Appeal No. UKEAT/0039/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 22 November 2019

Before

HIS HONOUR JUDGE AUERBACH

MR P M HUNTER
MR M WORTHINGTON

TEES ESK AND WEAR VALLEYS NHS FOUNDATION TRUST — APPELLANT

(1) MS H ASLAM (DEBARRED) — RESPONDENTS
(2) MS M A HEADS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CLAIRE MILLNS (of Counsel) Instructed by: Ward Hadaway Solicitors Sandgate house 102 Quayside Newcastle Upon Tyne NW1 3 DX
For the First Respondent	Debarred
For the Second Respondent	No appearance or representation

SUMMARY

HARASSMENT – Conduct

The Claimant in the Employment Tribunal was present when a colleague made a remark which included a reference to ISIS. She complained that this amounted to harassment by way of conduct related to race, identified by her for this purpose as her own race of being British Asian Indian. The Tribunal upheld the complaint and the First Respondent (the employer) appealed.

Held: The Tribunal erred because:

(1) It did not make a clear and distinct finding that the conduct related to race, as opposed to addressing the other elements of the definition of harassment;

(2) If it did consider that the conduct related to race, it appeared to have done so on the basis of its view that the "perception of ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular, those in such areas as Pakistan, Afghanistan and Iran". But, if so:

   (a) That was not a proper finding, because there was no evidence before the Tribunal to support it. It was not a matter of which it could take judicial notice;

   (b) In any event the Tribunal had to decide for itself whether the conduct, and, in this case specifically the making of a reference to ISIS, related to race, as opposed to relying on what it took to be the public perception; and

   (c) In any event it was unfair to the First Respondent to reply upon this proposition, because it had not been put forward, or canvassed, by either the Claimant or the Tribunal during the course of the hearing.

(3) The Appeal would therefore be allowed, and the decision upholding this complaint, and the associated award, quashed. On the evidence before the Tribunal, and the facts as

found, the Tribunal, correctly applying the law, could not have properly concluded that this was conduct related to race, as alleged. The matter would therefore not be remitted.

HIS HONOUR JUDGE AUERBACH

1. This appeal concerns the definition of harassment found in section 26 of the **Equality Act 2010.** Specifically, it concerns the requirement, in a case said to fall within section 26(1), that the conduct in question must be conduct "related to" a relevant protected characteristic. We shall refer to the parties as they were in the Employment Tribunal ("the ET"). The Claimant was, at the relevant time, employed by the First Respondent. She brought multiple complaints under the **2010 Act** relating to a number of alleged matters. Some of these concerned the alleged conduct of the Second Respondent, who was her original line manager. Some concerned the alleged conduct of other colleagues.

2. All of the complaints were considered at a full merits Hearing held at Middlesbrough in July and August 2018 before Employment Judge Shepherd, Mrs D Winter and Mr R Greig. The Claimant appeared in person. The Respondents were represented by Ms Millns of counsel. In a reserved Decision sent to the parties on 18 October 2018, the Tribunal dismissed all of the complaints, save for one of harassment related to race. That concerned a remark found by the Tribunal to have been made by another employee of the First Respondent, Dr Gerry Doyle, to a group which included the Claimant. It ordered the First Respondent to pay the Claimant £1500 by way of compensation for injury to feelings in that respect.

3. The First Respondent appealed against the Liability Decision in respect of that complaint. The four short grounds set out in the Notice of Appeal were considered by His Honour Judge David Richardson to be arguable. The Second Respondent entered an Answer indicating that she did not intend to resist the appeal and, indeed, agreed with the grounds of appeal. She has played no further active part in the proceedings. The Claimant failed to file an

Answer. That led to the Registrar making an Unless Order. Upon her failure to comply with its conditions, an Order was made debarring the Claimant from taking any further part in this appeal. That latter Order was made on 15 May 2019 and sealed on 3 June 2019. Neither the debarring of the Claimant, nor the lack of opposition from the Second Respondent, mean that this appeal should, therefore, automatically be allowed. It must be considered on its merits in any event.

4. In that regard, we have had the benefit of considering a skeleton argument, and hearing oral argument today, from Ms Millns, who has, once again, appeared for the First Respondent, now the Appellant.

5. The relevant provisions of the **2010 Act** are as follows:

> **"9. Race**
>
> **(1). Race includes—**
>
> **(a) colour;**
>
> **(b) nationality;**
>
> **(c) ethnic or national origins.**
>
> **(2) In relation to the protected characteristic of race—**
>
> **(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;**
>
> **(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.**
>
> **(3). A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.**
>
> **(4). The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.**
>
> **….**
>
> **26. Harassment**
>
> **(1). A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B….

…..

(4). In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

….

41. Contract workers

(1). A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

….

109. Liability of employers and principals

(1). Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2). Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3). It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4). In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

…."

