Case Number: 2203290/2011

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr R Fraser		**University & College Union**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central

ON: 22 October to 16 November 2012 (20 days); 21-23 January and 25-27 February 2013 (in chambers)

BEFORE: Employment Judge A M Snelson

MEMBERS: Mr A Grant
Lady Sedley

On hearing Mr A Julius, solicitor, on behalf of the Claimant and Mr A White QC, leading counsel, and Mr M Purchase, counsel, on behalf of the Respondents, the Tribunal unanimously adjudges that:

(1) The Claimant's complaints of unlawful harassment are not well-founded.
(2) Save in so far as they are based on acts or omissions which occurred on or after 26 May 2011, the Claimant's complaints of unlawful harassment are in any event outside the Tribunal's jurisdiction.
(3) Accordingly, the proceedings are dismissed.

A. M. Snelson

EMPLOYMENT JUDGE

Judgment entered in the Register and copies sent to the parties on 22/3/13

..... **for Secretary of the Tribunals**

Case Number: 2203290/2011

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Claimant	**and**	**Respondents**
Mr R Fraser		**University & College Union**

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 22 MARCH 2013

Introduction

1 The Respondents, a trade union, are the product of the merger in 2006 between the Association of University Teachers ('AUT') and the National Association of Teachers in Further and Higher Education ('NATFHE'). They have a membership of over 120,000 people who work in further or higher education. Like many other trade unions, their activities are not limited to seeking to protect and advance the financial and professional interests of those they represent. Among other things, they foster debate on a variety of political topics, domestic and international. One controversial area which has frequently divided opinion among members is the intractable conflict between Israel and Palestine.

2 The Claimant was born in the United Kingdom in 1947, the child of Jewish refugees who had fled Nazi Germany in 1939. Members of his family died in the Holocaust. He describes himself as a modern Orthodox Jew and a Zionist. He has a strong attachment to Israel. Since 2001 he has pursued a career as a teacher of mathematics in colleges of higher education and secondary schools. He joined NATFHE in 1998 and became a member of the Respondents in 2006. Although he says that he does not always agree with things done by or in the name of the State of Israel, he has throughout been a consistent advocate for its defence in union debates and in writing. This has involved him and other supporters of Israel in some robust exchanges with members whose sympathies lie on the Palestinian side.

3 The Claimant has for many years harboured a sense of dissatisfaction with the Respondents' handling of the Israel/Palestine debate within the union and with certain associated motions passed or decisions taken (or not taken). That sentiment now finds expression in this enormous piece of litigation in which he charges the Respondents with 'institutional anti-Semitism' which, he says, constitutes harassment of him as a Jew.

4 The gestation period has been lengthy. The Claimant and friends and colleagues of like mind have for some time enjoyed the formidable support of Mr Anthony Julius of Mishcon de Reya, solicitors. Correspondence critical of the

Respondents and their predecessors dates back to 2005 and, according to a letter of 3 June 2008, Mr Julius (he wrote in his own name on behalf of unidentified clients) was contemplating a claim for harassment under the Race Relations Act 1976, s3A(1) by that date. The proposed claim was articulated as resting on anti-Semitic behaviour in the form of a number of heterogeneous acts or omissions covering a significant period. It did not materialise. A further letter of 4 June 2009 challenged the legality of a motion passed at the Respondents' annual Congress the previous month. Again, no litigation followed. Mr Julius acts for the Claimant in these proceedings.

5 One important feature of this litigation is the dispute concerning motions debated at the Respondents' Congress (annual conference) in the years 2007 to 2011 inclusive on proposals for a boycott of Israeli academic institutions and related questions. We will deal with these matters in our factual findings below, but it is convenient to mention here that the legality of a boycott was understood by decision-makers within the Respondents to be in question by June 2007. As a consequence, they sought the views of Lord Lester of Herne Hill QC who, in an opinion dated 25 June that year (as to which there was a dispute about disclosure until the start of the hearing), advised that the union could not lawfully impose a boycott and that accordingly a motion passed at the inaugural Congress the previous month should be reconsidered urgently. At the heart of his advice was the view that any boycott would be *ultra vires* having regard to the union's aims and rules.

6 In considering claims to which the Respondents might be exposed, Lord Lester excluded any which might arise under the Race Relations Act 1976 on the basis that any member of the union complaining of direct discrimination would be likely to be found to have been disadvantaged on account of the political campaign, not ethnicity; and a complaint of indirect discrimination would be likely to fail because the boycott would not be shown to have produced a disparate adverse effect on a particular group, such as Jewish members of the union. It seems that leading counsel was not asked to address harassment as a possible claim but his view then would presumably have been the same as that given in relation to direct discrimination since both claims required the adverse treatment to be 'on grounds of' race. As we will note in due course, the claim now before us invokes the harassment protection of the Equality Act 2010, which poses a different test. Lord Lester also touched on the subject of freedom of expression in these terms (para 2 i):

> **… the Union and its members are fully entitled to exercise their right to freedom of expression, discussion and debate by considering the pros and cons of the proposed boycott, and, if so minded, to pass and publish resolutions criticising the policies of the Israeli government and its supporters and expressing support for the rights of Palestinians, withdrawal from the occupied territories and so on; according to a perspective which singles out Israel for special treatment because of the sufferings and injustice borne by the Palestinian people.**

7 The Respondents' Trustees also took legal advice in 2007, following the Congress of that year. Mr Antony White QC, who represents the Respondents in these proceedings, extending the reasoning of Lord Lester's opinion, advised that

any measure by the union designed to test support for an academic boycott of Israel would itself be unlawful.

8 In a second opinion, dated 23 September 2007, Lord Lester advised in terms consistent with the views of Mr White.

9 There is no dispute that the Respondents' executive was scrupulous to ensure that the union acted in accordance with the advice received.

10 While on the subject of early advice from eminent legal practitioners, we should also mention the joint opinion of Mr Michael Beloff QC and Mr Pushpinder Saini QC obtained by Stop the Boycott, an organisation set up to oppose the proposed academic boycott of Israel, dated 13 May 2008. Leading counsel were asked to advise on the legal implications of a draft motion to be debated at the 2008 Congress (later passed as Motion 25) calling on members to engage in a discussion on "the appropriateness of continued educational links with Israeli academic institutions" and proposing that Ariel College (located in the Israeli settlement of Ariel on the West Bank) be "investigated under the formal Greylisting [ie blacklisting] Procedure". Mr Beloff and Mr Saini concluded that the motion was unlawful in that it sought to discriminate directly on grounds of nationality against Israeli academics and indirectly against Jewish members (on the basis that they were much more likely to have links with Israeli institutions than non-Jewish members). They also considered that the motion was *ultra vires* having regard to the union's own rules. On the other hand, they advised that, given "the importance of political freedom of expression", a complaint of harassment based merely on the union permitting the motion to be debated would not succeed (although of course if the debate were allowed to descend into an attack on Jews under the guise of political debate, a claim for harassment would lie).

11 By a claim form presented on 25 August 2011 the Claimant sues the Respondents for harassment based on his protected characteristics of race (Jewish) and religion or belief (Jewish). Many of the allegations relied on featured in Mr Julius's letter of 3 June 2008, but more recent matters are also pleaded.

12 In their response form the Respondents contend that most of the claims are out of time and accordingly outside the Tribunal's jurisdiction and plead numerous defences on the merits.

13 A copious Equality Act questionnaire was served on 22 September 2011, to which the Respondents replied about two months later. The Claimant did not seek to rely on the timing or content of any answer.

14 Following the first of two case management discussions, held on 2 March 2012, the parties agreed a document listing the issues in dispute. So far as now material, it reads as follows:

> **Summary**
>
> **3. The key issue in this litigation is whether the Respondent's alleged acts and/or omissions constitute unlawful harassment of the Claimant pursuant to**

sections 57(3) and 26(1) of the Equality Act 2010 (the "EA") and if so, whether the Respondent is liable for such harassment.

In particular:

Liability

4. The alleged conduct upon which the Claimant relies is fully set out in the Claim but can be broadly summarised under the following general headings (the "Categories"):

4.1 certain resolutions in relation to Israel (ET1 paras 20-30 /ET3 paras 22-32);

4.2 the UCU's response to the Parliamentary Committee against Anti-Semitism (ET1 paras 31-43/ET3 paras 33-41);

4.3 the postings on, moderation of and differing treatment of members of the Activists' List (ET1 paras 44-67/ET3 paras 42-51);

4.4 the rebuffing of Gert Weisskirchen (ET1 paras 68-73/ET3 paras 52-55);

4.5 the Bongani Masuku affair including his invitation, the fall-out from that invitation, his conduct and the aftermath of his visit (ET1 paras 74-103/ET3 paras 56-61);

4.6 resignations of the Respondent's members between 2007-2011 in response to the perceived anti-Semitic conduct of the Respondent and/or the perceived intimidating, hostile, degrading, humiliating or offensive environment fostered by the Respondent and the Respondent's response to such resignations (ET1 paras 104-127/ET3 62-67);

4.7 the UCU's dealings with the Equality and Human Rights Commission (ET1 paras 128-129/ET3 paras 68-69);

4.8 behaviour at the UCU's meetings, conferences and committees (ET1 paras 130-131/ET3 paras 70-74);

4.9 the rejection of the EUMC Working Definition of anti-Semitism (ET1 paras 132-145/ET3 paras 75-80); and

4.10 the letter of 1 July 2011 (ET1 paras 146-149/ET3 para 81).

The Claimant makes no claim in respect of any conduct dating before 1 June 2006.

5. Did any or all of the alleged acts or omissions that fall within the Categories (as set out fully in the Claim) take place?

6. If so:

6.1 did they constitute unwanted conduct?

6.2 If so, was that unwanted conduct done by the Respondent, or a person acting in the course of his or her employment with the Respondent or an agent of the Respondent acting with the Respondent's authority for the purposes of section 109 of the EA?

7. If so, in respect of conduct relating to each of the Categories, when considered separately and/or cumulatively, was that conduct:

7.1 related to the Claimant's protected characteristics (being his race and/or religion or belief)? If so,

7.2 having regard to the Claimant's perception, the circumstances of the case and whether it was reasonable for the conduct to have that effect, did the conduct have the effect of:

7.2.1 violating the Claimant's dignity; or

7.2.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8. Was there a sufficient connection between that conduct and the Claimant such that it constituted harassment of *him*?

9. Having regard to section 3 of the Human Rights Act 1998 ("HRA"), would any finding of harassment be compatible with the Convention Rights (as defined in the HRA) of the parties, including the Article 10 rights of the Respondent and its members and the Claimant's rights under Articles 8, 9 and 14?

10. Does the Tribunal have jurisdiction to consider any acts and/or omissions falling within each of the Categories which took place before 26 May 2011? In particular:

10.1.1 Do they form part of an act extending over a period which concluded or continued on or after 26 May 2011? Or

10.1.2 Is it just and equitable to consider those complaints out of time?

11. Is the Respondent liable for any such unlawful harassment?

15 The case came before us for final hearing with 20 sitting days allocated. Mr Julius appeared for the Claimant and conducted all the advocacy on his behalf. Mr Anthony Metzer, counsel, attended part of the hearing in a supporting capacity. On behalf of the Respondents, Mr White QC appeared with Mr Mathew Purchase, counsel, who handled the cross-examination of some of the Claimant's witnesses. The hearing was originally scheduled to start on 15 October but, owing to sad personal circumstances, Mr Julius was unable to attend. We heard an application on the Claimant's behalf for the matter to be postponed to a fresh date. That would have entailed a delay of many months. We declined the application, but put the starting date back by a week. Our decision was not challenged. Fortunately, it proved possible to add a further week at the end of the original listing and, thanks to the co-operation of the advocates, the evidence and closing submissions were completed just within the adjusted allocation. We deliberated in chambers over six days in January and February this year.

Oral Evidence and Documents

16 We heard evidence from 34 witnesses, of whom 29 were called on behalf of the Claimant and five on behalf of the Respondents. It was agreed that we should admit in evidence the statements of six further witnesses without their attendance, four for the Claimant (Mr Ofir Frankel-Frishman, Mr Howard Jacobson, Ms Lesley Klaff and Professor Gert Weisskirchen) and two for the Respondents (Mr Michael MacNeil and Mr Paul Mackney). Of these, the first five statements were admitted on the basis that they were not challenged (although Mr White stressed that the

Respondents were willing to proceed in this way purely on relevance grounds and not on the basis that the evidence was accepted as factually correct). Mr Mackney was medically unfit to attend the hearing. Mr Julius was content for us to read his statement but rightly made the point that, in so far as his evidence was disputed, we should attach very limited weight to it since it was not to be tested in cross-examination. The *dramatis personae* produced on behalf of the Claimant, which identifies the witnesses and other individuals mentioned in the evidence, is appended to these reasons.

17 The voluminous paperwork in the case is organised as follows: Bundle A: 'pleadings' and other formal documents; Bundle B: witness statements on the Claimant's side; Bundle C: the Respondents' witness statements; Bundle D: 23 volumes of trial documents; Bundle E: party and party correspondence. In addition, we have had the benefit of documents prepared by the advocates, including comprehensive opening and closing written submissions, chronologies, reading lists, proposed trial timetables and a list of acronyms.

