Neutral Citation Number: [2022] EAT 54

Case No: EA-2021-000353-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07 April 2022

Before :

HIS HONOUR JUDGE AUERBACH
MR D BLEIMAN
MISS SM WILSON CBE

- -

Between :

MR ANIS ALI

Appellant

- and –

(1) HEATHROW EXPRESS OPERATING COMPANY LIMITED
(2) REDLINE ASSURED SECURITY LIMITED

Respondents

- -
- -

Nicholas Toms (instructed by RMT Legal Department) for the **Appellant**
Michael Salter (instructed by Eversheds Sutherland (International) LLP) for the **First Respondent**
Mark Williams (instructed by DWF LLP) for the **Second Respondent**

Hearing date: 10 March 2022

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JUDGMENT

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SUMMARY

HARASSMENT

The claimant/appellant works for the Heathrow Express which was, at the relevant time, run by the first respondent. The second respondent was responsible for carrying out security checks at Heathrow Airport, including Heathrow Express stations there. In particular, this involved creating and leaving suspicious objects to test how security officers responded to them. In August 2017 it carried out a test using a bag containing a box, some electric cabling and, visible at the top, a piece of paper with the words “Allahu Akbar” written in Arabic. The claimant, who is a Muslim, was among a group of employees of the first respondent who were circulated with an email reporting on the results of the test and including images of the bag and the note. He complained to the employment tribunal that the second respondent’s conduct amounted to either direct discrimination against him or harassment of him, as defined in the **Equality Act 2010**, by reference to his religion, that the second respondent had acted as the first respondent’s agent, and that, accordingly, both respondents were liable to him in that respect.

The tribunal concluded that the conduct amounted neither to direct discrimination nor to harassment by effect. As to harassment, this was because, applying section 26(4) of the **2010 Act**, it was not, in all the circumstances, reasonable for the claimant to perceive the conduct as having an effect falling within section 26(1)(b). In particular, the tribunal considered that the claimant should have understood that, in using this phrase, the second respondent was not seeking to associate Islam with terrorism, but, in the context of recent incidents in which the phrase had been used by terrorists, had used it in order to produce a suspicious item based on possible threats to the airport. The tribunal decided that it therefore did not need to determine the agency point, nor a defence which invoked section 192 (national security).

The claimant appealed against the decision on the harassment complaint on the grounds that it was either perverse or insufficiently reasoned. The appeal on both grounds was dismissed.

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HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal was, at the relevant time, employed by the first respondent, which ran the Heathrow Express train service. He continues to work for that service, having since TUPE-transferred to another employer. The second respondent to the appeal is engaged in security testing and provides such services in respect of Heathrow Airport, including the Heathrow Express stations there. There were two other respondents to the employment tribunal claim, being two other employees of the first respondent. As they were not involved in the conduct which is the sole subject of this appeal, they have, by consent, been dismissed from it.

2. The claimant brought a number of discrete complaints that, arising from various incidents, each involving one or other of the original respondents, he had been subjected to direct discrimination or harassment, as defined in sections 13 and 26 **Equality Act 2010**. The complaints were all heard at a full merits hearing before Employment Judge Anstis, Mr C Juden and Ms J Weaver, held in December 2020. The complaints variously succeeded, were withdrawn, or were dismissed.

3. This appeal solely concerns one unsuccessful complaint, being of harassment related to the claimant's Muslim religion. This was said to arise from the conduct of the second respondent, acting as the agent of the first respondent, in what the tribunal called the "security bag incident".

4. Before the tribunal the claimant complained that the conduct of the second respondent amounted to either direct discrimination against him or harassment of him. The tribunal concluded that it did not amount to either. It decided that it therefore did not need to resolve further issues about whether, had it been otherwise, liability on the part of the first and second respondents would have been established through the agency route, nor as to whether section

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192 of the **2010 Act** (national security) applied; and it dismissed both complaints.

5. This appeal is solely concerned with whether the tribunal erred in concluding that the conduct did not amount to harassment of the claimant as defined in section 26. There is no appeal against the conclusion that it did not amount to direct discrimination against him.

The Facts Found by the Employment Tribunal

6. The tribunal heard evidence about the security bag incident, in particular from the claimant and from the Operations Director of the second respondent, Mr Rutherford. It had various documents before it. Its salient findings of fact were as follows:

> **"24. The [second] respondent has a contract with Heathrow Airport for various security-related services including security testing. The scope of this contract extends to the stations operated by the first respondent on the estate of Heathrow Airport.**
>
> **25. This security testing includes deploying suspect packages in order to test whether those packages are treated appropriately by the relevant staff. We heard that this involves deployment of packages according to particular methods and standards designed to make them unambiguously suspicious, rather than items that may legitimately have been left behind by passengers.**
>
> **26. The claimant does not make any complaint of this method of security testing, which is accepted by all parties to be appropriate in the interests of security at the airport. The detriment he alleges relates to the specific design of one particular test.**
>
> **27. On 22 August 2017 the [second] respondent's staff concealed a carrier bag at one of the first respondent's stations on the Heathrow airport estate. This was open at the top, and contained a cardboard box and some electric cabling. At the top of the bag, so as to be visible on close inspection, was a piece of paper with the words "Allahu Akbar" written in Arabic. The claimant tells us that the proper translation of this is "Allah is Greater". It is not in dispute that this is an important and significant phrase for Muslims, which may be used many times a day by Muslims in the context of religious devotion. It was properly accepted by Mr Toms, and we also find that, regrettably, this is a phrase that has been used in connection with terrorist attacks in 2017 and beyond.**
>
> **28. The claimant was not on duty that day and the bag was found by a colleague. The claimant accepts that the [second] respondent could not have known whether he was or was not on duty that day. It cannot be said that the exercise was one particularly directed at the claimant. He learned of it only after the event when an email was circulated showing the outcome of**

