Neutral Citation Number: [2024] EAT 201

Case No: EA-2022-SCO-000133-JP

52 Melville Street, Edinburgh EH3 7HF

Date: 20 December 2024

EMPLOYMENT APPEAL TRIBUNAL

Before:

THE HONOURABLE LORD FAIRLEY

Between:

MR RICO QUITONGO

Appellant

- and -

AIRDRIEONIANS FOOTBALL CLUB

First Respondent

and

MR PAUL HETHERINGTON

Second Respondent

- -

Mr Calum MacNeill K.C. and **Mr Mark Allison**, Advocate (instructed by McGrade & Co, formerly Bridge Employment Law) for the **Appellant**

Mr Kenneth Gibson, Advocate (instructed by Harper Macleod LLP) for the **Respondents**

- -
- -

Hearing date: 27 August 2024

- -

JUDGMENT

SUMMARY

The appellant, a professional footballer, played for the first respondent between 2021 and 2022. After a match on 11 September 2021, the appellant learned of an allegation that one of the first respondent's supporters had shouted racist abuse at him during the match. He reported the allegation to the respondents who undertook to investigate it.

The appellant was ultimately dissatisfied with the outcome of the investigation. He brought claims against the respondents under the **Equality Act 2010** complaining *inter alia* of harassment (section 26) and victimisation (section 27). The employment tribunal dismissed all of his claims. He appealed in relation to one of his claims of victimisation, and five claims of harassment.

Held: The reasons given by the tribunal showed that it had erred in law in dismissing the victimisation claim. It had also made inadequate findings in fact in relation to one of the five harassment claims. The appeal was allowed on those two grounds (ground 1 and ground 2(b)) only. The other four grounds of appeal (grounds 2(a), (c), (d) and (e) were refused as the tribunal's reasons showed that it had, in each case, made permissible findings of fact and had not erred in applying the law.

The Honourable Lord Fairley:

Introduction and overview

1. The appellant is a professional footballer. In June 2021, he signed a one-year fixed term contract with the first respondent.

2. On 11 September 2021 the appellant played in a football match at Firhill stadium in Glasgow between the first respondent and Queen's Park Football Club. During the evening of 11 September, the appellant learned via a WhatsApp group message that a spectator at the match claimed that they had heard one of the first respondent's supporters shouting racist abuse at the appellant during the match.

3. On 12 September, the appellant reported the allegation to the first respondent's manager, Mr Murray and to the assistant manager, Mr Agnew. The appellant explained that although he had not personally heard the abusive comments, he wished to raise the issue because members of his family could have overheard them. The first respondent undertook to investigate the allegation. The role of the second respondent, as a director and the chairman of the first respondent, was to oversee the investigation and to decide upon the appropriate outcome.

4. The appellant was ultimately dissatisfied with the outcome of the investigation. He brought claims against the respondents under the **Equality Act 2010** complaining *inter alia* of harassment (section 26) and victimisation (section 27). Following a hearing before a full tribunal sitting at Glasgow over 8 days, followed by a further 6 days of deliberations, the tribunal dismissed all of the appellant's claims. The tribunal's reserved Judgment and Reasons dated 23 November 2022 extends to 130 pages and 517 paragraphs.

5. The appellant presented extensive grounds of appeal which he was permitted to amend at a Preliminary Hearing on 23 February 2023. The more focussed amended grounds were then allowed to proceed to a full hearing. In summary, the grounds of appeal as amended relate to one allegation of victimisation and five separate allegations of harassment.

6. For the sake of clarity, I will summarise the relevant facts and issues and the tribunal's conclusions in relation to each of those issues separately before turning to parties' submissions on the grounds of appeal. In light of the chronology, it is sensible to look at ground 2 first and thereafter at ground 1.

Ground of appeal 2(a) - the first harassment issue

7. This issue, as defined by the tribunal, was whether or not it was an act of harassment for the second respondent to state that he would regard the appellant as being in material breach of his contract if, on 23 September 2021, he participated in a BBC documentary about racism in football.

