Appeal No. UKEAT/0174/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 February 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MR H SINGH

MR P L C PAGLIARI

MR O FORBES — APPELLANT

LHR AIRPORT LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised on 1 November 2019

APPEARANCES

For the Appellant	Mr Peter M Ward (of Counsel) Citizens Advice Chiltern Townsend House Townsend Road Chesham HP2 2AA
For the Respondent	Mr Jason French-Williams (Solicitor) Eversheds Sutherland (International) LLP 1 Callaghan Square Cardiff CF10 5BT

SUMMARY

RACE DISCRIMINATION - Direct

HARASSMENT - Conduct

A colleague of the Appellant, Ms S, posted an image of a golliwog on her private Facebook page with the caption, "Let's see how far he can travel before Facebook takes him off". The image was shared with Ms S's list of Facebook friends, including another colleague, BW. BW showed the Facebook post to the Appellant. The Appellant complained of harassment by Ms S. Ms S apologised and received a final written warning. Thereafter, the Appellant was rostered to work alongside Ms S. When he raised a concern, he was moved to another location. The Appellant complained to the Tribunal of harassment, victimisation and discrimination.

The Employment Tribunal dismissed the complaint. Whilst it found that Ms S had shared an image that was capable of giving rise to offence on racial grounds, her act of posting the message on her Facebook page was not an act done in the course of her employment and was therefore not one for which the Respondent could be liable. The Appellant appealed.

Held (dismissing the appeal) that section 109(1) of the Equality Act renders an employer liable for the acts of an employee done "in the course of employment". Whether or not an act is in the course of employment within the meaning of that section is a question of fact for the Tribunal to determine having regard to all the circumstances: Jones v Tower Boot Co Ltd [1997] IRLR 168 applied. The relevant factors to be taken into account might include whether or not the impugned act was done at work or outside of work. It might not be easy to determine whether something was done at work if it is done online. In this case, the Tribunal did not err in law in concluding that Ms S's act of posting the image on her Facebook page was not done in the course of employment; it was a private Facebook account, and the image was shared amongst

her Facebook friends, one of whom happened to be a work colleague, BW, who took the subsequent step of showing the image to the Claimant at work. The outcome of the complaint might have been different if BW had been the target of the harassment complaint, as his subsequent act of showing the offensive image to the Appellant was done in the workplace and might be said to have been done "in the course of employment". However, that was not the complaint that the Tribunal had to consider.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. This is the unanimous Judgment of the Tribunal. The issue in this appeal is whether the sharing of a discriminatory image on a personal Facebook page, but which was seen by and caused offence to a work colleague, could be said to be something done "in the course of employment" within the meaning of Section 109(1) of the **Equality Act 2010** ("**EqA**"). If it is then the employer may be vicariously liable for the sharing of that image subject to the reasonable steps defence under Section 109(4).

2. The Appellant in this case, to whom we shall refer as the Claimant as he was below, appeals against the Decision of the Reading Employment Tribunal ("the Tribunal") that the sharing of the discriminatory image on Facebook was not an act done in the course of employment and that the Respondent was not liable for harassment related to race.

Factual Background

3. The Claimant worked for the Respondent as a security officer. One of his colleagues was Ms Deborah Stevens who worked in a similar capacity. Ms Stevens had a Facebook account.

4. On an unspecified date prior to 6 November 2016, Ms Stevens shared an image of a golliwog ("the image") on her Facebook page, accompanied by the message "Let's see how far he can travel before Facebook takes him off." The image was shared with people who were on Ms Stevens' list of Facebook friends. One of those friends was a work colleague, referred to here as BW. The Claimant was not on that list.

5. On 6 November 2016, BW showed the image on Ms Stevens' Facebook page to the Claimant. The Claimant was shocked and appalled by the fact that Ms Stevens had posted this image and complained to his line manager that racist images were being circulated in the workplace.

6. Upon an initial investigation by the line manager, it was accepted that Ms Stevens had shared the picture because it reminded her of a childhood memory about Robertson's Jam. The Claimant was told that no further action would be taken unless he made a formal complaint. The Claimant was understandably not satisfied with the line manager's response and proceeded to make a formal complaint by raising a grievance.