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the test (and including photographs of the bag and note) at the end of the day.

29. Mr Rutherford said in his witness evidence that: "The only purpose of the note is to ensure that the package looked obviously suspicious and was added by the Covert Team Leader to reflect just one of the current threats that were present in the UK at the time. … We would often use English words and text that is designed to raise suspicion too, e.g. "Animal Testing must STOP now" or "No Third Runway"."

30. We accept this evidence."

The Statutory Framework

7. In its summary of the law, for the purposes of all the complaints before it, the tribunal set out the material sub-sections of section 26 of the **2010 Act**, which are as follows.

"(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."

8. Although we are not concerned as such with these provisions, we note that section 39 makes it unlawful for an employer to harass an employee. Section 109 deems anything done by an agent with the authority of their principal to have been done by the principal, subject as there provided. Section 110 provides that in such a case the agent is co-liable with the principal. Section 192 exempts from liability, conduct for the purpose of safeguarding national security which is proportionate to that purpose.

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The Tribunal's Conclusions

9. The tribunal's conclusions in relation to whether the security bag incident amounted to direct discrimination or to harassment of the claimant were as follows:

> **"51. It seems to us that however we look at the security bag incident it cannot be said to be an act of direct discrimination – there was no sense in which this was directed against the claimant because of his religion. Indeed, the claimant was at most only indirectly involved in the incident.**
>
> **52. We remind ourselves that harassment occurs where:**
>
> > **"(1)(a) [A person] engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of: (i) violating [the other person's] dignity (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for [the other person]."**
>
> **And that:**
>
> > **"(4) In deciding whether conduct has the effect referred to in subsection (b) each of the following must be taken into account: (a) The perception of [the other person] (b) The other circumstances of the case (c) Whether it is reasonable for the conduct to have that effect."**
>
> **53. We do not think it is disputed that this was unwanted conduct, and given the association of the relevant phrase with Islam it did relate to the claimant's religion. The claimant tells us that he considered this to violate his dignity and created a hostile etc. environment for him – but his perception is just one of the matters we have to consider. We also have to consider "the other circumstances of the case" and "whether it is reasonable for the conduct to have that effect".**
>
> **54. The "other circumstances of the case" include that, regrettably, this phrase has been used in connection with terrorist attacks, and that it was legitimate for the [second] respondent to reinforce the "suspicious" nature of its packages by referring to known threats and matters connected with previous terrorist incidents. We also bear in mind the unchallenged evidence of Mr Rutherford that his team did not solely use this phrase: it was used alongside with a range of other phrases that may add to the suspiciousness of a package.**
>
> **55. We also have to consider whether it was reasonable for the conduct to have that effect. We conclude that in the circumstances that existed at the time it was not reasonable for the claimant to take offence at this incident. He should have understood that in adding this phrase Mr Rutherford's team were not seeking to associate Islam with terrorism – instead they were seeking to produce a suspicious item based on possible threats to the airport.**

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> **56. Bearing in mind the three factors we have to consider under s26(4) we find that this was not an act of harassment within s26(1) because the requirements of s26(1)(b) are not made out.**
>
> **57. We note that following the claimant's complaint the [second] respondent has not used any religious phrases in its exercises, which seems to us, broadly speaking, to be a sensible precaution against further complaints being made."**

The Grounds of Appeal

10. The two grounds of appeal are, in short, that the tribunal's decision was perverse and that it failed to provide adequate reasons. Specifically, ground 1 asserts that the decision was perverse, given the following (we have slightly summarised the original text):

(a) While it is true that a number of terrorist atrocities have been carried out in recent years by extremists who claim to be Muslims, the vast majority of Muslims do not behave this way or support their actions;

(b) It is wrong to tarnish the vast majority of Muslims as terrorists or terrorist sympathisers through using their sacred terms in association with terrorist acts. It is wholly understandable that law-abiding Muslims, including the claimant, are deeply offended by the association of their religion with terrorism;

(c) The tribunal's statement at [55] that the claimant should have understood that, in adding the phrase Mr Rutherford's team were not seeking to associate Islam with terrorism, is clearly perverse. By using the sacred phrase to make the bag appear more suspicious they were clearly associating Islam with terrorism;

(d) The idea that a religious phrase, in itself, makes a bag more suspicious is going to be offensive to adherents of that religion. The perpetuation of stereotypes of Muslims in this way will not aid the fight against terrorism. It is divisive and demonises and alienates Muslims;

(e) It was not necessary for the purposes of the test to have such a note inside the bag. Other ways could have been found to make the threat credible, which did not offend the

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followers of a major world religion.