8. On or around 20 September 2021, the appellant was contacted by Mr Marvin Bartley. Mr Bartley was then a professional footballer with Livingston Football Club. He was also an anti-racism campaigner and an equality and diversity advisor to the board of the Scottish Football Association. Mr Bartley was aware of the issue that had arisen on 11 September and asked the appellant if he would participate in a documentary about racism in football. The appellant was keen to do so, and an interview was arranged for 23 September. In terms of his contract, however, the appellant required the consent of the first respondent to undertake any interviews or media work.

9. On 23 September, the appellant texted Mr Murray to advise him that the interview was to take place later that day. Mr Murray initially replied in neutral terms, saying "OK I'll pass on mate". Mr Murray then spoke to the second respondent who was concerned about the impact that external statements could have upon the ongoing investigation. The second respondent provided wording to Mr Murray for a text to be sent to the claimant. In summary, the text stated that the appellant did not have permission to take part in the interview with Mr Bartley and that if he did so, it would be regarded as a material breach of his contract.

10. On this issue, the tribunal found (para 88) that:

> "The sole reason for the decision not to allow the claimant to participate in the interview was the desire to protect the integrity of the investigation and

> reputation of the claimant and the first respondent."

11. It elaborated upon that finding at paragraphs 405 *ff*. It found that the refusal of consent to the appellant's participation in the interview amounted to unwanted conduct, as did the assertion that doing so would amount to a material breach of contract. At para 406, it stated:

> "The tribunal carefully considered the conduct and the context and was satisfied the conduct was not related to race. The conduct was, when viewed in context, the genuine belief of the consequence of the claimant failing to follow the instruction that was given. It was not related to race - explicitly or implicitly. While it was in the context of an interview about racism, the conduct was not related to race in the sense necessary to amount to unlawful harassment."

12. As an alternative to that primary conclusion, at paragraphs 407 and 408, the tribunal also considered the issues of purpose and effect. It concluded that whilst the purpose of the conduct was not to violate the appellant's dignity, nor to create an intimidating, hostile, degrading, humiliating or offensive environment, that was its subjective effect upon him. At paragraph 409, the tribunal stated:

> "However, while the claimant believed it to create an intimidating, hostile, degrading or offensive environment, when viewed within the context, on an objective basis, it would not have been reasonable to so regard it. The respondents were entitled to take the view that they wished no publicity around the incident when it was under investigation. While others may disagree with their approach, it was not an unreasonable approach to take. It would not have been reasonable for the conduct to be regarded as creating an intimidating, hostile, degrading, offensive or humiliating environment, taking account of the claimant's views, the intention of the respondents and the full context."

Ground of appeal 2(b) – the second harassment issue

13. The tribunal identified this issue as:

> "The second respondent's assertion to the claimant's agent that the claimant was using the racist incident for publicity."

14. At paragraph 86 of its findings in fact, the tribunal recorded:

> "It was the claimant's agent's view that the claimant was seeking publicity and used the alleged racist incident to do so. This was a matter the second respondent had discussed as there had been some within the changing room

> who shared that view."

15. The finding at paragraph 86 was the only factual finding made by the tribunal on this issue. At paragraph 416 of its reasons, the tribunal stated:

> "The tribunal found that the belief of the claimant's agent and the second respondent that the claimant had used the alleged racist incident for publicity was unwanted conduct. He clearly did not like what was said or viewed. In the tribunal's view it, it did not matter that this was raised by the claimant's agent as it was a matter on which the second respondent gave his view. The tribunal was of the view that the unwanted conduct was related to race. It related to the claimant's desire to use the fact he believed he had been racially abused to boost his publicity period to that extent it was conduct related to race."

16. The tribunal went on to conclude (para 417) that the purpose of the conduct was not to violate the claimant's dignity, nor to create an intimidating, hostile or degrading, humiliating or offensive environment. It found that:

> "The sole purpose of the comment was the belief that the claimant had been using this issue to boost his position, increasing the notoriety of the claimant within the industry."

