Neutral Citation Number: [2024] EAT 89

Case No: EA-2022-001098-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 May 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

VUSI MATHEBULA **Appellant**

- and -

TIME 4 U LIMITED **Respondent**

- -
- -

Daniel Piddington (instructed through **Advocate)** for the **Appellant**
Jemma Fairclough-Haynes (consultant **Orchard Employment Law**) for the **Respondent**

Hearing date: 9 May 2024
- -

JUDGMENT

SUMMARY

Race Discrimination

The claimant in the employment tribunal, who identifies as Black African, brought a number of **Equality Act 2010** complaints, including about the alleged use of the word "monkey" or "monkeys" during the course of a particular meeting, in remarks addressed to, or about, him and other Black colleagues.

The tribunal identified in its decision that the respondent averred that this word had been used in a WhatsApp group message and that the respondent contended that the context was such that the use of the word was not racial. The tribunal accepted, as a general finding, that the word had been used by the manager concerned, but without making any finding about whether it was used at the meeting about which the claimant had complained. The tribunal discussed further on its decision matters relating to the WhatsApp group message. The claimant's complaint about the use of this word, as well as other complaints, was dismissed.

However, the tribunal failed to make any specific finding about whether the word complained of had been used in the meeting about which the claimant had specifically complained, and, if so, as to the context on that occasion, and as to the merits of the complaint relating to the alleged use of that word at that meeting. The tribunal's decision was fundamentally deficient because it failed to make findings about, and sufficiently to engage with, the specific complaint that had been raised, which related to that specific meeting.

The claimant was a litigant in person, and consideration should also have been given to whether this particular complaint should be treated as being of harassment related to race, or of harassment and alternatively direct discrimination.

The matter was remitted to a differently constituted tribunal to consider this particular complaint, relating to the alleged use of this word at the meeting in question, afresh, as one of harassment related to race, alternatively direct discrimination because of race.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they were in the employment tribunal. This is the claimant's appeal arising from the decision of EJ Apted, Mr Khan and Mr Wilby, sitting at London South, at a full merits hearing, in which the tribunal dismissed his claims under the **Equality Act 2010**. An oral decision was given at the hearing and written reasons were subsequently provided.

2. The claimant was a litigant in person in the employment tribunal and represented himself at the full merits hearing and at an earlier preliminary hearing. The respondent was represented by Orchard Employment Law. Jemma Fairclough-Haynes of Orchard, an HR consultant, appeared for it at both tribunal hearings.

3. The tribunal's decision at the full merits hearing had a brief introduction setting out some broad contextual findings of fact. In summary, these were as follows.

4. The respondent provides supported living services to individuals who have learning disabilities, mental health issues, and other complex care needs. The claimant was employed by the respondent as a support worker from August 2019. In September 2019 he was promoted to team leader. In May 2020 the respondent decided that it wanted to ensure that all team leaders were paid on the same basis. The claimant was one of only eight team leaders who were paid a daily rate. The others were paid an hourly rate plus an additional sum for sleep-in shifts. The net effect of the proposed change to the claimant's terms would be a significant reduction in his net pay.

5. On 11 May 2020 the proposed changes were discussed with the claimant at a meeting and on 12 May he was provided with a new contract. The claimant subsequently raised a grievance about certain matters, which was unsuccessful, and there was then an appeal from

the grievance decision, which was also unsuccessful. Subsequently, the claimant began an employment tribunal claim, which the tribunal described as being of direct race discrimination.

6. Following these introductory paragraphs, there was a section of the tribunal's decision headed: "The law" in which it set out the relevant parts of s.13 **Equality Act 2010** – the definition of direct race discrimination, and s.9 – the definition of the protected characteristic of race. The tribunal did not set out, or refer to, any other statutory provision, authority, or principles of law.

