31. It follows that, read fairly, Ms Toro’s qualified acceptance referred to at §157 of the judgment was in relation to allegation (iii) only. The Tribunal did not find that Ms Toro accepted all of the allegations and therefore did not reach a perverse conclusion.

32. I dismiss ground 4 accordingly.

Ground 1: Did the Tribunal give adequate reasons for finding Ms Toro had stated to the Claimant that she possessed ‘Nigerian Traits’?

33. Ground 1 is that the Tribunal gave inadequate reasons for finding that Ms Toro had stated to the Claimant that she possessed ‘Nigerian traits’. Mr Gorasia developed this ground by raising a number of sub-points which I consider below.

Did the Tribunal adjudicate on the factual dispute relevant to allegations (iv) and (v)?

34. First, Mr Gorasia argued that the Tribunal failed to make findings of fact about the case that had been

run by the Claimant. He submitted that whilst initially the Claimant had complained that Ms Toro had referred to her having ‘Nigerian traits’, during her evidence the Claimant alleged that Ms Toro had used the phrase “*negative Nigerian traits*”. He submitted that the Tribunal erred in law at §159 by making a finding which did not correspond to the case run by the Claimant. Further, he submitted that the Claimant had not put to Ms Toro (who had given evidence before the Claimant) that she had used the phrase “*negative Nigerian traits*”.

35. I reject these criticisms.

36. The case that fell for the Tribunal’s adjudication was that which arose from the Claimant’s ET1 pleading. The three material allegations were pleaded in that document as follows:

“4. Some of the abuse and hostility incidents were of a racial and dehumanising nature:

...

c. Unbeknownst to me, [Ms Toro] went on to carry out a profiling exercise comparing herself to Nigerians i.e. myself in March 2018.

d. 19th April 2018 – She cited the racial profiling she carried out and stereotypes of Nigerians as justification for her negative pattern of behaviour towards me. It was at this time that I became aware that she had racially profiled me.

e. She reinforced to me on several occasions that the way she was treating me was due to the stereotypical traits of Nigerians.”

37. Points (d) and (e) in that list correspond to allegations (iv) and (v) referred to by the Tribunal. Those allegations were also set out in the List of Issues that was before the Tribunal. Allegation (iv) was: “*On 19 April 2018, Alessandro Torro us[ed] the racial profiling exercise... to justify a negative pattern of behaviour towards the Claimant*”. Allegation (v) was that Ms Toro “*comment[ed] to the Claimant that the way she was treating the Claimant... was due to the stereotypical traits of Nigerians*”.

38. As I have already indicated, the Tribunal set out a summary of the competing factual accounts relevant to the two material allegations: the one-to-one meeting of 19 April 2018, and the later meetings held over the next four weeks. These appear at §§24-31 of the Tribunal’s judgment:

- a) The Claimant's case was that Ms Toro had said at the 19 April 2018 meeting that she wanted to discuss the breakdown in their communication and that she knew she had been "*poking*" the Claimant. The Claimant alleged that Ms Toro had said she had researched Nigeria and realised she was different to Nigerians in many ways. Ms Toro then went through the profiling document and made a number of comments about differences between her and Nigerians including about Nigerians not keeping to time. The Claimant then alleged Ms Toro "*told her that the negative Nigerian traits explained in the document were the reason she had been treating the claimant in the manner that she had been treating her before that meeting, and that she would continue to treat the claimant differently going forward*" (see judgment §§25-6). In later meetings over the next four weeks, the Claimant alleged that Ms Toro verbally abused her and reminded her that "*the negative Nigerian traits were the reason colleagues did not want to work with the Claimant*" (judgment §27).
- b) Ms Toro's account was that at the 19 April 2018 meeting she made reference to the Claimant and her not communicating appropriately. She said she showed the Claimant the Berlitz report. Ms Toro defended the use of what she called a "*cultural fluency*" tool. The Tribunal recorded her evidence that she found the reports helpful including that the Nigerian working profile was "*fluid*" whereas her personal preferences were "*fixed*" and that whereas she preferred a "*direct approach*", the Claimant would, in accordance with the Nigerian working profile, prefer an "*indirect approach*" (see §§28-29). It is also clear from Ms Toro's witness statement at §32 that her evidence was that she tried to tailor her own style to reflect what she had learned from the Berlitz report and she explained this to the Claimant at the time.

39. It might have been helpful for the Tribunal at this stage of its judgment to have resolved the factual differences between the two accounts. That way, it could then have moved forward to an analysis on the basis of clear findings of fact concerning the meeting of 19 April 2018 and its aftermath. The Tribunal did, at §31, resolve one factual issue at this stage of the judgment: it concluded that the Claimant was not told in so many words that she was "*technologically backwards*".