17. At paragraph 418, the tribunal found that whilst the appellant believed that the conduct had the effect of creating such an environment, it was not reasonable for him, in the whole context, to hold that belief:

> "The claimant's agent believed that the claimant had used the incident to boost his publicity. He was supporting the claimant and representing him. Others within the dressing room had raised the same issue. It was not unreasonable for such a belief to be held and it was not reasonable to conclude that having that belief and expressing it to the claimant's agent created the relevant effects."

Ground of appeal 2(c) – the third harassment issue

18. This issue was referred to by the tribunal as:

> "The second respondent's conduct towards the claimant at a meeting on 5 October 2022"

19. On 5 October 2021, a meeting took place between the appellant and the second respondent. The precursor to that meeting was that the second respondent had advised the appellant's agent that the club's investigation had not been conclusive, and it was the second respondent's opinion that the

allegation was more likely than not to have arisen as a result of a misunderstanding. He wished to sit down with the appellant and agree a joint statement to allow the parties to move on.

20. The second respondent conducted the meeting, which lasted for almost an hour. He gave a summary of the result of the investigation. He advised that one person had said the comments had been made, but was unable to say whether the person making the comments was an adult or a child or whether they were male or female. Nobody else sitting near the witness appeared to have heard anything. The second respondent stated that he did not believe that the comments had been made. He explained that, since the investigation had been inconclusive, he was keen to work with the appellant to draw a line under matters and move on. A draft statement was provided to the appellant and was read out. The appellant was not prepared to agree the terms of the draft statement. The appellant continued to believe that a spectator had racially abused him. He was, therefore, asked to prepare a revised statement in conjunction with his advisers which the parties could seek to agree with a view to issuing a joint statement.

21. The tribunal found that what was said by the second respondent at the meeting was unwanted conduct, but did not relate to race. It stated (paragraphs 428 and 429):

> "The conduct in question was the second respondent's belief, having carried out an investigation and reached his own view, that the alleged racist incident was unlikely to have taken place given the full evidence that had been obtained…
>
> …The tribunal did not accept that there was pressure placed upon the claimant to agree with the position. The second respondent set out what had been discovered and what the facts the respondent had obtained were."

22. Again, the tribunal also considered the issue of purpose and effect. It concluded that the purpose of the conduct was not to violate the claimant's dignity, nor to create an intimidating, hostile, degrading, humiliating or offensive environment. The sole purpose was to advise the claimant of the outcome of the investigation and to try to move on.

23. Whilst the tribunal concluded that, subjectively, the conduct had the effect of creating such an environment for the appellant, it also concluded that such an effect was not reasonable given that

the investigation had not disclosed sufficient evidence to support a conclusion that the incident had occurred. On the information available to the respondents, the approach taken during the meeting was reasonable. The respondents sought to support the appellant, but he was unable to accept their conclusion. That was a position he was entitled to take but, on the evidence it was not reasonable for him to conclude that the conduct violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

Ground of appeal 2(d) – the fourth harassment issue

24. This issue is closely linked to the preceding one, and was summarised by the tribunal as an allegation that, after the meeting on 5 October, Mr Murray applied pressure to the appellant to agree a joint media statement.

25. On 11 October 2021, the appellant refused the first respondent's request to issue a joint media statement about the alleged racist incident. The reason for his refusal was that the appellant did not agree with the terms of the proposed joint statement. The appellant was asked by Mr. Murray by text if he wanted to chat about the proposed statement as the club was "looking to move on it tomorrow". Mr. Murray offered to discuss matters with the appellant, but the appellant was still not prepared to agree to a joint statement.

26. On 12 October 2021, the first respondent then issued its own unilateral media statement. The appellant was unhappy at the terms of that statement. On 12 October he attended meetings with Mr. Murray and Mr. Agnew at which he indicated that he wished the statement to be retracted. He was told that it was unlikely that the respondents would agree to retract the statement as they wished to move on and focus on playing football. The appellant was upset by that position.

27. At paragraphs 445 to 450, the tribunal found that asking the appellant if he was prepared to issue a joint statement was unwanted conduct, but was not conduct related to race. The conduct was related instead to a desire to move on and return to focussing on football.