The Legal Framework

Protected characteristics: race and religion or belief

18 It was not, and could not be, in dispute that Jewishness is a characteristic which attracts protection under the race and religion or belief provisions of the 2010 Act (see *Seide-v-Gilette Industries Ltd* [1980] IRLR 427 EAT and *R-v-Governing Body of JFS and the Admissions Appeal Panel of JFS* [2010] IRLR 136 SC). In his closing submissions Mr White stressed that there was no room for a new claim based on Zionism, or an attachment to Israel, or any similar ideology or sentiment, as an independent 'religion or belief'. No such claim was before us. Although his closing written submissions at one point suggested otherwise, Mr Julius told us that he did not put the case in that way. Rather, he stood by his written opening, which includes this (para 3.1 and following):

> **C has a strong attachment to Israel. This attachment is a non-contingent and rationally intelligible aspect of his Jewish identity. It is an aspect, that is, of his race and/or religion or belief …**
>
> **The fact that not all Jewish people have the same views does not prevent it from being an aspect of the protected characteristic. A significant proportion of Jewish people have an attachment to Israel which is an aspect of their self-understanding as Jews, or Jewish identity.**
>
> **C's own characteristics are therefore protected …**

We are mindful that this is not a complaint of indirect discrimination. No authority has been shown to us for (or against) the proposition that the statutory protection attaches not only to any protected characteristic *per se* but also to a particular affinity or sentiment not inherent in a protected characteristic but said to be commonly held by members of a protected group.

Legal personality, vicarious liability and third party liability

19 A trade union is not a body corporate but is legally capable of making contracts and of suing and being sued in its own name (Trade Union and Labour Relations (Consolidation) Act 1992, s10(1)).

20 By s109, the 2010 Act provides:

> **(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**
>
> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
>
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval …**

21 It is clear that common law principles of agency apply in the context of the statutory anti-discrimination regime: *Yearwood-v-Commissioner of Police for the Metropolis* [2004] ICR 1660 EAT, paras 35-39. Accordingly, Mr White accepted (opening submissions, para 44) that the Respondents are liable for the conduct of their employees acting within the course of their employment and of their agents acting within their authority. He further accepted that in the trade union context the law of agency will fix a trade union with liability for the actions of its officers and officials, provided that they are acting within the scope of specific authority conferred on them or at least within a general implied authority consistent with the union's policies. Our attention was drawn to *General Aviation Services (UK) Ltd-v-TGWU & Others* [1975] ICR 276, in which the Court of Appeal, applying conventional agency principles, held that the defendant trade union was not liable for losses incurred by the plaintiff company as a consequence of unofficial industrial action taken at the behest of an unofficial group of shop stewards (most of whom were members of the union), which was not authorised by the union and was taken in contravention of union policy.

22 Naturally enough, Mr Julius did not quibble with Mr White's acceptance that the Respondents were potentially liable for the acts of their employees and agents. He maintained, however, that their exposure was much wider than that. It was his submission (written opening, para 4.4) that liability attaches to the Respondents in respect of acts or omissions of Congress, the NEC, officials of the union, employees of the union and members of the union. He referred in support of his argument to a concept unfamiliar to us and not, so far as we are aware, known to our law, namely 'institutional responsibility' (closing submissions, paras 83-87). Mr Julius placed particular reliance on a judgment of Morland J delivered on 13 December 2002 in the case of *Vowles-v-Evans & Others* [2002] EWHC 2612 (QB). With great respect, we do not begin to understand how the decision in that case can assist us. It does not decide anything to do with vicarious liability. *Vowles* was a personal injury action. The claimant suffered a catastrophic injury in an accident which occurred during an amateur rugby union match. The first defendant, Mr Evans, was the referee. The corporate vehicle for the Welsh Rugby Football Union was the second defendant. The judge upheld the claim against Mr Evans. His decision turned on the question whether it was just and reasonable that the law should impose upon an amateur referee of an amateur rugby match a duty of care

towards the players. Applying well-established principles, the judge held that it was just and reasonable to impose such a duty. A challenge to that holding was dismissed by the Court of Appeal (see [2003] 1 WLR 1607). There was no contest on the question of vicarious liability: the second defendant accepted that it was liable for the acts or omissions of the first defendant. Self-evidently, the common law of negligence is of no assistance to us as we are not deciding a negligence action. We are a statutory Tribunal charged with determining a statutory claim. Vicarious liability can only operate to the extent specifically provided for under the applicable legislation.

23 Even if we were exercising a common law jurisdiction, we would regard Mr Julius's case on vicarious liability as notably ambitious. The modern jurisprudence has certainly developed the law in this field. It includes two very recent judgments on claims alleging sexual abuse within the Catholic Church (*JGE-v-Trustees of the Portsmouth Roman Catholic Diocese & Trust* [2012] IRLR 846 CA and *The Catholic Child Welfare Society & Others-v-Various Claimants & the Institute of the Brothers of the Christian Schools & Others* [2012] UKSC 56 SC). In the latter, the Supreme Court upheld the Claimants' appeal, concluding that they were entitled to hold the Institute liable for the alleged abuse of school children by members of that organisation. Giving the only substantial judgment, Lord Phillips of Worth Matravers traced the development of the doctrine of vicarious liability, observing that in modern times its scope has been extended beyond its original limit of rendering an employer liable for the acts of his employees in the course of their employment to fixing organisations with liability on the basis of a variety of analogous relationships (paras 19-21). He went on to explain that determination of the issue of vicarious liability entailed consideration of two questions. First, is the relationship between the primary actor (D1) and the party said to be vicariously liable (D2) "sufficiently akin" to that of employer and employee to warrant imposition of liability upon the latter as a matter of policy (paras 21 and 34-61)? Secondly, is there a sufficient connection between the act(s) complained of and the relationship between D1 and D2 (paras 62-87)? The evolution of the case-law over recent years has been significant but the courts have not, so far as we are aware, come close to rendering an unincorporated association vicariously liable to a member for upset or distress experienced as a result of the behaviour of a fellow-member. Indeed, for so long as the first question requires a relationship akin to that of employer and employee, we struggle to see how a vicarious liability argument could be maintained in such a case.

24 By s40, the 2010 Act prohibits the harassment of employees and applicants for employment and makes employers liable for third party harassment in specified circumstances. So far as material, the section reads:

> **(1) An employer (A) must not, in relation to employment by A, harass a person (B) –**
>
> **(a) who is an employee of A's;**
> **(b) who has applied to A for employment.**
>
> **(2) The circumstances in which A is to be treated as harassing B under sub-section (1) include those where –**
>
> **(a) a third party harasses B in the course of B's employment, and**

> **(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.**
>
> **(3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.**
>
> **(4) A third party is a person other than –**
>
> **(a) A, or**
> **(b) an employee of A's.**

25 In our view, the statutory provisions are perfectly clear. Four obvious propositions can be stated. First, *employers and principals only* are fixed with vicarious liability for the acts of their *employees and agents* (s109). Secondly, the prohibition of harassment under s40(1) protects *employees and applicants for employment only*. Thirdly, the special third party harassment provisions under s40(2)-(4) extend the scope of subsection (1) and accordingly that protection is restricted to *employees and applicants for employment only*. (The extended protection under s40(2)-(4) is, of course, not properly seen as a matter of vicarious liability at all. Rather, it deems the employer to commit an act of harassment where he fails to take reasonably practical steps to protect the complainant from harassment by a third party.) Fourthly, the third party provisions are not replicated in s57, under which the Claimant sues (and to which we will shortly turn).

26 Mr Julius placed reliance on *Conteh-v-Parking Partners Ltd* [2011] ICR 341. There the EAT (Langstaff J and members) considered an appeal against the dismissal of her complaint of harassment under the Race Relations Act 1976, s3A. Mr Julius relied on the EAT's judgment because it included a passage in which it was accepted that, by failing to protect an employee from third party harassment, an employer might himself be held liable for 'creating' an intimidating etc environment for him. The EAT observed:

> **28 … What must be looked at is the environment, and then the question be asked: how was that environment created? Creation may of course take place as a matter of an instant; but it may take place over time. It may be that third party behaviour has created the environment in part, but the actions of an employer, to whom those third parties are not responsible, has made it worse, in which case the environment might be said to have been created by the actions of both … Since the process of creation envisages a positive change in circumstance, can inaction ever be said to create an environment?**
>
> **29 An example would be where a failure to act when an employee reasonably required that there be action had itself contributed to the atmosphere in which the employee worked, as for instance where she or he felt unsupported, to the extent that the failure to support him or her actively made the position very much worse, effectively ensuring that there was no light at the end of the tunnel in remedy of the situation with which, as a result of the actions of others, he or she [was] then faced. In exploring that as a matter of theory we do not suggest that such cases will be common. It is perhaps unlikely that they would be readily found and an Employment Tribunal should only conclude that such has happened if there is cogent evidence to that effect; but we can see it is a possibility which is covered by the wording of the statute. We have greater hesitation in concluding however that 'creating' is apt to include a case where all that can be said against an employer is that he has failed to**

> **remedy a situation brought about by the actions of others for whom he is not responsible.**

27 Mr White submitted that reasoning derived from *Conteh* is not available to the Tribunal, for two main reasons. First, that case was decided under legislation which included no provision about liability for third parties. That legislation has been replaced by the 2010 Act which, by s40, enacts a carefully drawn scheme contemplating, in specific circumstances only, the possibility of liability of an employer to his employees arising out of third party harassment. Parliament must be taken to have intended to substitute s40 liability for the less clearly defined protection referred to in *Conteh*. Secondly, even if *Conteh*, in parallel with s40, still represents the law, it offers no warrant for admitting liability on the basis of third party harassment *otherwise than as between an employer and an employee*. There is nothing in *Conteh* to justify holding a trade union liable to one of its members in respect of alleged harassment by another member or any other third party.

28 In our view, Mr White is right on both points. The 2010 Act was the product of a thorough review of the law relating to discrimination in all its forms. If Parliament had wished to retain a form of liability corresponding with the *Conteh* decision, it would have so enacted. Accordingly, it must be assumed that Parliament's intention was that liability based on third party harassment should be confined to the circumstances provided for under s40. And on the second point, it seems to us unarguable that *any* liability to a non-employee can be spelled out of *Conteh*: quite simply, no wider liability was suggested.

Harassment

29 The claim is brought under the Equality Act 2010 ('the 2010 Act'), s57 which, so far as material, provides:

> **(3) A trade organisation must not, in relation to membership of it, harass –**
>
> **(a) a member …**

It is common ground that the Respondents, as a trade union, are for these purposes a trade organisation.

30 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(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 sub-section (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;**
> **religion or belief …**

31 In *Richmond Pharmacology-v-Dhaliwal* [2009] ICR 724*,* the EAT (Underhill P and members) provided valuable guidance on the law of harassment under the Race Relations Act 1976, s3A. The wording of that section differs materially from the 2010 Act, s26 but two points which we draw from the authority are no less valid for that. First, stress was placed on the importance of a methodical approach. Although they may overlap, the three constituent parts of the statutory tort (unwanted conduct, the relevant nexus between the conduct and the protected characteristic, and the prescribed purpose or effect) should be considered separately and appropriate findings made on each. Secondly, the jurisprudence (a) of 'harassment' as a form of direct discrimination (developed prior to the enactment of the new statutory complaint of harassment), and (b) under the Protection from Harassment Act 1997 is unlikely to assist (para 13).

32 In one respect at least the language of the 2010 Act marks a significant departure from the earlier law: the pre-2010 Act legislation required that the treatment complained of should be 'on grounds of' the relevant protected characteristic (see the Race Relations Act 1976 ('the 1976 Act'), s3A(1) and the Employment Equality (Religion or Belief) Regulations 2003 ('the 2003 Regulations'), reg5(1)), whereas the 2010 Act posits only a 'related to' link. In *R (Equal Opportunities Commission)-v-Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' formulation (unlike 'on grounds of') does not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection is sufficient. (We are alive to the fact that the use of the term 'cause' (and derivatives) as synonymous with a 'ground' or 'reason' has been deprecated (see *eg* the judgment of Nicholls LJ in *Constable of West Yorkshire Police-v-Khan* [2001] UK HL 48, para 29) but it would serve no useful purpose to engage in that controversy here.) To similar effect, in *Warby-v-Wunda Group Plc* UKEAT/0434/11 (27 January 2012), the EAT appeared to accept as correct the shared position of the parties that the 'on the grounds of' and 'related to' tests were materially different.

