Appeal No. UKEAT/0375/14/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 29 September 2015
Judgment handed down on 5 January 2016

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR T NOBLE — APPELLANT

(1) SIDHIL LTD
(2) MR R MOORE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID CAMPION (of Counsel) Instructed by: Wilkinson Woodward Bearders Solicitors 11 Fountain Street Halifax West Yorkshire HX1 1LU
For the First Respondent	MR JOHN CROSFILL (of Counsel) Instructed by: EEF Legal Services Broadway House Tothill Street London SW1H 9NQ
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent

SUMMARY

HARRASSMENT

The Claimant made complaints of harassment under various protected characteristics. The Employment Tribunal found some proved, and the majority of the claims not proved. The Claimant appealed against the findings on those which were not proved. Held the Employment Tribunal had erred in law in the method used by one member to decide on credibility. Further, the Employment Tribunal erred in law in finding that the Claimant could not be harassed unless he shared the protected characteristic. Case remitted to a Tribunal to reconsider, leaving the findings of harassment intact and reconsidering the whole case in light of them, and applying the law correctly that there is no need for the Claimant to share the protected characteristic, whether any claims found not proved have been proved.

Cross-appeal: the First Respondent cross-appealed on a finding of harassment on grounds of disability, on the basis that the First Respondent did not know of the disability. Held: cross-appeal dismissed, there being no requirement of knowledge.

THE HONOURABLE LADY STACEY

1. This is an appeal and cross-appeal. I will refer to the parties as the Claimant and First and Second Respondent as they were in the Employment Tribunal. Mr Campion appeared for the Claimant both at the Employment Tribunal and before me. Mr Crosfill appeared before me for the First Respondent, Mr Dulovic having appeared at the Employment Tribunal. The Second Respondent was not represented.

2. The decisions appealed against were made by an Employment Tribunal sitting in Leeds in November 2013 and March 2014, comprising Employment Judge Keevash, Miss Atkinson and Dr Ursell. Judgment was reserved, and Written Reasons were given on 25 June 2014. These reasons required correction and a corrected Judgment was issued on 10 April 2015.

3. The background facts are that the Claimant was employed by the First Respondent in a paint workshop between 2003 and 2012. His line manager was the Second Respondent. The nature of the work was such that the Claimant and the Second Respondent worked together, frequently with no one else in the close vicinity. The Claimant made many claims under the **Equality Act 2010** ("the Act") and the legislation in force prior to the Act against both Respondents for harassment on grounds of race, age, sexual orientation and religion or belief. All but one of the events of which he complained were said to involve the Second Respondent. The First Respondent was said to be vicariously liable as the Second Respondent's employer.

4. The Employment Tribunal found that some of the claims made succeeded and some failed. All complaints of harassment on the grounds of race failed. Complaints of harassment on the grounds of age succeeded in part. Complaints of harassment on the basis of sexual

orientation succeeded in part, as did complaints of harassment on the grounds of religion or belief. Complaints made of direct disability discrimination, failure to comply with the duty to make reasonable adjustments, discrimination arising from disability and victimisation were withdrawn by the Claimant and therefore dismissed by the Tribunal. The First Respondent admitted liability in respect of discrimination arising from disability in relation to non-payment of a bonus. They made payment and as they admitted discrimination, the Employment Tribunal found that the claim succeeded. The Claimant appealed against the refusal of many of his claims.

5. Between 2007 and 2012 there were occasions when the Claimant was subject to adverse appraisal at work. His work record included appraisals in which he had been found to lack confidence. He stated in 2007 that things were building up in his personal life, and that the Second Respondent "kept pulling him up on the slightest thing". The Claimant went off work sick on 17 July 2012, claiming that he had been harassed by the Second Respondent. He lodged a grievance to that effect. The First Respondent carried out an investigation into his grievance which it dismissed on 10 September 2012. The Claimant appealed that decision but it appears, although there is no direct finding in fact about the outcome, that the appeal did not succeed.