11. Ground 2 postulates that the tribunal's reasons were inadequate because the same five points, referred to at (a) – (e) of ground 1, were not addressed in its decision. The claimant therefore did not know why these points had been rejected.

The Arguments

12. We had the benefit of written skeletons and oral argument from all three counsel. We were referred to a number of authorities and to material in our appeal bundle. In summary, what appeared to us to be the most significant strands of the rival arguments were as follows.

13. For the claimant Mr Toms made the introductory point that religious discrimination may take the form of stereotyping. Of particular pertinence to this appeal, he submitted, is the stereotyping of Muslims as, or as more likely to be, terrorists, by false association with acts of terrorism carried out by a tiny number of extremists. He referred us to a recent Amnesty International publication which contains discussion of this phenomenon, and to a report of the Social Mobility Commission from 2017 on the challenges faced by young Muslims, including the experience of being forced to defend their beliefs in the wake of extremist terrorist attacks. He referred to examples of stereotyping given in the International Holocaust Remembrance Alliance's working definition of antisemitism, including the wrongful imputing of collective responsibility for individual actual or perceived wrongdoing. He submitted that, in the same way, wrongly associating adherents of Islam with acts of terrorism carried out by a small number of extremists is a form of Islamophobia.

14. Mr Toms accepted that a perversity appeal faces a high hurdle, requiring an overwhelming case, as discussed in **Yeboah v Crofton** [2002] IRLR 634.

15. However, section 26(4) required the tribunal to consider the "other circumstances", that is to say, the other relevant circumstances. The relevant circumstances in this case should have

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been regarded as including that :

(a) Islam is not a terrorist organisation;

(b) the vast majority of Muslims are not terrorists and do not support terrorism;

(c) neither the governing agreement between the respondents, nor the guidance about security testing issued by the first respondent (both of which were before the tribunal) required a prop used for the purposes of a security test to be accompanied by religious writing, or indeed anything in writing; and

(d) the evidence before the tribunal was that the test did not involve requiring the bag to be opened, so its contents were irrelevant. Employees who discovered such a bag were required not to touch it or to look inside it.

16. Mr Toms submitted that the tribunal erroneously failed to make any findings with regard to these factual features of the circumstances.

17. Further, the tribunal also erred by concluding, at [54], that it was "legitimate for the [second] respondent to reinforce the 'suspicious' nature of its packages by referring to known threats and matters connected with previous terrorist incidents." The fact that the phrase "Allahu Akbar" had been used by extremists in a small number of terrorist attacks did not make it legitimate to use it to reinforce the suspicious nature of a package. This was having regard to the following:

(a) The vast majority of Muslims do not engage in, or support, such extremist actions;

(b) The tribunal was effectively accepting that it was appropriate to tarnish the majority through the use of this sacred term in association with possible terrorist acts;

(c) It was wholly understandable that law-abiding Muslims including the claimant would be deeply offended by the association of their religion with terrorism;

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(d) The tribunal's conclusion was in danger of making it more likely that Muslims would be subject to harassment and discrimination through false stereotyping;

(e) This would not aid the fight against terrorism. It is divisive and alienates Muslims. It did not treat them with respect.

18. The tribunal's conclusion at [55] was perverse. By using this particular sacred religious phrase Mr Rutherford's team were obviously linking Islam with terrorism. The second respondent had submitted to the tribunal that the phrase was topical, as it had been used in acts of Islamist terrorism that were at their height in 2017, specifically the London Bridge, Westminster Bridge and Manchester Arena attacks, which all took place that year. By accepting this as legitimate, effectively the tribunal was saying that the claimant should accept that his religion could be associated with terrorism in this way. It was in danger of itself reinforcing the stereotype. This was particularly concerning given the central role that employment tribunals have in ensuring the effectiveness of the protections conferred by discrimination law.

19. The tribunal's decision was further perverse because (a) the claimant could not have known what was in Mr Rutherford's mind; and (b) in any event Mr Rutherford's motives or intentions were irrelevant. For this point Mr Toms relied upon **Amnesty International v Ahmed** [2009] ICR 1450 at [33]. He submitted that the observations of Elias LJ in **Land Registry v Grant** [2011] ICR 1390, about the need to view the conduct in its particular context, did not assist the respondents. Unlike **Grant**, and other authorities relied upon by the respondents, the present case was not about an oral remark, the effect of which might be viewed differently according to the context in which it was made. It was about the use of a sacred phrase of Islam purportedly to create a credible threat by means of that association.

20. As the claimant had pointed out when he complained about the matter internally, another method could have been used to create the impression of a credible threat. It was hard to see what the purpose of choosing these words was, other than to associate a particular religion with

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terrorism. It was perverse for the tribunal to conclude that it was not reasonable for the claimant to feel offended, even though the chosen method was unnecessary. The use, in other tests, of slogans associated with other extremist terrorists, such as those employed by animal rights extremists, the association with which might offend and upset ordinary vegans, could not be compared to the use of a text that formed part of the profound beliefs of a major world religion.