7. In a section headed: "The issues" the tribunal reproduced the text of the list of issues that had been included in the minute of an earlier preliminary hearing in July 2021. This included the following:

> **"Direct race discrimination (Equality Act 2010 section 13):**
>
> **1.1 The claimant self describes his ethnicity as Black South African.**
>
> **1.2 Did the respondent do the following things:**
>
> **1.2.1 Call the claimant (and other Black staff) 'Monkeys',**
>
> **1.2.2 Reduce his pay because he should not be paid more than a European,**
>
> **1.2.3 Failure to deal fairly with his grievance (and particularly not interviewing Mr Benn Ohurake)**
>
> **1.3 Was that less favourable treatment?**
>
> **The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.**
>
> **If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.**
>
> **The claimant says he was treated worse than a white Polish worker (his name was provided in the hearing) or a hypothetical Black British worker.**
>
> **1.4 If so, was it because of race?**
>
> **1.5 Did the respondent's treatment amount to a detriment?"**

8. The witnesses who gave oral evidence at the hearing were the claimant and, for the respondent, Mrs Fairclough-Haynes and Mrs Mudavanhu. Although the tribunal did not identify her position, Mrs Mudavanhu was described in the response to the claim and in her witness statement to the tribunal as the respondent's HR manager and a member of its senior management team. As I have noted, Mrs Fairclough-Haynes is an external HR consultant. She had been brought in by the respondent to hear the claimant's grievance appeal. For completeness, I note that the tribunal also had a witness statement from another external individual who it appears considered a complaint that the claimant made about Ms Fairclough-Haynes; but the tribunal did not hear oral evidence from him and he did not otherwise feature in its decision.

9. The section of the tribunal's decision headed: "Discussion and findings of fact", after some introductory remarks, made findings by reference to each of the three complaints identified at para.1.2 of the list of issues, beginning with the following:

> **"Did the respondent call the claimant (and other Black staff) monkeys?**
>
> **18. The respondent accepts that the word 'monkeys' was used. The respondent's case is that the word was used in a WhatsApp group chat. Those messages were not retained and so have not been seen by this Tribunal. That is unfortunate. The claimant's case is that during the course of a meeting which he said took place on the 15th June 2020 - his manager - a man referred to as Mr Benn - referred to staff as monkeys. The claimant does not allege that the word was used in a WhatsApp group.**
>
> **19. We therefore find that although there is some discrepancy as to when the word was used, we find and it is accepted by the respondent, that the word was used. In her witness statement, Mrs Mudavanhu states that the respondent employs approximately three hundred staff and that the majority are Black African or African diaspora. We therefore infer and find that the word 'monkeys' was said to other members of staff including Black staff members."**

10. In a section concerning the complaint that the respondent had reduced the claimant's pay "because he should not be paid more than a European", the tribunal referred to various

meetings at which the reasons for the changes to his terms were discussed. It also referred to evidence that, of the eight team leaders, two were white European and the remainder were Black. The tribunal found that the reason why the claimant's pay was reduced was not because he should not be paid more than a European, but in order to bring his pay in line with that of the other team leaders.

11. The tribunal then made findings relating to the third complaint, being: "Failure to deal fairly with his grievance and particularly not interviewing Mr Benn Ohurake." I interpose that Mr Benn Ohurake, who the claimant and the tribunal generally referred to as "Mr Benn", was, at the relevant time, the claimant's line manager.

12. The tribunal set out the various issues that the claimant had raised in his internal grievance, including "whether some form of discrimination was involved in his downgrading". It recorded that, following the decision on his initial grievance, the claimant appealed. In preparation for the hearing of that appeal, he set out his key points of appeal. The first related to what he said was the unfairness of the variation of his contract. The second was a complaint of racial discrimination in which the claimant identified that it was Mr Benn Ohurake who he said had discriminated against him.

13. The tribunal continued:

> **26. Following that meeting, the claimant's appeal was dismissed on the 11th August, (in a report dated the 3rd August). In relation to the claim for racial discrimination, Mrs Fairclough-Haynes found that the word monkey was used but that when considered in the context in which it was used, it was not a racial or prejudicial term. Instead, it was a reference to how the group were behaving. In relation to the change of contract, Mrs Fairclough-Haynes found that although the variation would result in difficulty for the claimant, the variation had been conducted lawfully.**
>
> **27. During the course of her investigation, Mrs Fairclough-Haynes established that Mr Benn had not made or influenced the decision to change the claimant's contract. We have also not identified any evidence that Mr Benn had any**