6. This is an unusual case in which the appeal to the Employment Appeal Tribunal was made broadly on two fronts. It was argued that the Employment Tribunal had erred in law in considering claims in respect of race and religion or belief, by deciding that the Claimant did not share the protected characteristic and so could not have been subject to harassment. Counsel for the First Respondent conceded that the Claimant did not need to share the protected characteristic, and so decisions made on that basis were in error. He argued however that the

Employment Tribunal had other reasons for its decisions. The other broad appeal point was that the Employment Tribunal had erred in law in its decision making because one of the members (Dr Ursell) had misunderstood her function. While she was in the minority in several decisions, it was argued that her decision making had infected the whole Judgment. In addition, the Employment Tribunal had used medical records in an impermissible way. Further the Employment Tribunal had failed to consider the whole picture and had instead focussed on each complaint separately. In any event, the Employment Tribunal had failed to explain sufficiently its reasons for its decisions.

7. I have found it necessary to consider the allegations made and to consider the treatment of those allegations by the Employment Tribunal. I am conscious that the Employment Tribunal had the advantage of hearing the witnesses and that it had to make decisions on credibility. It was necessary for it to consider all of the incidents and it was of course entitled to decide that the Claimant was not credible or reliable, provided always that it had reasons for so doing. I accept that in cases where there is a conflict of fact between two witnesses who were the only people present, the Employment Tribunal is entitled to believe one and not the other because they find one to be generally incredible or unreliable. I have considered the decision making process as reported in the Written Reasons. Taking into account the concessions made, correctly in my opinion, I have decided that the decision of the Employment Tribunal must be set aside. The reasons for my so deciding follow.

8. The Employment Tribunal set out the complaints made by the Claimant according to the category of protected characteristic and within each category considered each complaint in separate numbered paragraphs. Paragraph 26 dealt in 17 separate sub-paragraphs with harassment on the grounds of race.

9. In certain sub-paragraphs the Employment Tribunal was faced with conflicting testimony as the Claimant said that the Second Respondent had said various things, whereas the Second Respondent denied it. The Employment Tribunal accepted the Second Respondent's evidence and so found the allegations unproved. In particular, sub-paragraph 1 deals with the Claimant's allegation that the Second Respondent was in the habit of chanting "Agadoo do do do kill a Paki gas a Jew". The Employment Tribunal found by a majority that the Second Respondent did not say these words. A similar decision was made in sub-paragraph 5 where the Claimant alleged that the Second Respondent made unspecified comments about Asian shopkeepers. The Employment Tribunal found that he did not. In sub-paragraph 10 the Claimant alleged that the Respondent used the word "Yid" in a derogatory fashion. The Employment Tribunal found that another unidentified worker had used the word, but the Second Respondent had not. In sub-paragraph 17 the allegation was that the Second Respondent had said that he was "sweating like a nigger". The Employment Tribunal found he had not said these words. In sub-paragraph 7 the Employment Tribunal notes the Claimant had alleged that the Second Respondent said that Jews had a monopoly on sympathy over the Holocaust. The Employment Tribunal did not accept he had said that. The Employment Tribunal did not accept an allegation that the Second Respondent had mimicked the accent of a black neighbour. At 26.15 the Employment Tribunal did not accept an allegation that the Second Respondent had referred to his sister as a "black bastard". At 16 there was reference to an allegation that the Second Respondent had stated that his sister was seeing a Muslim and he hoped the Muslims would move in next door. The Employment Tribunal found that he had not said this. No explanation is given for these decisions, other than that the Employment Tribunal believed the Second Respondent and did not believe the Claimant.

10. In paragraph 26.3 the Employment Tribunal dealt with an allegation by the Claimant

that the Second Respondent had told him that he had referred to a black security guard as "Sooty" when talking to his daughter. The Employment Tribunal accepted the Second Respondent's denial, noting that his daughter had not been born at the time of the alleged incident.