21. As to failure to provide adequate reasons, Mr Toms accepted that a tribunal does not have to address in its decision every point advanced by a party in submissions. But significant points which went to the heart of the claimant's case were not addressed by the tribunal. These points were, in summary, as follows:

(a) That the vast majority of Muslims did not behave in the manner of the extremists who had carried out terrorist attacks, nor did the vast majority support them;

(b) That it was wrong to tarnish the vast majority of Muslims by using their sacred term in association with possible terrorist acts;

(c) That perpetuating stereotypes would not aid the fight against terrorism, is divisive and demonises Muslims.

(d) That it was unnecessary to use a note with this phrase on it in order to carry out the test.

22. The claimant did not know from the decision why, despite his making these points, which were set out in Mr Toms' closing skeleton to the tribunal, his claim was rejected.

23. For the first respondent Mr Salter's principal arguments were as follows.

24. As to perversity, as well as **Yeboah v Crofton** he referred to **Martin v Glynwed Distribution Limited** [1983] ICR 511 and **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457 at [51], where Elias LJ referred to the "very high hurdle" which must be surmounted by a perversity challenge. In relation to adequacy of reasons he referred to the

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well-known (to lawyers) guidance in **Meek v City of Birmingham District Council** [1987] EWCA Civ 9 and **English v Emery Reimbold and Strick** [2003] IRLR 711.

25. In relation to the definition of harassment, Mr Salter drew the following particular points from the authorities.

26. Evaluation of the conduct complained of is highly fact sensitive and context specific: **Evans v Xactly Corporation Limited**, UKEATPA/0128/18/LA, 15 August 2018. The purpose or intention behind the conduct complained of could also be relevant to whether it was reasonable to regard it as having a particular effect. He referred to **Heafield v Times Newspaper Limited**, UKEATPA/1305/12, 17 January 2013, which in turn referred to the discussion in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 and in **Grant** [2011] ICR 390. The underlying points made in these authorities, about the importance of context, and that how the purpose or intention of the actor should, in context, reasonably have been understood, may be relevant to harassment by effect, were of general application.

27. Accordingly, Mr Salter submitted, when deciding whether the conduct in this case was reasonably viewed by the claimant as having had the proscribed effect, the tribunal had properly had regard to the following circumstances of the case: first, the fact that, regrettably, the phrase had been used in connection with recent terrorist attacks, and secondly that it was legitimate for the second respondent to drawn on known threats and matters connected with previous terrorist incidents to make the package appear suspicious. Further, he argued, the tribunal made other relevant contextual findings, being that the claimant was not on duty that day, that it could not be said that the exercise was particularly directed at him, and that he learned of it only from the email reporting the outcome of the test. These were all proper findings of fact, properly relied upon by the tribunal. There was no basis on which the EAT could intervene.

28. As to the reasons challenge, the tribunal's decision clearly conveyed to the reader why

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it did not think that the conduct amounted to harassment, and hence why the claimant lost.

29. For the second respondent, Mr Williams' main points were as follows.

30. He too referred to **Yeboah v Crofton**. It was not said in this case that the second respondent had *intended* to cause offence. The issue was purely about effect, and the reasonableness of the claimant's perception. He highlighted the observation in **Dhaliwal** that the reasonableness question in what is now section 26(4) is "quintessentially a matter for the factual assessment of the tribunal." It could not, he submitted, possibly be said that this was a decision which no reasonable tribunal could have reached.

31. Mr Williams also relied upon **Grant** as to the importance of context. He highlighted in particular the following features of the circumstances and context in the present case. The claimant was, in the tribunal's words, "at most only indirectly involved." The purpose of the conduct, found by the tribunal, was to make the package look obviously suspicious by drawing on current threats and features connected with previous incidents. The phrase had been used in connection with recent incidents, in particular at Westminster Bridge, Manchester Arena and London Bridge, and beyond. The tribunal properly found that it was legitimate to draw on this. Mr Williams also referred to Mr Rutherford's evidence that other phrases were used on other occasions, referring to other causes; and he submitted that the second respondent and Mr Rutherford were plainly serious people who had world class expertise and major clients.

32. Mr Williams submitted that the stereotyping, demonisation and alienation of Muslims was not an issue for the tribunal. The issue related to the claimant's perception of the use of the sacred phrase in this specific context. The tribunal understood and accepted the significance and importance of this particular phrase in Muslim faith and observance. It accepted that the conduct was unwanted by the claimant and his subjective perception of it. But the claimant's argument that this particular use by the second respondent tarnished the vast majority of

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Muslims as terrorists or terrorist sympathisers was a completely erroneous interpretation of its actions. It was not perverse to find that by using the phrase in this context the second respondent was *not* seeking to associate Islam with terrorism, but was seeking simply to produce a realistically suspicious-looking item. It was the argument that they were themselves seeking to associate Islam with terrorism that was perverse. Similarly it would be illogical to reason that the use of a slogan opposing animal testing in another exercise would be tantamount to painting all vegans as terrorists.