33 The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' formulation at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic. Moreover, the protection applies not only to conduct which relates to the *complainant's* protected characteristic (para 7.9) but also where it has any other connection with a protected characteristic (para 7.10). As one of several examples, the Code offers the following:

> **A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result,**

> **the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.**

34 This ample interpretation, while not openly challenged, is not easily reconciled with the narrower arguments of Mr White QC and Mr Purchase on behalf of the Respondents. In their opening skeleton (from now on, purely in the interests of brevity, we will attribute the submissions to leading counsel only), at para 9, they say this:

> **However, it is submitted that there must still be a substantial and sufficient nexus between the conduct and the protected characteristic. It is submitted that it is not enough to say that the conduct in question relates to the behaviour or policies … of a nation state with which some, or even most, individuals of a particular racial or religious group have an affinity. Since section 9 of the 2010 Act provides that a 'racial group' can be defined by nationality or national origins, this approach would rule out unwelcome criticism of virtually any nation state and, indeed, political criticism of many kinds. For example, most American people have an affinity with the United States of America; yet it surely cannot be the case that criticism of that country's policies and conduct 'relates to' their race. Similarly, criticism of inadequate governance in the Catholic Church which has allowed sexual abuse of minors cannot sensibly be regarded as relating to individual Catholics and capable of amounting to harassment on religious grounds …**

35 We do not accept this argument. In our judgment, the 'related to' test denotes a loose, associative link between the behaviour under consideration and the protected characteristic. We consider that Parliament's choice of language dictates a wide interpretation. It seems to us that a practice of repeatedly criticising the actions and policies of the United States could certainly be seen as 'related to' race. Nor do we accept the Catholic Church example as valid. One flaw, in our respectful opinion, lies in the notion that the imaginary criticism of church governance must relate to individual Catholics. The behaviour under challenge must relate to the *protected characteristic*. In our view repeated criticism of any religious institution could be seen as 'related to' the religion which that institution espouses or represents. And, as the EHRC Code points out, the religion of the complainant would be strictly irrelevant (as would the religion of any particular person).

36 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the claimant must show that the conduct was unwanted. Some claims will fail on the Tribunal's finding that he or she was a willing participant in the activity complained of. Moreover, it seems to us self-evident and necessarily implicit that any behaviour on which a claim rests must be (a) of a sort to which a reasonable objection can be raised and (b) voluntary, or at the very least such that the respondent can properly and lawfully bring it to an end.

37 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit that it also entails consideration of one subjective factor, the

perception of the complainant (s26(4)(a)). It is here that the Tribunal is invested with the means of weighing all relevant considerations to achieve a just solution.

38 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

At para 51, the Lord Justice added this:

> **I do not think that a Tribunal is entitled to equate an uncomfortable reaction to humiliation.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

39 We have mentioned that in *Dhaliwal*, the EAT doubted whether case-law under the Protection from Harassment Act 1997 ('the 1997 Act') could assist Tribunals in interpreting s26 of 2010 Act. Mr White properly drew attention to that doubt but then sought to argue that it was, certainly for the purpose of the instant case, misplaced. The 1997 Act prohibits harassment in the form of a course of conduct which amounts to harassment of another and which the perpetrator knows, or ought to know, amounts to harassment of that other person (s1(1)). By s1(2) it is enacted that the person whose conduct is in question ought to know that it amounts to harassment if a reasonable person in possession of the same information would think that it amounted to harassment. Harassment constitutes an offence (s2) and a tort (s3). Further provisions for the interpretation of these sections are enacted in s7.

40 In *Thomas-v-News Group Newspapers Ltd* [2001] EWCA Civ 1233, Lord Phillips MR, giving the only substantial judgment said this (para 30):

> **The [1997] Act does not attempt to define the type of conduct that is capable of constituting harassment. 'Harassment' is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct.**

41 We have noted the points made by Mr White but we are not persuaded by them. The 1997 Act, which has been interpreted at Court of Appeal level as requiring behaviour 'targeted' at an individual, cannot assist us in interpreting the 2010 Act, s26, in which that requirement is conspicuously absent.

42 In a related submission, Mr White reminded us that s26 is concerned with acts which create an adverse environment *for the complainant*. There must be a sufficient nexus, not only between the conduct and the protected characteristic (the 'related to' link) but also between the conduct and the individual who claims to have been harassed. The point is clearly picked out in the agreed list of issues, para 8 (see para 14 above). We agree with Mr White but here again, it seems to us that the solution lies in the flexible language of s26(4)(b) and (c). While the conduct need not be aimed at a claimant, the further he stands from it, the less likely the Tribunal is to find that in fact he experienced the stated adverse effect or, if he did, that it was reasonable for the conduct to have that effect.

43 The obligation to take account of reasonableness requires the Tribunal to have regard to interests wider than those of the immediate parties. The Convention for the Protection of Human Rights & Fundamental Freedoms ('the Convention') was agreed by the Council of Europe at Rome on 4 November 1950. Several Articles have been drawn to our attention, of which these are, for present purposes, the most important:

Article 10

Freedom of expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

Freedom of assembly and association

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the

> **imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.**

44 The Human Rights Act 1998 ("the 1998 Act") s3 provides (inter alia):

> **(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights.**

Under s12, directed to freedom of expression, the following provisions appear:

> **(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.**
>
> **…**
>
> **(4) The court must have particular regard to the importance of the Convention right to freedom of expression …**
>
> **(5) In this section –**
>
> **'court' includes a tribunal …**

45 In *Sunday Times-v-United Kingdom* (1979-80) 2 EHRR 245, the European Court of Human Rights observed (para 65):

> **… freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as matters of indifference, but also to those that offend, shock or disturb the State or any sector of the population.**

Later in the same paragraph, the Court observed:

> **The Court is faced … with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.**

Mr White referred us to a number of other authorities under domestic and Community jurisprudence to similar effect.

46 In *Unison-v-Kelly* [2012] IRLR 442 the EAT (Supperstone J and members) considered an appeal by a trade union against an Employment Tribunal's decision that it had imposed unjustifiable discipline on members responsible for a leaflet to which other members had taken offence. In its judgment the EAT remarked (para 44):

> **The right to freedom of expression entitles a union member to reasonably express his opinions on internal union matters generally and the right of freedom of association must entitle members of the union to influence the policies and actions of their union.**

47 Mr White also drew our attention to a judgment of Mr JP Scott, Sheriff given at Edinburgh on 8 April 2010 in the case of *Procurator Fiscal-v-Napier & Others* [D13/4553]. The five accused, all members of the Scottish Palestine Solidarity Campaign, disrupted a performance by the Jerusalem String Quartet at the

Edinburgh Festival in 2008, making comments such as, "They're Israeli army musicians", "Genocide in Gaza" and "Boycott Israel". They were charged with pursuing a racially aggravated course of conduct which amounted to harassment or alternatively acting in a racially aggravated manner. Unlike the instant case, the racial basis for the charges was not said to be Jewishness but Israeli nationality. The Sheriff dismissed the charges, holding that the prosecution must be content with a charge of breach of the peace (to which there was no apparent answer). On the subject of freedom of expression, he remarked (para 46):

> **And if persons on a public march designed to protest against and publicise alleged crimes committed by a State and its army are afraid to name that State for fear of being charged with racially aggravated behaviour, it would render worthless their Article 10(1) rights. Presumably their placards would have to read, "Genocide in an unspecified part of the Middle East"; "Boycott an unspecified State in the Middle East", etc.**

48 Although, as we have explained, we do not regard jurisprudence under the 1997 Act as an aid to the interpretation of s26, some decisions under it contain valuable observations on wider points of principle. One such is the judgment of Tugendhat J in *Trimingham-v-Associated Newspapers* [2012] 4 All ER 717. At para 265, the learned judge said this:

> **… pluralism requires members of society to tolerate the dissemination of information and views which they believe to be false and wrong. This can be difficult for people to understand, especially if the subject is an important one and they are so convinced of the rightness of their views that they believe that any different view can only be the result of prejudice. Welcoming pluralism cannot be justified by logic. But in a society where people in fact hold inconsistent views about important matters, pluralism is a practical necessity if that society is to be free.**

Burden of proof

49 We were referred to the 2010 Act, s136 and the leading cases under the equivalent sections of the pre-2010 anti-discrimination code. We have this familiar material in mind but do not think it necessary to set it out here. It seems to us that the burden of proof provisions have no real application in this kind of case. They assist in litigation where the key question is whether the Tribunal should find as a matter of inference that the conduct under consideration was materially influenced by a proscribed factor. Here, the case does not rest on inference at all. The Claimant's main contention is that the conduct of which he complains was inherently discriminatory in that it consisted of acts and omissions concerning the conflict between Israel and Palestine and so 'related to' *his* (although of course not every Jew's) Jewish identity and, as such, *his* Jewish race and/or religion or belief. It is the common position of the parties that the link, if any, between the material events and the Claimant's race and/or religion is to be determined on the basis of legal argument, not by resort to inference. In a harassment claim based on 'purpose' rather than 'effect', the burden of proof provisions are, of course, likely to come into play, but that is not this case.

The Facts

50 We have already referred to the scale of this dispute. We have also mentioned, however, that the claim consists of allegations of harassment based on

10 particular facts or events or series of events. Mr Julius urged us to make wide-ranging findings of fact. We are not persuaded that it is appropriate to do so. Had the nature of the claim been such that the burden of proof provisions made it necessary to record 'background' facts and ask whether they were capable of supporting an inference of unlawful discrimination, we would of course have shouldered that responsibility but, for reasons given in our last paragraph, we are clear that this is not such a case. In these circumstances, although we have devoted many hours to reviewing the evidence and the submissions thereon, our findings are deliberately narrow, at least when measured against the breadth of the material arrayed before us. We sincerely hope that our approach will not be thought disrespectful. No offence whatsoever is intended, to the parties or their legal teams, and we readily acknowledge the immense amount of effort and skill which has gone into the preparation of this litigation. Nor are we oblivious to the emotional energy which it has generated. But our touchstone must be the overriding objective (see the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004, reg 3) and in particular the key principle of proportionality. The facts essential to our decision, either agreed or proved on a balance of probabilities, are the following.

The debate on anti-Semitism and the Israel/Palestinian issue

51 So long and terrible has been the persecution of the Jewish people through history that much learning has developed on the subject. The study of anti-Semitism has to an extent acquired its own terminology (for example, stereotypes tend to be referred to as 'tropes'). Naturally, scholars in this discipline, as in any other, disagree. There is even a debate, which raises serious points, about how the term 'anti-Semitism' should be spelt. One controversial question much explored in this case is whether, and if so in what circumstances, criticism of the actions and policies of the modern State of Israel can properly be regarded as anti-Semitic. At one extreme, such criticism could be seen as intrinsically anti-Semitic simply because Israel is the Jewish State. The polar opposite view is that the actions and policies of a state are by their nature political, and accordingly criticism of acts by or at the behest of the Israeli government and institutions cannot be anti-Semitic. Between lie many intermediate positions. For some sympathetic to Israel, what is seen as disproportionate or excessive attention to the Israel/Palestine conflict may constitute or evidence anti-Semitism, conscious or unconscious. For others, the determining factor is the tone or content of the language used, in particular where what are seen as anti-Semitic tropes are employed. Many sympathetic to the Palestinian cause, while not excluding the possibility that *some* criticism of Israel may be actuated by anti-Jewish prejudice, complain that the charge of anti-Semitism is largely raised as a device to distract attention from injustices (as they see them) perpetrated in the name of Israel. Among the vast field of witnesses on the Claimant's side, there was an interesting spread of opinions on where the line is, or should be, drawn. So, to take one of many examples, Mr Whine of the Community Security Trust, an organisation which provides security, training and advice for British Jews, did not consider that comparisons between Israel and apartheid South Africa were inherently anti-Semitic, whereas the Claimant did.

52 The obvious difficulty confronting anyone seeking to grapple with this controversy is that the arguments cannot meet each other head on unless and until participants agree on what is meant by 'anti-Semitism'. Without such common ground, questions put to witnesses for the Respondents seeking to elicit a view as to whether such-and-such a comment 'was' or 'was not' anti-Semitic lacked any meaning. As we have mentioned (and will more fully explain in due course), the Claimant bases his case in part on the rejection by the Respondents' Congress (in 2011) of the 'Working Definition' of anti-Semitism produced by what was then the European Union Monitoring Centre on Racism and Xenophobia (referred to above and below as the EUMC). He was content with that definition. Others disagreed, regarding it as exposing critics of Israel to the unfair accusation of anti-Semitic conduct. They pointed to the fact that the definition might be read as branding attacks on Zionism as anti-Semitic and precluding criticism of Israel save where 'similar' to that levelled against any other country. We cannot escape the gloomy thought that a definition acceptable to all interested parties may never be achieved and count ourselves fortunate that it does not fall to us to attempt to devise one.

53 In his written opening Mr Julius identified a feature of modern anti-Semitic discourse as 'good Jew / bad Jew' analysis. This separates 'bad' Jews from 'good' Jews, the former being 'bad' because of some trait or characteristic associated with Jewishness, the latter being 'good' for their rejection of the former. No doubt Mr Julius is right that this device is employed, but it is certainly not limited to anti-Semitic discourse. It is the old 'divide and rule' trick which campaigners against racism in all forms have long warned against. That, as a debating tactic, it is alive and well was illustrated before us. When it was put to the Claimant that many Jewish members of the Respondents disagreed with his views, he protested that the 'bad' Jew label was being applied to him. Of course it was not: Mr White was simply fulfilling his professional duty of putting material facts. But at other points in his evidence, no doubt unwittingly, the Claimant was to be found employing the very device of which he complained, disparaging pro-Palestinian Jewish speakers as 'not mainstream'. Professor Hillel-Ruben appeared to say something similar. No doubt a dispassionate analysis of the arguments and techniques of those who speak for the Palestinian cause within the union would rapidly turn up similar flaws in their reasoning. It is the stuff of political debate.