11. The next category of claims comprises paragraph 26.2 which deals with an allegation that in September 2006 the Second Respondent told the Claimant that Nelson Mandela was evil and referred to "fucking Kaffers". The Employment Tribunal believed the Second Respondent that he did not refer to "fucking Kaffers". It found he did refer to Nelson Mandela as evil during a conversation. It found as follows:

> **"… even if the words were regarded as unwanted conduct, the Respondents' conduct or the effect of that conduct did not have the purpose or the effect of either (a) violating the Claimant's dignity or (b) creating an adverse environment for the Claimant. The Second Respondent was merely expressing a view shared by many people in the UK and across the world at the time. The Second Respondent did not intend any adverse effect. His words could not be regarded as having an adverse effect having regard to the factors set out in section 3(A)(2) of the 1976 Act. The words might have upset the Claimant but they were not unlawful bearing in mind that he is white British."**

12. The Employment Tribunal made similar findings in respect of an allegation that the Second Respondent habitually used the words "Paki" and "nigger". The Employment Tribunal found that the Second Respondent had not used the word "nigger". It found he had used the word "Paki" but made no finding about the context or detail of what had been said. It made the same finding as set out above about the Claimant being white British, and the word therefore not being unlawful.

13. At paragraph 26.11 the Employment Tribunal dealt with an allegation that the Second Respondent had mocked the Claimant's (unspecified) view about why black people were poor and stated that white people were "more intelligent". At 26.13 the Employment Tribunal discusses an allegation that the Second Respondent told the Claimant that black people were in

poverty in Africa because they did not have the intelligence to stop having more children; that white countries were more advanced than black countries and black people would still be living in the jungle were it not for white people. The Employment Tribunal does not make a clear finding as to whether the Second Respondent did say any of these things, but it finds that if he did, it was not a contravention of the legislation because the Claimant is white British.

14. At paragraph 26.12 the Employment Tribunal dealt with an allegation that the Second Respondent had said that President Obama was elected only because he is black. Once again there is no finding about whether this was said or not. The Employment Tribunal finds that even if it was said, it was not unlawful in light of the Claimant being white British.

15. At paragraph 26.8 the Employment Tribunal dealt with an allegation that the Second Respondent told the Claimant he "didn't get it" during a conversation about the meaning of anti-Semitism. The Claimant alleged the Second Respondent said people should be able to say what they want. The Employment Tribunal found that this did not happen. They also stated that this could not constitute a complaint under the **1976 Act**. A similar decision was made in paragraph 26.9 on an allegation by the Claimant that the Second Respondent had asked the Claimant if he thought that Hitler had some good qualities.

16. The harassment in respect of age was dealt with in a similar way, by noting in paragraph 27 a number of allegations. The first was that the Claimant said that the Second Respondent had "fifteen years on" the Claimant. The Employment Tribunal found that the Second Respondent did say that. It was true. The Claimant provided no context or detail tending to show that that the purpose or effect of the remark was to violate the Claimant's dignity or create for him a hostile environment. Thus there was no contravention of the legislation. In paragraph

27.2 the same decision was made about a remark by the Second Respondent that the Claimant "wasn't getting any younger". In the next paragraph, 27.3, the same decision was made about remarks referring to a midlife crisis or the male menopause. In paragraph 27.5 the Employment Tribunal found that another worker, Mr Lowe, told the Claimant that he should take evening primrose oil to treat the menopause. The Claimant said he felt humiliated by that. Mr Lowe said it was in response to the Claimant saying he was having a hot flush. The Employment Tribunal decided that the comment did not have the purpose or effect of violating the Claimant's dignity or of creating a hostile environment for him. The Employment Tribunal found that the Claimant's allegation that the Second Respondent had said he was "living fifty years ago" and that he had been born in 1860 were not proved. It found the Second Respondent lost his temper with the Claimant on or around 17 July 2012, and told him he was a "boring old man". That was the Claimant's last day at work. The Second Respondent agreed that he had lost his temper, and said the Claimant was "weird" and may have said he was "not right in the head". The Employment Tribunal found the words were used with the intention to create an adverse environment for the Claimant, and were unwanted. It upheld the complaint of harassment on the grounds of age.