> **influence. We find as a fact that Mr Benn did not make or influence the decision to change the claimant's contract.**
>
> **28. As part of the investigation into the claimant's grievance, Mrs Fairclough-Haynes did not interview Mr Benn and did not obtain a copy of the WhatsApp group messages.**
>
> **29. Insofar as Mr Benn is concerned, Mrs Fairclough-Haynes stated that Mr Benn left the respondent two days after the grievance meeting on the 15th July 2020. She stated that it had not been possible to speak to him in the intervening two days, that she did not have any personal contact details for him and that he could be elusive. She had not attempted to contact him since.**
>
> **30. Insofar as the WhatsApp messages are concerned, she stated that she had been told that they existed, and that Mrs Mudavanhu would obtain a copy. She was subsequently told that Mrs Mudavanhu was unable to do so, but she told Mrs Fairclough-Haynes what the messages said (having previously seen them). She had no reason to disbelieve what Mrs Mudavanhu said and accepted her explanation; that when considered in the context in which the remark was made, that the comment was not racist. Mrs Fairclough-Haynes stated that she had been told that the remark had been made to all team leaders, which included white members of staff.**
>
> **31. We therefore find that the failure to interview Mr Benn was not unfair in the circumstances, he having left the respondent, two days after the 15th July.**
>
> **32. Mrs Fairclough-Haynes was investigating the outcome of the claimant's grievance. In doing so, she did not obtain the WhatsApp group messages. She simply accepted what Mrs Mudavanhu said and accepted Mrs Mudavanhu's interpretation of the messages. She did not try to obtain the WhatsApp messages herself and so has not viewed them to ascertain if Mrs Mudavanhu's interpretation was correct. It is unfortunate that she did not obtain the WhatsApp messages and that we have therefore been unable to view them ourselves, but we find that the failure to obtain them was not unfair.**
>
> **33. We therefore find that the claimant's grievance was not dealt with unfairly."**

14. Under a further heading: "Was that less favourable treatment?", the tribunal first found that changing the claimant's contract to bring it into line with that of other team leaders was not less favourable treatment. It then continued:

> **"36. We have already found that the claimant and others were referred to as monkeys. However, we have considered the context in which that remark was made, and we make the point again, that we have not seen the WhatsApp messages for ourselves and are therefore unable to determine the context for ourselves. The evidence that we do have is that the remarks were made to other members of staff and that they were made in the context of the behaviour of the staff. This was the conclusion that was reached by Mrs Fairclough-Haynes and the respondent's management at the time and in our judgment, it does not seem unreasonable to have reached that conclusion. We do not have any other**

> **evidence to contradict this conclusion. We therefore find that although the remark was made, this did not amount to less favourable treatment."**

15. The tribunal went on to find that there was no less favourable treatment in relation to the claimant's pay or the handling of his grievance. It rejected his reliance on a Polish colleague as a comparator, who was not a team leader, and it also found that he was not treated less favourably than a hypothetical Black British worker.

16. The final two paragraphs of the decision were as follows:

> **"40. Having found that the claimant was not treated less favourably, we find that the respondent's treatment did not amount to a detriment.**
>
> **41. The claimant's claim for direct race discrimination is therefore not well founded and is dismissed."**

17. The claimant presented his notice of appeal acting again as a litigant in person. The grounds were considered on paper by Judge Stout who directed that ground 3, only, proceed to a full appeal hearing. That ground, as drafted by the claimant, is as follows:

> **"3. The fact of importance is [Mrs Fairclough-Haynes'] finding that the word monkey was used, which was not correctly interpreted by the Tribunal as consideration was not given to the Impact the word had on me as a Black person, thus, elements of racial discrimination exist."**

18. Judge Stout's reasons for allowing that ground to proceed were as follows:

> **"It is arguable that the Tribunal has misdirected itself in law and/or erred in its application of the law and/or failed to make adequate findings of primary fact and/or failed to give adequate reasons for the conclusion of secondary fact at [36] that the claimant had not been directly discriminated against because of his race when he and other members of staff, the majority of whom were Black African or African diaspora, had been referred to as '*monkeys*' (see the Tribunal's finding of primary fact at [19]).**
>
> **The Tribunal has arguably failed to direct itself by reference to / properly apply well-known authorities such as *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065; *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337; *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469; and *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010. It has failed to make a factual finding as to who made the '*monkeys*' remark and failed to consider (or make a finding as to) the reason why the remark was**