40. Nonetheless, I must look to what the Tribunal then did in the section of the judgment dealing with the three allegations. At §159 the Tribunal repeated the Claimant's case concerning allegations (iv) and (v). It then reached its conclusions at §§162-5. It found that the manner in which the profiling exercise was communicated to the Claimant involved Ms Toro stating to the Claimant that the differences between their working styles were "*why I have been poking you*" and that she (the Claimant) possessed "*Nigerian traits*" (§162). The Tribunal further found that only the Claimant had been treated in this way (§163) and that Ms Toro had said that the Claimant's "*'Nigerian traits' adversely affected her working relationships with her colleagues who did not want to work with her*" (§165).
41. In my judgment, those conclusions involved the Tribunal adjudicating that the core elements of the Claimant's account relevant to allegations (iv) and (v) had been established. They corresponded to the pleaded case, which was in turn encapsulated in the list of issues.
42. I do not consider the Tribunal erred in law by finding that Ms Toro told the Claimant she possessed "*Nigerian traits*", or that it was precluded from so finding because the Claimant had contended in evidence that Ms Toro had used the phrase "*negative Nigerian traits*". The finding made by the Tribunal corresponded to the pleaded case and was not inconsistent with the Claimant's evidence. For the purposes of the case before the Tribunal it was not necessary or incumbent upon the Tribunal to consider whether the additional word "*negative*" had also been uttered by Ms Toro. The same point arises in respect of the finding that the Claimant's "*Nigerian traits*" adversely affected her working relationships.
43. As for the question of whether the Claimant had put to Ms Toro that she had used the phrase "*negative Nigerian traits*", Mr Davies for the Claimant submitted that it is clear from the materials before the EAT that she had. He referred to the Respondent's own notes of evidence which record the Claimant asking Ms Toro about the 19 April 2018 meeting. Those notes record that *inter alia* the Claimant asked Ms Toro whether she agreed that "*...you saying negative Nigerian traits were the reason you had been treating me in the way [you had]*". A later question also included reference to "*what you [Ms Toro]*

labelled as my negative Nigerian traits”. I was also provided with the Claimant’s question plan for cross examination. That included at question 18: “*Do you recall that you told me during the 19 April meeting that Annie, Caroline and EMA GBM colleagues did not want to work with me because of what you labelled as my negative Nigerian traits?*” On the basis of that material, I agree with Mr Davies that the Claimant did put to Ms Toro that she had used the phrase “*negative Nigerian traits*” and Mr Gorasia’s complaints in this regard are unfounded.

44. For these reasons I cannot accept Mr Gorasia’s criticism that the Tribunal failed to make appropriate adjudications on the factual allegations within (iv) and (v).

Did the Tribunal give adequate reasons for its adjudication?

45. Mr Gorasia next argued that, given that Ms Toro disputed the factual allegations at (iv) and (v), the Tribunal failed to give adequate reasons explaining why it rejected her evidence and preferred that of the Claimant.

46. As Donaldson LJ observed some time ago, the purpose of reasons given by an Employment Tribunal is not to provide “*a comprehensive and detailed analysis of the case, either in terms of fact or in law*”. Rather the aim is to “*to tell the parties in broad terms why they lose or, as the case may be, win*”: see ***Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542** at 551E-F. The standard has been expressed in various ways over the years. In ***Meek v City of Birmingham District Council* [1987] IRLR 250** Bingham LJ referred to the need to give “*an outline of the story which has given rise to the complaint and a summary of the tribunal’s basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts*”. In ***English v Emery Reimbold & Strick Ltd* [2003] IRLR 710**, Lord Phillips MR emphasised that this did not mean that “*every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained*”. Rather, “*the issues the resolution of which were vital to the judge’s conclusion should be identified and the manner in which he resolved them explained*”. In ***English v Royal Mail Group Ltd & Warburton* (2009) UKEAT/0027/08**, Bean J and members referred to the

need “to deal specifically with at least the principal points made in [the loser’s] closing written submissions”: see §12.

47. Cavanagh J summarised the relevant principles in *Frame v The Governing Body of the Llangiwg Primary School & Another* (2020) UKEAT/0320/19: see §§40–48. At §47 the Judge said as follows:

"The relevant principles can be summarised as follows:

(1) The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they had won or lost and so that the Appellate Tribunal/Court can understand why the Judge had reached the decision which s/he had reached;

(2) The scope of the obligation to give reasons depends on the nature of the case;

(3) There is no duty on a Judge, in giving his or her reasons, to deal with every argument presented by counsel in support of his case;

(4) The Judge must identify and record those matters which were critical to his decision. It is not possible to provide a template for this process. It need not involve a lengthy judgment;

(5) The judgment must have a coherent structure. The judgment must explain how the Judge got from his or her findings of fact to his or her conclusions;

(6) When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which s/he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question; and

(7) It is not acceptable to use a fine-tooth comb to comb through a set of reasons for hints of error or fragments of mistake, and try to assemble them into a case for oversetting the decision. Nor is it appropriate to use a similar process to try to save a patently deficient decision."

48. The Tribunal’s rules also provide guidance. At the time of the judgment under appeal, Rule 62(5) in Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** was in force. That states that reasons:

“... shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues...”

49. The obligation to make findings of fact is evident from that provision. It was described by this Tribunal in *Peart v Dixons Store Group Retail Limited* (2004) UKEAT/0630/04 at §26 (per HHJ Richardson and members):

“...it will generally be the duty of a Tribunal, faced with the decision as to whether a particular event occurred or not, to find as a fact whether it occurred. If there is evidence both ways, it can decide either way. Generally that is precisely what it should do. There will be rare occasions when the evidence is so finely balanced that the Tribunal is unable to make up its mind whether the event occurred or not. In that rare event, the Tribunal should say so, and the burden of proof will decide the issue.”

50. I was also referred to *Anya v University of Oxford* [2001] ICR 847 in which Sedley LJ endorsed observations by Morison J in *Tchoula v Netto Foodstores Ltd* (6 March 1998), unreported that *“A bald statement saying that X’s evidence was preferred to Y’s is... both implausible and unreasoned and therefore unacceptable... What a tribunal should do is state their findings of fact in a sensible order (often chronological) indicating in relation to any significant finding the nature of the conflicting evidence and the reason why one version has been preferred to another”*: see §§24-5.
51. I turn then to whether the Tribunal provided sufficient reasons for its decision on allegations (iv) and (v). As the authorities make clear, the reasoning must be sensitive to the circumstances of the particular case and what was accepted in evidence. Here, whilst the reasoning could have been fuller, I have concluded that it was sufficient.
52. First, the Tribunal found that the manner in which the profiling exercise was communicated to the Claimant involved Ms Toro stating to the Claimant that the differences between their working styles were *“why I have been poking you”* (judgment §162). In relation to this finding, it is important to consider the evidence that was before the Tribunal. The Respondent’s notes of Ms Toro’s cross-examination record that Ms Toro accepted that she had, on 19 April 2018, said she had been *“poking”* the Claimant. Ms Toro is recorded as saying: *“I do agree on the phrase that I was poking on you referring to feedback content”*. The Tribunal was entitled in my view to make its findings and give its reasons in light of that acceptance. Whilst the Tribunal might have referred to this part of the cross-examination, I do not consider that it erred in law by reaching this finding without doing so. The reasons are provided to the parties who knew what had occurred at the hearing. I do not consider further reasons for this finding were required.