17. The allegations made about harassment in respect of sexual orientation were dealt with in the same fashion, by listing each one and stating whether it was found proved or not.

18. The first, in paragraph 28.1, was as follows:

> **"(a) from the Claimant's first day in the Paint Plant, the Second Respondent constantly referred to the Claimant as "gay" and habitually used the term "gay Trev", "queer Trev", "talking gay", "this is so gay" and "queer". …"**

He also wrote those expressions in dust which had collected on the walls of the paint room and on one occasion drew a love heart on the wall with the words "gay Trev" inside it.

19. The Employment Tribunal found by a majority that the Second Respondent did use the words alleged. The Claimant had told the Second Respondent that his stepson was gay. The Employment Tribunal found that the conduct was unwanted and had the effect of creating an adverse environment for the Claimant. It upheld the claim. The Employment Tribunal found, unanimously, that another worker had drawn the love heart, and that the First Respondent was vicariously liable for that conduct. They upheld the claim.

20. Dr Ursell was in the minority in this part of the decision. She found as follows:

> **"28.1.2. Dr Ursell found and decided that the conduct was not unwanted. To her the Claimant presented as someone who threw everything that he could invent at the Second Respondent. He played along with the conduct because he was seeking an acceptance profile. She did find that the Claimant had told the Second Respondent about his stepson."**

21. The Employment Tribunal found another allegation proved under this heading, to the effect that whenever the Claimant mentioned that his stepson was visiting the Second Respondent would refer to him as "the gay one". He also alleged that the Second Respondent said that gay people are immoral. The majority found the conduct to be unwanted, and to have the purpose of creating an offensive environment for the Claimant. The minority, Dr Ursell, found it had neither that purpose nor that effect. The Employment Tribunal found that the Second Respondent did not say that gay people are immoral.

22. The next allegation dealt with was that the Second Respondent repeatedly told other employees that the Claimant was gay, and on an occasion in 2011 he approached the Claimant and a named employee and asked if they were having a gay affair. The Employment Tribunal accepted the Second Respondent's denial and noted that the named employee had denied any such question when asked about it by a manger in an investigation.

23. The Employment Tribunal dealt at paragraph 28.3 with an allegation that the Second Respondent repeatedly hit the Claimant on the bottom with a piece of wire saying "gay Trev" or similar words. They did not find that proved. No reason for the decision is given.

24. The Employment Tribunal by a majority found that the Second Respondent, knowing that the Claimant was active in karate, described karate to the Claimant as "a load of gay men in gay clothes, having a midlife crisis"; this incident was found to be harassment. Dr Ursell found this allegation not proved, holding that to do otherwise "would have involved a leap of faith".

25. The next category of allegations relates to religious belief. The Claimant is Christian and open about his beliefs. The Employment Tribunal found that he made unspecific allegations that the Second Respondent had made adverse comments, but as they were unspecific found nothing proved. The Employment Tribunal went on to consider other allegations, that the Second Respondent referred to religion as "hocus pocus"; that he giggled when the Claimant said he prayed, and referred to his minister as a woman; that the Claimant did not believe in God, and that his beliefs were like socialism and communism and he was "Godless"; that the Second Respondent intensified his remarks after finding which church the Claimant attended. The Employment Tribunal found none of that proved, accepting the Second Respondent's denials of having said these things.

26. The Employment Tribunal also accepted the denial by the Second Respondent of having said to the Claimant that he was having a "sing song" when attending church; that he would go to hell and that he was talking to Jesus. It found that even if these things had been said there was no evidence of context which would enable it to decide their purpose or effect.

27. In recognition that some of the allegations referred to above under the heading of race could also be considered under the heading of religion or belief, the Employment Tribunal repeated its findings about them.