7. The grievance was investigated by another manager, Mrs Branda Bowles. Having spoken to both the Claimant and to Ms Stevens, Mrs Bowles decided that the Claimant's grievance should be upheld. A disciplinary investigation into Ms Stevens' conduct was commenced. It appears that Ms Stevens was contrite when the offensive nature of the image was explained to her. Notwithstanding that, Ms Stevens was disciplined and received a final written warning for conduct which was considered to be in breach of the Respondent's dignity at work policy.

8. On 4 December 2016, the Claimant was posted to work alongside Ms Stevens. The Claimant raised a concern with his union representative that he was being required to work alongside Ms Stevens even though his grievance against her had been upheld. The Claimant was thereafter moved to work at another location without any explanation.

9. This upset the Claimant as he felt that he was being victimised and discriminated against because of the fact that he had done a protected act, namely complaining about the image on Ms Stevens' Facebook page. The Claimant was signed off sick the following day and did not return to work until 27 April 2017. Shortly prior to his return to work on 14 March 2017, the Claimant issued proceedings before the Tribunal alleging harassment, victimisation and discrimination.

The Tribunal's Decision.

10. After a two-day hearing in December 2017, the Tribunal in a reserved Judgment sent to the parties on 18 January 2018, dismissed the Claimant's complaint. Whilst it found that Ms Stevens had shared an image that was capable of giving rise to offence on racial original grounds, she was found not to have done so in the course of her employment with the Respondent. The Tribunal's unanimous Decision in respect of this issue appears at paragraph 34 of the Reasons:

> **"34. The conclusion of the Tribunal is that the actions of Ms Stevens were not in the course of her employment. At the time that the action was taken, Ms Stevens was not in work. The sharing of the image made no reference at all to the respondent or any of the respondent's employees. There was nobody within the respondent's employment who was mentioned in the sharing of the image. The equipment that was used for sharing the image was not any of the equipment of the respondent.**
>
> **35. The conclusion of the Tribunal is that when Ms Stevens shared this image, she was not acting in the course of her employment with the respondent."**

11. Elsewhere in the Judgment, this Tribunal had noted that the image had been shared by Ms Stevens privately amongst her friends' list, that it was not something that she did at work, and the Claimant was not on her friends' list: see paragraph 38. The Tribunal further concluded, by a majority, that the sharing of the image did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Tribunal expressed its conclusion on that issue as follows:

> **"38. After considering section 26(4) Equality Act 2010, the majority are not satisfied that this amounts to harassment within the section. In coming to this conclusion, the majority take into account the claimant's perception which was that the image was offensive and that it was shared in the workplace, and was drawn to his attention by one of his work colleagues. We also take into account other circumstances of the case and they include that Ms Stevens shared this image privately. It was amongst her friends list. It was not something that she did at work. The claimant was not on her friends list. A person on her friends list does not appear to have made a complaint about this matter to the respondent. When the offensive nature of the image was explained to Ms Stevens, she offered an apology and was agreeable to mediation.**
>
> **39. Taking all those circumstances into account, the majority have gone on to consider whether it was reasonable for the sharing of the image to have had the effect that it had on the claimant. We are not satisfied in all the circumstances that it was. We are satisfied that this was an offensive image; we are satisfied that it did cause the claimant to feel offended. However, taking into account Ms Stevens' willingness to apologise in relation to the matter, we do not consider that section 26(4) has been made out.**
>
> **40. The minority view is that the image was offensive. It offended the claimant. It is reasonable to consider that the image was offensive and the fact that Ms Stevens shared it privately does not take away from the fact that it was being circulated amongst work colleagues and therefore, the minority view is that it was reasonable to conclude that the conduct had the harassing effect which the claimant complains of."**

12. The Tribunal then went on to consider whether the Respondent had taken all reasonable steps to prevent the employee from doing a discriminatory act. As to that issue its conclusions were as follows:

> **"41. The Tribunal takes into account that the respondent has policies which make clear that the behaviour complained of was unacceptable. We are also satisfied that in signing contractual documents, the respondent brings these policies to the attention of its employees. In terms of publicising the policies and auditing and monitoring of the policies, we have had no evidence as to what steps are taken by the respondent in that regard. We do however have evidence before us which shows that the respondent not only says it takes the matter seriously but in this case, did take the matter seriously. Ms Stevens was taken to disciplinary proceedings; the case was found proved against her and she was given a final written warning. Ms Stevens' explanation that it was an innocent remembrance of her youth was quite properly rejected by the respondent. All of which shows that this respondent took the matter seriously.**
>
> **42. Having regard to the provisions contained in section 109(4), the unanimous view of the Tribunal is that the respondent took reasonable steps to prevent the employees doing the discriminatory act and in the circumstances therefore we do not consider that the respondent is vicariously liable for the actions of Ms Stevens."**

13. The Claimant's claim for harassment was therefore dismissed. The Tribunal also dismissed his complaint about victimisation by reason of the fact that the person making the decision to move the Claimant to another post on 4 December 2016 was merely implementing a decision to impose a restriction on Ms Stevens and the Claimant working with each other and was not aware of the reasons behind that restriction.