53. Next the Tribunal found that in communicating the findings of the profiling document on 19 April 2018, Ms Toro stated that the Claimant possessed “*Nigerian traits*” (§162). Further, the Tribunal found that thereafter Ms Toro told the Claimant her “*Nigerian Traits adversely affected her working relationships with her colleagues who did not want to work with her*” (§165). Again the reasoning justifying these findings is brief, however it is tolerably clear to me, reading the reasons as a whole, that the Tribunal inferred that these matters had most probably occurred from the primary facts that it had found. Those primary facts included:

- a) Ms Toro was aware that the Claimant had been born in Nigeria and had lived there until 2007 (judgment §§6-7).
- b) In the profiling exercise Ms Toro aligned the Claimant with a Nigerian workstyle (judgment §162). This finding was supported by evidence given by Ms Toro at §§21-23 of her witness statement, summarised by the Tribunal at §29 of its judgment. Ms Toro had stated she used a Nigerian profile for the Claimant and treated her as “*someone who identified with a Nigerian workstyle*”. In my judgment the Tribunal was reaching a finding of primary fact that Ms Toro had in fact treated the Claimant for the purposes of the profiling exercise as possessing Nigerian traits.
- c) Ms Toro had communicated to the Claimant that there were differences between their working styles (judgment §162). The Tribunal summarised the relevant parts of Ms Toro’s evidence at §§28-9 of its judgment. In the context of discussing how to improve the way she and the Claimant were communicating, Ms Toro accepted she showed the Claimant the profiling documents “*and explained that I thought the analysis could be a good tool for us to use to better understand each other’s ways of working*” (witness statement §26). She further accepted that the Claimant took away the profiling documents (witness statement §27). She gave evidence that she had both tailored the way she had given feedback to the Claimant to reflect what she learned from the profiling documents, and that she had explained that she had

done so to the Claimant (witness statement §§25, 32).

- d) Ms Toro had stated she had contrasted traits identified in her own profile with that of the Nigerian profile attributed to the Claimant (judgment §29). This reflected Ms Toro's witness statement at §23.
- e) The profiling document was limited to comparing Ms Toro with a Nigerian profile attributed to the Claimant. The Claimant was the only person with whom the profiling documents were shared (judgment §§29, 30, 163). The Tribunal specifically rejected Ms Toro's evidence that similar analyses had been carried out using other nationalities (§163).

54. It is also relevant that, when it was suggested to Ms Toro in cross-examination that she had said colleagues did not want to work with the Claimant due to the Claimant's negative Nigerian traits, Ms Toro is recorded in the Respondent's notes of the evidence as having responded: *"I said due to several instances, perception was they didn't trust you to do the DD and preferring to connect with Natalie or me. No narrative. Honestly with the EMEA team and local leads and Jacksonville team would double check as don't trust you to do the full DD. Them coming to me asking to involve Natalie or me. They felt the quality of the checking was not what they were expecting. Don't agree I created the narrative or that I said that to you."* Whilst Ms Toro did not accept that she said colleagues did not want to work with the Claimant because of her negative Nigerian traits, she did accept that she had discussed with the Claimant complaints colleagues had with her, and that this was done in the context of a discussion which had attributed to the Claimant Nigerian traits.

55. In my judgment the Tribunal inferred from the primary facts I have set out that Ms Toro had likely stated to the Claimant that she possessed *"Nigerian traits"*. That is consistent with her having in fact attributed to the Claimant the Nigerian profile, having compared herself with traits from the Nigerian profile attributed to the Claimant, and having told the Claimant that there were differences in their working styles as evidenced by the profiling document. Similarly, in my view the Tribunal inferred from those

primary facts that Ms Toro had most probably said that her Nigerian traits adversely affected her working relationships with colleagues as the Claimant had alleged.

56. Those inferences from the primary facts were in my judgment open to the Tribunal of first instance. Whilst the reasoning by which the Tribunal joined the dots was very brief, the Tribunal set out the core factual findings required to draw the inference, and it was in my view tolerably clear from the reasons read as a whole that this is what the Tribunal had done.

Did the Tribunal engage with the Respondent's submissions on credibility?

57. A final strand of Mr Gorasia's argument was that in closing submissions before the Tribunal the Respondent had relied on the nature of the Claimant's allegation having changed (Ms Toro saying the Claimant had "*Nigerian traits*" v "*negative Nigerian traits*"). It had been submitted that this went to the Claimant's credibility. Mr Gorasia took me to his written closing submissions below and relied on having advanced approximately 7 pages of written submissions on credibility. He complained that the Tribunal erred by failing to engage with those credibility submissions.
58. It is true that in the closing submissions, the Respondent advanced a number of points relating to the Claimant's credibility. Not all of those points concerned the material allegations. Nonetheless the submission was made at §83 of the written closing submissions that the use of the phrase "*negative Nigerian traits*" was a "*change in position and is a hyperbolic and inherently incredible allegation particularly given that the Claimant did not raise this allegation in her email complaining about Ms Toro's treatment or her grievance*".
59. I do not consider that the Tribunal erred in law in failing to engage expressly with this particular submission. It is not incumbent on a Tribunal to deal with every point that is raised in argument before it. Here, as I have explained, the Tribunal found that Ms Toro had referred to the Claimant having "*Nigerian traits*". This finding corresponded with the pleaded case and the framing of it in the list of issues, and therefore the Claimant's position (at least prior to giving her evidence). As I have explained