28. In any event, the purpose of the conduct was not to create the proscribed effect. Whilst the

tribunal found that the conduct did, in fact, have that effect on the appellant, it was not reasonable for it to have done so. The respondents reasonably wished to agree a joint statement and were merely offering the appellant the opportunity be a party to that statement.

Ground of appeal 2(e) – the fifth harassment issue

29. This issue was described by the tribunal simply as "the first respondent's letter to the claimant on 20 October 2021."

30. More specifically, however, this issue related to the issuing of written confirmation of the reasons for a decision taken by the first respondent's board of directors to place the appellant on paid leave for an initial period of two weeks. That decision was intimated to the appellant verbally on or around 18 October. The appellant requested confirmation of the decision and the reasons for it in writing. He thereafter received a letter from the first respondent dated 20 October 2021. By that stage, the alleged racist incident had been referred by the respondents to the police. The letter of 20 October stated that the appellant was being given two weeks paid leave "to allow the police investigation to progress". This was described as a "cooling off period". The letter noted that that the respondents would reassess the position "at the end of the two-week period or when the police investigation is concluded."

31. At paragraph 471, the tribunal found that the letter was not unwanted conduct because the appellant had expressly requested that it be sent:

> "[t]he claimant had been told verbally what the reasons for the cooling off period were. He asked for this in writing and the respondent provided the reasons in writing. It is not logical to say the reasons he asked for were unwanted, even if he did not like the reasons he was given…. It was not unwanted conduct to have given the claimant an answer to his request in writing, such written answer having been requested by the claimant."

32. The tribunal also found that, in any event, the conduct in sending the letter was not related to race (paragraph 473). The sole purpose of the letter was to explain the reasons for placing the claimant on a cooling off period:

> "Viewed in context, objectively, the letter is not related to race. It is the

> respondents concern about how matters had progressed and the inability to reach consensus about how to deal with the race allegation. The tribunal did not consider that fact alone resulted in the letter being conduct 'related to race'. The intention of the author was to communicate the reasons why the claimant was to take a break, the concern being matters were no longer about football but about how the respondent had handled matters. The claimant did not consider the letter related to race. He was unhappy at being on enforced leave. Viewed in context, while some may regard the approach as unfair, the conduct, the letter and its contents, were not, when viewed objectively in context, related to race."

33. Again, the tribunal also considered purpose and effect. It noted that it would not have found that the purpose of the conduct was to create any of the proscribed consequences. The sole purpose of the letter was to explain why the respondents wished the claimant to take a step back and refocus upon football. The tribunal was also not satisfied that the issuing of the letter in fact had the effect of creating any of the proscribed effects:

> "The claimant knew he had been placed on enforced leave and knew the reasons. Receiving a written record did not violate the claimant's dignity. Nor did receiving the letter (and reading its contents) create an offensive, intimidating, hostile, [or] degrading environment for the claimant. The tribunal was satisfied that it would not have been reasonable for the conduct to be considered to have had such an effect given the terms of the letter and the context in which it was written."

Ground of appeal 1 – the victimisation issue

34. On 16 October 2021, whilst the respondents' investigation was ongoing, the appellant's agent sent a message to the club manager, Mr Murray in which he stated that the appellant had been "hung out to dry…called a liar by a director who is trying to sweep this under the carpet" and "suspended" for drawing the allegation of racial abuse to the attention of the respondents. Similar allegations were made by the agent in a tweet at or about the same time. The first respondent thereafter refused to communicate with the appellant's agent.

35. The tribunal found that the text sent by the agent on 16 October was a protected act in terms of section 27(2)(d), being an allegation by the appellant's agent that the respondents had breached the **Equality Act**. It also found that cutting off communications with the agent was a detriment. The question for the tribunal was therefore whether the refusal to communicate with the agent was

"because of" the protected act.