33. The second respondent had considerable latitude as to how it devised any particular test. The fact that it was not required to incorporate a feature of this type into this test did not make the tribunal's decision perverse. That form of reasoning was not a feature of the statutory test. The fact that the second respondent could have done it another way did not mean that the tribunal was not entitled to consider that the claimant's perception of the effect of incorporating this feature was not reasonably held, applying the statutory test.

34. Mr Williams submitted that the reasons were more than adequate. They clearly conveyed why the tribunal did not consider that this conduct amounted to harassment by effect. The absence of reference in the decision to certain contentions advanced by the claimant did not point to the reasons being inadequate. The tribunal had properly set out the matters that it considered to be relevant and germane to its findings. These various submissions were not directly relevant to what the tribunal had to decide, which was about the issue of whether the claimant personally suffered harassment as a result of this particular conduct. In any event they were answered by the non-perverse conclusion that the claimant ought to have appreciated that the second respondent was not, by its conduct, itself seeking to associate Islam with terrorism.

Discussion and Conclusions

35. We start with some points about the respective roles of the employment tribunal and the EAT, and about the law. The task of the employment tribunal was to find the facts, and evaluate

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those facts, correctly applying the law to them, in particular the statutory definition of the concept of harassment for the purposes of the **2010 Act**, guided by the pertinent authorities. The task of the EAT is to decide whether the tribunal erred in law.

36. A tribunal will err in law if its decision is, in the legal sense, perverse. But an appeal is not an opportunity to rerun the employment tribunal hearing, and, even if another employment tribunal panel might have properly come to a different conclusion, that does not establish perversity. In **Martin v Glynwed Distribution** Sir John Donaldson MR said:

> **"It is very important, and sometimes difficult, to remember that where a right of appeal is confined to questions of law, the appellate tribunal must loyally accept the findings of fact with which it is presented and where, as can happen from time to time, it is convinced that it would have reached a different conclusion of fact, it must resist the strong temptation to treat what are in truth findings of fact as holdings of law or mixed findings of fact and law. The correct approach involves a recognition that Parliament has constituted the industrial tribunal the only tribunal of fact and that conclusions of fact must be accepted unless it is apparent that, on the evidence, no reasonable tribunal could have reached them. If such be the case, and happily it is a rarity, the tribunal, which is to be assumed to be a reasonable tribunal, must have misdirected itself in law and the Employment Appeal Tribunal will be entitled to intervene."**

37. As Mummery LJ put it in **Yeboah v Crofton** at [93]:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", *British Telecommunications PLC –v- Sheridan* [1990] IRLR 27 at para 34."**

38. This approach applies both where the perversity challenge is to the tribunal's primary findings of fact, and where it is to the application by the tribunal of an essentially evaluative test to the found facts, such as, in **Roldan**, whether a dismissal was unfair. So it applies where the challenge is, as here, to the tribunal's evaluation of whether the claimant's perception was reasonable in all the circumstances of the case for the purposes of section 26(4). This point is

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specifically made in **Dhaliwal** in the course of a passage we set out at paragraph 43 below.

39. As to adequacy of reasons, rule 62(5) **Employment Tribunals Rules of Procedure 2013** requires the reasons for a judgment to identify the issues which the tribunal has determined, state the findings of fact made in relation to them, concisely identify the relevant law, and state how the law has been applied to those findings to decide the issues. In **Meek v Birmingham District Council** [1987] IRLR 250 Bingham LJ cited with approval a dictum from an earlier authority that the purpose of reasons is "to tell the parties in broad terms why they lose, or, as the case may be, win." The guidance given in **English v Emery Reimbold & Strick** [2003] IRLR 711 at [15] – [21] included the same point, and stated, in terms, that there is no duty on the judge to deal with every argument presented by counsel. What is required is for the judge "to identify and record those matters which were critical to his decision."

40. Turning to the substantive law, in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 the EAT (Underhill P and members) considered the definition of harassment at that time found in section 3A **Race Relations Act 1976**. By the time of **Pemberton v Inwood** [2018] ICR 1291 that had been replaced by section 26 of the **2010 Act**. In **Pemberton** Underhill LJ, after discussing one difference between the two provisions, continued, at [88]:

> "The other difference is that, although section 26 (2) has the same three elements as section 3A (2) (in short: B's perception; the "circumstances"; and reasonableness), they are specified as matters to be taken into account in deciding whether the effect has occurred, whereas in section 3A (2) it was expressed to be a requirement of liability that it was reasonable that the conduct should have the effect in question. However, it was not suggested to us that that difference in the structure of the successor provision was intended to make any substantive difference, and I do not believe it does. Nevertheless it means that the precise language of the guidance at para. 13 of my judgment in *Dhaliwal* needs to be re-visited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse

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environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

41. The present challenge relates solely to the tribunal's decision on what Underhill LJ called the objective question. In deciding that question the tribunal had to take into account the other relevant circumstances of the case.