it was not necessary for the purposes of deciding the pleaded case for the Tribunal to adjudicate on whether in addition Ms Toro used the adjective “*negative*” when referring to Nigerian traits. In these circumstances, I do not accept that it was incumbent on the Tribunal expressly to engage with the Respondent’s argument that the Claimant’s credibility was affected by her having said in evidence that Ms Toro also used the word “*negative*”. That was not in my judgment a sufficiently central point to require the Tribunal expressly to deal with it (cf *Royal Mail Group*). I note in this regard that the Tribunal did engage with the submission criticising the Claimant for not raising the allegation. The Tribunal found, at §165, that the Claimant *had* complained about the issue in May 2018 and raised it during her grievance meeting in August 2018.

60. For all these reasons I dismiss ground 1.

Ground 3: Did the Tribunal err by failing to construct a hypothetical comparator or by failing to undertake any comparative exercise?

61. I turn then to Ground 3. This is that the Tribunal reached a perverse outcome and/or gave inadequate reasons for finding that the Claimant was subjected to less favourable treatment by failing to construct a hypothetical comparator and/or undertake any comparative exercise. Whilst expressed in terms of perversity and failure to give adequate reasons, the real complaint is that the Tribunal failed to construct a hypothetical comparator or undertake any comparative exercise when determining the allegations of direct race discrimination.

62. Judge Susan Walker KC (hon) permitted this ground to proceed only in respect of allegation (iii): the carrying out of the racial profiling exercise in March 2018. It was not permitted to proceed in respect of allegations (iv) and (v) which concerned communications by Ms Toro to the Claimant arising from the profiling exercise. The Judge explained:

“It is not an error of law not to construct a hypothetical comparator, especially where the findings of the tribunal include conduct that is inherently discriminatory. I do not think this ground is arguable in respect of the second and third allegations ([identified as] (iv) and (v)...). However, as the Tribunal considered the three allegations in a rolled up manner, it is unclear whether they found that the carrying out of the racial profiling itself was discriminatory (issue (iii)...). If so, then it is arguable that they failed properly to consider the explanation given by Ms Toro and therefore failed to explain why it was not accepted.”

63. In his submissions, Mr Gorasia accepted that it does not amount to an error of law for a Tribunal to fail to construct a hypothetical comparator. I agree.
64. The wording of section 13(1) **Equality Act 2010** (“EqA”) does not require Tribunals to adopt a two-stage approach of considering separately whether an employer has treated the employee “*less favourably than [s/he] treats or would treat others*” before then considering whether that was “*because of a protected characteristic*”. That conclusion has been reached by this Tribunal in a number of cases: see for example **Law Society v Kamlesh Bahl** [2003] IRLR 640 (see the discussion at §§103ff and the conclusion at §115) and **Amnesty International v Ahmed** [2009] ICR 1450 (see §38). The conclusion follows from Lord Nicholls’ analysis in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, at §§8, 11-12:

“8. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined¹.

...

11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

12. The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the claimant. Adopting this course would have simplified the issues, and assisted in their resolution, in the present case.”

¹ That the issues are intertwined is reinforced when one considers Lord Rodger’s assessment of what amounts to relevant circumstances that must be kept constant on any comparison in accordance with what is now section 23(1) EqA (there, article 7 of the Sex Discrimination (Northern Ireland) Order 1976). In **Shamoon** Lord Rodger explained at §134: “... ‘the relevant circumstances’ in article 7 are those which the alleged discriminator takes into account when deciding to treat the woman as he does or when deciding to treat the man as he treats, or would treat, him.”

65. In *Bahl*, Elias P summarised the position as follows (§§126-8):

“126. In our opinion the decision in Shamoon indicates that tribunals need not be unduly concerned to identify which is the hypothetical comparator in order to address the issue of less favourable treatment, as though this were a necessary stage in the reasoning process. That may lead to unnecessary and needless disputes. The tribunal must of course ensure that there is a proper comparison of like with like: that is essential to the finding of less favourable treatment. Moreover, the relevant statutory provisions require a comparison such that the relevant circumstances of the comparator are the same or not materially different from those of the applicant. However, the significance of identifying the comparator is that it identifies potential differences between the applicant and comparator which could explain the difference in treatment. Strictly, whether those factors are considered in the context of constructing an appropriate hypothetical comparator or whether they are considered in the context of the stage of determining the reason for the conduct will not matter in practice, although the decision in Shamoon makes it plain that all relevant factors should be considered at both stages, and indeed that ultimately there is only one question. What is crucial is that the tribunal considers all the explanations which, in the light of its findings, may realistically explain the decision. These explanations may be the reasons for the treatment relied upon by the alleged discriminator which the tribunal accepts as genuine, or they may naturally suggest themselves in the light of the tribunal's primary findings of fact. Provided these potential explanations are considered, the tribunal will in fact have taken account of all the characteristics that could be material to the make up the hypothetical comparator, however the comparator is defined.

127. If these possible explanations are going to be rejected in favour of a discriminatory reason, or if the tribunal finds that in addition proscribed reasons have contributed to the decision, then the tribunal ought to say why, and there must be a proper evidential basis for that conclusion. It is not legitimate to infer discrimination simply on the grounds that the reasons are unjustified; that would be to fall into the Zafar trap.