36. At paragraph 130 of its reasons, the tribunal made the following finding:

> "The sole reason for cutting off contact with the claimant's agent was the respondent's belief that the agent was responsible for misinformation and communicating mistruths about the claimant. The assertion that the Equality Act had been breached was in no sense whatsoever a reason for the decision."

37. The tribunal elaborated upon that finding in its reasons at paragraph 367:

> "The second respondent was unhappy that the agent was publicly suggesting the way matters had been handled was wrong. The protected act, the assertion that the Equality Act had been contravened, was in no sense a reason for the decision to cease communication as it was solely the second respondent's belief that the agent was issuing mistruths about how the investigation had been conducted. The assertion that the Equality Act had been breached was not an effective or substantial cause for the decision. The reason was the assertion (in both the tweet and message) that the respondents had "brushed things under the carpet" when, in the second respondent's belief, matters had been fully and properly investigated. The tribunal accepted the second respondent's evidence that it was the misinformation that was the reason and not the assertion that the Equality Act was breached that was the only reason for ceasing contact with the agent."

Submissions for the appellant

Ground 1 – the victimisation issue

38. Senior counsel for the appellant submitted that the question for the tribunal in the victimisation claim was whether the detriment of cutting off communication with the appellant's agent was "because of" the allegation that the respondents had breached the 2010 Act. The question was whether the "reason" for the protected act was "wholly or in substantial part" the doing of the protected act: **Page v Lord Chancellor** [2021] ICR 912 at paragraphs 53 to 54; **Fullah v The Medical Research Council** [2022] EAT 45 at paragraphs 23 to 26; **Kong v Gulf International Bank (UK) Ltd** [2022] ICR 1513 at paragraphs 57 to 61.

39. The allegations of the appellant being "hung out to dry", being "called a liar", of the first respondent "trying to sweep this under the carpet" and of the claimant being "suspended" were individually and cumulatively found to be protcted acts. The tribunal's finding at paragraph 130 was

irreconcilable with its reasons at para 367. Specifically, the respondents' belief in the truth or otherwise of the allegation was irrelevant in the absence of a finding of bad faith, which the tribunal had not made.

Ground 2(a) – refusal to allow the appellant to be interviewed / breach of contract

40. The threat by the respondents to treat the appellant as being in material breach of contract if he participated in a radio programme about racism in football was correctly characterised by the tribunal as unwanted conduct. When addressing whether it was conduct related to race, however, the tribunal misdirected itself. The tribunal's conclusion that the conduct was the "genuine belief" of the consequence of the claimant failing to follow the instruction that he was given did not make sense. The "belief" was not "conduct", although the belief may have been a reason for the conduct. The respondents' conduct was the issuing of the threat. That conduct was clearly related to race.

41. On the issue of purpose, the tribunal had also erred. The conduct could only be viewed as a threat involving the possibility of dismissal. Objectively viewed, it could only have been done to affect the claimant's conduct by creating an intimidating or hostile environment for him. The tribunal's finding that the "sole reason" for the decision not to allow the claimant to participate in the interview was a desire to protect the integrity of the investigation and reputation of the claimant and the first respondent was unsupported by any factual basis. The tribunal made no finding that the integrity of any investigation would have been compromised or that there would have been reputational damage.

42. Finally, on the issue of the proscribed effect it was illogical and perverse for the tribunal to conclude that it was unreasonable for the claimant to view a threat of a claim of material breach of contract, with the concomitant implication of the danger of dismissal, as creating an intimidating or hostile environment.

Ground 2(b) – the suggestion that appellant was seeking publicity

43. The tribunal made no finding as to what the second respondent had said about the opinion expressed by the appellant's agent. In the absence of such a finding, the tribunal could not properly have assessed whether or not anything said by the second respondent was related to race, nor could it make any proper assessment as to its purpose or as to the reasonableness of any effect it may have had.

Ground 2(c) – the meeting of 5 October 2021

44. The Tribunal had correctly accepted that the respondents' conduct at the meeting of 5 October 2021 was unwanted, but had erred in concluding that the conduct was not related to race. The tribunal's reasoning that "[t]he conduct in question was the second respondents' belief that ... the alleged racist incident was unlikely to have taken place, given the full evidence that had been obtained" again did not make sense. A belief is not of itself conduct. The conduct was the respondents' attempt to persuade the claimant to issue a joint press statement and to "move on". There was, moreover, no finding of what the "investigation" comprised nor what evidence had been obtained.