> **made, and whether that person was, consciously or unconsciously, influenced by race (whether of the claimant or anyone else).**
>
> **It has also failed to address the claimant's argument that use of the word '*monkeys*' to describe staff, the majority of whom were Black African or African diaspora, was inherently racially offensive/discriminatory and thus constituted less favourable treatment of him as a Black employee in comparison to a non-Black employee (in this respect, *cf Earl Shilton Town Council v Miller* [2023] EAT 5 at [12]-[27] per HHJ Tayler as to the circumstances in which treatment afforded to a group may constitute less favourable treatment for the purposes of direct discrimination). Alternatively, it is arguable that the complaint should have been treated by the Tribunal as an allegation of racial harassment under s.26 EA 2010 which does not require less favourable treatment to be established provided the other elements of the definition are met."**

19. At today's hearing of this appeal Mr Piddington of counsel has appeared for the claimant instructed through Advocate. Mrs Fairclough-Haynes has, once again, appeared for the respondent. The claimant, as I have noted, presented his appeal as a litigant in person. Judge Stout's reasons put some legal flesh onto the bones of ground 3, articulating the points of challenge embraced by and implicit in it; and both representatives engaged with all of the points brought out by Judge Stout.

20. Mr Piddington accepted that the challenge, as such, raised by this appeal is to the tribunal's conclusion dismissing the complaint regarding the use of the word "monkey" or "monkeys". But he argued that, if that appeal succeeded, the implication would be that the tribunal's entire decision was unsafe and would need to be revisited. I will return to this. I turn, however, to the substantive challenge raised by the appeal.

21. In her short skeleton argument, Mrs Fairclough-Haynes submitted that the tribunal had made comprehensive factual findings about the "monkey(s)" remark having considered evidence from multiple sources – specifically: the claimant, Mrs Mudavanhu, and Mrs Fairclough-Haynes herself. The tribunal had correctly identified at [18] that it was Mr Benn Ohurake who made the remark; and at [36] it had addressed the context, which included the

behaviour of staff members, and it addressed whether racial factors were at work. The tribunal was best placed to assess witness credibility and the EAT must defer to its findings of fact. She also submitted that the tribunal's approach aligned with established legal principles regarding the interpretation of discriminatory remarks and the burden of proof in discrimination cases.

22. I do keep firmly in mind, of course, that the EAT did not read or hear all of the evidence that was presented to the tribunal. It is also long established that a tribunal does not, in its decision, have to deal with every aspect of the evidence or every factual matter canvassed before it. This tribunal specifically noted at [16] that failure by it to refer to a piece of evidence did not mean that it had not been considered. However, in order to produce a decision which is *Meek*-compliant, and conforms to the basic requirements of rule 62 **Employment Tribunals Rules of Procedure 2013**, the tribunal does have to make the necessary and essential findings of fact in relation to each *particular* complaint that is before it; and it must then apply the relevant principles of law to those findings of fact in order to determine each such complaint.

23. Further, while it will not ultimately be fatal that a tribunal's statement of the law does not fully cover the ground, if it has demonstrated in its substantive reasoning that it has correctly applied the law, nevertheless, where the statement of the law is very brief, the EAT may be less able to be confident that all the relevant principles have indeed been fully understood, considered, or applied.

24. In considering this appeal, the place to start is with what the claimant complained had factually occurred. In his claim form, he wrote this:

> **"On Monday, 15 June 2020, we had a meeting after staff complained about how they were treated by Mr Benn. Mr Benn said that if the staffs want to**

> **be treated like monkeys, he will exactly do that because what they want is how monkeys are treated."**

25. In a further letter (responding to a tribunal direction that he set out his position regarding comparators) written prior to the preliminary hearing in the tribunal, the claimant wrote this of Mr Benn Ohurake:

> **"He also made it very clear that he considered myself and my colleagues in my team to be 'monkeys' saying this in meetings openly. Management are aware of and do not deny his comments."**

26. The minute of the July 2021 preliminary hearing records the following in the case summary section at [37]:

> **"The claim is about direct race discrimination. The claimant complains that his manager Mr Benn Ohurake referred to him as monkey and he reduced his pay. The respondent's defence is to deny all claims of race discrimination. However, they accept that they were aware of the monkey comment."**

27. In its decision arising from the full merits hearing, as I have set out, at [18] the tribunal identified that it was the claimant's case that Mr Benn Ohurake had used the word "monkeys" during the course of a meeting which took place on 15 June 2020. That, as such, correctly reflected his pleaded case. It also reflected the account given in his witness statement for that hearing, which referred specifically to what the claimant said Mr Benn Ohurake had said at a meeting on that date.