This does not mean that it is irrelevant whether an explanation is reasonable or not. The more obvious the ‘innocent’ explanation for the treatment, the stronger should be the evidence to displace it. Conversely, if the explanation given for the treatment is unreasonable or unsatisfactory then that may justify the tribunal inferring that it is not genuinely held. If there is no other cogent explanation arising from the evidence for the treatment complained of, then the rejection of the reason may (not must) justify an inference of discrimination. If, however, the tribunal accepts that the reason given for the treatment is genuine, then unless there is evidence to warrant a finding of unconscious discrimination, such that the tribunal is really finding that the alleged discriminator has concealed the true reason even from himself, there will be no basis to infer unlawful discrimination at all. Tribunals can in a proper case make a finding of unconscious discrimination, but it is a significant finding for a tribunal to hold that they can read someone's mind better than the person himself, and they are not entitled to reach that conclusion merely by way of a hunch or speculation, but only where there is clear evidence to warrant it.

128. It is not, therefore, an error of law to fail to construct a specific hypothetical comparator, provided all potentially non-discriminatory reasons which might sensibly account for the treatment have been properly taken into consideration. These may be the reasons actually given in evidence by the alleged discriminator, if they are accepted as genuine by the tribunal. Even if they are rejected, there may be other reasons which, on the facts found by the tribunal, could provide a cogent and non-discriminatory explanation for the conduct. If such non-discriminatory reasons are to be rejected, then the tribunal needs to state clearly why.

66. Faced with this authority, Mr Gorasia focused his submissions on the second part of the pleaded ground: that the Tribunal failed to undertake any comparative exercise when scrutinising Ms Toro's non-discriminatory reason for undertaking the profiling exercise. Whilst there was reference to lazy stereotyping in the profiling, he submitted that the Tribunal had failed properly to engage with Ms Toro's reason for the profiling: she undertook a comparison of working styles in order to 'flex' her workstyle preferences and to avoid unfavourable treatment on the grounds of different workstyles which may arise from cultural country norms. Mr Gorasia also submitted that Ms Toro had also 'profiled' herself at the same time as the Claimant and that she was therefore an appropriate actual comparator.
67. I do not consider that Mr Gorasia's submissions are well founded, or that an error of law on the part of the Tribunal has been demonstrated.
68. In accordance with the authorities referred to above, the Tribunal was entitled to focus on the evidence concerning why Ms Toro had undertaken the particular profiling she did on the Claimant. The Tribunal did not ignore or fail to engage with Ms Toro's reasons. It understood and set out her evidence as to why she attributed to the Claimant a generic Nigerian profile containing a number of lazy stereotypes. At §158 of the judgment the Tribunal recorded that Ms Toro used a Nigerian profile because the Claimant had referred to her working practices being influenced by her childhood in Nigeria and her time working there with Procter and Gamble. The Claimant's childhood and early working experience had been in Nigeria because, as the Tribunal found, she had been born there and lived there. That was, on the Tribunal's findings, connected to her Nigerian nationality, ethnic and/or national origins.
69. The Respondent did not submit that a comparator of non-Nigerian nationality and non-Nigerian ethnic and national origins who had spent their childhood and early working life in Nigeria would also have been allocated the generic Nigerian profile in the same way as the Claimant. Nor did it lead evidence to that effect. Rather, the Respondent focused on Ms Toro's explanation being that she profiled the Claimant and others with the intention of 'flexing' her workstyle preferences and avoiding unfavourable treatment on the grounds of different workstyles arising from cultural/country norms. The way the case

was run is clear from the extracts of the evidence before this Tribunal and from the Respondent's closing submissions at §§79-84. In these circumstances, the Tribunal cannot in my view be criticised for failing to construct a hypothetical comparator similar to that which I have outlined, or by failing to consider the particular comparison inherent in it. In any event, I was shown no evidence that was before the Tribunal that such a comparator (or a similar comparator) would have been treated in the same way as the Claimant.

70. The Tribunal considered and rejected part of the explanation Ms Toro advanced – viz that she used the profiling tool to make comparisons with others as well as the Claimant at the material time. The Tribunal found that only the Claimant had been treated in this way and that the profiling document made no references to any other nationality/country (§29, §163). This was a significant finding in my view. It involved the rejection of the Respondent's case that the profiling was part of a wider exercise and supported the Claimant's case that the reason she alone had been profiled was her race.
71. The Tribunal also expressly considered what Ms Toro had said about her intention in carrying out the profiling (see §28, §158). I see no error or inconsistency in the Tribunal nonetheless finding that the profiling was done because of the Claimant's race (§164). The evidence of Ms Toro's intentions did not, properly analysed, amount to a true competing non-discriminatory reason for the profiling. Ms Toro was claiming she had benign or good intentions when conducting the profiling. That is not the same as saying that the profiling was not done because of the Claimant's race. An employer who discriminates with good intentions nonetheless remains liable for the discrimination in question (see e.g. the employer's motive in *Amnesty International*).
72. Mr Gorasia's final point was that Ms Toro had profiled herself as well as the Claimant and therefore she would have been an appropriate comparator and the Tribunal erred by failing to consider her as such. I reject that argument. First, I am far from convinced from the materials before me that this argument was run in these terms below. However it is clear that Ms Toro was not profiled in the same way as the Claimant. At §20 of her witness statement, Ms Toro's profile was "*already programmed in[to]*" the

system having been built as a bespoke personal profile to her. By contrast, the Claimant was attributed a generic Nigerian profile employing, the Tribunal found, lazy stereotypes. Ms Toro confirmed at §179 of her supplementary witness statement that she did not create a personal profile for the Claimant. There was no finding or suggestion that Ms Toro's profile was generic or involved lazy stereotypes in the same way as the Claimant. It follows that, to the extent Ms Toro was a relevant comparator, the evidence showed she received more favourable treatment (a bespoke profile) as compared to the Claimant.