28. The Employment Tribunal did accept an admission from the Second Respondent that he had made a "silly joke" about the Claimant's plans to renew his marriage vows. They found it did not have the purpose of creating an adverse environment but it did have that effect.

29. The Employment Tribunal heard evidence over five days. The case had been the subject of case management before the hearing and there had been specification given of the claims following the lodging of the ET1 and ET3. An annexe was produced setting out the issues for the Employment Tribunal. Evidence was given by the Claimant and on his behalf by his partner, Tracey Knagg. The Second Respondent gave evidence on his own behalf and on behalf of the First Respondent. Kate Kendall, the Group HR Director, Paul Blackburn, Welding Supervisor, Simon Lowe, Powder Coating Worker, and Lynne Marie Dickson, Operations Manager all gave evidence. The Claimant's GP did not give evidence; a report written by him was considered. Closing submissions were made on behalf of all parties and much emphasis was laid by at least the Claimant's counsel on reasons why the Employment Tribunal should prefer the Claimant's account where it differed from that of the witnesses for the First Respondent. Thus it was clear before the Employment Tribunal that credibility of the witnesses was in issue.

30. The Employment Tribunal considered each event and found that 8 out of 56 allegations made by the Claimant were proved. The decisions of the Employment Tribunal were partly by

a majority, on most occasions comprising the Employment Judge and Miss Atkinson, but on occasion comprising Miss Atkinson and Dr Ursell, and on other occasions were unanimous.

31. The Employment Tribunal found that certain claims of racial harassment were not made out because, amongst other things, the Claimant did not share the protected characteristic. As they put it in several sub-paragraphs of paragraph 26 where they dealt with complaints that the Second Respondent had made racially motivated comments when referring to people who are not "white British".

> **"… The comments might have upset the Claimant but they were not unlawful bearing in mind he is white British."**

Counsel for the First Respondent did not seek to support the Employment Tribunal decision on this part of the case. He stated that he had no idea where it came from, as no such submission had been made at the Employment Tribunal. In my opinion he was correct in his stance, as it is clear that it is not necessary for a person to share the protected characteristic before he may be harassed or discriminated against. Counsel argued however that the Employment Tribunal had other reasons for its decision which were legitimate and that their decision should still stand. The argument, put broadly, was that the Employment Tribunal was entitled to hold that a view that a statement that Nelson Mandela was evil is not racist. The Employment Tribunal was entitled to state that some people held a view which would be described as finding Mr Mandela evil as some people did consider his advocation of an armed struggle to be morally indefensible.

32. Counsel for the First Respondent also accepted that if the Employment Tribunal had decided that anti-Semitic behaviour could not be harassment under the **Equality Act 2010** or the legislation in force before the Act, they were wrong to do so. He accepted such conduct

may amount to discrimination or harassment on grounds of either or both of race, or religion and belief. He also accepted that there is no need for the Claimant in such a case to share the protected characteristic. Once again counsel argued that the Employment Tribunal had other legitimate and sufficient reasons for its decisions.

33. The Employment Tribunal found proved an allegation of disability related harassment. The Second Respondent had referred to a relative suffering depression, but had added that no one should be depressed, and that such people should get "a kick up the backside and get into work".

34. The Claimant's first ground of appeal was that the Employment Tribunal had erred in law by preferring the evidence for the Respondents to that of the Claimant; it had erred by considering each incident in isolation and failing to stand back and consider the whole picture; and in any event it had failed to give adequate reasons for its decisions on credibility. Counsel recognised that questions of fact are for the Employment Tribunal and that the weight to be put on evidence is a matter for the decision-makers at first instance. He accepted that where there is a divergence between witnesses on factual matters, the Employment Tribunal will have to decide what it holds proved. That may involve finding a Claimant to be incredible. He argued that the Employment Tribunal in this case had done so, but had not given sufficient reasoning for their decision. Further, counsel argued that both the majority comprising the Employment Judge and Miss Atkinson and the minority, Dr Ursell, had erred in their use of medical evidence. Counsel argued that Dr Ursell had erred in the way in which she had made her decisions. He also argued that Dr Ursell's methodology, to which he took objection, had infected decisions which were unanimous or in which she was in the majority.