6. As we have already mentioned, while there were multiple complaints, only one succeeded, and it is the Liability Decision in relation to it that is the subject of this appeal. It concerned a remark found to have been made on a particular occasion by Dr Doyle. He did not feature in any of the other allegations, and nothing alleged by the Claimant, or found by the Tribunal, about the other matters, had any bearing on the Tribunal's reasoning in relation to this particular complaint. For all of those reasons, we do not need to say anything more about the other complaints that failed. However, we may note that the Tribunal identified that all of the complaints, and the legal and factual issues, had been clarified and identified at an earlier

Preliminary Hearing before Employment Judge Buchanan. It then reproduced, within its Decision, the text in full of the issues, as recorded on that previous occasion.

7. The complaint with which we are concerned was identified as being allegation 16, that "on 19 September 2017 the Claimant was subjected to race-related harassment by Gerry Doyle at Mulberry Centre Darlington." The list of issues derived from that earlier Preliminary Hearing then set out, in generic forms, the legal issues to which the different complaints gave rise. The Tribunal, at that earlier Hearing, had gone on to describe how a draft list of factual issues produced by the Respondents had been discussed with the Claimant, as a result of which an amended list of issues had been produced, and agreed by her. It then set out those agreed issues in relation to each of the complaints in turn.

8. In relation to the complaint which is the subject of this appeal, the Tribunal set out the agreed issues as follows:

> **"13.2. Did the First Respondent's employee (Gerry Doyle) engage in unwanted conduct towards the Claimant: by making the comment described by the Claimant?**
>
> **13.3. Was the conduct related to the Claimant's protected characteristic of race (British Asian Indian)?**
>
> **13.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant?**
>
> **13.5. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether, if it did, it is reasonable for the conduct to have that effect."**

9. The Tribunal which heard the matter then set out its findings of fact at paragraph 7 of its Decision. It recorded that the Claimant was employed by the First Respondent as a band five nurse in its Child and Adolescent Mental Health Service (CAMHS) from 31 October 2016. The Second Respondent was the Claimant's line manager during the time that she worked at the Ackley Centre in Newton Aycliffe. Because of the narrow scope of this appeal, we can pass

over entirely much of the detailed findings of fact about how events then unfolded over the following 21 months or so. However, the Tribunal made factual findings about various alleged incidents, and about how the Claimant raised, first, an informal grievance, and then a formal grievance. These were focussed on the alleged conduct of the Second Respondent. The Tribunal also considered the course of the grievance process thereafter.

10. In the course of its findings, the Tribunal recorded that in January 2017 the Claimant was temporarily relocated to Middlesbrough CAHMS, and then, in February 2017, to the Mulberry Centre, Darlington, which is where the incident with which we are concerned occurred. The Tribunal set out the following findings of fact about that incident:

> **"7.34. On or around 19 September 2017 the Claimant said that, at around 12:30pm, a psychiatrist, Dr Gerry Doyle had made a remark to the whole team about a young man he'd seen in his clinic. The allegation was that Dr Doyle stated, "I've just seen this boy; he should join ISIS that'll sort him out" and went on to comment on how hyper the boy was because of his ADHD.**
>
> **7.35. The Claimant alleged that this was an offensive remark. She was the only Asian member of staff and there had been several recent terrorist bomb attacks in Manchester and London. She said that it was very insensitive and she was very disturbed by the comment. The Claimant had said, in her list of allegations, that this occurred on 19 September 2017. In her witness statement she said that she could not remember the exact date and that it occurred sometime between 7 to 19 September 2017.**
>
> **7.36. Matthew Evans, Child and Adolescent Psychotherapist, said he was not at work on 19 September 2017 but he did remember Dr Doyle making such a remark and that it could well have been a different day in September 2017. He knew it was on a Monday. He agreed that Dr Doyle had made a comment like the one referred to by the Claimant. He said his impression at the time was the comment was a badly judged attempt at dark humour and that the team collectively pulled Dr Doyle up on the remark. It was an inappropriate comment to make about a service user. It was a throwaway comment in bad taste about a patient and later that afternoon Dr Doyle had spoken to Matthew Evans and indicated that he regretted making the comment. He said that it was not a comment about the Claimant's race and, in fact, Dr Doyle did not even mention the race of the patient to whom he was referring."**

11. We interpose that Dr Doyle was not, in fact, a witness before the Tribunal. The only witnesses who give evidence about this incident were the Claimant and Matthew Evans. The Tribunal also had no documentary or other evidence relating to it or casting light upon it.