73. Furthermore, in my judgment there were material differences between Ms Toro and the Claimant that were relevant to their treatment. It was not suggested that Ms Toro had grown up in Nigeria, or that she had early working experiences in Nigeria. She was therefore not in a comparable situation to that of the Claimant. Further, Ms Toro was not in the position of being profiled by her manager and being compared to her manager's bespoke profile. These differences would, in my view, have precluded Ms Toro constituting a statutory comparator, or an evidential comparator of any value².

74. For all of these reasons, I conclude that the Tribunal did not err in its conclusion that allegation (iii) constituted less favourable treatment of the Claimant because of her race. The Tribunal considered the explanation and case the Respondent put forward below. It was not incumbent upon it to construct a hypothetical comparator; it focused on the evidence going to the true reason for the treatment. The reasoning of the Tribunal was adequate and not perverse. I therefore dismiss the appeal on ground 3.

The Just and Equitable Extension of Time

75. I now turn to consider the Respondent's appeal in relation to the Tribunal having extended time for the presentation of allegations (iii) to (v).

Legal Principles

76. A complaint of direct race discrimination must be presented to the Tribunal within the period set out in

² In relation to the distinction between an actual statutory comparator and an evidential comparator, see Lord Scott's judgment in *Shamoon* at §§107-110.

section 123(1) EqA. The complaint must be brought within the period of three months starting with the date of the act to which the complaint relates: section 123(1)(a). This can be called the ‘primary’ limitation period. Alternatively, the complaint must be brought within “*such other period as the employment tribunal thinks just and equitable*”: section 123(1)(b). Technically, s123(1)(b) is part of the definition of the statutory time limit; however this alternative is often referred to as the provision empowering the Tribunal to extend the primary time limit on the just and equitable basis. The principles governing such extensions are well-known. Of relevance to this appeal are the following.

77. When determining the “*other period*” which the Tribunal considers “*just and equitable*” for the purposes of section 123(1)(b), the Tribunal exercises a discretion. The “*wide words*” of the subsection confer an equally “*wide discretion*” (*Hutchison v Westward Television Ltd* [1977] ICR 279); indeed it has been referred to as the “*widest possible discretion*” (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at §18). From time to time arguments have been advanced suggesting that the discretion should be exercised either strictly or liberally. There is, however, “*no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised...Whether a claimant has succeeded in [persuading the Tribunal to extend time] is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it*”: *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 per Sedley LJ at §§31-2; see also *Jones v Secretary of State for Health and Social Care* [2024] IRLR 275 at §§30-35.
78. Whilst the factors identified in section 33 of the **Limitation Act 1980** have been suggested as a useful guide (*British Coal Corporation v Keeble* [1997] IRLR 336 at §8), section 123(1)(b) EqA contains no statutory list of considerations and it is wrong to treat the provision as if it did: see *Southwark London Borough Council v Afolabi* [2003] ICR 800 at §33; *Morgan* §18; and see the similar reasoning concerning relief from sanctions in *Neary v Governing Body of St Albans Girls’ School* [2010] ICR 473 at §47. Nonetheless, when exercising the discretion, the Tribunal must ensure that no significant factor or consideration is left out of account: *Morgan* §18. As Leggatt LJ observed at §19 of *Morgan*:

“... 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).”

79. In ***Concentrix CVG Intelligent Contact Ltd v Obi* [2023] ICR 1**, HHJ Auerbach regarded it as “*unsurprising*” that the length of, and reasons for, the delay would almost always be relevant, observing that no one had “*yet been able to come up with an example of a case in which it would be immediately obvious that this was wholly irrelevant*” (§61). It is perhaps for this reason that Underhill P in ***Accurist Watches Limited v Wadher* (2009) UKEAT/0102/09** used the stronger language of it being “*always necessary*” to identify the cause of the failure to bring the claim within the primary time limit of three months (see §15). The presence of a ‘good’ explanation (that is to say a full, honest and acceptable reason for the delay) will no doubt assist a claimant; however it does not follow that the discretion cannot be exercised in a claimant’s favour without one: see ***Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] ICR 283** at §16. More recently, in ***Morgan***, Leggatt LJ explained that (§25):

“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.”

80. The onus is on a claimant who requires an extension to persuade the Tribunal to grant it: ***Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132** at §28. As Wall LJ put it in ***Caston***, “*the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour)*”: see §26. There has, however, been some debate in the authorities about whether a Tribunal is prevented from concluding that it is just and equitable to extend time in circumstances where, on consideration of all the evidence, including the claimant’s, no reason for the delay has been advanced. Conflicting authorities were reviewed by HHJ Auerbach in ***Concentrix***. Fortified by, *inter alia*, the decision in ***Morgan***, the EAT concluded that the absence of a reason for the delay in the evidence does not as a matter of law mean that a just and equitable extension must be refused: see §§50-66.