35. While the minority decision of Dr Ursell was subject to detailed and particular criticism, further discussed below, the decision of the majority was also said to have been reached on the basis of a finding in fact, also found by Dr Ursell, that the Claimant tended to "blame the Second Respondent for all his troubles when it was clear that there were other factors at play". That decision was criticised. The matter arose in the following way. The Claimant lodged medical records which included letters from Mr McLennan, a counsellor, written in 1991 and 1992 as well as a report by Mr Wright, a Forensic Psychologist, which was more up to date. After discussion between counsel before me, counsel were able to agree that Mr McLennan's letters had not been the subject of submissions to the Employment Tribunal, but they had been referred to in Mr Wright's report. Following an adjournment which enabled discussion with Mr Dulovic who had represented the First Respondent at the Employment Tribunal hearing, I was advised by counsel that counsel for the First Respondent may have briefly put a letter from Mr McLennan to the Claimant in cross-examination. Neither Mr McLennan nor Mr Wright gave evidence.

36. Despite Mr McLennan not giving evidence, his letters were quoted in part by the Employment Tribunal. He had had 33 counselling sessions with the Claimant between October 1991 and September 1992 and in 1991, in a letter, he stated:-

> **"Trevor said that in relationships he presents an image, a false front bolstered by lies about his status. He attributes his getting into debt, as due to his need to maintain this image by buying clothes and spending over £3,000 redundancy money.**
>
> **What is missing from Trevor's descriptions, is Trevor taking any responsibility for what's happened to him. He takes a very blaming standpoint. His "part" in anything which has happened to him is not owned …"**

37. Counsel argued that the Employment Tribunal had made use of these remarks in its decision making. Dr Ursell's reasoning was the subject of detailed criticism which I set out below.

38. The GP records on which the Employment Tribunal relied included entries between 1998 and 2012, with a gap between 2000 and 2006. The entries between 2006 and 2012, when the Claimant was employed by the First Respondent, referred to depression for which medication was prescribed. Worries at work were noted in 2007. Between 2008 and 2012 problems with neighbours were noted, as "some problem at work". In 2011 four entries were made relating to depression, three of which referred to work including in December 2011 the following:

> **"… Ongoing stress at works last five years - ongoing - little help from superiors with this - and bully covers his tracks well."**

39. Each of the three entries for 2012 referred to stress at work. They included:

> **"… Being bullied at work, the bully is charming for anyone else - Robert Moore - Supervisor at Sidhil Limited. Bullying been going on the last 6 years, getting worse, non-stop, always looking to put him down e.g. "You belong in the lunatic asylum". Been driven to making mistakes at work, lies told about him, getting him down, conscientious worker."**

40. A later entry in that year reads as follows:

> **"Stress at work. Has a symptom diary from his work experience - over ten sheets handwritten - detailed records of what has happened - many clear examples documented. Document written evening 23.7.12 - events described happened in last 6.5 years, has been with company 9 years. …"**

41. Dr Ursell had been in the minority of most of the decisions. Counsel criticised her method of assessing credibility. The Written Reasons described the method at paragraph 17 thus:

> **"17. The minority member (Dr Ursell) made a thorough analysis of the GP notes and Mr [McLennan's] letters. She also relied on the medical report of Mr Wright, Forensic Psychologist. She constructed a psychological profile of the Claimant which led her to conclude that by reason of his mental impairment the Claimant was rendered not invariably credible. She referred to several instances where the Claimant admitted to the Tribunal that he had lied: - for instance when in 2003 he told his work colleagues that he was married and that the marriage had taken place in Greece. Dr Ursell's analysis led her to conclude that before the July 2012 incident, the Respondents did not discriminate against the Claimant."**