12. After completing its findings of fact, the Tribunal moved on, in paragraph 8, to direct itself as to the law, including citing sub-sections 26(1) and 26(4) of the **2010 Act**. The Tribunal then turned to its conclusions. In relation to this particular complaint they were as follows:

> **"71. Allegation 16-19 September 2017. This is an allegation of harassment related to race in respect of the comments made by Dr Gerry Doyle. The allegation was that Dr Doyle stated: "I've just seen this boy; he should join ISIS that'll sort him out" and went on to comment on how hyper the boy was because of his ADHD. It was accepted that this remark had been made and that Dr Doyle had indicated that he appreciated that it was inappropriate.**
>
> **72. The first Respondent did not raise the statutory defence, pursuant to section 109 (4), that it had taken all reasonable steps to prevent the employee from committing a particular discriminatory act. The onus rests on the employer to establish a defence and it was not contended that Dr Doyle was acting outside his employment. The Respondent will be vicariously liable under section 109 (1). If it was an act of harassment it was carried out in the course of employment.**
>
> **73. This is a claim of harassment related to the Claimant's race. The Tribunal has considered whether the first Respondent engaged in unwanted conduct towards the Claimant and, if so whether that conduct related to the Claimant's protected characteristic of race and did it have the purpose of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant. If not did it have the effect of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.**
>
> **74. The case of *Moonsar v Five ways Express Transport Limited* 2005 IRLR 9 was a case relating to staff downloading pornographic images in a room in which they were working alongside the female Claimant. They were not circulated to her but she was in close proximity and was aware of what was happening. Viewed objectively, the behaviour complained of had the potential to cause affront to female employees.**
>
> **75. The Tribunal has also considered the case of *Grant v HM Land Registry* [2011] IRLR 748 in which the Court of Appeal said that "Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**
>
> **76. The comments or conduct does not have to be directed specifically at the Claimant for it to be unwanted conduct. The EHRC employment code gives an example of paragraph 7.10 which is that, during a training session attended by both male and female colleagues, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. It is stated in the code that she would be able to make a claim for harassment even though the remarks were not specifically directed at her. Also, the case of *Morgan v Halls of Gloucester Limited Kapiti* case number 140 0498/09 in which a black employee overheard a colleague use the term "gollywog" to describe a black colleague and succeeded in a Tribunal claim for racial harassment.**
>
> **77. The test is part objective and part subjective. It requires that the Tribunal takes an objective consideration of the Claimant's subjective perception. The Tribunal has to look at the Claimant's personal perception and consider whether it was reasonable for the Claimant to have considered her dignity to be violated or that it created an intimidating, hostile, degrading, humiliating or offensive environment.**
>
> **78. In the case of *Heathfield v Times Newspapers Limited* UKEAT/0179/13 the EAT upheld the Tribunal's Decision that offence caused by reference to "the fucking Pope" did not amount to harassment because, to the extent the Claimant felt his dignity had been violated or a hostile environment created, that was not a reasonable reaction in the context of the facts in that case.**
>
> **79. In the case of *Taj v GBM Services Ltd* ET case number 3301281/07, a religious harassment, claim the Tribunal found that there was a culture of banter including**

inappropriate banter and that the Claimant was a willing participant. Jokes about Ramadan were found to violate his dignity and create an offensive environment.

80. The Tribunal has to consider whether it was reasonable for a person of South Asian Indian origin, as the Claimant was, in her particular circumstances, to have such a reaction. Did the Claimant have such a reaction and whether it was reasonable for the conduct to have the effect on this particular Claimant. The Claimant made no complaint at the time of the incident.

81. The Tribunal has taken into account that it must be considered whether a remark such as the one made was, or could reasonably be considered to be, hostile or offensive to someone of Claimant's race. The Claimant has not brought a claim of discrimination or harassment by reason of religion or belief

82. This claim was brought within time. It was submitted by Ms Milns that the words were offensive, distasteful, wholly unprofessional and should not been said. The Claimant did not raise any complaint at the time. They cannot, in any sense, be said to be related to race. It was submitted that ISIS refers to the Islamic State of Iraq and Syria, a Salafi jihadist unrecognised proto-state and militant group which follows a fundamentalist doctrine of Sunni Islam. It is not a racial group but a political military organisation with extremist views which claim to follow the Muslim faith. Even if it was, or is, associated with one or another racial group, ISIS is not associated in any sense whatsoever, geographically with the Claimant's race of South Indian Asian origin.

83. The Tribunal does not accept the submission that the reference to ISIS is related to Middle Eastern states. It is a terrorist organisation with international links and influence. The Tribunal has to consider whether it would be reasonable for the conduct to have the effect on the Claimant of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

84. The Claimant was the only Asian employee within the team and the Tribunal accepts that she found the remark degrading and offensive. The remark was not aimed specifically at the Claimant. The Tribunal is unaware of the race of the boy to whom it referred. However, it is satisfied that it was reasonable for the remark to have that effect on the Claimant. The Tribunal appreciates that this is not a claim of religious discrimination. However, the Tribunal finds that perception of ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular, those in such areas as Pakistan, Afghanistan and Iran.