28. While the tribunal also identified in the same paragraph that it was the respondent's case that Mr Benn Ohurake had used the word "monkeys" in a WhatsApp group chat, the tribunal itself also identified there that this was *not* what the claimant was himself specifically alleging.

29. As I have set out, at [19] the tribunal began by stating:

> **"We therefore find that although there is some discrepancy as to when the word was used, we find and it is accepted by the respondent, that the word was used."**

30. What this does not contain is any clear or express finding of fact about the *occasion* on which the tribunal found that the word was used. Further, all of the later discussions – including about the consideration by Mrs Fairclough-Haynes of the claimant's appeal, discussed by the tribunal at [26] – [32], and the tribunal's own conclusions at [36] – in so far as they refer to any specific occasion on which the word was used, refer only to its use in the WhatsApp group chat. There is, in this decision, no finding by the tribunal, directly or indirectly, about whether the word was also used at the meeting on 15 June 2020, or otherwise about its use at that meeting.

31. Mrs Fairclough-Haynes has told me this morning that the claimant's grievance appeal related, in part, to his allegation that the word was used at the 15 June 2020 meeting, which she considered when considering that appeal. She found that it was, indeed, used on that occasion; but her conclusion was that, in the context of that meeting, its use did not relate to race. She told me that the tribunal had the evidence about that before it. However, none of that is apparent from the decision.

32. I am unable to say why, in its decision, the tribunal did not make findings of fact about, or otherwise consider in terms what happened at, the 15 June 2020 meeting. There is no finding of fact about that, nor any discussion by the tribunal specifically of what it might have made about the use of that word on that occasion and whether the claimant's complaint in relation to it was well founded or not. On a natural reading the tribunal's conclusions at [36] appear to be about, solely, the use of the word in the WhatsApp group chat. If the tribunal intended those conclusions to be also about its use at that meeting, it did not say so, or otherwise make that clear.

33. It was incumbent on the tribunal, doing the best it could on the evidence presented to it, to make a specific and clear finding of fact about the specific factual allegation on which the claimant relied and which formed the basis of his particular complaint to the tribunal. It needed to decide whether the alleged remark was made by Mr Benn Ohurake at the meeting on 15 June 2020 and, if so, so far as it was able, to make further findings to enable it to determine the complaint about that remark, such as in relation to the nature of the meeting, who was present, the context, and the gist of what was said, including the use of that word. The tribunal might not have felt able to make detailed factual findings about all of those aspects, but it needed to engage with the task and do the best that it could.

34. The tribunal's observations about the context of the remark discussed by it at [36] are not sufficient. As I have already said, on its face, the natural reading of this paragraph is that it is addressing there the use of the word in the WhatsApp group chat. This passage seems to refer back to what the tribunal said at [30] which, on its face, again appears to form part of a discussion by the tribunal, of what it found Mrs Fairclough-Haynes made of the WhatsApp group chat.

35. It was not a sufficient response to the complaint about the 15 June 2020 meeting for the tribunal not to have made findings about that meeting, including the context of the remark, if made on that occasion. Even if, at its highest, it might be said that the found use of the same word in the WhatsApp group, by the same individual who the claimant complained had used it at the 15 June meeting, could cast some light on what happened at that meeting, the tribunal still could not properly or fairly dispose of the claimant's actual complaint without making some factual findings in relation to it.

36. If authority be needed for this proposition, which I regard as axiomatic, Mr Piddington referred me to **Jocic v London Borough of Hammersmith & Fulham** [2007], UKEAT/0194/07 at [57], referring, in particular, there to the discussion in the earlier case of **Peart v Dickson's Store Group Retail Ltd**. UKEAT/0030/04.

37. The evaluation of complaints of this kind, both as to the primary facts, as to what inferences may be drawn from the primary facts (applying, in particular, the guidance in **King v The Great Britain-China Centre** [1991] EWCA Civ 161; [1992] ICR 516), or as to whether those primary facts are such as to cause the burden of proof to shift under s.136 **Equality Act 2010**, is highly content-specific and fact-specific. In this case, the importance of the tribunal approaching that task with focus and rigour was heightened by the fact that the particular allegation was that the claimant, who is Black African, had, along with other colleagues, been referred to as a "monkey" and, indeed, the tribunal's own finding that the word "monkeys" had, on at least one occasion, been said by Mr Ben Ohurake to members of staff including Black staff members.