42. Two particular points are well-established in the authorities. The first is mentioned in a footnote in **Pemberton**, to the reference at [88] to the shorthand "adverse environment". In the footnote Underhill LJ commented: "This is the shorthand adopted in *Dhaliwal* for the cornucopia of epithets deployed in the statute. Although it is a convenient shorthand, it is important not to lose sight of the force of the particular adjectives used: see *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390, *per* Elias LJ at para. 47." The point here is that the particular language of section 1(1)(b) needs to be kept in mind, when judging whether the legal threshold of harassment, whether by purpose or, in a case such as the present, effect has been crossed; and that not all unwanted conduct which relates to a protected characteristic and causes offence or upset will necessarily do so.

43. The second point emerges from the following passage in **Dhaliwal** at [15]:

> **"Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."**

44. This passage was specifically endorsed by the Court of Appeal in **Grant** at [13], where the submission that the intention of the actor could only be relevant to harassment by purpose,

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as opposed to effect, was specifically rejected. We should add, as it was relied upon by Mr Toms, that **Amnesty International v Ahmed** [2009] ICR 145 is not in point. It was concerned with direct discrimination, and makes the point that if the treatment is because of (at the time, the statute said "on grounds of", but the meaning is the same) a protected characteristic, it makes no difference that the discriminator may have had a laudable motive. But the definition of harassment is different. There was no issue in this case, and the tribunal found, that the conduct was *related to* religion (itself a different connector from "on grounds of/because of"). The test of effect, as set out in sections 26(1) and (4), is something on which **Ahmed** casts no light.

45. Although the particular authorities referred to by the respondents concerned conduct by way of things said, we do not agree with Mr Toms that this point is only of potential relevance in cases of that particular type. The underlying wider point is that, in judging whether the complainant's perception of the conduct was reasonable, it is relevant for the tribunal to consider, in light of the particular context of the conduct, what the complainant appreciated, or reasonably ought to have appreciated, about the purpose or intention that lay behind it.

46. Turning, then, to ground 1 – perversity – it appears to us that, at the heart of this ground is the challenge at ground 1(c) to the tribunal's conclusion at [55] that:

> **"[the claimant] should have understood that in adding this phrase Mr Rutherford's team were not seeking to associate Islam with terrorism – instead they were seeking to produce a suspicious item based on possible threats to the airport."**

47. Plainly the tribunal was entitled to find that the claimant did understand that the context in which the phrase had been used was the carrying out of a security test, as such. As the tribunal found (and whether or not he also heard about it independently from colleagues) the claimant was among the recipients of an email reporting on the results of the test, which included photographs of the bag, including the note containing the phrase. The context of the security test was also referred to by the claimant in his internal email of complaint. That he

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understood that this was the factual context, as such, was not disputed by him.

48. However, the basis of the perversity challenge, was, in effect, that it was intrinsically logically wrong to say that in using this phrase Mr Rutherford's team "were not seeking to associate Islam with terrorism". Mr Toms argued that it was *inherent* that, in using the sacred words of Islam in this context, that was precisely, and inescapably, what they were doing. They were thereby inherently associating the religion with terrorism, in the specific sense, as he put it in his skeleton, that they were tarnishing the vast majority of Muslims as terrorists or terrorist sympathisers "through using their sacred terms in association with possible terrorist acts".

49. On this reasoning, the tribunal should, and could only properly, have concluded that the use of these words in this way *inherently* amounted to the stereotyping of Muslims. That is why, as Mr Toms argued, by holding at [54] that it was legitimate for the second respondent to reinforce the suspicious nature of the package by referring to known threats and matters connected with previous terrorist incidents, the tribunal were "basically saying it is legitimate to connect the sacred words or Islam with a terrorist threat" and so the tribunal were thereby "in danger themselves of perpetuating the stereotyping of Muslims as terrorists"

50. We do not agree that the tribunal's conclusion was logically flawed, and perverse, in that way. The tribunal stated at [27] that it was accepted by Mr Toms "and we also find that, regrettably, this is a phrase that has been used in connection with terrorist attacks in 2017 and beyond". It was never suggested that the claimant did not himself appreciate that fact, and indeed he referred, in his internal email complaint, which was before the tribunal, to the test scenario having centred around the circumstances of previous similar attacks of this nature, mirroring details of past events. The tribunal made a specific finding of fact that the purpose of using the words was to make the package seem obviously suspicious by drawing on recent incidents and currents threats. Having regard to those recent high-profile incidents, and bearing in mind that the test was directed at security officers, that was a finding it was entitled to make.

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51. We do not accept that the tribunal should have considered that the proposition, on which the second respondent avowedly did rely in designing the test, that *some terrorists* invoke or use the sacred words of Islam in connection with their terrorist acts, is logically effectively the same as the proposition that *some, or most, Muslims* in general are terrorists, or terrorist sympathisers. These two propositions are simply not logically equivalent.

52. That, inevitably, leads to the conclusion that the perversity challenge must fail, as all the other strands of the challenge were, in our view, to a degree parasitic upon that central plank and/or could not, in any event, themselves surmount the very high hurdle faced by a perversity challenge. We take them in turn.