A

Legal Framework

14. Section 26 of the **EqA**, so far as relevant provides:

> **"(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.**
> **(5) The relevant protected characteristics are---**
>
> **Race…"**

15. Section 109 of the **EqA** provides as follows:

> **"Liability of employers and principals**
>
> **(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**
>
> **…**
>
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.**
>
> **(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—**
>
> **(a) from doing that thing, or**
>
> **(b) from doing anything of that description."**

In the course of employment

16. Several cases have dealt with the issue of whether alleged acts can be said to be "in the course of employment". The leading authority is still the decision of the Court of Appeal in **Jones v Tower Boot Co Ltd** [1997] IRLR 168. In that case, the employer had argued that it should not be liable for serious acts of harassment by white employees against a black co-

worker on the grounds that those acts were not done in the course of employment within the meaning of the then relevant provision under Section 32(1) of the **Race Relations Act 1976**.

17. The Employment Appeal Tribunal ("EAT") had overturned the Tribunal's Decision that the acts were done in the course of employment on the basis that the phrase, "in the course of employment", had a well-established meaning in law derived from the law of tort, under which an important consideration was whether an unauthorised wrongful act of an employee was so connected with that which he was employed to do as to be a mode of doing it. The EAT considered that by no stretch of the imagination could the acts in that case, which included deliberate branding with a hot screwdriver and whipping, be described as an improper mode of performing authorised tasks.

18. The Court of Appeal overturned the decision of the EAT and restored that of the Tribunal. In doing so, it held that the relevant provisions of the anti-discrimination legislation should be given a broad interpretation and that it would be inconsistent with that approach to allow the concept of an act being done in the course of employment to be construed in any sense more limited than the natural meaning of those everyday words would allow. Waite LJ held as follows:

> **"43. The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words 'in the course of employment' in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstance which is liable to occur in particular instances - within or without the workplace, in or out of uniform, in or out of rest-breaks-all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort."**

19. In **Waters v Commissioner of Police of the Metropolis** [1997] ICR 1073, the Court of Appeal had to consider whether a sexual assault, committed by a male police officer ("T") against a female colleague at a police section house where she had a room and when both were

off-duty, amounted to an act committed by T in the course of employment. The Tribunal held that the conduct was not done in the course of employment. The EAT agreed. Waite LJ in the Court of Appeal dismissing the Claimant's appeal held as follows at page 1095:

> **"T and the applicant were off-duty at the time of the alleged offence. He lived elsewhere and was a visitor to her room in the section house at the time and in circumstances which placed him and her in no different position from that which would have applied if they had been social acquaintances only with no working connection at all. In those circumstances, it is inconceivable in my view that any Tribunal applying the test in the *Tower Boot* case could find that the alleged assault was committed in the course of T's employment. This ground of appeal therefore fails."**

20. The next authority dealing with the issue is that of **Chief Constable of Lincolnshire Police v Stubbs & Ors** [1999] IRLR 81. In that case a female police officer was sexually harassed by a male colleague at a pub where officers had gathered socially after the conclusion of their duties. The Tribunal considered that the social gathering was closely connected to work and that the male officer's conduct was done in the course of employment. The EAT, the then President, Morison J, presiding, upheld the decision stating as follows at paragraph 44 of that Judgment:

> **"44. We turn to the second point. We also reject Mr Bowers' submissions on the proper interpretation of course of employment. We concur with the findings of the Industrial Tribunal, that the two incidents referred to, although "social events" away from the police station, were extensions of the work place. Both incidents were social gatherings involving officers from work either immediately after work or for an organised leaving party They come within the definition of course of employment, as recently interpreted by the Court of Appeal in *Jones v Tower Boot Limited* (19971 ICR 254 and the case of *Waters v The Commissioner of Police of the Metropolis* [1997] IRLR 589 . It would have been different as it seems to us had the discriminatory acts occurred during a chance meeting between Mr Walker and the applicant at a supermarket, for example, but when there is a social gathering of work colleagues such as there was in this case, it is entirely appropriate for the tribunal to consider whether or not the circumstances show that what was occurring was an extension of their employment. It seems to us that each case will depend upon its own facts. The borderline may be difficult to find. It is a question of the good exercise of judgment by an industrial jury whether a person is or is not on duty, and whether or not the conduct occurred on the employer's premises, are but two of the factors which will need to be considered."**

21. In another decision of the EAT, **Her Majesty's Prison Service & Ors v Davis** EAT/1294/98, the then President, Lindsay J, considered that a sexual assault by a male prison officer against a female colleague could not, just because a clause in the employer's code of conduct required employees not to do anything whilst on or off-duty that could bring discredit on the prison service, be regarded as conduct in the course of employment. The Tribunal

A accepted a submission that such a clause cannot bring within the course of employment all acts done by employees when off-duty.

B 22. It was also argued by the Claimant in that case that the fact that the employer had taken action after the incident in supporting the victim and in disciplining the male officer meant that it had impliedly accepted responsibility for dealing with the situation and that that supported the contention that the male officer's conduct was in the course of employment. As to that

C contention Lindsay J said as follows:

> **"17. But again, that is a matter that arose after the event. It is hard to see how the question of whether, at an earlier point, Mr Randall was acting within or without the course of his employment can be affected by how the employer responded thereafter."**

D The EAT reiterated that the application of the phrase "in the course of employment" will be a question of fact for each Tribunal to resolve in the light of the circumstances presented to it.

E 23. The next authority to consider is that of **Sidhu v Aerospace Composite Technology Ltd** [2000] IRLR 602. In that case, Mr Sidhu was subject to racial abuse by a white colleague at a family day out at a theme park where that family day out had been organised by the

F employer. The Tribunal dismissed Mr Sidhu's contention that this was conduct in the course of employment, notwithstanding the fact that the employers had organised the event at which the conduct had occurred. The Tribunal regarded as significant that the day out was not in the place of employment but at a public theme park; that everyone was there in their own time, not

G during working hours, and that the majority of the participants were friends and family rather than employees.

H 24. The Court of Appeal upheld the decision of the Employment Tribunal. Gibson LJ said as follows at paragraph 28 of that Judgment:

> **"28. Mr. Gill further argued that on the facts the tribunal should have found that the day out was 'in the course of employment'. He pointed to the fact that disciplinary proceedings had been initiated against Mr. Smith and Mr. Sidhu. He referred to *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81, in which the EAT upheld the decision of a tribunal that a social gathering of work colleagues, at which a woman police constable had been subjected to inappropriate sexual behaviour by a policeman, was an extension of their employment. But the EAT there stressed that each case would depend on its own facts, calling for the good exercise of judgment by an industrial jury. I recognise that another tribunal could properly have reached the conclusion that the incident on the day out was in the course of employment. But in my judgment, it is quite impossible to say that no tribunal could have reached the conclusion which the majority did on this point."**

25. From these authorities, it can be seen that the main principle to be gleaned is that the question of whether conduct is or is not in the course of employment within the meaning of Section 109 of the **EqA** is very much one of fact to be determined by the Tribunal having regard to all the relevant circumstances. It can also be said that the words "in the course of employment" are to be construed in the sense in which the lay person would understand them and that there is no clear dividing line between conduct that is in the course of employment and that which is not. Each case will depend on its own particular facts.

26. It is also apparent from these authorities that the relevant factors to be taken into account might include whether the impugned act was done at work or outside of work, and if done outside of work, whether there is nevertheless a sufficient nexus or connection with work such as to render it in the course of employment. Those kinds of factors are readily understood when one is dealing with the physical environment of the workplace. It is much more difficult to apply them to the virtual landscape in which many people these days spend their time. Thus, it may not be very easy to say whether a person is doing something whilst at work where some of that person's work activity is conducted online at home. Equally, it may be very difficult to ascertain whether there is a sufficient nexus between an activity carried out on a personal social media account and their employment. If that account is used for purposes relating to work then it might well be open to the Tribunal to consider that there is a sufficient connection with work to render an act done on that social media account as being done in the course of employment;

whereas if the link with work is tangential or more tenuous then it might well be open to the Tribunal to conclude otherwise.