38. The tribunal needed to make specific findings about whether this occurred on the specific occasion alleged, so that it could decide whether the use of this word to describe him and others on that occasion was inherently racist and/or whether the facts were such that a racial motivation, conscious or unconscious, could properly be inferred and/or were such that the burden of proof shifted to the respondent to show otherwise.

39. I am bound also to say also that even the findings at [36], which appear to have been in relation to the admitted use of that word in the WhatsApp group, were themselves extremely limited. The tribunal stated that it had not seen the messages. It was unable to determine the context "for ourselves", but also stated that it had evidence from others (being,

I infer, the respondent's two witnesses) about the context. But, beyond saying that the remarks were made to other members of staff and in the context of the behaviour of other members of staff, the tribunal said nothing more about that. Further, the tribunal appears to have been content to rely upon the conclusions of the respondent's management at the time, and Mrs Fairclough-Haynes, which it regarded as reasonable, rather than coming to its own independent conclusion.

40. I am therefore bound to say that, even had the claimant's original complaint been about the use of the word in the WhatsApp group, I would not have regarded this reasoning as sufficient to dispose of that complaint. To repeat, in all events, if [36] is, as it appears to be, about what was said in the WhatsApp group, those findings would not, by themselves, constitute sufficient consideration or basis for determination of the complaint about the 15 June 2020 meeting, even if the tribunal considered that they might cast some light on what had happened at that meeting.

41. The claimant's case was that the use of the word "monkey" or "monkeys" to, or about, him as a Black African, as well as other colleagues of his race had a *particular* significance and adverse effect on him. This gives rise to two further related points as identified by Judge Stout. Firstly, even if the remark was made to or about a group of staff that included the claimant and others who were of his race but also some others who were *not* of his race, that would not necessarily preclude a finding that the conduct was *because of* race for the purposes of s.13. The tribunal would still need to consider whether, taking account of all the relevant circumstances, the conscious or unconscious motivation of this choice of this particular word was race.

42. This is the sort of complaint in relation to which the questions of whether the treatment was detrimental and/or less favourable and/or because of race all run together. It might be argued that, doctrinally, where the remark is addressed to a group including people both of the claimant's race and not, that feature also poses a particular obstacle to the conclusion that it involves less favourable treatment in the requisite sense. However, I do not think that that is doctrinally inevitably the case.

43. In this regard, while I agree with Mrs Fairclough-Haynes that the factual matrix was rather different, nevertheless, the discussion by the EAT in **Earl Shilton Town Council v Miller** [2023] EAT 5 is illuminating as to the more general point. In particular, the discussion in that case notes at [20] that in certain circumstances, treatment that is ostensibly the same could be less favourable treatment, and at [28], that a robust common-sense approach needs to be taken to the question of whether treatment is less favourable – or, I would add, detrimental – bearing in mind that how the treatment is described can be framed in different ways.

44. The second and related point, highlighted in Judge Stout's reasons, concerns whether the tribunal should have at least proactively explored with the parties whether this complaint should have been treated as being not only of direct discrimination but also, or alternatively, of harassment, contrary to s.26 of the **2010 Act**.

45. As to that, I note that the boxes in section 8 of the claim form only allow for the option of identifying which protected characteristic is relied upon and do not set out the different types of discrimination that may be asserted by reference to a given characteristic. Of course, some claimants, particularly those who are assisted or represented by lawyers, will, in the narrative of their claim, identify which particular types of legal complaint they are

bringing. But this claimant, who was a litigant in person, simply set out factually the conduct that he said had occurred and about which he was complaining. That appears to have been identified by the tribunal at the preliminary hearing as being a complaint of direct discrimination and the tribunal at the full hearing then adopted that formulation in the list of issues.

46. As the minute of the case management hearing did not indicate that the legal categorisation of the complaint had been proactively raised and considered, I consider that the tribunal at the full merits hearing should have raised and considered whether the complaint should be treated as one of harassment (with direct discrimination as an alternative), which is the obvious and more natural legal category for this particular factual complaint. Mrs Fairclough-Haynes, very fairly, told me that she was not able to recollect at this distance in time whether there had been any such discussion.