42. The contention by counsel for the Claimant was that Dr Ursell had gone about her assessment of credibility in the wrong way. She was not qualified to construct a "psychological profile" and in any event was not required to do so. Further she had used material in the medical records in the bundle in a way which was not urged on her by either party. While Dr Ursell was entitled to assess the Claimant as incredible, she had to have acceptable reasons for doing so. It was clear that she lacked such reasons. She had found the Claimant to be incredible even to the extent that at paragraph 30.1.1 where the Employment Tribunal recorded the admission of the Second Respondent that he had called the called the Claimant "weird" and a "fucking idiot" and might have called him "stupid" and "not well in the head", on a particular occasion, Dr Ursell accepted the Second Respondent's denial of having done these things over the years as alleged by the Claimant. From that it could be seen that Dr Ursell was not prepared to accept anything the Claimant said. She had not given a good reason for that. At paragraph 28.1.2 where the majority found events to have happened and to be unwanted, Dr Ursell was quoted as finding:

> **"Dr Ursell found and decided the conduct was not unwanted. To her the Claimant presented as someone who threw everything that he could invent at the Second Respondent. He played along with conduct because he was seeking an acceptance profile. …"**

43. In paragraph 28.5.2 Dr Ursell is recorded as being in the minority. She found an allegation by the Claimant that the Second Respondent had said certain things unproved, because "In her judgment to have found otherwise would have involved a leap of faith". Thus counsel argued that Dr Ursell had refused to accept the Claimant's evidence while giving no proper reasons for doing so.

44. The majority had found in paragraph 16 that the Claimant blamed the Second Respondent "for all of his troubles where it was clear that there were other factors at play". Counsel argued that the point made by the Employment Tribunal in that sentence was irrelevant

to liability, while it might be relevant to remedy. If he was wrong in that, he argued that it was a finding that was insufficiently explained by the Employment Tribunal.

45. In connection with the allegation of hitting the Claimant with a piece of wire, the Employment Tribunal unanimously "accepted the Second Respondent's evidence. It found that it [sic] did not behave as alleged". Counsel argued that more was needed by way of explanation. Having found that the Second Respondent habitually referred to the Claimant as "gay Trev" it was necessary to explain why the Employment Tribunal did not accept what the Claimant said happened with the piece of wire.

46. For the First Respondent counsel argued that the Claimant's counsel was making an overly forensic criticism of the Employment Tribunal's Written Reasons. The majority had made findings in his favour where they found it appropriate to do so. They had found that his medical records showed that he did not mention work related problems to his GP when he might have been expected to do so. That was an acceptable observation on which to base a conclusion as to credibility. The Employment Tribunal found that he had many problems from other sources and they were entitled to find that he exaggerated the Second Respondent's activities and that he exaggerated the effect they had on him. They had a basis to do so and they were not perverse in doing so.

47. Counsel for the Respondent argued that the criticism of failure to stand back and look at the big picture was unfair. The Employment Tribunal had to consider each allegation and it did so methodically. It correctly guarded against finding that one allegation being proved meant that they were all proved. The Employment Tribunal had to make separate findings about each allegation but the Written Reasons had to be read as a whole. When that was done, one could

see that the Judgment was coherent and was constructed in a sensible fashion. It began by setting out the background, then referring to the issues. The facts were then narrated and the law correctly set out.

48. Counsel for First Respondent argued that in the long section headed "Discussion", the Employment Tribunal set out the submissions made to it about credibility. It gave its reasons for its decisions in paragraphs 15 to 17. All members of the Tribunal were influenced by the medical records to the extent that they found it inexplicable that the Claimant did not mention stress from work to his GP before 2010. The majority accepted that the Claimant had sought advice from the mental health charity MIND in December 2009 about stress at work and found that the Claimant had done so because he did feel bullied at work at that time. They were prepared to accept that despite it not being mentioned to the doctor. Thus they accepted that stress at work occurred in 2009. They stated that they had some doubts about the Second Respondent's credibility because he made admissions at the Employment Tribunal which he had been reluctant to make during the First Respondent's grievance procedure. Counsel argued that the members of the Tribunal had all found that the Claimant sought to blame the Second Respondent for all his troubles even though it was clear that there were other factors at play. He argued that the Employment Tribunal had given cogent and acceptable reasons for accepting some allegations and rejecting others. The method by which they had set them out involved stating at the start of a section what their judgment was and they had properly not repeated that every time.