54 Mr White made no apology for putting to one witness after another the proposition that there was a 'range of views' on the issues thrown up by the Israel/Palestine conflict and the limits of acceptable comment arising from it. Few could disagree, and none plausibly. That diversity of opinion is to be found within the Respondents' Jewish membership, across their membership as a whole and in society at large. It was nowhere better illustrated than in the heated exchanges in the *Guardian* and *Sunday Times* newspapers following their publication of cartoons in November 2012 and January 2013 respectively. The former suggested that Israel enjoyed disproportionate influence in world politics; the latter denounced her treatment of Palestinians. Some attacked the cartoons as anti-Semitic; others replied that the critics were merely trying to silence legitimate political comment.

55 Political engagement, within the Respondents as outside, is organised. Groups are formed to pursue particular interests. Coalitions develop in support of shared causes. We heard evidence about the work of three pressure groups

concerned with the proposals for an academic boycott of Israel, one supportive and two against. The Claimant does much of his campaigning through the 'Academic Friends of Israel' ('AFI'), an impressively-presented organisation with a PO Box address, a mission statement and a letterhead showing its patron as the Chief Rabbi and its advisory board as comprising a list of dignitaries including the President of the Board of Deputies of British Jews. Despite appearances, as the Claimant engagingly told us, AFI consists of him, his wife and a computer. Like any experienced political activist, he is alive to the PR benefits of disseminating his own views in such a way as to seem to be speaking for a significant number of others.

56 In union politics as elsewhere, effective use of the media is nowadays understood to be an important weapon. We will make one or two references below to the use of the press and the Internet by the Claimant and his supporters. Their opponents also perceive tactical advantage in managing publicity. In the course of the hearing before us, a letter was circulated on the Internet voicing support for the Respondents in this litigation, signed by over 50 Jewish members.

Complaint (1): Certain resolutions in relation to Israel

57 The resolutions relied on were passed at Congress in the five years from 2007 to 2011.

58 In the inaugural Congress of 2007 Motion 28 was passed approving a policy on international 'greylisting' and boycotts. The policy listed a series of 'triggers' intended to stand as conditions precedent to any 'greylisting' or boycott being implemented.

59 The same year, Congress passed Motion 30 which condemned "the complicity of Israeli academia" in the occupation of the West Bank, proclaimed the belief that passivity or neutrality was unacceptable and that criticism of Israel in the context of the occupation and associated actions could not be construed as anti-Semitic, and instructed the NEC to implement a number of measures including to:

- **Circulate the full text of the Palestinian boycott call [to all branches/Local Associations] for information and discussion;**
- **Encourage members to consider the moral implications of existing and proposed links with Israeli academic institutions;**
- **Organise a UK-wide campus tour for Palestinian academic/educational trade unionists …**

60 Motion 31 was also passed. This called for a campaign for the restoration of international aid to Palestine and a moratorium on collaborations with Israel involving funding from the EU and other sources.

61 Having received both of the opinions from Lord Lester to which we have referred (see paras 5, 6 and 8 above), Ms Hunt, the General Secretary, took the question of the legality of Motion 30 to the Strategy and Finance Committee where it was discussed on 28 September 2007. The result was a unanimous decision to write to branches and members explaining that a call for an academic boycott

would be unlawful, that debates which proactively sought members' opinions might be unlawful and that opinions should not be tested on the question of a boycott. Accordingly, a proposed tour for the purpose of discussing the boycott proposals at local branches could not go ahead. Motion 30 was not implemented.

62 At the 2008 Congress, Motion 25 was passed. We have summarised its main features in para 10 above. Before it was debated, Ms Hunt announced that, should the motion be passed, the NEC would need to consider, and take advice upon, what steps could lawfully be taken to implement it.

63 Also in 2008, motions were passed on the impact on Gaza of the recent military action, on the organisation of a fact-finding delegation to Gaza and on a call to the Histadrut (the equivalent, we were told, of the British TUC) to pay sums of money said to be owed to the Palestinian General Federation of Trade Unions.

64 In 2009, Congress debated a number of relevant motions. Motion 7 was directed to anti-Semitism and instructed the NEC to produce leaflets concerning the dangers of anti-Semitism, to organise a one-day event on that subject to coincide with Holocaust Memorial Day at four locations around the country, to organise an event with other education unions to be held annually on Holocaust Memorial Day, to organise a fringe meeting on anti-Semitism at Congress 2010 and to work with the National Union of Students and other unions on anti-Semitism and develop further campaigning activities. Two amendments were proposed and lost. The first would have added this:

> **Congress notes with concern the rise of anti-Semitism in the UK and resignations of UCU members apparently in connection with perceptions of institutional anti-Semitism.**

The second proposed an investigation into recent resignations from the union and the reasons for them.

65 Motion 24, condemning the military operation in Gaza and the use of rockets against Israeli citizens, was passed.

66 Motion 26 welcomed the Scottish TUC campaign for disinvestment in Israel. It was passed unopposed.

67 Motion 28 referred to the Israeli invasion of Gaza of December 2008 and January 2009. It noted the deaths, injuries and destruction resulting from the military operation and the scale of arms sales from Britain to Israel in 2008. It condemned the attack and the refusals of the US and UK governments to condemn it. It resolved (inter alia) to demand changes in British government policy towards Israel and Palestine including a ban on arm sales to Israel and economic support for Israel and to call for a ban on imports of all goods from Israeli settlements in the Occupied Territories. The main motion was passed, as was an amendment, which affirmed support for a campaign of boycott, disinvestment and sanctions (hereafter 'BDS'). Ms Hunt explained to Congress before the amendment was debated that if it was passed as formulated, the NEC would be obliged, on legal advice, to treat it as void and of no effect. When it was passed, it was formally declared to be void and of no effect.

68 Motion 29 was passed with an amendment. The text included:

> **Congress urges branches to discuss prior to Congress 2010 the Palestinian call for a [BDS] campaign.**

It also resolved to:

- **host an Autumn International, Inter-Union Conference of BDS supporters to investigate lawful implementation of the strategy, including an option of institutional boycotts.**

On legal advice, Ms Hunt told Congress that, as amended, Motion 29 was lawful and could be implemented.

69 At the 2010 Congress, Motion 31 was passed. This noted the "successful" conference on BDS (held pursuant to Motion 29 passed the previous year) and resolved to reaffirm its support for BDS "within the constraints of the existing law", to seek in conjunction with other trade unions to establish an annual international conference on BDS, to sever all relations with the Histadrut and to urge other trade unions and similar bodies to do likewise, to campaign against the EU-Israel Association Agreement, and sundry other measures. An amendment proposed by the Claimant, which would have required a review of relations with the Histadrut, was defeated.

70 Motion 32, which called for an investigation of Ariel College, was passed unopposed.

71 Motion 33 related to the Respondents' invitation to Mr Bongani Masuku, International Relations Secretary of COSATU, the Congress of South African Trade Unions, to a meeting in December 2009 to discuss BDS measures against Israel. The motion drew attention to alleged instances of anti-Semitic speech by Mr Masuku and proposed that Congress dissociate itself from his "repugnant views". A further sentence censuring those elected members responsible for inviting Mr Masuku was withdrawn. Motion 33 was defeated. We will return to the complaint concerning the invitation to Mr Masuku in due course.

72 Motion 67 was passed. It noted the success of events organised for the Holocaust Memorial Day 2010 and resolved to continue to campaign against anti-Semitism and to organise a seminar on Holocaust Memorial Day 2011.

73 At Congress 2011 two significant motions were debated. Motion 36, which was passed, noted the "continued illegal occupation of Palestine and the daily oppression of Palestinian teachers and students", the restrictions on the free movement of Palestinian academics within the Occupied Territories and elsewhere, the "ongoing constructions of settlements", the "current witch-hunting of Israeli academics" and others, the "recent alarming moves in the Israeli Knesset to penalise Israeli academics who support boycott action" and the petition from Israeli academics expressing their "unwillingness" to take part in academic activity at Ariel College. The motion "deplored" attacks on the academic freedom of "our Palestinian and Israeli colleagues". It instructed the NEC to circulate to all members the petition of the Israeli academics, the call by PACBI (Palestinian Campaign for the Academic and Cultural Boycott of Israel) for a boycott, and

information about relevant legislation then passing through the Knesset. It also instructed the NEC to seek a meeting with the Israeli Ambassador, to press the Foreign Office to protest to the Israeli authorities and to take sundry additional steps.

74 Motion 70, which was also passed, expressed the view that the EUMC 'Working Definition of anti-Semitism' confused criticism of Israeli government policy and actions with "genuine" anti-Semitism and was being used to silence debate about Israel and Palestine on university and college campuses. Accordingly, the motion resolved that the union should make no further use of the Working Definition and dissociate itself from it, campaigning for open debate concerning Israel's past history and current policy while continuing to combat all forms of racial or religious discrimination. We will return to this subject when dealing with complaint (9) below.

75 The Claimant's pleaded case (grounds of claim, para 25) is that 46 International Committee motions were debated at the Respondents' Congresses between 2007 and 2011, of which 19 were connected with the Israeli/Palestinian question. The proportion, on that count, is 41%. The Respondents take issue with the Claimant's statistics. Their pleaded position is that during the relevant five-year period there were 13 motions, or arguably 15, concerned with Israel and Palestine out of a total of 38 on with international issues. In other words, they put the relevant proportion at about one third or perhaps a little more. In the written opening on behalf of the Respondents, it appeared to be conceded that the international motions numbered 46 and that 16 concerned Israel and Palestine. In so far as there is any residual difference between the parties on the numbers, we find it unnecessary to resolve it.

76 It also appeared to be common ground that during the five-year period the overall total number of motions listed for debate was either 837 or 839.

Complaint (2): The Respondents' response to the report of the All Party Parliamentary Inquiry into Anti-Semitism

77 The Inquiry was commissioned by Mr John Mann MP, Chairman of the All Party Parliamentary Group against Anti-Semitism, and a witness before us. A cross-party committee of MPs ('the Committee') chaired by the Rt Hon Dr Denis MacShane, also a witness before us, was appointed and began work in 2005. It reported in September 2006.

78 The report runs to over 50 pages plus appendices. We will not attempt to summarise it but it may help to note certain features. In the first place, the Committee found that anti-Semitism was on the rise. The new trend appeared to be largely associated with the politics of the Middle East and in particular the Arab/Israeli conflict. The report concluded that the correlation between conflict in the Middle East and attacks on members of the Jewish community in the United Kingdom must be better understood and that academic research in that area would be welcomed (para 110). The Committee appeared to accept that criticism of Israel or Zionism was not "necessarily" anti-Semitic but added that the converse was also true: "… it is never acceptable to mask hurtful racial generalisations by claiming the right to legitimate political discourse".

79 Dealing with evidence about anti-Semitism in the academic sphere, the Committee found:

> **We conclude that Jewish students feel disproportionately threatened in British universities as a result of anti-Semitic activities which vary from campus to campus. Attacks on Jewish students and their halls of residence, and a lack of respect shown for observant Jewish students and their calendar requirements amount to a form of campus anti-Semitism which Vice-Chancellors should tackle vigorously. While criticism of Israel – often hard-hitting in the rough and tumble of student politics – is legitimate, the language of some speakers crosses the line into generalised attacks on Jews.**

80 At paras 206-213, the Committee addressed the question of academic boycotts. It noted the motions passed at the annual conference of AUT in 2005 proposing the boycott of two Israeli universities. It also referred to a motion at the NATFHE conference of May 2006 calling on members to boycott all Israeli academics. The Committee perceived, and criticised, the "singling out" of Israel for boycotting purposes. Evidence given by Dr Jon Pike (also a witness for the Claimant before us) was quoted with apparent approval. Dr Pike was a leading member of 'Engage' an anti-boycott organisation. This section of the report ended as follows (para 213):

> **We conclude that calls to boycott contact with academics working in Israel are an assault on academic freedom and intellectual exchange. We recommend that lecturers in the New University and College Lecturers Union (sic) are given every support to combat such collective boycotts that are anti-Jewish in practice. We would urge the new union's executive and leadership to oppose the boycott.**

81 The Committee heard oral evidence over four days in February and March 2006. Those who gave evidence included the Chief Rabbi, the Home Secretary, a senior police officer, the Attorney-General, the President of the Board of Deputies of British Jews, Dr Brian Klug (an Oxford academic with special expertise in the area of anti-Semitism) and Dr Pike, to whom we have already referred. The Committee also received evidence in writing from a wide range of sources including several Jewish organisations, political parties, the Commission for Racial Equality, embassies of six countries including Israel and the United States of America and eminent individuals including Mr Howard Jacobson, the well-known author (whose evidence we read in these proceedings). The list of those who supplied written evidence also includes AFI and Engage.

82 NATFHE supplied written evidence to the Inquiry. AUT did not. Ms Hunt was General Secretary of AUT at the time. She told us without challenge that her union was not asked to comment on the academic boycott issue or notified that the Committee was interested in that particular topic.

83 The Respondents had come into existence by the date of publication of the Committee's findings. They decided to respond to the report. Before doing so, they requested a meeting with the parliamentarians and as a result an appointment was fixed for 13 December 2006. Those present were Mr Mann, Dr MacShane, Ms Hunt and Mr Mackney, formerly General Secretary of NATFHE and by then joint General Secretary of the Respondents (a position which he continued to share with Ms Hunt until May 2007).