47. For all of these reasons, I conclude that the tribunal unfortunately fundamentally failed to address and make the necessary findings of fact about the specific complaint that was before it regarding the alleged remark at the meeting on 15 June 2020 or any sufficient findings specifically about that meeting at all. The conclusions and findings which the tribunal did reach were not adequate to properly engage with and dispose of that complaint. I therefore allow the appeal.

48. I have heard submissions already as to what further and consequential directions I should give in the event that I so concluded. Mr Piddington, as I have already noted, submitted that, in that case, I should direct that the matter be remitted to the tribunal for a complete rehearing of all of the complaints and not just the complaint relating to the use of the word “monkey” or “monkeys”. Mrs Fairclough-Haynes disagreed.

49. On this point, I am with Mrs Fairclough-Haynes. That is for two reasons. Firstly, as Mr Piddington to a degree acknowledged, the specific ground and points of challenge permitted by Judge Stout to proceed to a full appeal hearing relate specifically to the dismissal of the complaint about the use of the word "monkey" or "monkeys". There is no ground of appeal before me to the effect that if the tribunal erred in that regard, it also erred in relation to its disposal of the other complaints that it considered.

50. Secondly, I do not accept that the outcome in relation to this complaint, or the defects in the tribunal's reasoning in relation to it, necessarily render its decision in relation to the other complaints defective or unsafe. Mr Piddington focused on the complaint about the change to the claimant's contract. Whilst it was the claimant's case that it was Mr Benn Ohurake who had decided upon that change, the tribunal found as a fact that he had not been involved in, or influenced, that decision, which had been taken by more senior management. That was a finding that it was entitled to make, as was the finding that the reason for the change was not connected to race, but was in order to bring the claimant's terms in line with those of the other team leaders. Those were findings which were also, as such, sufficiently reasoned.

51. The grievance and grievance appeals, which were also the subject of distinct complaints, also involved the action and decisions of others, not Mr Benn Ohurake. Again, I do not consider that the allowing of this appeal, specifically relating to the complaint about the use of the word "monkey" or "monkeys" by him, renders the part of the tribunal's decision relating to the grievance process unsafe.

52. Mr Piddington also contended that the matter should now go back to the tribunal to take forward on the basis that it is now seized of two live complaints relating to the use of

that word, one relating to the meeting on 15 June 2020 and the other relating to the WhatsApp group. I do not agree. It appears to me that the claimant's complaint throughout, including at the full merits hearing, always was, and was solely, about the use of the word at the meeting on 15 June 2020. However, it is apparent that at some point the respondent introduced into the picture its case that the word had been used in a WhatsApp group, and the tribunal then considered that at the full merits hearing.

53. I do agree with Mr Piddington that the use of that word on that other occasion may be considered by the tribunal to form a relevant part of the overall factual matrix when considering the complaint about the 15 June 2020 meeting. But that is different from treating it as an additional complaint in its own right. If the claimant wishes, upon remission, to have it treated in that way, he will need to make an application to the tribunal to amend, and any such application will need to be considered by the tribunal in the usual way, applying the guidance in **Selkent** and other authorities.

54. Lastly, I have to decide whether to direct that remission should be to the same or a differently-constituted tribunal panel. Regrettably, I consider this decision to be so fundamentally flawed in relation to the subject matter of this appeal that remission should be to a differently constituted tribunal to consider the matter afresh. I was told that there is ongoing in the tribunal a separate complaint, following the termination of the claimant's employment, of unfair dismissal, which is currently listed to be heard in August 2024. Mr Piddington submitted that, were I to direct remission of the matter before me to a different tribunal, it would be advantageous for it to be heard on the same occasion. Mrs Fairclough-Haynes did not agree about that.

55. I have directed remission to a different tribunal for the reasons that I have given, and not because there is also another complaint that is proceeding. Whether, now that there will be a need for a further and fresh hearing of the complaint that I have remitted, that hearing should or should not take place on the same occasion as the hearing of the unfair dismissal complaint, and whether on the dates currently listed for the hearing of that complaint or otherwise, or whether these two matters should be heard separately, is a matter that the tribunal will need to consider as a matter of case management of both complaints. Further submissions on that should therefore be directed to it.