85. The Claimant was the only Asian member of staff. There had been recent well publicised terrorist attacks in Manchester and London and the Tribunal accepts that it was an insensitive remark and the Claimant was disturbed by it. This is a claim which is isolated from the other claims brought by the Claimant which are in respect of the Claimant's allegations of bullying and harassment by other members of staff towards her.

86. The claims other than this are in respect of alleged facts which the Claimant has claimed are discrimination whereas they may well be incidents in which the Claimant has perceived bullying and harassment and has later claimed the actions were discriminatory. This allegation of harassment is entirely separate from the other allegations. There was no question that the remark was made and that it was inappropriate and unprofessional.

87. The Tribunal has given careful consideration to this allegation and is satisfied that the Claimant has established that it was a comment that had the effect of creating a hostile and offensive environment for the Claimant and that, taking into account the perception of the Claimant and the other circumstances of the case it was reasonable for the conduct to have that effect. The Claimant was the only Asian member of staff and it was reasonable for her to be offended by the comment."

13. Further on, the Tribunal turned to the question of remedy for this one successful complaint. Because there is no appeal against that award as such, we do not need to set out the

detailed reasoning. However, we note that, in considering the degree of injury to feelings that the Claimant had experienced arising from this incident, the Tribunal cited from her witness statement the following: "This was an offensive remark by Gerry. I'm the only Asian member of staff. My colleagues were all white. There had been several recent bomb attacks in Manchester and London, it was very insensitive. I was very disturbed by Gerry's comment."

14. The grounds of appeal are admirably succinct, and we can set them out in full:

> **"Ground One.**
>
> **6. <u>The Decision was an error of law because the Tribunal failed to apply Section 26(1)(a) Equality Act 2010</u>**
>
> **The Tribunal fell into error by failing to consider separately the question as to whether the conducted related to the Claimant's race. Erroneously, the Tribunal focused only on the question of whether it was reasonable for the remark to have the effect claimed (s.26(1)(b)) and/or conflated the issue as to whether it was reasonable for conduct to have the claimed effect with the 'related to' question.**
>
> **Ground Two**
>
> **7. <u>The Tribunal's treatment of the facts amounted to an error of law because there was no evidence to support a particular finding of fact.</u>**
>
> **The follow extract from the Tribunal's Judgment (at paragraph 84) was not supported by any evidence:**
>
> **'However, the Tribunal finds that perception ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular, those in such areas as Pakistan Afghanistan, and Iran'.**
>
> **Further, as the Tribunal failed to raise the above findings the Respondent, the Respondent was denied the opportunity to respond.'**
>
> **On the assumption that no issue will be taken with the Respondent's assertion that there was no evidence supporting this conclusion, the Respondent does not propose to apply for a copy of the Employment Judge's notes.**
>
> **Ground Three**
>
> **<u>8. The Tribunal's treatment of the facts amounted to an error of law because it was perverse.</u>**
>
> **The finding set out within paragraph 84 and quoted within Nuimbered Ground Two was one which no reasonable Tribunal could have come to on the evidence. The evidence was limited and the issue and is set out within the Tribunal Judgment. The evidence certainly did not extend to how members of the public (nor indeed the Claimant) might perceive ISIS as being connected Asian people.**
>
> **Ground Four**
>
> **<u>9. Alternatively, the Tribunal failed to adequately explain the findings relevant to its conclusion."</u>**

15. These grounds to some extent overlap and interact. Ms Millns' principal submissions in support of them were as follows. Firstly, she said, there are three distinct and essential elements to this permutation of the definition of harassment: that there be unwanted conduct, that the conduct has the proscribed purpose or effect, and that it relates to a relevant protected characteristic. If the Tribunal fails to engage distinctly with the question of whether the conduct related to a relevant protected characteristic, it will err. See: **London Borough of Haringey v O'Brien** [2016] UKEAT/004/16 at paragraph 69.

16. Ms Millns also referred to the recent discussion of the concept of "related" to a protected characteristic in **Unite the Union v Nailard** [2019] ICR 28, an authority to which we will return. She also cited **Hartley v Foreign and Commonwealth Office Services** [2015] UKEAT/0033/15 for the proposition that "related to" is a broad test, and the perpetrator's knowledge or perception of the characteristic is not conclusive, nor the perpetrator's own perception of whether the conduct relates to a protected characteristic.