27. We do not consider that it is possible or even desirable to lay down any hard and fast guidance in respect of these matters, especially as the extent to which social media platforms are used continues to increase. Just as is the case with the physical work environment, whether something is done in the course of employment when done in the virtual landscape will be a question of fact for the Tribunal in each case having regard to all the circumstances. No clear boundary as to when such conduct will be in the course of employment can be defined. With those matters in mind, we turn to consider the Claimant's grounds of appeal.

Ground 1

28. The Claimant's complaint here is that the Tribunal's conclusion that the sharing of the image by Ms Stevens on her Facebook page was not conduct in the course of employment was perverse, in that the Tribunal ignored its own finding of fact that the image was shared in the workplace. The Claimant, represented before us today by Mr Ward (as was the case below), submits that, in the light of that finding and the need to adopt a broad interpretation of the legislation, the only possible conclusion that the Tribunal could reach was that the initial posting and subsequent sharing of the image was an extension of Ms Stevens' and the Claimant's employment. Mr Ward further submits that the Respondent's disciplinary action against Ms Stevens demonstrates that it considered there to be a sufficient nexus between the sharing of the image and the workplace so as to render such conduct as being in the course of her employment.

29. Mr French-Williams, who appears for the Respondent (as he did below), submits that the Tribunal's conclusion was one of fact and was one that it was entitled to reach. He points out that Ms Stevens' Facebook page was not work-related; that her post was shared with a list of friends that, save for BW, did not include any colleagues, and, in particular, did not include the Claimant.

30. He submits that the mere fact that the image was shared in the workplace cannot suffice to render Ms Stevens' act as being in the course of employment. To find otherwise would mean that in any case where even a single friend is a work colleague, or where a friend of a friend, where access settings so permit, is a work colleague, the sharing of an image would amount to conduct in the course of employment. He submits that that would cast the net of work-related matters far too widely.

31. In our judgement, the factors relied upon by the Tribunal in deciding that the sharing of the image by Ms Stevens was not in the course of employment were proper ones to take into account. The words "in the course of employment" are to be understood in their ordinary and natural sense as they would be by the lay person. The lay person would not consider that the sharing of an image on a private non-work-related Facebook page, with a list of friends that largely did not include work colleagues, was an act done in the course of employment. The factors taken into account by the Tribunal also included the fact that Ms Stevens was not at work when the image was posted; that the image had not made reference to the Respondent or any of the Respondent's employees; and that she did not use the Respondent's equipment in sharing the image.

A

32. Mr Ward's submission that the Tribunal had failed to take into account the fact that the image had been shared amongst work colleagues is based, at least partly, on an incorrect premise. There was no finding that the image was shared amongst colleagues as such. The only evidence of the image being shared in the workplace was that BW had shown the image to the Claimant. As the Tribunal clearly found at paragraph 6, *"unless shown by BW the Claimant would not have seen the image."* Further, at paragraph 16, the Tribunal found as follows:

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C

> **"The Claimant's concern was the material being circulated within the Respondent. That concern does not appear to have been justified, save to the extent that he became aware of it after it was brought to his attention by BW.**

33. It is correct to point out that at paragraph 38 the Tribunal does refer to the image being *"shared in the workplace",* and at paragraph 40, that the minority view was that the image had been "*circulated amongst work colleagues*." However, those two findings or references must be read with the other findings of fact to which we have already referred. Those make it quite clear that the only act of sharing that went on in the workplace was BW's act of showing it to the Claimant.

D

E

34. In the light of those findings, it does not appear to be correct to say that the image was any more widely shared by Ms Stevens or anybody else within the workplace. Indeed, the issues which had been identified at the Preliminary Hearing on 9 June 2017 focused on the sharing of the image by Ms Stevens. It would appear from the Tribunal's finding of fact that Ms Stevens only 'shared' the image when she posted it on Facebook at some point before 6 November 2016; it was then that the image would have come to the attention of BW. There is no finding that she subsequently shared the image with any of her other colleagues at work.

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35. The fact that BW showed the image to the Claimant is not probative of the question of whether Ms Stevens 'prior act of sharing the image with her Facebook friends, including BW, was in the course of her employment. The Tribunal was correct, in our judgement, to focus on the time at which Ms Stevens shared the image because that was the act of alleged harassment that the Tribunal was required to consider.