84 The meeting was not particularly a productive one. Ms Hunt and Mr Mackney referred to parts of the report which had described Jewish students feeling threatened on campus and explained that they wished for further information because that matter called for investigation. The parliamentarians did not provide any detail and did not genuinely respond to that inquiry at all. Mr Mann led for them and the more conciliatory tone of Dr MacShane gave way to a somewhat hostile display in which Mr Mann made no bones about his view that the union was operating in an anti-Semitic way and that those at its head must address the problem. He did not explain what the anti-Semitic behaviour was supposed to have consisted of besides referring to the boycott debate and characterising any boycott of Israel or Israeli institutions as itself anti-Semitic.

85 Following the meeting Mr Mackney drafted the Respondents' written answer to the Committee's report. He affirmed the Respondents' opposition to anti-Semitism. He was critical of what he characterised as a lack of balance in the report and questioned whether it was appropriate to take anti-Semitism as a topic in isolation, pointing out that Islamaphobia was also on the increase and suggesting that the two problems would benefit from a balanced joint approach. He referred to the evidence which had been submitted by NATFHE and observed that it would have been courteous and helpful to invite the Respondents to give oral evidence. Mr Mackney acknowledged that some groups might make criticism of Israel an excuse for anti-Semitic activity but contended that criticism of the Israeli government was not in itself anti-Semitic and argued that defenders of Israel had used the charge of anti-Semitism as a tactic to smother democratic debate and legitimate censure, citing research by Israeli journalists published in the Guardian in June 2006 to that effect. Mr Mackney reserved his most direct strictures for the recommendation concerning the boycott issue remarking:

> **We find this recommendation highly improper, constituting an interference in the democratic processes of our union. The UCU and its predecessors are and were democratic organisations … the report itself struggles and fails to satisfactorily resolve the issue of whether a policy which is critical of the actions of the Israeli government is anti-Jewish in practice and this is likely to remain a highly subjective issue.**

86 In January 2007 the Times Higher Education Supplement published a letter from 76 members of the Respondents, including the Claimant, attacking Mr Mackney's response to the Parliamentary Inquiry report as "evasive, disingenuous and complacent".

Complaint (3): Postings on, the moderation of, and the differing treatment of members of the Activists List

87 The Activists List ('The List') is an online facility run by the Respondents to enable union members to exchange views on subjects of their choosing. Membership of the List, which stands at about 700, is open to members of the Respondents. Between late 2007 and mid 2011 about 7,000 'threads' (or series of linked 'posts') were posted. Of these, about 1,500 concerned the Israel/Palestine question. The Claimant was responsible for 67 messages, every one on that topic.

88 The List was not and is not policed. Users' attention is drawn to a disclaimer which includes the following:

> **Please note that the views and advice posted within this forum are those of the sender and not necessarily those of national UCU, nor can we accept responsibility for any advice given. If in doubt, you are advised to contact your regional office. This List is a private discussion forum hosted by UCU for the exclusive use of UCU members. No material from this List may be reproduced without the express permission of the original poster. Please keep messages pertinent, and don't be rude or offensive. The List owner reserves the right to remove your posting privileges and/or your List membership …**

89 Although the List is not policed, an officer and employee of the Respondents, Mr Matt Waddup, was at all relevant times its designated 'moderator'. He holds and held the position of National Head of Campaigns, Organising, Recruitment and Training.

90 Mr Waddup told us that he employed two main instruments in seeking to manage the List and, in particular, disputes arising from posts on it. The first was the Respondents' Rules governing the general conduct of members. Rule 6 prohibits members from engaging in all forms of harassment and unfair discrimination. By Rule 13 the NEC is empowered to censure or bar any office-holder or suspend or expel from membership any member whose conduct is found to be in breach of the Rules or detrimental to the interests of the union.

91 Secondly, Mr Waddup had discretionary authority in his capacity of moderator to manage the List and resolve disputes about its use. On occasions he posted his own general warnings to members of the List. We were shown one example, dated 9 May 2008, reminding them to be civil, to take circular or extended arguments off the List and not to publish messages from the List elsewhere. Mr Waddup went on to explain that he did not spend his time reading messages as they came in and that it was necessary for him to rely on members to treat one another with respect. He also reminded users that he could and would, if necessary, exercise his power to remove posting rights in proper cases. In addition to general interventions of this sort, Mr Waddup took action in response to complaints by members about particular postings. It may help to mention a few examples of his interventions.

92 In June 2007, Mr Waddup suspended a member, Mr Howard Fredericks, who had posted a message stating that he looked forward with relish to "fighting" another member, whom he characterised as anti-Semitic, "on the physical battlefield". Mr Waddup told us that he judged this posting intimidatory.

93 Dr David Hirsh, a founder of the anti-boycott organisation, Engage, and a witness before us, was warned by Mr Waddup in August 2007 about the need to be more careful in his choice of language and about the rule prohibiting the copying of extracts from the List elsewhere. Dr Hirsh responded, stating that he would "make no undertaking whatsoever" not to publish material from the List on other websites. In November 2007 Mr Waddup received a message from a List member which revealed that Dr Hirsh had copied further material from the List on to another website. Accordingly, Mr Waddup then suspended Dr Hirsh's posting rights.

94 A complaint about the treatment of Dr Hirsh was investigated by Mr Paul Cottrell, the Respondents' National Head of Public Policy, who rejected it as unfounded.

95 In May 2008, Mr Waddup received complaints about recent postings by Ms Jenna Delich. Although he did not find the substance of her remarks objectionable (and he certainly did not interpret them in the manner contended for in the claim form, para 49.2 as defending anti-Semitism or blaming Israel for anti-Semitism), he did warn her to take care in future with her choice of language and the tone of her messages. In August 2008 there was a further complaint about Ms Delich, namely that she had posted extracts from an extreme right-wing website. She claimed to have done so inadvertently but Mr Waddup nonetheless decided to remove her posting rights and she was suspended from the List.

96 On 8 December 2010 Mr Mike Holmes posted a message which included a reference to "halal halfwits". The matter came to Mr Waddup's attention and he suspended Mr Holmes's posting rights.

97 On 8 October 2010 Mr Keith Hammond posted a message addressing earlier contributions from two other members. To one, he set out some views concerning what he judged to be the deplorable treatment of Palestinian prisoners in Israeli jails and associated matters. To the other he addressed a somewhat condescending and sarcastic message consisting only of an attack on that individual's earlier contribution. The latter message attracted the attention of Mr Waddup, who issued Mr Hammond with a warning to be more careful in his use of language in future postings.

98 In February 2010 the Claimant made complaints under rule 13 of the Respondents' Rules, concerning posts by Mr Hammond on 23 and 30 January 2010 and Mr Waddup's alleged failure to moderate the List. The complaint about Mr Waddup was considered and, in March, dismissed by Ms Hunt. In giving her decision, she volunteered the view that Mr Hammond should be removed from the List (because of his postings of 28 and 30 January). At that point, the complaint against Mr Hammond was itself unresolved. Mr Waddup told us, and we accept, that he believed that it was not open to him to determine the question of Mr Hammond's continued membership of the List until the conclusion of the rule 13 proceedings. Accordingly, he did not take action at that stage. On 28 June 2010, 10 days after the determination of the rule 13 complaint, Mr Waddup suspended Mr Hammond from the List. He did so because of the tone of his two postings of January 2010, the earlier of which had contained references to the Holocaust, Nazi death camps and sundry other highly emotive allusions, purportedly intended to mark Holocaust Memorial Day but principally directed to the memory of the victims of Israeli military action in Gaza in 2008/09.

99 On 16 April 2008 Dr Joshua Robinson, a witness before us, placed on the List a post from Dr Hirsh, who was already suspended from the List (see above). The latter came to the attention of Mr Waddup, who warned Dr Robinson, but did not suspend him. Mr Waddup told us that he "moderated" Dr Robinson's posts thereafter, which we understand to mean monitored. In about May 2008 Dr Robinson made a complaint against three other members of the List and a general allegation of 'institutional anti-Semitism' aimed at the union itself. There were also

complaints at around the same time by Dr Pike and Ms Eve Garrard against other members of the List and by Ms Delich against Dr Pike and Ms Garrard. The matter was referred to Dr Steve Wharton, a past president of the Respondents. He ruled Dr Robinson's charge of institutional racism outwith the scope of rule 13 and declined to take it further. He considered all other complaints and gave a judgment on them on or about 19 June. The gist is contained in para 7 of his adjudication which reads as follows:

> **Whilst I am concerned at the excessive directness and robustness of views posted, and saddened at times by the lack of courtesy and the level of personal attack (actual, inferred, imputed or implied) by some which arises from what I have seen, I do not believe on balance that claims by any party … should be dealt with here under the Rule 13 process.**

100 Dr Robinson was informed that the institutional anti-Semitism allegation would be referred for consideration by the "appropriate bodies of the Union". When he chased the matter up, he was finally advised, on 8 August 2008, that the outstanding complaint would be considered by Mr Tom Hickey and Mr Waddup. Dr Robinson was not impressed. Mr Hickey, a member of the NEC, was also a well-known activist and campaigner on behalf of the Palestinian cause. He had proposed Motion 30 at the Congress of 2007 (see our findings under complaint (1) above). And, to state the obvious, Mr Waddup was the official responsible for the administration of the List. Dr Robinson did not feel confidence that the investigation, if in the hands of those two individuals, would be conducted impartially. He sent an e-mail to Ms Sasha Callaghan, President of the Union, on 11 August 2008 raising objections to the grievance being assigned to Mr Hickey and Mr Waddup. Ms Callaghan replied, insisting that those individuals were the appropriate people to handle the matter, citing their positions on the relevant union committee and the union's structural arrangements. In the event, Dr Robinson's outstanding complaint was never adjudicated upon. We heard no explanation for that fact.

101 On 11 May 2008 Mr Waddup issued a warning to Ms Sue Blackwell, a well-known pro-Palestinian activist for sending a post to a person who was not a member of the List.

102 On 5 June 2009 the Claimant posted a message on the List challenging another Jewish member, Mr Sean Wallis concerning a second-hand allegation that he (Mr Wallis) had made a comment about lawyers with "bank balances from Lehman Brothers that can't be tracked down". The Claimant's post continued:

> **Well Sean, for the sake of clarity, did you say it or didn't you say it?**
>
> **If you continue to refuse to answer this simple question, we will all have to assume that you did make this anti-Semitic comment.**

Mr Waddup reminded the Claimant of the rules of the List and quoted explicitly the requirement to avoid rude or offensive communications.

103 Mr Waddup was not cross-examined on his first witness statement, paras 20-27 in which he explained that certain other posts referred to in the grounds of complaint were not the subject of complaints and were not brought to his attention.

104 One matter not raised in the Claimant's pleaded case is a complaint by Mr Harry Goldstein (a witness before us). He alleged on 13 July 2011 that a Mr Will Podmore had posted a message including a link to an extreme right-wing website. In fact, Mr Podmore had been suspended from the List before that for rudeness, but had regained access by operating from a different e-mail address. The complaint was investigated and ultimately an adjudication was given that Mr Podmore had acted inadvertently but that his behaviour had nonetheless had the effect of harassing Mr Goldstein. He was censured for breach of the union's rules.

Complaint (4): The union's 'rebuffing' of Professor Gert Weisskirchen

105 Professor Gert Weisskirchen was a member of the German Bundestag from 1976 until 2009. Between 2005 and 2008 he also held the position of Personal Representative of the Chairman in Office in the Organisation for Security and Co-operation in Europe (OSCE) on anti-Semitism. He is also Hon Professor of Applied Cultural Studies at the University of Applied Sciences in Potsdam. At all relevant times his responsibilities within OSCE extended to issues relating to human rights and anti-Semitism within OSCE member states.

106 In May 2007 Professor Weisskirchen became aware of Motion 30 passed at the Respondents' inaugural Congress the same month. He issued a press release strongly critical of the motion and accusing the Respondents in terms of anti-Semitism. He also contacted the leadership of the union to request a meeting with Ms Hunt. He proposed 19 July (or around that time) in London but said that some other date and, if need be, location could be considered.

107 Ms Hunt did not see the e-mail but a member of her office staff forwarded it to Mr Paul Bennett, a senior national official, noting that Ms Hunt would not be doing any more interviews on the boycott issue and in any event would not be available on 19 July. Mr Bennett was asked to follow the matter up. He wrote promptly to Professor Weisskirchen strongly challenging the content of his press release and in particular explaining that the union had not "called for" a boycott of any Israeli institution but rather for a debate on the question of a boycott and strongly challenging the suggestion that criticism of the actions of the State of Israel was anti-Semitic.

108 Professor Weisskirchen replied, defending the press release and arguing that criticism of the State of Israel, while not intrinsically anti-Semitic, had a "potential anti-Semitic impact". It appears from e-mail correspondence in 2008 that attempts were made to arrange a meeting between Mr Bennett and Professor Weisskirchen. On Mr Bennett's account a date and time were fixed but the Professor "pulled out" and then, very late, attempted unsuccessfully to reinstate the meeting. Professor Weisskirchen's witness statement does not enlighten the Tribunal on the matter and we have not heard evidence either from him or from Mr Bennett.

109 On 2 August 2007 a letter was published on the Engage website calling on the Respondents to "stop playing with the fire of anti-Semitism, to stop ruling out in advance the possibility of anti-Semitism through word-play, to meet Gert Weisskirchen and to listen seriously to his concerns". The letter alleged that the union had "refused" to meet Professor Weisskirchen. It also referred to the union's

"dismissive response to him". The 39 signatories included a number of witnesses before us. These did not include the Claimant but he became aware of the letter and told us that he was "saddened and amazed" by its contents. The letter was published in the Times Higher Education Supplement on 3 August.