17. The Tribunal in the present case, she submitted, made no findings about Dr Doyle's motivation, and it also, she said, made no other finding that, for any other identified reason, his conduct was related to race. Rather, she submitted, it focused, repeatedly and exclusively, on the perception of the Claimant and whether that perception was reasonably held. Alternatively, she submitted, if the Tribunal did come to the conclusion that the conduct was related to race, it erred in doing so. In particular, the only part of its Decision from which it might be inferred that it had come to such a conclusion was the finding in paragraph 84 as follows:

> **"However, the Tribunal finds that perception of ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular, those in such areas as Pakistan, Afghanistan, and Iran."**

18. If that finding was the basis for the conclusion that this conduct was related to race, then it was not fairly reached, said Ms Millns. That was, firstly, because this proposition was not addressed in evidence or submissions by the Claimant, or raised during the course of the Hearing by the Tribunal itself. So the First Respondent did not have a fair opportunity to address it in submissions or otherwise. Alternatively, she said, any such conclusion was perverse, because there was no evidential or factual basis for it. In her written submissions, Ms Millns put it this way:

> **"30. The Tribunal's finding makes absolutely no sense, is certainly wrong and was not a permissible conclusion. Whilst ISIS is undeniably commonly associated with Islamic religious extremism, it is not commonly associated with one or another racial group, culture, or ethnicity. Earlier within its reason, at paragraph 83, page [51] the Tribunal accepted that ISIS is, "…*as a terrorist organisation with international links and influence.*" With respect, that is as far as the Tribunal ought to have taken its conclusions. Such conclusions could not rationally support a claim of that Dr Doyle's remarks amounted to racial harassment."**

19. Finally, and this was ground four, the Tribunal, at the very least, submitted Ms Millns, failed sufficiently to explain how it had reached any conclusion that the conduct related to the South-Indian Asian race, which was the race relied upon. Therefore, the Decision was not **Meek**-compliant (That is, compliant with the guidance in **Meek v City of Birmingham District Council** [1987] IRLR 250 (CA)).

Discussion and Conclusions

20. Some basic points about the architecture of the variation of the definition of harassment found in sub-sections 26(1) and 26(4) are worth restating at the outset. Firstly, as Ms Millns correctly submitted, there are three components, all of which must be satisfied, albeit that the third has within it two alternatives. The conduct must be found to be unwanted; it must be found to relate to the relevant characteristic; and it must have either the proscribed purpose or the proscribed effect, or both. Secondly, the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected

characteristic, which is the connector used in the definition of direction discrimination found in section 13(1) of the **2010 Act**. Put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits.

21. Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to *relate to the characteristic itself*. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the *complainant* considers that the conduct related to that characteristic is not determinative. These propositions, we think, derive from a pure consideration of the language of the statute, and have been articulated in previous authorities, including **Hartley**, **O'Brien**, and **Nailard**.

22. In **Nailard** the Claimant alleged that lay officials of her union had behaved in a manner amounting to sexual harassment. The focus of the discussion, however, was on the allegations that employed officials had not dealt properly with her complaint, and concerning a decision to transfer her, which conduct was itself alleged to have amounted to harassment related to sex. The speech of Underhill LJ (Moylan LJ concurring) included the following passages:

> **"53. In the earliest versions of the discrimination legislation there was no distinct proscription of harassment. Cases of what we would now regard as harassment were brought as cases of ordinary direct discrimination. The fit with the legislative language was awkward, and some difficult case-law was generated. However, an amended version of the EU Equal Treatment Directive (EU/2002/73 EC), promulgated in 2002, required member states to proscribe "harassment", which was defined in the Directive as "where unwanted conduct *related to* the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment [my emphasis]".**
>
> **54. That requirement was sought to be implemented in 2005 by secondary legislation which inserted an express prohibition on harassment – section 4A – into the Sex Discrimination Act 1975. (Similar amendments were made to the legislation relating to other protected characteristics.) Section 4A essentially tracked the Directive, save that it**

used the formulation "on the ground of her sex" – that is, the same language as in the definition of direct discrimination – rather than "related to sex".

55. The Equal Opportunities Commission believed that the amendment legislation failed in that respect – and in several others – to conform to the requirements of the Directive. It brought judicial review proceedings. In *Equal Opportunities Commission v Secretary of State for Trade & Industry* [2007] EWHC 483 (Admin), [2007] ICR 1234, ("the *EOC* case") Burton J upheld the Commission's challenge. We are only concerned with two of the grounds of challenge, which I take in turn.

56. First, the Commission argued, and Burton J accepted, that the Directive's formulation of "related to … sex" proscribed not only harassment which was "caused by" the Claimant's sex but also harassment which was "associated with" it: see paras. 6-28 of his Judgment. Burton J illustrated the distinction between the two types of case, at paras. 10-11 (p. 1242-3), by accepting three examples taken from the case-law by counsel for the Commission (Dinah Rose QC), namely:

- where an RAF NCO had used offensive and obscene language in front of a group of male and female staff but which was peculiarly offensive to the women (*Brumfitt v Ministry of Defence* [2004] UKEAT 1004/03, [2005] IRLR 4);

- where the Claimant had been unfairly treated by a manager who was jealous of her sexual relationship with a colleague (*B v A* [2007] UKEAT 0450/06);

- where a manager "barged into" a female toilet but would equally have barged into a male toilet (adapted from *Kettle Produce Ltd v Ward* [2006] UKEATS 0016/06/0811).