45. In relation to purpose, the tribunal erred in finding that the "sole purpose" of what was said at the meeting was "to inform the claimant of the outcome of the investigation." The tribunal also found that the respondents wished to "find a resolution", "to find a solution that allowed the focus to return to football given the outcome of the investigation", "to move matters on" and "to move matters forward".

46. Finally, the conduct of the meeting could only have had the purpose of having the proscribed effect and it could only be have been reasonable for the claimant to have experienced that effect.

Ground 2(d) – Mr Murray

47. This ground was closely related to ground 2(c). It related to pressure from Mr Murray after

the meeting of 5 October 2021 for the claimant to agree a statement with which he knew that the claimant did not agree. The tribunal correctly concluded that the conduct was unwanted but erred in concluding that it was not related to race. Its reasoning was that the conduct was about issuing a statement about "moving on", which "protected both of the parties" and which was "a desire to protect the claimant and the respondents and seek to return the focus to football".

48. Having a "desire" is not "conduct". There was no basis for a conclusion that the issuing of a statement would "protect" the parties. "Returning the focus to football" assumed that it was not possible to keep a vigilant lookout for racism on the terraces and play football at the same time. The whole tenor of the conduct was to get away from having to deal with the issue of the potential for racism amongst the supporters. That was plainly related to race. The connection with race, the purpose of the conduct, its effect and the reasonableness of its effect were extensions of the points made in relation to the meeting of 5 October.

Ground 2(e) – the letter of 20 October 2021

49. The Tribunal concluded that the enforced period of leave was a detriment (para 353). The tribunal erred in conclusing that the letter of 20 October 2021 explaining the reasons for the enforced leave was not unwanted conduct because the appellant had asked for the reasons to be provided to him. The implication of that conclusion is that the expression of any reasons, no matter how objectionable, could not be unwanted conduct if they had been requested in writing. The conduct in question was related to race and had the proscribed purpose and effect.

Submissions for the respondent

Ground 1 – the victimisation claim

50. The relevant protected act was the text of 16 October 2021, and it was accepted that cutting off communication with the agent was a detriment. It was a reasonable inference, however, that the tribunal had found that the allegations in the text – particularly the allegation that matters had been

swept under the carpet – were made in bad faith. It should therefore be inferred that the tribunal had found that section 27(3) was engaged.

Ground 2(a) – refusal to allow the appellant to be interviewed / breach of contract

51. The tribunal had correctly applied the "related to" test and had made a permissible finding in fact that the relevant conduct was not related to race (para. 406) but instead to a desire to preserve the integrity of the ongoing investigation. The tribunal had correctly considered the issue of motive or intention as a relevant but not determinative factor. It had also correctly directed itself on purpose and effect and reached conclusions that were open to it on the evidence.

Ground 2(b) – the suggestion that appellant was seeking publicity

52. It was accepted that the findings in fact at para. 86 were not helpful in making an assessment of what the tribunal concluded that the second respondent had said. It could, however, be inferred that the tribunal must have concluded that the appellant's agent had expressed an opinion with which the second respondent had agreed. Thereafter, the tribunal had correctly directed itself on the law and had reached conclusions that were open to it.

Ground 2(c) – the meeting of 5 October 2021

53. On the tribunal's findings in fact, the meeting of 5 October 2021 was held in order to advise the appellant of the outcome of the investigation and to try to find a way to move on. The fact that the investigation had been about an allegedly racist episode did not lead to the conclusion that the conduct of the meeting was "related to race" (**UNITE v. Nailard** [2019] ICR 28). The tribunal's conclusions about purpose and effect were also properly reached.