Complaint (5): The Bongani Masuku affair including his invitation, the fall-out from that invitation, his conduct and the aftermath of his visit

110 As mentioned above, at the 2009 Congress a motion (Motion 29) was passed which required the Respondents to host an autumn international inter-union conference of BDS supporters. An invitation only conference was arranged for 5 December 2009. The Claimant was not among the invitees. In October 2009 invitations were sent out to various organisations including COSATU (see para 71). They were not sent to individuals; organisations were invited to identify proposed representatives whom they wished to send. On 2 November COSATU advised the Respondents that they wished to send Mr Bongani Masuku, their International Relations Secretary, and another named individual. The Respondents then issued personal invitations to both. By 24 November it had been agreed that Mr Masuku would be one of the speakers at the conference and would address the subject of BDS with reference to apartheid era South Africa and current political realities in Israel.

111 On 30 November 2009 the Claimant sent an e-mail to Mr Waddup enquiring about plans for the conference. Mr Waddup replied on 2 December and confirmed that the event was proceeding as had been reported in the *Morning Star* (from where the Claimant had picked up the story, and which had named Mr Masuku as one of the billed speakers).

112 At just after 3.00 pm on 3 December 2009 the Claimant sent an e-mail to Ms Hunt, copied to Mr Waddup, alleging that Mr Masuku had made inflammatory statements against the South African Jewish community which were under consideration by the South African Human Rights Commission ('SAHRC'). He described Mr Masuku as a racist and asked Ms Hunt to clarify whether he was scheduled to attend and, if so, urging her to withdraw his invitation.

113 Mr Waddup attempted to find out more. He found some evidence on the Engage website and at least one other website with similar sympathies, tending to support the Claimant's allegation. He was unable to ascertain from the SAHRC any information other than that the case of Mr Masuku was awaiting adjudication. Mr Waddup advised Ms Hunt that she should not respond to the Claimant's message.

114 In fact, on 3 December 2009, SAHRC issued a 'Finding' to Mr Masuku, upholding a complaint by the South African Jewish Board of Deputies that statements made by him in February and March the same year amounted to hate speech. He was offered the option of settling the matter amicably by tendering an apology to the complainants within 14 days and notified that failing that, the matter would be referred to the relevant 'Equality Court' for final adjudication without further notice.

115 At just after midnight on the morning of 4 December 2009 the Claimant sent a further e-mail to Ms Hunt, this time stating that the SAHRC had "unequivocally" found that statements made by Mr Masuku amounted to hate speech. He attached links to the Engage website and another with similar sympathies.

116 COSATU issued a press statement strongly challenging the SAHRC 'Finding'. It also promised an appeal. The Respondents received a copy on 5 December, before the conference began.

117 The conference proceeded. Mr Masuku spoke. The event was unremarkable and it was not suggested that anything improper was said or done.

118 In the event, Mr Masuku's appeal failed: it was rejected on procedural grounds, having been presented out of time.

119 As we have mentioned (para 71), the subject of Mr Masuku was raised at the 2010 Congress, when a motion referring to his allegedly anti-Semitic utterances and proposing that Congress dissociate itself from his "repugnant views" was put to the vote but lost.

Complaint (6): Resignations of the Respondents' members between 2007 and 2011 and the Respondents' response to such resignations

120 During the years 2007 to 2011 inclusive, members of the Respondents who identified themselves as Jewish resigned giving reasons connected with the Israel/Palestine issue in the following numbers: 2007: 47; 2008: 3; 2009: 0; 2010: 0; 2011: 22. We were not supplied with leaver numbers for those individual years but between 1 June 2008 and 13 November 2012 Jewish leavers numbered over 1,100. During the five years from 2007 to 2011 new members identifying themselves as Jewish were enrolled in the following numbers: 2007: 53; 2008: 47; 2009: 66; 2010: 75; 2011: 53. In the same five years, Jewish members leaving but not citing any reason connected with Israel or Palestine were as follows: 2007: 12; 2008: 23; 2009: 25; 2010: 40; 2011: 16.

121 Responses to resignations varied. In one or two cases, the individual was invited to reconsider. In a few cases, Ms Hunt wrote personal letters expressing regret. In more cases, a standard form letter was sent. Some resignations were not responded to at all. In 2008 Mr Waddup and Ms Hunt considered whether the spate of resignation in 2007 warranted an investigation. They decided that it did not.

122 We were told by Ms Hunt without challenge that overall about 1,000 people leave the union every month. Resignations usually 'peak' when the union declares its policy on matters such as pay and pensions.

Complaint (7): The union's dealings with the Equality and Human Rights Commission ('EHRC')

123 The Claimant's case is that the Respondents had a "dismissive attitude" towards the EHRC (grounds of claim, para 129). That allegation is denied as a matter of fact.

124 We heard very little evidence about this allegation. Ms Hunt told us without challenge that, in July 2011, she attended a meeting with representatives of the EHRC prompted by concerns raised on behalf of Jewish organisations and others relating to Motion 70, debated at the 2011 Congress, to do with the EUMC Working Definition of anti-Semitism (the subject-matter of complaint (9), considered below). The result of the meeting was a letter from Sir Trevor Phillips, Chairman of the EHRC, to Mr Eric Pickles MP dated 29 July 2011 in which it was observed that the union's rules appeared "pretty robust" and that the writer was satisfied that the Respondents' officials sincerely wished all of their members to feel confident that they could speak out on any subject without fear of harassment or intimidation.

125 In addition, it was not in dispute that the Respondents consulted the EHRC in connection with a leaflet on anti-Semitism which they produced in or about January 2012.

Complaint (8): Behaviour at union meetings, conferences and committees

126 The Claimant's pleaded case was that a "culture of institutional anti-Semitism" had been manifest at meetings and conferences of the Respondents and their predecessors and that he and others had experienced public bullying, harassment and humiliation by reason of their Jewish identify (grounds of claim para 130). The pleaded case then lists three specific examples. The Respondents (grounds of resistance, paras 70-74) deny the general charge and deal one by one with the particular instances.

127 The first example is of heckling said to have been experienced by Mr Stephen Soskin, a member, during a debate on Gaza and Palestine at the 2008 conference. It is alleged further that Mr Soskin was called a "racist" by another delegate as they were leaving the conference hall. The Claimant pleads that he was present and was appalled by the treatment of Mr Soskin. We find that Mr Soskin was, briefly, heckled. That intervention happened immediately after he had characterised the motion (proposed by a fellow member) as itself "racist". The meeting was brought to order. We are unable on the evidence to make any finding as to whether the alleged further remark was made. Nor do we regard it as necessary to do so.

128 The second pleaded event took place on Friday 4 December 2009 at a meeting at which Mr Masuku was a speaker. Mr Jonathan Hoffman, Co-Vice Chair of the Zionist Federation, attempted to challenge Mr Masuku over the SAHRC 'Finding'. The meeting was organised by BRICUP (British Committee for the Universities of Palestine). It was not a UCU meeting. Mr Tom Hickey (to whom we have already referred) was, as we understand it, the chairman. There was no suggestion that he was acting for, or in the name of the Respondents. The Claimant was not present. Mr Hoffman's intervention resulted in loud booing and Mr Hickey made it clear that further contributions on the subject which he had attempted to raise would not be welcome.

129 The third matter relied on by the Claimant arose at a one-day conference held at Brighton on 18 January 2010 entitled, "The Legacy of Hope: Anti-Semitism, the Holocaust and Resistance, Yesterday and Today". The event marked National Holocaust Day. The conference was chaired by Ms Hunt and speakers included

pro-Israeli and pro-Palestinian voices. Among them was Dr Hirsh (already mentioned). He departed from the subject which he had agreed to address, and spoke instead about what he perceived as anti-Semitism within the Respondents and their predecessors, making specific allegations against a number of individuals (members and non-members) who were not present to respond and had no warning of what was going to be said about them. He alleged that the union was not concerned about anti-Semitism and was "the most complacent public institution in Britain" in that regard. Mr Hickey responded to Mr Hirsh's remarks. He denounced them as unwarranted and false. The Claimant was not present at the meeting but received a report of it subsequently.

130 The claim form also refers to an occasion in 2006 when a Jewish delegate at the NATFHE Outer London Regional Assembly, Mr Pete Green, described the Claimant as a Zionist and a racist. When challenged, he purported to withdraw the remark but then added a comment to the effect that the Claimant was a Zionist and Zionists were racists (or perhaps that Zionism was a racist ideology). The Claimant was made aware of these remarks and made a complaint. The matter was investigated and Mr Green acknowledged and defended his view that Zionism was a racist ideology.

131 There was a conflict of evidence concerning an event at the Respondents' Congress in 2008. It is not pleaded in the claim form but since it relates to the behaviour of witnesses who appeared before us, we think it right to record brief findings on it. A closed debate was to be held, for which permits were required. Ms Jane Ashworth, a member of Engage (and a witness before us), managed (as she put it) to "sneak in'" without the necessary permit. Mr Jeremy Newmark, now and perhaps then Chief Executive of the Jewish Leadership Council (also a witness before us), attempted to do likewise but was stopped by stewards. He then tried to push his way in, but was not allowed to do so. Mr Waddup (already mentioned in relation to complaint (2)), spoke to Mr Newmark and told him that he would not be allowed in. We reject the allegation that Mr Waddup said, "You're not wanted here". We also reject as utterly unfounded the emotive allegation of Ms Ashworth that Mr Newmark was "Jew-baited". He was not baited at all. Neither Ms Ashworth nor Mr Newmark was a member of the Respondents.

132 More generally, we can record these brief observations. We do so having spent an entire day listening to recordings of Congress debates. In our judgment, the proceedings were well-ordered and balanced. They were carefully controlled from the Chair. They were managed in an even-handed fashion with speakers selected in turn to speak for and against the motions. On the very rare occasions when it was necessary to call Congress to order, the chairman did so and those present responded appropriately. The debates were conducted with courtesy. Speakers on both sides received applause. Despite the strength of feeling, they lightened the occasion with humour from time to time. We were quite unable to detect the atmosphere of intimidation which the written case on the Claimant's behalf attempted to convey.

133 It should be said that we are alive to the fact that a microphone will not pick up everything said in a debating hall. There may of course have been the odd barbed remark or whispered aside which some participants could hear but the microphone not gather. That said, we are confident that our broad impression

(derived from the recordings and the other evidence) of the manner in which the proceedings were conducted and the atmosphere during debates is a fair reflection of the reality.

Complaint (9): The rejection of the EUMC Working Definition of Anti-Semitism

134 We have already referred to Motion 70 passed at the 2011 Congress (see our findings under complaint (1) above). The motion was democratically passed in accordance with the Respondents' rules. Jewish members spoke for and against the motion.

135 The 'Working Definition' reads:

> **Anti-Semitism is a certain perception of Jews, which may be expressed as hatred towards Jews. Rhetorical and physical manifestations of anti-Semitism are directed towards Jewish or non-Jewish individuals and/or their property, towards Jewish community institutions and religious facilities.**

These observations are added:

> **In addition, such manifestations could also target the state of Israel, conceived as a Jewish collectivity … examples of the ways in which anti-Semitism manifests itself with regard to the State of Israel in taking into account the overall context could include:**
>
> - **Denying their Jewish people their right to self-determination, e.g. by claiming that the existence of the State of Israel is a racist endeavour.**
> - **Applying double standards by requiring of it a behaviour not expected or demanded of any other democratic nation.**
> - **Using the symbols and images associated with classic anti-Semitism (e.g. claims of Jews killing Jesus or blood libel) to characterise Israel or Israelis.**
> - **Drawing comparisons of contemporary Israeli policy to that of the Nazis.**
> - **Holding Jews collectively responsible for actions of the State of Israel.**
>
> **However, criticism of Israel similar to that levelled against any other country cannot be regarded as anti-Semitic …**

Complaint (10): The letter before action of 1 July 2011 and UCU's response

136 By the letter before action, Mr Julius charged the Respondents with harassing the Claimant. It was said that the union was not a place that was hospitable to Jews and that the union's treatment of the Claimant was not merely a violation of equality legislation but also a scandal. Reference was made to correspondence going back to 2008, the boycott motions, the management of the Activists List, the Bongani Masuku affair and other matters. It was said that the union was institutionally anti-Semitic and that the decision most recently taken to abandon the Working Definition was just the most recent of many "insults". That motion was characterised as a choice to legislate anti-Semitism out of existence. The letter continued in similar unbridled fashion and culminated in the demand for the abrogation of Motion 70 of 2011, an open an unqualified acknowledgment that the union had been guilty of institutional anti-Semitism coupled with a public

apology, a commitment to abide by a code of conduct in respect of its Jewish members to be drawn up by a body comprising individuals approved by the Claimant and a further commitment to sponsor a programme (for a minimum of 10 years and conducted by that same body) educating academics about the dangers of anti-Semitism, "with special reference to the relationship between anti-Semitism and what now passes for 'anti-Zionism'".