Those were all cases where the harassment would be "associated" with the complainant's sex but not "caused by" it, in the sense of it forming any part of the actor's motivation. The Commission contended that that type of case was not caught by the formulation in section 4A "on the grounds of sex". Counsel for the Secretary of State (David Pannick QC) argued that it was, if necessary applying a *Marleasing* approach to construction. Burton J was doubtful about whether that was so, but he held that in any event it was important that the legislation was drafted in a way that put the matter beyond doubt: see paras. 59-63 of his Judgment (p337). In the summary of the relevant part of his decision at para. [63] (i) he required section 4A to be "recast so as to eliminate the issue of causation.

….

58. In response to the Decision in the *EOC* case the Secretary of State, exercising his powers under the European Communities Act 1972, made the Sex Discrimination (Amendment of Legislation) Regulations 2008, which took effect from 6 April 2008. So far as relevant for present purposes the Regulations did two things:

(1) They amended the definition of harassment section 4A of the 1975 Act so as to substitute the "related to" formulation used in the Directive. That formulation was then, as we have seen, carried over into the 2010 Act.

(2) They inserted into section 6, which proscribed discrimination and harassment in employment, a new sub-section (2B) dealing with third party liability. This was in substantially the same terms as section 40 (2)-(4) of the 2010 Act, which I set out at para. [59] below.

…..

79. In short, the EAT allowed the appeal as regards the finding of harassment based on the conduct of the employed officials because the ET's finding that their conduct, as opposed to the lay officials', was "related to" the Claimant's sex was based on a misunderstanding of the nature of the exercise required by the statute. The necessary relationship between the conduct complained of and the Claimant's gender was not created simply by the fact that the complaints with which they failed to deal were complaints about sexual harassment – or, in the case of Mr Kavanagh, that part of the situation that led him to decide to transfer the Claimant was caused by such harassment.

…..

> **91. Given my conclusion in the foregoing paragraphs about the effect of the phrase "on the ground of", the question is what, if any, change was affected by the substitution of the language of "related to".**
>
> **92. As to that, it is clear that, as the EAT held, the change was made in response to the Decision in the *EOC* case. It must at least have been the intention both of the Secretary of State in 2008 and of Parliament in 2010 to ensure that the legislation applied in cases where Burton J had held that the current language did not (or arguably did not) reflect the requirements of the Directive. It follows that the change must have been intended to ensure that the statutory definition covered cases where the acts complained of were "associated with" the proscribed factor as well as those where they were "caused by" it, as illustrated by the examples that he gave (see para. [56] above).**
>
> **93. I should like to make two points in passing before proceeding further:**
>
> **(1) I am inclined to doubt whether the change which Burton J required was indeed strictly necessary. It seems to me that his distinction between an "associative" and a "causative" relationship may not be essentially different from that expounded in *Amnesty* (which had not been so clearly articulated at the time of the *EOC* case). In, for example, a case of the *Brumfitt* type (see the first bullet in para. 56), where a speaker uses overtly sexist language, the link with the protected characteristic is in the words themselves and does not depend on his motivation.[7] However, it does not ultimately matter whether I am right about this, since the importance of the *EOC* case for our purposes lies in the light it sheds on the statutory intention behind the use of the "related to" formulation in the 2010 Act.**
>
> **(2) Although I have used Burton J's terminology of "associative" and "causative" because of the centrality of the *EOC* case to the argument, I am not sure that it best describes the distinction he had in mind. It seems to proceed on the basis that a proscribed factor can only "cause" an act of discrimination where it affects the mental processes of the putative discriminator. But in at least one sense any ground of discrimination is "causative", whichever of the two "*Amnesty* types" it belongs to. Perhaps this only illustrates the wisdom of Lord Nicholls' caution about the use of the language of causation: see para. [83] above.**
>
> **…..**
>
> **108. Mr Carr submitted that, even if the employed officials' conduct could not be said to be "because of" the Claimant's sex, it was on any view "related to" it within the meaning of section 26. I have already explained at paras. 96-98 above why that language does not cover cases of third-party liability; and for the reasons given at para. 104, the present claim is, on the ET's reasoning, in substance such a case. If the employed officials, and through them the Union, are to be liable for harassing the Claimant because of their failure to protect her from the harassment of the lay officials, and (in the case of Mr Kavanagh) for transferring her, that can only be because of their own motivation, as to which the Tribunal made no finding.**
>
> **109. Mr Segal sought in his post-Hearing submissions to distinguish between a situation where an employer was "culpably inactive knowing that an employee is subjected to continuing harassment (as on the facts of Burton)" and one where he was culpably inactive without [any such knowledge]"; and to show that the ET's findings established that the case was in the latter category. I am not sure of the relevance of the distinction; but since we did not hear oral submissions on it I prefer to say no more than that on the law as I believe it to be the employer will not be automatically liable in either situation. I repeat, to avoid any possible misunderstanding, that the key word is "automatically": it will of course be liable if the mental processes of the individual Decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.**

23. It is important to note that much of the discussion in **Nailard** concerned whether there was harassment related to sex, by virtue of what is called the motivation of the particular individuals concerned, because that was the focus of the particular issue in that case. The

A Tribunal in that case, it was said, needed to focus on the motivation for the conduct of the employed officials, as opposed to that of the lay officials, about whose alleged conduct complaint had been made to the employed officials.