Ground 2(d) – Mr Murray

54. The tribunal had made was no finding in fact that Mr Murray had applied pressure to the

appellant after the meeting of 5 October. It had correctly concluded that Mr Murray's conduct after the meeting was innocuous. Its context was a belief, reasonably held after the 5 October meeting, that the appellant might still be prepared to agree a joint statement so that parties could move on. The conclusions reached by the tribunal showed that it had correctly applied the law and reached a conclusion that was open to it on the facts found.

Ground 2(e) – the letter of 21 October 2021

55. Having regard to its finding in fact at para. 131, the tribunal was entitled to conclude that the sending of the letter was not "unwanted" conduct. It was also entitled to conclude that the sending of the letter was not related to race and that it did not have the proscribed purpose or effect.

Decision and reasons

Ground 1

56. No cross-appeal is taken against the tribunal's conclusion that the text sent by the appellant's agent on 16 October 2021 was a protected act under section 27(2)(d) of the **Equality Act 2010**. Similarly, no cross appeal is taken against its conclusion that cutting off communications with the appellant's agent shortly after the text was a detriment. For present purposes, therefore, I take both of those conclusions to be correct.

57. The tribunal's finding at paragraph 130 that protected act was "in no sense whatsoever" the reason for the detriment is, however, irreconcilable with the reasons given by it at paragraph 367, and with section 27(3) of the Act. In particular, it is clear that at para. 367 that the tribunal misdirected itself by focusing upon the second respondent's subjective disagreement with the allegations in the text and upon his belief that they were false. It thus reached an erroneous conclusion that "the issue as to misinformation was properly severable from the protected act." It failed to note that the protected act – the text – would have lost its protected status only if it was both false **and** made in bad faith (section 27(3)). The tribunal made no finding, however, that the allegations in the text were made in

bad faith, and I do not accept the submission for the respondents that such a finding is implicit in its reasons. A finding of bad faith would have had to be clearly and unequivocally made, and the basis for it explained. In the absence of such a finding, the second respondent's subjective views about the truth of the allegation were irrelevant. The tribunal accordingly erred in its application of section 27 of the **Equality Act** to the victimisation claim which is the subject of this appeal. The only possible conclusion from the findings made was that the act of cutting off communications with the appellant's agent was an act of victimisation because of the contents of the text.

Ground 2 – general

58. A recurring feature within ground 2 is an assumption that because the investigation into the events of 11 October 2021 was of an allegation of racist abuse, all aspects of the way in which the investigation was conducted were themselves "related to" the protected characteristic of race in terms of section 26(1) of the Act. As was noted in **Conteh v. Parking Partners** [2011] ICR 341 and **UNITE v. Nailard** [2019] ICR 28, however, that is not correct. Even where an allegation of third party conduct is of something that is – or would be – inherently racist, it does not follow that a failure properly to investigate the allegation must be taken to be "related to" the protected characteristic of race. Section 26 requires an employment tribunal to focus upon the conduct of the individual or individuals concerned and to ask whether their conduct was itself related to the protected characteristic. It is not enough to establish such a relationship that a person has in some way failed to deal with an allegation of third party discriminatory conduct unless there is something about the person's own motivation for the conduct which is related to the protected characteristic in question.

Ground 2(a)

59. This ground is not well founded. On the basis of the findings in fact made at paragraphs 87 and 88, the tribunal permissibly concluded at paragraph 406 that neither the refusal to give permission to the appellant to be interviewed by Mr Bartley nor the statement by the second respondent that, if

he did so, he would be in breach of contract was related to race. The finding that the refusal was related only to the respondent's wish not to compromise the ongoing investigation was one that was clearly open to the tribunal on the evidence, and no error of law is apparent in its approach. On the tribunal's findings, the statement by the second respondent about breach of contract was simply a recognition of the terms of the contract between the appellant and the first respondent.