137 By a letter of 13 July the Respondents replied. They began by noting that the text of the letter before action had already been published on the internet in the Jewish Chronicle (whose Chairman Mr Julius was and is). They expressed regret that the Claimant considered himself to have been harassed but firmly dismissed the complaints and promised that any litigation would be strongly resisted. Points were made concerning the constraints on the union arising from its democratic obligations to its members. Attention was drawn to the Claimant's right to pursue matters of complaint through the Respondents' internal procedures but his right to litigate was also fully acknowledged.

Facts relevant to jurisdiction

138 We have mentioned the correspondence from Mishcon de Reya of 3 June 2008, threatening harassment proceedings against the Respondents. The Claimant told us in evidence that he was not one of the proposed litigants, but accepted that he published the letter. It contained no fewer than five of the claims he now pursues. In September 2008 Mishcon de Reya wrote again to the Respondents, this time threatening a High Court claim based on Motion 25, passed at the May 2008 Congress (referred to in our findings under complaint (1) above). There is no evidence connecting the Claimant with this potential litigation.

139 The Claimant told us that he did not contemplate a claim against the Respondents until early 2011. Until then he was (he said) too busy. In addition, it was his evidence that he did not give the matter thought until made aware of the obligations of trade unions under the 2010 Act. (This was a puzzling remark as there was nothing new about the trade organisation provisions of the 2010 Act.) When asked about what he had understood concerning his own rights in 2008 (when he published Mr Julius's letter before action), he told us that if a claim was being contemplated for others, it was not "on [his] radar" and did not "register" with him.

140 There was no dispute that the Claimant was at all relevant times aware of the availability of remedies for discrimination and similar torts. He brought Employment Tribunal proceedings against NATFHE in 2003, based on a complaint about the practice of holding union meetings on Saturdays. That litigation was withdrawn on agreed terms.

Miscellaneous facts

141 The Respondents are governed by Rules. Rule 2, in force from June 2007, proclaims the aims and objects as follows:

> **2.1 To protect and promote the professional interests of members …**
> **2.2 To promote Adult, Further and Higher Education and research.**
> **2.4 To promote equality for all …**

> **2.5 To oppose actively all forms of harassment, prejudice and unfair discrimination …**
> **2.6 To pursue political objects …**

With effect from May 2008, Rule 2 also included these objects:

> **2.8 To affiliate to, cooperate with, make donations to or otherwise expend money on or in support of such other trade union or labour organisations, organisations for the advancement of education or other organisations in the UK or abroad which in the opinion of the National Executive Committee or Congress have the same or similar aims, objects or policies as the union.**
> **2.9 To pursue by appropriate means approved by the National Executive Committee or Congress lawful acts of solidarity with other trade union or labour organisations, organisations for the advancement of education or other organisations in the UK or abroad which in the opinion of the National Executive [sic] have the same or similar aims, objects or policies as the union.**

142 By rule 16.1 Congress is the supreme policy-making body of the union. Membership of Congress consists of the NEC and delegates elected regionally by 'sector committees' (rule 17).

143 The NEC is the principal executive committee of the union. It is responsible for the execution of policy and the conduct of general business between annual Congresses and is required to abide by decisions passed at Congress, subject to any other obligation or duty under the Rules (rule 18.1). It consists of the elected Officers of the Union (Vice-President, President-Elect, President, Immediate Past President and Honorary Treasurer (rule 15.1)) and ordinary members elected for defined constituencies (rule 18.2-18.12.2).

144 As we have already mentioned (in our findings under complaint (2)), rules 6 and 13 contain provisions governing the conduct and obligations of members and the Respondents' powers in relation thereto.

145 As far as we are aware, except in relation to the academic boycott issue, there was no suggestion by or on behalf of the Claimant that any act by the Respondents or any employee or agent of theirs relied upon as the basis for any of his 10 claims involved a breach of any rule or was in any way unconstitutional.

146 Mr White in his written opening, paras 104-5, made the point that there is nothing unique about the debates, motions and resolutions within the Respondents concerning the Israel/Palestine conflict. He listed a number of examples of similar activity within other unions, in the UK and abroad, including resolutions supporting boycotts of Israeli goods, motions in support of the BDS campaign and a vote to suspend relations with particular federations of the Histadrut. This information was documented in the bundle and not the subject of dispute before us.

Secondary Findings and Conclusions

Reflections on the evidence

147 The Claimant impressed us as a sincere witness. He was overcome when taking the oath and at a later point in his evidence. There was nothing synthetic

about his displays of emotion. He believes passionately in the campaign which he has waged for so long, and appears to regard this litigation as an important engagement within it. Although his sincerity is not in question, his political experience showed at a number of points. He veered away from awkward questions. We were also struck by the contrast between his simple, down-to-earth style and the magnificent prose in which his written case was couched. We do not believe that it would ever occur to him to think that as a member of the Respondents he inhabits an environment of "thickening toxicity".

148 An unsurprising consequence of bringing forward on behalf of the Claimant a very large number of well-informed and independent-minded witnesses (including some individuals of great distinction in their fields) largely for the purpose of offering their opinions rather than giving evidence of facts, was that disagreements emerged. We have already given an example (para 53). This diversity eloquently made Mr White's 'range of views' point. Some witnesses were most impressive. These include, but are not by any means limited to, Professor Yudkin, Mr Kline and Dr Seymour. They gave careful, thoughtful, courteous evidence and were clearly mindful of their obligations as witnesses in litigation. Unfortunately, others appeared to misunderstand the nature of the proceedings and seemed more disposed to score points or play to the gallery rather than providing straightforward answers to the clear questions put to them. We regret to say that we have rejected as untrue the evidence of Ms Ashworth and Mr Newmark concerning the incident at the 2008 Congress (see our findings under complaint (8) above). Evidence given to us about booing, jeering and harassing of Jewish speakers at Congress debates was also false, as truthful witnesses on the Claimant's side accepted. One painfully ill-judged example of playing to the gallery was Mr Newmark's preposterous claim, in answer to the suggestion in cross-examination that he had attempted to push his way into the 2008 meeting, that a 'pushy Jew' stereotype was being applied to him. The opinions of witnesses were not, of course, our concern and in most instances they were in any event unremarkable and certainly not unreasonable. One exception was a remark of Mr Newmark in the context of the academic boycott controversy in 2007 that the union was "no longer a fit arena for free speech", a comment which we found not only extraordinarily arrogant but also disturbing. We did not derive assistance from the two Members of Parliament who appeared before us. Both gave glib evidence, appearing supremely confident of the rightness of their positions. For Dr MacShane, it seemed that all answers lay in the *MacPherson Report* (the effect of which he appeared to misunderstand). Mr Mann could manage without even that assistance. He told us that the leaders of the Respondents were at fault for the way in which they conducted debates but did not enlighten us as to what they were doing wrong or what they should be doing differently. He did not claim ever to have witnessed any Congress or other UCU meeting. And when it came to anti-Semitism in the context of debate about the Middle East, he announced, "It's clear to me where the line is …" but unfortunately eschewed the opportunity to locate it for us. Both parliamentarians clearly enjoyed making speeches. Neither seemed at ease with the idea of being required to answer a question not to his liking.

149 For their part, the Respondents' witnesses were rather less colourful than the Claimant's. They were after all called for the mundane purpose of telling the Tribunal about facts rather than ventilating their opinions (although Mr Julius took

the opportunity to explore their opinions nonetheless). In so far as they were tested on matters of fact, we found all of them careful and accurate witnesses.

Protected characteristics

150 It seems to us that a belief in the Zionist project or an attachment to Israel or any similar sentiment cannot amount to a protected characteristic. It is not intrinsically a part of Jewishness and, even if it was, it could not be substituted for the pleaded characteristics, which are race and religion or belief. Accordingly, if and in so far as the Claimant seeks to base his claim on what might be termed a sub-characteristic (we are bound to say that we remain uncertain as to Mr Julius's position on this point), we find that it is not open to him to do so. A separate matter, which we will address in relation to the individual claims, is whether the treatment complained of, or any of it, was 'related to' his Jewish race or his Jewish religion or belief.

Vicarious liability and third party liability

151 We have discussed the relevant provisions and authorities above (paras 19-28) and will not repeat those observations here. On our reading of the law the Claimant's claim to hold the Respondents liable for harassment said to result from the conduct of fellow-members of the union (not acting as agents), or from motions passed by Congress, is wholly untenable.

Harassment: the individual complaints

152 Complaint (1) (certain resolutions in relation to Israel) is without substance. The resolutions were passed by Congress, for the decisions of which, as we have explained, the Respondents cannot be held liable. Through their employees and the NEC they acted constitutionally in managing the debates and implementing resolutions except where they understood (in the Claimant's favour) that the law precluded them from doing so. Was *their* behaviour (rather then that of pro-Palestinian activist fellow-members) unwanted? It seems to us that it was unobjectionable and that no legal claim can sensibly be based upon it. If, as his letter before action suggested, he would prefer them to behave unconstitutionally by subverting the authority of Congress and the union's democratic processes, he cannot base a legal claim on that preference. To entertain it would bring the law into disrepute. It is implicit in the word 'unwanted' that a claimant complaining of harassment must have a sustainable ground for feeling aggrieved about the conduct on which the claim is rested. He has none.

153 That disposes of the claim, but we will complete the analysis. Was the conduct 'related to' the Claimant's protected characteristics of race or religion or belief? Plainly, the *Respondents'* conduct was not. Their constitutional behaviour was not connected in any way whatsoever with his Jewishness.

154 Did the *Respondents'* conduct have the effect of violating the Claimant's dignity or creating the necessary adverse environment for him? Self-evidently, it did not.

155 Even if we were persuaded that complaint (1) could somehow stand on the strength of the actions of Congress or individual members, we would not uphold it. Apart from anything else (in particular, the question whether debates and decisions about Israel, the academic boycott and so forth 'related to' the Claimant's race or religion or belief), the requisite effect would not be made out. We bear in mind the need to avoid trivialising the protection against harassment. No doubt the Claimant found some of the motions and some things said in the course of debates upsetting, but to say that they violated his dignity or created for him an adverse environment such as to merit the use of any of the five statutory adjectives (see s26(1)(b)(ii)) is to overstate his case hugely. In his evidence he spoke of reactions of 'disappointment'. As our findings on the time defence (para 140) show, he also claimed to have been too busy to think about union matters until shortly before the proceedings were instituted. Measuring his own experience against the strong language of the legislation, we are not persuaded that, even if considered on the basis of his subjective perception alone, an effect capable of amounting to harassment is made out.

156 Moreover, even if, contrary to our finding, the Claimant perceived the conduct complained of as satisfying the language of s26(1)(b), we are quite clear that it would not be reasonable for it to have had such an effect (see s26(4)(c)). We have two main reasons for this view. First, as the authorities show, context is critical. The Claimant is a campaigner. He chooses to engage in the politics of the union in support of Israel and in opposition to activists for the Palestinian cause. When a rugby player takes the field he must accept his fair share of minor injuries (see *Vowles*, para 35, citing an earlier Court of Appeal authority). Similarly, a political activist accepts the risk of being offended or hurt on occasions by things said or done by his opponents (who themselves take on a corresponding risk). These activities are not for everyone. Given his election to engage in, and persist with, a political debate which by its nature is bound to excite strong emotions, it would, we think, require special circumstances to justify a finding that such involvement had resulted in harassment. We find no special circumstances here. Secondly, the human rights implications of the claim must not be overlooked. As we have noted, Article 10(2) of the Convention countenances limitations on freedom of expression only to the extent that they are *necessary in a democratic society*. The numerous authorities under domestic and Community jurisprudence (some cited above) emphasise repeatedly that freedom of expression must be understood to extend to information and ideas generally, including those which offend, shock or disturb society at large or specific sections of it. If the case were marginal (which it certainly is not), we would unhesitatingly hold, pursuant to the 1998 Act, ss3 and 12, that the narrow interests of the Claimant must give way to the wider public interest in ensuring that freedom of expression is safeguarded.

157 Complaint (2) is also devoid of any merit. The Respondents defended themselves courteously but robustly against treatment by the Parliamentary Committee the fairness of which was, to put it at its very lowest, open to question. Their response was sincere and had substance. On any view, it was open to them to do as they did. Their action cannot properly be seen as 'unwanted': it was perfectly proper and unobjectionable. No legal claim can arise from it. Our reasoning on the meaning of 'unwanted' under complaint (1) is repeated.

158 In any event, the assertion that the Respondents' act of defending themselves, even if 'unwanted', constituted harassment of the Claimant is manifestly untenable. Even if it is assumed in his favour that the conduct was 'related' to one or both of his protected characteristics, it did not have the prescribed effect. As an eager participant in the political debate and a strong critic of the union, he doubtless drew satisfaction from the Parliamentary Committee's remarks, but he cannot have been surprised that the Respondents reacted as they did. The idea that their doing so violated his dignity is absurd. Nor did it create for him an environment to which any of the statutory adjectives can sensibly be applied. On his own case, he was "troubled", "upset" and "hurt". We do not accept that, judged only by reference to his subjective perception, anything close to the required adverse effect is established.

159 Further and in any event, such an effect, if it had been experienced, would not have been reasonable. The implication of this complaint is stark: that the Respondents could not lawfully defend themselves by answering the critical comments of the Parliamentary Committee for fear of harassing the Claimant by doing so. Our comments on context and human rights in respect of complaint (1) are repeated, *mutatis mutandis*.