B

24. However, as the passages in **Nailard** that we have cited make clear, the broad nature of the "related to" concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an C individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

D 25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is E satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it F may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

G

26. We turn, then, to our conclusions in relation to this particular Decision. First, we have noted that the Tribunal referred to the issue in this case as being whether the conduct related to the Claimant's characteristic of race, being British-Asian Indian. As we have noted, the H definition does not restrict its ambit to cases in which the race relied upon is that of the

complainant. But this was an accurate reflection of how the Claimant, herself, in fact put her case, as reflected in the agreed list of issues. She identified herself as British-Asian Indian. It was clearly her case that, because she was herself Asian, she found Dr Doyle's remark particularly sensitive and upsetting. More specifically, it was her case that the reference to ISIS related to race, because of what she contended was an association between ISIS and race, as defined (by her) by reference to her own characteristic of British-Asian Indian.

27. In short, it was the Claimant's case that the conduct related to race, at least of being Asian or South Asian, and that because this was a component of *her* race, this was a facet of why it had the proscribed effect *on her*, whatever Dr Doyle's intention might have been, and even if the remark was not in any sense aimed at her.

28. The Tribunal certainly appears to have considered the Claimant's own race to have been relevant to the question of whether she reasonably perceived Dr Doyle's remark as having the proscribed effect. See: paragraphs 80, 85, and 87 of its Reasons. However, Ms Millns submitted that these passages show that the Tribunal focused on the Claimant's perception, and whether it was reasonably held, to the exclusion of any distinct consideration of, or conclusion about, the question of whether the conduct was in fact related to that race. Alternatively, she suggested, it had not sufficiently distinguished the questions of what the Claimant perceived, and whether she reasonably did so, from that of whether the conduct was in fact related to race.

29. As to that, we observe that there may, of course, in some cases, be a potential relationship between these questions, in the sense that, if the Tribunal does find, in a particular case, that the conduct related to race, and indeed to the complainant's own race, that may then also be treated as a relevant consideration when appraising what effect it had on her, and

whether any perception she had about it was reasonably held. Nevertheless, these questions are distinct and need to be distinctly addressed by the Tribunal.

30. In this case, as Ms Millns correctly submitted, whether or not the Claimant herself perceived the remark of Dr Doyle to be related to race (in this case, as claimed, her race), was not determinative of the question of whether the conduct did, in fact, relate to race. The Tribunal had to decide that for itself. The Tribunal clearly was, at points in its Decision, cognisant of the fact that the question of whether the conduct is related to race is a distinct component of the definition of harassment in sub-sections 26(1) and 26(4). The Tribunal properly refers to that in its summary of the law and issues, albeit borrowed from the findings made at the Preliminary Hearing; and it also, effectively, refers to it again in its summation of Ms Millns' submissions to it at paragraph 82 of its Decision.

31. However, we agree with Ms Millns that, at any rate the bulk of the discussion which then follows, in paragraphs 83 to 87, is concerned with the question of the Claimant's reaction to, and perception of, Dr Doyle's conduct, and whether her perception was reasonably held. This is expressly referred to as the subject of this part of the Decision, at several points throughout these paragraphs, and can be seen from the substantive content of them.

32. That said, the first two sentences of paragraph 83 do appear to be addressed to the "related to" test, apparently by way of the Tribunal giving its response to part of Ms Millns' submission on part of that question, as summarised in paragraph 82. Paragraph 82 does not, however, suggest that Ms Millns submitted in terms that, if it had any association with race at all, ISIS was associated with Middle Eastern states, or any particular Middle Eastern states. Rather, her case was that ISIS had *no* specific association with any particular nation state or

group of states; but that, if she was wrong about that, certainly, she argued, it had no association whatsoever with the Claimant's race of South-Indian Asian origin. It appears that the Tribunal may, nevertheless, have taken Ms Millns to have been implicitly submitting that, if there *was* any association of ISIS with race, then it was by way of a Middle-Eastern connection. However, if so, we note that, in any event, the Tribunal rejected *that* proposition in paragraph 83. We note also that, in any event, this was *not* how the *Claimant* put her case, as to how it was said that the conduct was related to race. Her case, to repeat, was that it was related, in some way, to being of South-Indian Asian origin.