53. The propositions that the vast majority of Muslims do not behave as the terrorists do, or support their actions, that it is wrong to tarnish the vast majority in that way, and that they are deeply offended by the association of their religion with terrorism (grounds 1(a) and (b)) are all, surely, wholly unexceptionable. But they do not point to the conclusion that this tribunal should, and only could, have found that what the second respondent did itself amounted to that form of egregious and fundamentally misconceived stereotyping.

54. Similarly, the proposition that the idea that a religious phrase, itself, makes a bag more suspicious is going to be offensive to adherents of the religion (ground 1(d)), does not point to the conclusion that this tribunal should have concluded that the second respondent's use of the phrase was, in effect, not materially different from the use of the phrase by terrorists themselves, or from the actions of those who stereotype Muslims as terrorists or terrorist sympathisers.

55. The fifth strand of the perversity challenge (ground 1(e)) makes the point that it was not necessary to use the note as part of the scenario. Other ways could have been found, which would not offend the followers of Islam. There are a number of points to make about this.

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56. First, a strand of Mr Toms' argument was, more specifically, that the note was pointless, because a member of staff or the security team finding the bag would be advised not to open it up or delve inside it. However, the tribunal specifically found as a fact at [27] that the bag was left open and the note was placed at the top so as to be visible on close inspection. The tribunal was entitled to find that this was done in order to ensure that a security guard finding, or being shown, the bag would not fail immediately to treat it as suspicious.

57. A different point, however, is that there was nothing in the service agreement or protocols that obliged the second respondent to use this particular writing, or any writing at all, to make the object or prop used in a security test appear obviously suspicious. However, that does not appear to have been disputed, as such; and certainly there is nothing in the decision to suggest that the tribunal thought otherwise. Nor can it be said that the tribunal did not appreciate, or agree, with the proposition that the use of the holy phrase was liable to cause offence to Muslims. The tribunal specifically referred at [27] to the fact that it was not in dispute that this was an important and significant phrase for Muslims, which may be used many times a day in the course of religious devotion.

58. But, once again, this feature does not point to the tribunal's conclusion at [55] being in the legal sense perverse. It is not said, on appeal, that the tribunal should have concluded that these words had been chosen gratuitously with the deliberate purpose of causing upset, still less with one of the purposes proscribed by section 26.

59. We understand that a strand of the claimant's case was that the use of this phrase was particularly insensitive, and offensive to him, not merely because it referenced Islam, but because of the sacred nature and significance of this particular phrase in religious observance. While we do not accept that it was perverse not to regard the conduct of the second respondent as amounting in itself to the stereotyping of Muslims generally as terrorists or terrorist sympathisers, we do understand that he also says that, because such stereotyping is a significant

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and serious blight on the lives of Muslims, the use of these words in this context was particularly charged for him, more than, say, the use of an animal-rights slogan co-opted by some terrorists would be for a vegan. However, we cannot say that these features point to the conclusion that the tribunal could only properly have found that the claimant's perception that the conduct had the effects on him of the kind referred to in section 26(1)(b) was a reasonable one.

60. We remind ourselves again that the application of the reasonableness test was "quintessentially" a matter for the tribunal, not the EAT. Further, although the tribunal said, at [55] that it was not reasonable for the claimant to "take offence" at this incident, that was plainly itself a shorthand for his perception that it had effects referred to in section 26(1)(b): violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Reading the decision as a whole, the tribunal plainly was alive to this test, and had it in mind. They cited it when first summarising the law, specifically reminded themselves again of it, when considering this particular complaint, at [52], used its language when referring to the claimant's evidence, at [53], and referred back to it again at the start of [55] by referring to "that effect".

61. The tribunal made proper findings that the conduct was not directed at the claimant because of his religion, that the phrase *had* been used in connection with recent high-profile terrorist attacks, that it was, for that particular reason, chosen to reinforce the suspicious nature of the package, and that the claimant should have reasonably appreciated that. These were all features of the circumstances to which it was entitled to have regard when deciding whether it was reasonable for him to perceive the conduct as having the proscribed effect. We do not think any of these other points or arguments show that it was bound nevertheless to decide otherwise.

62. In argument Mr Toms advanced the further point that the claimant could not have known what was inside the minds of Mr Rutherford, or his team, when they devised this test. But the tribunal's point precisely was that, within the context of this being a security test, and against

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the background of a recent spike of terrorist attacks, in which these words had been invoked, of which the claimant was aware, the purpose reasonably should have been appreciated by him.

63. It may be said, nevertheless, that the claimant did not appreciate at the time that other phrases were used in other tests, but we do not consider that the tribunal's reference to Mr Rutherford's evidence in this regard makes good the perversity challenge. The two particular circumstances that the tribunal highlighted and relied upon in the main part of [54] were the recent past use of the phrase by terrorists, and the associated use by the second respondent of it as a means of provoking suspicion by referencing those topical incidents. The evidence that other phrases were used on other occasions was added as something that the tribunal said they "also bear in mind"; and it was the former two, linked, features that are the ones to which it specifically returned at [55]. The tribunal was, in any event, fully entitled to reach the view that they did on the reasonableness question, having regard to those features alone.