81. In the course of his judgment in *Concentrix*, HHJ Auerbach observed that “...it would usually be an error not to consider the question [of delay and reasons for it] at all, but that is a different point.” (§66). Where relevant, and where a reason for the delay emerges from the evidence, the Tribunal must properly engage with the reason and explain how it weighed this factor in the balance when exercising the discretion: see *Polystar Plastic Limited v Liepa* [2023] EAT 100 at §47.
82. Similarly, whether the delay has prejudiced the respondent in meeting the claims must be considered by the Tribunal and weighed into the balance as the passage I have cited from *Morgan* makes clear.
83. A Tribunal is also entitled to consider the merits of the relevant claim(s) and weigh this in the balance when considering the justice and equity of granting an extension. However, as HHJ Auerbach explained in *Kumari* (§59):
- “...even if the merits are assessed as better than no reasonable prospect, or even if found meritorious at a full trial, subject to the time point, it does not follow that time will always in such a case be extended, because that factor may be outweighed by other considerations, including possible considerations of prejudice in favour of the respondent. See the discussion in *Ahmed v Ministry of Justice* , UKEAT/0390/14, at [67].”
84. In argument, Mr Davies, for the Claimant, submitted that where a claim is adjudicated as meritorious at a final hearing, and where the respondent is found not to have suffered prejudice in meeting the claim, those factors will constitute paramount factors in the exercise of the discretion. I do not consider that this proposition should be endorsed as a matter of generality. The authorities I have cited above are clear that it is for the Tribunal at first instance to consider all the relevant circumstances and weigh them appropriately: see, e.g. *Caston* at §§31-2. As *Kumari* at §59 makes clear, it does not follow from the fact that a case is well-founded that an extension of time will be given. The same can be said for the absence of prejudice. Whilst the two factors in combination are likely to provide a promising basis for the exercise of the discretion, all relevant factors still have to be balanced. To accept Mr Davies’

submission as a general proposition would be to fetter the wide discretion that is for the Tribunal to exercise in accordance with the principles above.

85. Finally, the exercise of the discretion is for the Employment Tribunal. The EAT can only interfere if an error of law is disclosed: see *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434 at §§24, 35 and *Caston* at §§17, 29, 32. In *Morgan* Leggatt LJ summarised the position as follows (§20):

“...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 Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434, para 24.”

The Tribunal’s Analysis

86. The Tribunal recognised that the acts of direct race discrimination which it considered established had been presented outside of the primary limitation period of three months. It therefore considered whether to extend time, and concluded that it would be just and equitable to do so. In addition to §165, which I have already set out, the Tribunal gave its reasons at §§230-232 as follows:

“Time limits

230. The Tribunal found [for] the claimant in [relation to] the complaint about Alessandra Toro profiling. [The relevant acts] do not form part of a continuing act that was in time.

231. The Tribunal consider that it is just and equitable [to extend time] because the claims [in] which the claimant has succeeded ... have permeated the whole case and in many respects are the trigger for the claimant’s disenchantment with the respondent and underly all her thinking about the events that occurred up to the time of her dismissal.

232. The respondent has been able to respond to the complaints and was not prejudiced in its ability to reply and respond to the details of the claimant’s allegations. In extending time other than the fact that the claims are out of time there is no prejudice to the respondent. However, in refusing the application to extend time the claimant would be left with a burning sense of injustice in respect of issues which go to the heart of all her complaints and further which were in our view well founded.”

87. Three overlapping grounds of appeal against these conclusions have been permitted to proceed: grounds 5, 6(ii) and 7.

Ground 6(ii)

88. It is convenient to take ground 6(ii) first. This ground is that the Tribunal failed to analyse the Claimant's explanation for delay in bringing the complaint.
89. Mr Gorasia for the Respondent submitted, relying on *Morgan*, *Concentrix* and *Pizza Express* that the Tribunal had entirely failed to consider the extent of the delay and whether the Claimant had offered any explanation for it. He submitted that this was to leave out of account an important factor relevant to the exercise of discretion, and amounted to an error of law. He further submitted that as the Claimant advanced no explanation for the delay in presentation, this Tribunal should substitute a decision that there should be no just and equitable extension, and that the claims are out of time. Alternatively, he submitted that the matter should be remitted to a fresh Tribunal given the emotive language used by the Tribunal in its decision.
90. Mr Davies disagreed. He submitted that the Tribunal had in fact considered the extent of the delay and the reasons for it. He pointed to §165 of the reasons where the Tribunal referred to the Claimant having first complained about the issue in May 2018 and having raised it during her grievance meeting. He also relied on the Tribunal having found that the discriminatory act "*continued to impact ... the claimant*" (§165), that the Claimant had been unable to work due to sickness from 21 February 2019 (judgment §53), was "*never in a position where she was ready to return to work*" (judgment §220), and that she claimed mental health injury as a result (judgment §228).
91. Having carefully considered the Tribunal's decision, I am satisfied that an error of law is disclosed. I reject Mr Davies' submissions that the extent of, and reasons for, the delay in presenting the claim were

properly weighed into the balance by the Tribunal. Other than identifying the date of presentation, and the impact of EC (see judgment §57), the Tribunal did not identify how late the claim was in respect of the relevant allegations, nor did it identify or analyse any reasons that lay behind the delay (or in the absence of any good reason, take that into account when exercising its discretion). The matters referred to by Mr Davies are not said by the Tribunal to amount to the reasons for the delay and in my view amount to him effectively rearguing the point, rather than identifying places where the Tribunal assessed the reasons for the delay. Whilst the Tribunal found that the Claimant had been impacted by the discriminatory conduct, and that the relevant allegations were the “*trigger for the claimant’s disenchantment*”, it did not suggest that explained the delayed presentation of the claims. Nor did it suggest the Claimant’s absence from work provided the reason. This is perhaps unsurprising given that, as Mr Gorasia submitted, without any real contradiction on behalf of the Claimant, the Claimant had not advanced evidence giving reasons for the delay in presentation.