33. Ms Millns, as we have noted, also submitted to us that the Tribunal had made no finding about Dr Doyle's motivation in making the remark. The Tribunal did, we note, in paragraph 7.36, make findings about what Dr Doyle had said to Mr Evans about the incident, in the aftermath; and about what Mr Evans himself had made of Dr Doyle's conduct. It also did find that the remark was addressed to the whole group generally, and not aimed specifically at the Claimant (see paragraph 84). But it is correct that the Tribunal did not make any finding about what it, for its part, thought about his specific motivation when making the remark.

34. However, that was not, in itself, necessarily an error. That is because, to repeat, motivation is not the only route through which a Tribunal may find that conduct is related to a protected characteristic. Ms Millns, to repeat, confirmed that she did not contend otherwise. Rather, her point was merely that the potential route of a finding relating to motivation, was *not* the route by which the Claimant in this case apparently succeeded. Rather, the basis of the Tribunal's conclusion appears to have been its consideration of the content of the remark itself, and, in particular, of the significance of the mere reference to ISIS, in and of itself.

35. Ms Millns' case, at its highest, was that there simply was no clear finding by the Tribunal that the conduct was related to race. We agree that there is no clear and explicit finding to that effect. However, if there is some other finding within this Decision that may have led the Tribunal to conclude (without spelling it out) that the conduct was related to race, then it seems to us that it can only have been in the last part of paragraph 84 where the Tribunal states: "However, the Tribunal finds that perception of ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular, those in such areas as Pakistan, Afghanistan and Iran."

36. It is not clear to us whether, in that part of its Decision, the Tribunal was purporting to address the question of whether the conduct was related to race, rather than making an observation which it may have considered fortified the reasonableness of the perception held by the Claimant, on the footing that she was not alone in holding such a perception. But we cannot find any other passage in this Decision which could be arguably said to support a conclusion that the conduct related to race, in the manner alleged. For example, there are no findings of fact about the race of the boy about whom Dr Doyle was speaking, or to the effect that there was any mention, or discussion, in the group, of that boy's race.

37. Focusing, therefore, on this part of paragraph 84, and allowing for the possibility that it *may* have been relied upon by the Tribunal to support a conclusion, although not expressly stated, that the conduct related to race, we have considered whether that is, or would be, a sound conclusion. The Tribunal's reliance on what it asserts there is the perception of ISIS in the minds of a significant proportion of the general public is, however, problematic for several reasons.

38. Firstly, while the Tribunal purported to make a finding about the public perception of ISIS in the terms stated there, we agree with Ms Millns that it was not entitled to do so without some evidential basis for so finding. But there was none in the evidence before it. This was not the sort of thing of which it could purport to take judicial notice. Ms Millns, before us, went further, and submitted that this proposition was, as a matter of fact, simply wrong. Effectively, she was inviting us to take judicial notice of *that*, which we decline to do. However, it remains the case that this was not a factual proposition that the Tribunal could assume to be correct, or a matter of common knowledge, without having some evidential basis to support that conclusion; and it had none.

39. Secondly, and in any event, the Tribunal had to decide for itself whether the reference to ISIS was correctly viewed as related to race, in the sense particularly alleged in this case, of a connection with Asia or South Asia or South-Indian Asia. It did not suggest that it, itself, considered that what it took to be the perception of a significant portion of the general public was in fact correct. We also agree with Ms Millns that, had it done so, that would have been at odds with its own very generally-expressed observation in paragraph 83, that ISIS is a terrorist organisation with international links and influence.

40. We also accept – the Tribunal's Decision does not suggest otherwise, and Ms Millns specifically confirmed this during the course of oral submissions – that this suggestion, relating to what the Tribunal took to be the perception of ISIS in the minds of a significant proportion of the general public, was *not* canvassed in any way during the course of the Tribunal Hearing, by either the Claimant or the Tribunal itself. If the Tribunal did rely on this as supporting some unstated conclusion that the conduct was related to race, it was, therefore, in any event, unfair

to the Respondent for the Tribunal to have done so, given that it had no chance to make submissions about that.

41. It follows that this appeal must be allowed by reference to all of grounds one, two, and three. Ground four, therefore, effectively, falls away. Indeed, for the reasons that we have given, not only do we conclude that it is not clear that the Tribunal reached a conclusion that the conduct was related to race; or that, if it did, there was nothing in its reasoning which sufficiently explained or properly supported that conclusion. It also seems to us that, on the basis of the evidence before it, and the facts found, it could not, in any event, correctly applying the law, have properly reached such a conclusion in this case.

42. We will therefore allow the appeal. Applying the guidance in **Jafri v Lincoln College** [2014] ICR 920, because we have concluded that, had it properly applied the law, on the particular evidence before it and the facts found, the Tribunal could not properly have found that the conduct was related to race in the manner alleged, that is to say to race defined in the way the Claimant defined it, we do not need to remit the matter. Rather, we will simply quash the upholding of this complaint, and, therefore, the associated award of compensation; and this complaint must stand dismissed.