64. We stress again, in conclusion on this ground, that it would not be sufficient to a perversity challenge that another employment tribunal might, properly, have come to a different conclusion as to whether the claimant reasonably viewed this conduct as having the proscribed effect. The perversity hurdle is only surmounted if no reasonable tribunal, applying the correct legal test, could have reached the conclusion that this tribunal did. Whether or not the second respondent's actions, notwithstanding their found purpose, might be thought to have been ill-judged, or insensitive, we do not find that hurdle to have been surmounted in this case.

65. We turn to ground 2 – the "reasons" challenge. In the notice of appeal, this postulates that the tribunal's reasons were inadequate because of a failure to address the same five matters that were referred to in ground 1 at sub-paragraphs (a) to (e).

66. As to the points made at (a) and (b), true it is that, in his closing skeleton argument to the tribunal, Mr Toms referred to them in support of his contention that it was reasonable for

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the claimant "to be offended", which, we assume, was intended by him to be a shorthand for the statutory test. True it is that the tribunal did not expressly mention them in its decision. However, it was, in our view, not necessary for it do so. That is for the following reasons.

67. First, there is no reason at all to suppose that the tribunal's failure to mention these propositions – that the vast majority of Muslims do not behave in the manner of the terrorist extremists, or support them, that it is wrong to tarnish Muslims generally by using their sacred terms in association with possible terrorist acts, and that law-abiding Muslims would be deeply offended by the association of their religion with terrorism – was because it had failed to consider them, or took issue with them as such. Their nature is such that the tribunal did not need to confirm if it regarded them as uncontroversial as such. Rather, it would have been necessary for the tribunal to spell out if for some reason it took issue with any of them.

68. Secondly, as we have discussed, the significance, or not, of these propositions, for the issue that the tribunal had to decide, was largely parasitic on the submission that the claimant reasonably regarded the second respondent's conduct as *itself* inherently amounting to an act of stereotyping or tarnishing of Muslims in general as terrorists or terrorist sympathisers. The tribunal gave, in substance, in its decision, its reasons for rejecting that core proposition. That being so, we do not think it was incumbent on it to go on to address these propositions in terms.

69. As to point (c) this expressly refers to something that was stated in the tribunal's reasons, at [55], so it cannot be said that the tribunal erred by failing to address it; and we note that this strand of ground 2 was not pursued in Mr Toms' submissions.

70. As to point (d) this too featured in Mr Toms' skeleton to the tribunal. It is, however, in its first part, effectively a restatement of points (a) and (b). Its second part makes points about stereotyping and its effects, which, once again were relied upon in support of the underlying proposition that the claimant reasonably considered that the second respondent was itself

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engaging in such stereotyping. Once again, the nature of the proposition about the stereotyping of Muslims and its perniciousness, is such that we do not think it can be inferred, because it did not mention it, that the tribunal had overlooked or took issue with it. Once again, the particular significance said to attach to this point was that it was relied upon in harness with the proposition that the second respondent had itself engaged in such stereotyping, which the tribunal did, as such, address.

71. As to (e), again the point was raised in Mr Toms' skeleton. But there is nothing in its decision to suggest that the tribunal had overlooked this, or otherwise thought that the second respondent was *obliged* to use material of this sort as part of a test prop, or relied upon any such assumption. The tribunal accepted that the claimant had been deeply offended by it, and noted at [57] that the second respondent had not used any religious phrases in its tests since receiving his complaint, which it commended as sensible. As we have stated, we do not think that the tribunal was obliged to regard this feature as pointing to the conclusion that the claimant's perception, by reference to section 26(1)(b)(i) and (ii), was, in all the circumstances a reasonable one. All of that being so, we do not think it was necessary for it, in its decision, specifically to refer to this submission.

72. We note that the tribunal was, in this decision, concerned with a number of complaints of which this was only one. Perhaps it would have been better if its conclusion in relation to this particular complaint had been expressed a little bit more fully. But in rule 62 terms, all the essential facts are set out. As to the law, some reference to the key authorities or principles emerging from them might usefully have been included. But, as we have said, the tribunal plainly had the section 26 definition firmly in mind, understood how to apply section 26(4) and did apply it. Standing back, and applying the fundamental test in **Meek** and **English**, the tribunal set out the facts at [34] to [30]. It opened paragraphs [54] and [55] by referring to what the other circumstances "include". It went on, there, to identify the features among all the

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circumstances of the case, those that were critical to its decision on this particular complaint. It thereby told the claimant why this complaint was unsuccessful.

73. Ground 2 accordingly fails.

Outcome

74. We appreciate the strength of feeling that the claimant plainly has about this matter, and about matters more generally concerning the treatment of Muslims in society. But the task of the tribunal was to consider whether the conduct of the second respondent of which he complained amounted to harassment as that term is defined in section 26 of the **2010 Act**. The EAT can only interfere with its decision if it erred in law. We have concluded that the tribunal's decision was neither in the legal sense perverse, nor insufficiently reasoned.

75. As both grounds fail, the appeal is dismissed.

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