36. There may of course be many circumstances where the sharing of an image on a Facebook page could be found to be an act done in the course of employment. This could include situations where the Facebook page is solely or principally maintained for the purposes of communicating with work colleagues or is routinely used for raising work-related matters. In those circumstances, one can see that an ostensibly private act could be regarded as being sufficiently closely connected to the workplace to render it an act done in the course of employment. Whether or not such an act is seen as such will depend on the facts of the individual case.

37. The fact that the Respondent treated the matter as a disciplinary one as far as Ms Stevens was concerned is not determinative. In the first place, the Respondent's actions were after the event, and, as with BW's sharing of the image with the Claimant, was not necessarily probative of the prior question of whether Ms Stevens' sharing of the image was done in the course of her employment. Furthermore, the employer may, depending on its policy, be entitled to take disciplinary action in respect of a Facebook post which it considered to be potentially damaging of its reputation.

38. However, the fact that the employer considers it appropriate to take such action does not mean that the conduct in question is necessarily done in the course of employment. The

employer can, for example, take action, again depending on policies, against an employee where it transpires that he or she has committed criminal acts outside employment, or acts which are otherwise considered offensive or unacceptable. An employee found to be chanting racist slogans at a football match, for example, might be regarded by an employer as engaging in conduct worthy of censure. However, no reasonable person would regard such conduct as being done in the course of employment, unless there was shown to be some connection between attendance at the football match and employment that suggested otherwise. There is, in other words, no necessary correlation in this context between conduct outside of work, which is considered by the employer to be unacceptable, and the statutory test of an act being done in the course of employment.

39. It did occur to us that BW's act of showing the image to the Claimant in the workplace could itself be regarded as being something done in the course of his employment. However, the issue for the Tribunal was not whether BW's act amounted to harassment but whether Ms Stevens' act did. Mr Ward fairly acknowledges that the list of issues made no reference to BW's act, but submits that the Tribunal should not have slavishly stuck to the list of issues and that it erred in law in failing to consider whether there was harassment on the part of BW for which the employer should be liable.

40. Whilst it does appear to us to be somewhat unsatisfactory that the BW issue was not addressed as fully as it might have been, we do not consider that the Tribunal can be criticised for taking the approach that it did. There is nothing in the Claimant's claim form to suggest that anything BW did was considered to amount to an act of harassment for which the Respondent should be liable; the clear target of the ET1 is the posting of the image by Ms Stevens.

41. Furthermore, although the Claimant was acting in person when the list of issues was defined at the Preliminary Hearing, he was professionally represented at the Full Hearing. There is no suggestion that any argument was put forward to the Tribunal that BW should be regarded as the primary harasser. In the circumstances, we do not consider that the Tribunal erred in law in focusing as it did on the actions of Ms Stevens.

42. The appeal under Ground 1, therefore, boils down to a perversity challenge and whether it can be said that the Tribunal reached a conclusion which no reasonable Tribunal could have reached on the evidence before it. Mr Ward fully acknowledges the heavy burden on an Appellant in respect of such a challenge. It is not necessary to set out here the well-known passages from cases such as **Yeboah v Crofton** [2002] EWCA Civ 794 or **Stewart v Cleveland Guest (Engineering) Ltd** [1994] UKEAT/683/93/0405 as to the circumstances in which this Appeal Tribunal can interfere with a decision of the Tribunal on the facts. In our judgment, none of the matters relied upon by the Claimant get anywhere near discharging that heavy burden. The conclusion that the Tribunal reached, namely that Ms Stevens' conduct was not in the course of her employment, was one that was open to it on the evidence before the Tribunal and no error of law is established.

43. Ground 1 is therefore dismissed.

44. The Claimant's claim was brought against the Respondent alone. If, as the Tribunal found and as we have upheld, Ms Stevens' act was not done in the course of employment, then pursuant to Section 109 of the **EqA**, the Respondent would not be vicariously liable for that act. The remaining grounds of appeal are therefore rendered academic, because even if there had been any error, no liability could attach to the Respondent. Notwithstanding that, and as we

have heard detailed submissions on them from both counsel, we go on to consider Grounds 2 and 3 as well.