92. I agree with Mr Gorasia that it was an error in this case for the Tribunal not to assess the extent of, and any reasons for, the delay in presenting the complaint. As Leggatt LJ explained in *Morgan* these factors will almost always be relevant and I see no principled reason why they should not be in this case. The Tribunal erred by failing to consider these relevant considerations when exercising its discretion: how out of time the relevant claims were, why this was so, and the presence or absence of a good reason for the delay.
93. As can be seen from §§231-232 of the judgment, the Tribunal did consider the merits of the Claimant’s claims along with the extent of the prejudice suffered by the Respondent in meeting the Claimant’s allegations. The Tribunal was plainly right to consider these factors. However, as I have explained, its error lies in not weighing them against the issue of delay, whether or not there were acceptable reasons for the delay, and any other relevant factors. I considered whether the Tribunal’s reasons, read fairly, can be understood as the Tribunal identifying the meritorious nature of the claims and the absence of prejudice as being the critical factors justifying an extension in this particular case. That would certainly be a conclusion open to the Tribunal provided that it had considered all the relevant factors. The

difficulty here is that the Tribunal has given no indication that the extent of the delay, and the absence of good reason for it, formed part of its assessment of whether to grant an extension.

94. For these reasons, I conclude that the Tribunal did err in law by failing to take into account relevant circumstances.

95. I turn then to disposal. I decline Mr Gorasia's invitation to substitute a decision. I do not consider that there is a single clear answer to the issue of whether to grant a just and equitable extension of time. Even if the Claimant did not put forward evidence concerning the reason for the delay, that fact does not preclude an extension being granted. It is for the Tribunal of first instance to weigh up all the legally relevant factors and exercise the discretion. Whilst I have identified factors that ought to have been considered, nothing in this judgment should be taken as fettering the Tribunal's discretion when attributing the weight it considers appropriate to the respective considerations. In accordance with *Jafri v Lincoln College* [2015] QB 781 and *Burrell v Micheldever Tyre Services Ltd* [2014] ICR 935 the case must be remitted.

96. Should the remittal be to the same Tribunal or a fresh Tribunal? For the Respondent Mr Gorasia submitted that the remittal should be to a new Tribunal because of emotive language in the decision which, he submits, raises questions about whether the Tribunal can remain impartial. Mr Davies for the Claimant disagreed. He submitted the case should return to the same Tribunal.

97. I have considered the factors outlined in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763. In my view there are distinct advantages to the matter being remitted to the same Tribunal. It is familiar with the case having heard all the evidence over a considerable period. Much of the judgment was not challenged. The issue of time (and particularly whether a just and equitable extension should be granted) is a discrete point. On the other hand, the advantage of a fresh Tribunal is that there would be no temptation to reach the same result in an unthinking or reflexive way without going through the proper process of assessing the evidence and weighing the relevant factors. Ultimately, I have concluded that

the professionalism of the Tribunal can be relied upon to reconsider the issue afresh. I do not consider that Mr Gorasia's principal objection is well founded. The language used by the Tribunal below was not so emotive that the fair-minded and informed observer would consider that there was a real possibility that the Tribunal had predetermined the issue or was biased. Nor does the language used give rise to an indicator that the Tribunal is not capable of a professional approach to dealing with the matter on remission.

98. The matter will therefore be remitted to the same Tribunal to reconsider the issue of whether there should be a just and equitable extension of time. I accept Mr Davies' submission that, given that the issue has been reopened by legal error, it would be fair for the parties to be permitted to give evidence on the issue of a time extension at the remitted hearing. Whilst the Claimant did not give evidence on this specific point before the initial Tribunal, I am told that this arose as a result of her representing herself. With the benefit of advice, her position now is that she would wish to give evidence in support of a time extension. In my judgment it would be fair for my disposal order to enable both parties to call evidence (if so advised). It will be for the Tribunal to conduct any further case management it considers necessary.

The Remaining Grounds

99. Given my decision on ground 6(ii) it is not strictly necessary for me to determine the other grounds advanced. I shall, however, briefly address them. For the reasons that follow, I do not consider that grounds 5 or 7 contain a well-founded error of law beyond that already identified under ground 6(ii).
100. Ground 5 was that the Tribunal's reasoning for the decision to extend time was inadequate. Whilst the reasoning given by the Tribunal was short, I do not consider that it failed to tell the parties why the Claimant succeeded and the Respondent failed on the issue of the extension of time. Of course, I have concluded that relevant matters were not considered and not contained in the reasoning, but that is a separate point dealt with above.
101. Nor do I consider that ground 7 is made out. The Tribunal did not reach an inadequately reasoned or perverse finding that the profiling exercise polluted the Claimant's relationship with her colleagues.

102. Mr Gorasia argued that the reasoning was incoherent and inadequate; he submitted the Tribunal found none of the Claimant's other complaints were well-founded and therefore had no basis for concluding that there was a sufficient trigger for the "*burning sense of injustice*" or disenchantment it found. In my view that argument is not sound. It is not necessarily incoherent or inconsistent for the Tribunal to reject a number of claims, but find three allegations well-founded, and then conclude that the profiling exercise gave rise to disenchantment/a sense of injustice on the part of the Claimant. Further, and in any event, there is a qualitative difference between a complaint being well-founded and it existing in the mind of the complainant so as to give rise to a sense of injustice. In my judgment the impugned conclusion was open to the Tribunal on the evidence before it. This is not a case where no reasonable Tribunal, on the evidence, could have reached that conclusion. I therefore reject the perversity argument.

103. Mr Gorasia also argued the Tribunal did not give reasons for rejecting the Respondent's submissions on the Claimant's credibility when finding the profiling exercise affected the Claimant's relationship with her colleagues. I have already considered these submissions under ground 1 above. Similarly here, I do not consider that when reaching the impugned finding it was incumbent on the Tribunal expressly to deal with these points.

Conclusion

104. It follows from the above that I consider ground 6(ii) well founded and allow the appeal against the conclusion that time should be extended on a just and equitable basis. That issue is remitted to the same Tribunal to be reconsidered, with the parties at liberty to call evidence on the point. Otherwise, the other grounds of appeal are dismissed.