49. Turning to the description of the minority judgment of Dr Ursell contained in paragraph 17, counsel for the First Respondent accepted that it was unusual. He argued that it ought properly to be read as saying that the evidence of dishonesty (the marriage evidence) and the

medical evidence led Dr Ursell to conclude that the Claimant found it difficult to differentiate between reality and his own (different) perceptions. Dr Ursell was entitled to put such weight as she thought fit on the evidence, and was entitled to find that the Claimant was not credible. There was no error of law in her doing so.

50. Counsel agreed that the Employment Tribunal was entitled to find that conduct was not intended to create a hostile environment, nor did it have that effect, on an objective test - see **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336.

51. The cross-appeal is against a decision that the First Respondent was fixed with knowledge that the Claimant was disabled from 2006. That was based on him having shown his employers anti-depressant medication in 2007. After that however he had no complaints of depression and therefore it was argued by counsel for the First Respondent that there was no reason to think that the depression was ongoing. Mr Crosfill for the First Respondent conceded that for a claim under section 26 there is no need for knowledge on the part of the person who harasses another person. He argued it is still relevant as all the circumstances have to be considered - **Weeks v Newham College** UKEAT/0630/11.

52. In my opinion the cross-appeal fails, as knowledge is not necessary. The First Respondent did in any event have some knowledge of the Claimant having suffered from stress.

53. It was broadly accepted by counsel for the First Respondent that the Judgment of the Employment Tribunal was flawed. The question boiled down to whether or not the flaws were material.

54. I have come to the opinion that they were material. It seems to me that the Employment Tribunal had a difficult task as there were many complaints made by the Claimant and the Employment Tribunal was correct in looking at each one and deciding whether or not the events had happened. It did however require, once it had made its decisions, to look once again at the overall picture and to come to a view in that regard. It then had to give sufficient reasoning. I accept the argument for the Claimant that it failed to do so.

55. Further I accept, as was agreed between counsel, that the Employment Tribunal did err in law in regard to its view that the Claimant could not make a claim in respect of harassment when he did not share the protected characteristic. That is plainly wrong.

56. Disposal is difficult in this case as the events all happened some time ago and there have already been five days of proof. Both counsel were very responsible in recognising this. Efforts were made by each of them to suggest a way in which justice could be done at the least cost. In the end, I have come to the view that I must remit this case to be reheard before a freshly constituted Tribunal. The new Employment Tribunal should hear evidence and decide on the claims which were found not to be proved, and for which no reasons were given. Therefore the claims that the Second Respondent referred to a black person as a "Sooty" does not require to be heard again, as a satisfactory explanation for the decision has been given. Similarly, the allegation concerning taking primrose oil has been rejected as harassment, the Claimant having made the remark about a hot flush. Neither do the remarks about "having 15 years on the claimant" and "not getting any younger" need to be considered further. In view of Dr Ursell's strongly held opinion it would not be in accordance with the appearance of justice were she to sit on the newly constituted panel. That would not however apply to the other two members. It is of course for the Regional Employment Judge to select a panel.

57. Given the history of the case, it does seem appropriate for me to comment that the parties may wish to consider whether further litigation is in anyone's interests. The Employment Tribunal did find that there was a basis for several of the Claimant's complaints and had it applied the law correctly it may have found that he was harassed by the other remarks that were made. I appreciate that they found that much of the difficulty in the Claimant's life did not however come from any action for which the First Respondent must take responsibility. In the circumstances, parties may consider that an agreement to settle the case would be wise.