Ground 2(b)

60. The tribunal's very limited findings in fact at para. 86 about the conduct of the second respondent do not support its conclusions at paragraphs 410 to 419. As noted above, the only factual finding made by the tribunal about the second respondent was that he had "discussed" the appellant's agent's view that the appellant was seeking publicity because there were (unspecified) others within the dressing room who shared that view. It made no finding at all as to what the second respondent actually said about this issue. In the absence of such a finding, the tribunal was not in any position to assess whether or not the conduct of the second respondent (whatever it may have been) was related to race, nor could it have make any proper assessment either as to its purpose or the reasonableness of any effect it may have had on the appellant. This ground is therefore well founded.

Ground 2(c)

61. The tribunal's reasons in relation to the meeting on 5 October 2021 are supported by its findings in fact and show no error of law. On the evidence it recorded, the tribunal was entitled to conclude that the sole reason for the meeting and the conduct at the meeting was to explain the outcome of the investigation to the appellant and to try to move forward. It was entitled to conclude that such conduct was not "related to" the appellant's race. As noted above, the mere fact that the investigation had been about an allegation of racist conduct did not mean that the respondents' conduct at the meeting was "related to" race.

Ground 2(d)

62. This ground is also not well founded. It is an attempt to re-try fact. The tribunal's findings do not support any suggestion that Mr Murray sought to apply pressure to the appellant after the meeting on 5 October 2021.

Ground 2(e) – the letter of 20 October 2021

63. It is important to recognise that in the list of agreed issues for determination by the employment tribunal, the act of alleged harassment founded upon by the appellant was the sending of the letter of 20 October 2021 (para. 30) rather than the prior decision to place him on a period of enforced leave. That latter decision was identified in the proceedings before the tribunal as an alleged act of victmisation (para 22), but not as an allegation of harassment. The tribunal was not, therefore, ever asked to consider whether the decision to place the appellant on a period of enforced leave was itself an act of harassment and it is clear that it did not do so. Instead, it was asked to consider only the narrower question of whether or not the sending of the letter 21 October 2021 was an act of harassment. This important distinction was not apparent in the amended ground of appeal 2(e), but was implicitly recognised by the appellant's senior counsel both in his skeleton argument and in his oral submissions, each of which focussed only upon the letter and not upon the prior decision to which the letter referred.

64. Having regard to the very narrow issue it was asked to consider, it is unsurprising that the tribunal took the view that the sending of the letter of 21 October 2021 was not unwanted conduct. That conclusion was a consequence of its factual finding (seen at para. 131) that the appellant sent a text on 18 October 2021 asking for the reasons for the "cooling off" period to be sent to him.

65. The appellant's submission that it would be illogical to separate the sending of the letter from the prior decision which it reported, though superficially attractive, loses its force on a more careful examination of the way in which the appellant advanced his case before the tribunal. The decision to which the letter made reference was never challenged as an act of alleged harassment. The conclusion

reached by the tribunal was, therefore, limited by the issue that it was asked to determine, namely whether or not sending the letter was an act of harasment.

66. The tribunal's conclusion, on the facts found, that the letter was not unwanted was open to it and discloses no error of law. For essentially the same reasons, the tribunal was also entitled to conclude that the reason the letter was sent was not related to race but to the request made by the appellant in his text of 18 October (paras 473 and 474), that its purpose was not to create the proscribed effect, that it did not have that effect, and that it would not have been reasonable to regard it as having that effect (para 476).

Conclusions and disposal

67. For these reasons, the appeal on grounds 2(a), (c), (d) and (e) is refused. The appeal succeeds only on grounds 1 and 2(b). I will therefore set aside the tribunal's judgment of 23 November 2022 to the extent that it dismissed the two particular claims to which grounds 1 and 2(b) respectively relate.

68. On ground 1, I will substitiute a finding that the appellant was victimised by the first respondent contrary to section 27 of the **Equality Act 2010** by its refusal to communicate with his agent after 16 October 2021, and I will remit the issue of remedy on that issue to the same tribunal.

69. On ground 2(b), I will remit to the same tribunal (i) the task of making findings in fact about what (if anything) was said by the second repondent about the appellant's agent's opinion as recorded by the tribunal at para. 86; (ii) determination of whether anything said by the second respondent about that issue amounted to an act of harassment; and (iii) if so, what remedy is appropriate.