160 There is nothing in complaint (3). The List, a facility open only to members of the union who wished join it, was operated fairly and Mr Waddup's management of it was almost wholly unobjectionable. The Respondents' conduct (through him) cannot be described as 'unwanted', in the sense which we ascribe to that word. Nor is the requisite effect established. If the Claimant was upset to a significant extent by anything to do with the List, it was not Mr Waddup's management of it but the nature of the comments of pro-Palestinian contributors. Nor, in any event, would it be reasonable for the effect to be made out. The delay in suspending Mr Hammond (explained) and the failure to deal with Dr Robinson's complaint (unexplained) were unfortunate, but neither matter is capable of sustaining a complaint that the Respondents harassed *the Claimant*, nor can the two taken together. They are much too remote from him (see para 42 above). More generally, our comments on context and human rights in relation to complaints (1) and (2) are repeated, *mutatis mutandis*. These considerations would make the claim untenable even if there were any legal means by which the Claimant could in principle hold the Respondents liable based on the posts of individual members.

161 Complaint (4) is palpably groundless. On our primary findings, Professor Weisskirchen was not 'rebuffed'. Mr Bennett reasonably challenged the arguably intemperate accusation of anti-Semitism levelled at the Respondents. The evidence does not substantiate the allegation that the Respondents refused to meet Professor Weisskirchen. No 'unwanted' objectionable conduct capable of supporting a complaint alleging a statutory tort is made out. Even if such conduct were shown, it would not have been possible for the Claimant to found an arguable complaint of harassment upon it. Apart from anything else, the required adverse effect is not shown. The Claimant was not aware of the relevant events at the time and, on learning of them later, he told us that he was "saddened and amazed". On his own case, his experience fell far short of what the statutory language demands. And on any view, it would not be reasonable for the events to produce the effect

contended for. Our comments on context and human rights in relation to complaints (1) and (2) are repeated, *mutatis mutandis*.

162 In complaint (5) we find for the first time a matter about which a legitimate grievance is raised. Although the information came to them very late, the Respondents' decision-makers were made aware before the conference that SAHRC, an independent and reputable body, had upheld a complaint against Mr Masuku of hate speech. It seems to us that in deciding not to revoke the invitation the Respondents exposed themselves to a complaint of harassment on the part of Claimant which can be seen as arguable if measured against the language of the 2010 Act. We will return to complaint (5) in due course.

163 Complaint (6) is obviously untenable. The fact that some Jewish members resigned from the union is part of the narrative in this case but it cannot amount to harassment of the Claimant by the Respondents. 'Unwanted' conduct (as we understand that term) is not identified. And the union's unobjectionable reactions to those resignations are equally incapable of sustaining a claim. Furthermore, the requisite effect is not made out and, in any event, it would not be reasonable for the alleged conduct to have had such an effect. Our comments on context and human rights in relation to complaint (1) are repeated, *mutatis mutandis*.

164 Complaint (7) fares no better. On our primary findings, nothing is established concerning dealings between the Respondents and the EHRC about which any remotely arguable complaint of harassment (or anything else) could be made. There was no 'unwanted' conduct. There was no adverse effect. In any event, such an effect could not be reasonable.

165 There is nothing in complaint (8). Again, it falls on our primary findings. The Respondents' management of the meetings and debates was unobjectionable and no valid allegation of 'unwanted' conduct *on their part* (rather than by pro-Palestinian activists) can be founded on it. In any event, for reasons stated in relation to complaint (1), the prescribed effect is not established and it would not be reasonable for the alleged conduct to have had such an effect.

166 In respect of complaint (9) the Claimant again fails to make out any arguable complaint of 'unwanted' conduct against the Respondents. There was a debate, constitutionally managed by them, which culminated in the vote to reject the EUMC Working Definition. It was open to Congress to consider that motion. Its legality was not in question. The vote was valid and the outcome was the product of the union's democratic processes. The 'unwanted' conduct was that of the members who proposed and supported the motion and Congress as a whole which passed it. As we have already explained, no claim lies against the Respondents in respect of these actions. Nor was *the Respondents'* conduct 'related to' the Claimant's protected characteristics. Nor did *their* conduct produce the prescribed effect upon him. Nor would it have been reasonable for it to do so. And even if the Claimant could base his complaint on the decision of Congress to pass the motion and even if that decision produced the prescribed effect on him, it would not be reasonable for it to have done so. Our comments on context and human rights in relation to complaint (1) are repeated, *mutatis mutandis*.

167 Complaint (10) is obviously hopeless. Our conclusions in relation to complaint (2) are repeated, *mutatis mutandis.*

Cumulative effect

168 Mr Julius argued that, in a case like this, a complaint of harassment must be judged on the basis of an assessment of the cumulative effect of all the matters complained of. He has a valid point: the tort can certainly take the form of a series of apparently minor acts or omissions which, taken together, cause harm reasonably seen as fulfilling the statutory language and meriting a legal remedy. The difficulty here is that the Claimant has failed to show a succession of events (or non-events) about which any complaint against the Respondents can sensibly be made. We have found that he has identified only one matter on which a legitimate grievance could be based, namely the failure (as he sees it) to revoke the invitation to Mr Masuku on 4 or 5 December 2009 (complaint (5)). No question of cumulative effect arises.

Three consequences of our reasoning so far

169 Our analysis to date has dispatched almost the entire case as manifestly unmeritorious. The one claim which has been found to raise an arguable grievance has been analysed against the 2010 Act. Not unnaturally, the dispute has been prepared and presented throughout on the footing that that Act applies. But given the fate of the other nine claims and the fact that complaint (5) relates to events in December 2009, it now becomes apparent that the pre-2010 provisions are applicable. The material parts of the 2010 Act came into force on 1 October 2010. (Where an act unlawful under the earlier legislation continued after the commencement date and was unlawful under the 2010 Act, it became justiciable under the 2010 Act (see the Equality Act 2010 (Commencement no. 4 etc) Order 2010, art 7), but that is not this case. The Bongani Masuku affair did not continue after 5 December 2009.)

170 We have reminded ourselves of the relevant anti-harassment provisions of the 1976 Act and the 2003 Regulations (mentioned in para 32 above). As we pointed out there, the one difference of substance is that under the pre-2010 code there was a requirement for harassment to be 'on grounds of' race or religion or belief, rather than the looser stipulation of a 'related to' link under the 2010 Act. In our view, this difference is critical here. Although an arguable claim based on complaint (5) might have been maintained under the 2010 Act (had it been applicable), we are satisfied that such a claim is untenable under the pre-2010 legislation. While the 'failure' to revoke the invitation to Mr Masuku might be seen as 'related to' Jewishness or Jewish racial identity or the Jewish faith, there is no arguable basis for holding that it was driven by, or materially influenced by, any of those things, as the 'on grounds of' formulation requires (see *eg Nagarajan-v-London Regional Transport* [1999] IRLR 572 HL). The fact that Mr Masuku was alleged to have made anti-Semitic comments was certainly the *context* in which the question of possible revocation of Mr Masuku's invitation arose, but those alleged remarks were neither *the* reason, nor *a* reason, for the decision not to revoke the invitation. Nor was the Claimant's race or religion. We are quite satisfied that a guest of the union accused in like circumstances at the eleventh hour of hate

speech allegedly directed at some other racial or religious group (or any other protected category) would have been treated exactly as Mr Masuku was. The union would have decided against the drastic measure of withdrawing the invitation at the last minute on the strength of an (apparently) strongly challenged allegation. It follows that, once judged against the applicable law and not the 2010 Act, complaint (5) is no more sustainable than any of the others.

171 The second consequence is that complaint (5) is also, on its face, out of time. We will very shortly return to this aspect.

172 The third consequence is that some of the other complaints strictly fall to be considered under the 1976 Act and the 2003 Regulations, rather than the 2010 Act. This does not necessitate a wholesale revision of our analysis. The 2010 Act is more favourable to the Claimant than the earlier legislation (because of the substitution of the 'related to' link). Any claim which has been found wanting when measured against the 2010 Act is self-evidently unsustainable under the predecessor legislation.

Time

173 In case we are wrong about the merit of complaint (5), we have addressed the jurisdictional defence. By the 1976 Act, s68 (from which the corresponding provisions of the 2003 Regulations (reg 34) do not differ in any material respect), it is provided that:

> **(1) An employment tribunal shall not consider a complaint … unless it is presented to the tribunal before the end of –**
>
> **(a) the period of three months beginning when the act complained of was done …**
>
> **…**
>
> **(6) A court or tribunal may nevertheless consider any such … complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.**
>
> **(7) For the purposes of this section –**
>
> **…**
> **(b) any act extending over a period shall be treated as done at the end of that period; and**
> **(c) a deliberate omission shall be treated as done when the person in question decided upon it …**

174 There is no question of an act extending over a period. Our reasoning in para 169 above is repeated. The only issue is whether the Tribunal should consider the claim out of time. In *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA, which was of course decided under the pre-2010 law, Auld LJ observed (para 25):

> **When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify the failure to exercise the discretion. Quite the reverse. A tribunal cannot**

> **hear a complaint unless the [claimant] convinces it that it is just and equitable to extend time. So the exercise of the discretion is the exception rather than the rule …**

We have also reminded ourselves of *Chief Constable of Lincolnshire-v-Caston* [2010] IRLR 327 CA, to similar effect.

175 We are quite satisfied that it would not be just and equitable to consider complaint (5) out of time. On the findings recorded above (paras 138-140), the Claimant was aware in 2003 of his right to seek a remedy in the Tribunal. He knew by 2008 at the latest that a legal claim based on alleged anti-Semitism within the union was being contemplated by Mr Julius. The time limit expired on 4 March 2010 and this claim was not instituted until August 2011, almost 18 months out of time. In the context of a limitation period of three months, the delay in issuing proceedings is very great indeed. Employment Tribunals exist to deliver swift, practical, economical justice in the employment field and some related areas. Narrow jurisdictional time limits are in keeping with the scheme, being designed to ensure that disputes are not allowed to fester but are promptly litigated and determined so that the parties can put their differences behind them and move on. It is for the Claimant to show a good reason to entertain a claim out of time. The length of the delay, his awareness of the Tribunal's jurisdiction and his access to legal support all argue compellingly against us exercising the discretion which he invokes. Quite simply, no good reason is shown to consider this very late claim.

176 Since the other claims have so clearly failed on their merits, we do not consider it appropriate to deal individually with the time defences raised in respect of them. Compendiously, we hold, for the reasons just stated, that the Claimant has failed to demonstrate a good reason for the Tribunal to entertain *any* claim presented out of time.

Outcome and Postscript

177 The result is that the proceedings are dismissed in their totality. The Claimant has put before us one claim which, on initial examination, appeared arguable on its merits. Closer scrutiny, however, showed it to be clearly unsustainable. And, being hopelessly out of time, it is outside our jurisdiction in any event. The other nine claims are wholly unfounded and many are also defeated by the jurisdictional time bar.

178 Lessons should be learned from this sorry saga. We greatly regret that the case was ever brought. At heart, it represents an impermissible attempt to achieve a political end by litigious means. It would be very unfortunate if an exercise of this sort were ever repeated.

179 We are also troubled by the implications of the claim. Underlying it we sense a worrying disregard for pluralism, tolerance and freedom of expression, principles which the courts and tribunals are, and must be, vigilant to protect (for a recent example, see *Smith-v-Trafford Housing Trust* [2012] EWHC 3221 (Ch)). The Claimant and his advisors would have done well to heed the observations of Mr Beloff and Mr Saini concerning the importance which the law attaches to political freedom of expression.

180 What makes this litigation doubly regrettable is its gargantuan scale. Given the case management history, the preparations of the parties and the sensitivity of the subject-matter, we thought (rightly or wrongly) that it was proper to permit the evidence to take the course mapped out for it, provided that the hearing did not overrun its allocation. But we reminded ourselves frequently that, despite appearances, we were not conducting a public inquiry into anti-Semitism but considering a legal claim for unlawful harassment. Viewed in that way, a hearing with a host of witnesses, a 20-day allocation and a trial bundle of 23 volumes can only be seen as manifestly excessive and disproportionate. The Employment Tribunals are a hard-pressed public service and it is not right that their limited resources should be squandered as they have been in this case. Nor, if (contrary to our view) it was proper to face them with any claim at all, should the Respondents have been put to the trouble and expense of defending proceedings of this order or anything like it.

181 We hope that something of benefit can be salvaged from the wreckage of this litigation for the benefit of the Respondents and all their members, including the Claimant and those who share his views. The matters explored in relation to complaint (5) illustrate the need for decision-makers to be willing to react quickly to events in order to avoid the risk of attracting legitimate criticism. It was also regrettable that Dr Robinson's complaint was referred to Mr Hickey, a well-known pro-Palestinian activist, and that it was never resolved. If an internal rule dictated the reference to Mr Hickey, it should be amended. Procedural rules should be the servants of organisations, not their masters. The obvious aim should be to devise a means of hearing and resolving complaints in which all interested parties, particularly the complainant, can feel confident. Dr Robinson was denied that comfort.

182 No doubt there are other lessons for the parties to learn. As they look to the future we hope that they will acknowledge the need to make a fresh start and work together with energy and determination to re-build trust. If they do so, a happier and more mutually beneficial relationship may yet develop.

A.M. Snelson

EMPLOYMENT JUDGE

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Reasons entered in the Register and copies sent to the parties on ...22/7/13...

..... for Secretary of the Tribunals