Ground 2

45. Mr Ward's complaint here is that the Tribunal, in considering whether the conduct amounted to harassment within the meaning of Section 26 of the **EqA**, erroneously took into account Ms Stevens' apology after the event. Mr Ward submits that in so doing, the Tribunal was unduly swayed by the discriminator's motive and whether she intended to cause offence rather than focusing on the "effect" of the conduct and the fact that it clearly did cause offence.

46. We were referred to an example in the statutory code of practice at paragraph 7.17 thereof, where it was emphasised that the downloading of pornographic images onto office computers could have the effect of creating a hostile and humiliating environment for a female colleague, notwithstanding the fact that those doing the downloading did not do so for the purpose of upsetting the female colleague.

47. In our judgment, the Tribunal did not err in its approach to the Section 26 test. It took into account, as it was required to do, the Claimant's perception of the conduct (finding that he was clearly offended by it), the other circumstances of the case and whether it was reasonable for the conduct to have the proscribed effect. The other circumstances identified by the Tribunal included the fact that the images had been shared privately amongst Ms Stevens' friends; that it was not something she did at work; and that the Claimant was not on her friends' list.

48. There was no error in going on also to consider Ms Stevens' apology, as that would fall within the wide rubric of the "other circumstances" which the Tribunal must take into account in applying Section 26 of the **EqA**. There is no warrant, in our judgment, for treating the reference to the other circumstances under Section 26(4)(b) as being confined only to those extant at the time of the alleged act of harassment. Unlike the situation under Section 109, where the Tribunal, in determining whether an act was in the course of employment, will focus on matters at the time the act took place, under Section 26, the Tribunal is required to consider whether conduct has the purpose or effect of creating a hostile and intimidating etc., environment. That may, in appropriate circumstances, include taking account of an apology that is made shortly after the impugned conduct or the immediate cessation of the conduct once it is brought to the employer's attention. Both of those matters could be relevant in assessing whether there was the hostile environment which has been proscribed by the legislation.

49. For these reasons we do not uphold Ground 2 of the appeal.

Ground 3

50. The final ground of appeal is that the Tribunal, having found that there was no evidence that the Respondent took steps to publicise, audit or monitor its policies, was not entitled to conclude that the Respondent had taken all reasonable steps to prevent the discriminatory act from occurring. Mr Ward relies upon paragraph 10.51and 10.52 of the Code of Practice where it is stated that:

> **"10.51**
> **An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.**
>
> **10.52**
> **Reasonable steps might include:**
> **• implementing an equality policy;**
> **• ensuring workers are aware of the policy;**
> **• providing equal opportunities training;**
> **• reviewing the equality policy as appropriate; and**

• dealing effectively with employee complaints."

51. Mr Ward also drew our attention to chapter 18 of the Code of Practice, which contains further information in relation to equalities policies and practice in the workplace. The introduction to that chapter states as follows:

> **"18.1. There is no formal statutory requirement in the act for an employer to put in place in equality policy. However, a systematic approach to developing and maintaining good practice is the best way of showing that an organisation is taking its legal responsibility seriously…"**

There then follows a series of recommendations, including monitoring and auditing such policies. In our judgment, it is important to bear in mind that the Code of Practice is not to be considered in this regard as comprising a list of statutory requirements, each of which must be met in order for an employer to be regarded as having taken all reasonable steps. The steps that would be reasonable in a particular case would depend on the facts. Moreover, the Code of Practice suggests that the reasonable steps "might" include those set out; it does not suggest that the failure to take any one of those steps in relation to any policy will necessarily mean that the reasonable steps defence under the 109(4) of the **EqA** cannot succeed.

52. In the present case, the Tribunal regarded as significant that the employer treated Ms Stevens' conduct seriously and gave her a final written warning. The Tribunal was, in our judgement, entitled in those circumstances to conclude that, notwithstanding the absence of any evidence as to the publication, auditing or monitoring of the policy, the Respondent did take reasonable steps to prevent its employees from doing the discriminatory act in question.

53. We do note that the Tribunal omitted the word "all" in paragraph 42. However, the correct test was set out in full at paragraph 30. The Reasons do not indicate, and nor, it appears, was it argued below that there were further steps which the employer ought to have taken but did not. In those circumstances, we do not consider that it would be appropriate to regard the

Tribunal's omission of the word "all" as anything other than an infelicity of expression. It is not indicative of an incorrect application of the relevant test.

Conclusion

54. For of all those reasons we consider that the grounds of appeal are not made out in this case and that this appeal must be dismissed.