06 Mar 2024
EMPLOYMENT APPEAL TRIBUNAL
EA-2021-000523-NLD

Neutral Citation Number: [2024] EAT 30

Case No: EA-2021-000523-NLD
EA-2021-000604-NLD
EA-2021-000086-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 March 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

SEYI OMOOBA **Appellant**

- and –

MICHAEL GARRETT ASSOCIATES LTD (T/A GLOBAL ARTISTS) (1)
First Respondent

LEICESTER THEATRE TRUST LTD (2)
Second Respondent

- -
- -

NIAZI FETTO KC and **BRUNO QUINTAVALLE** (instructed by Andrew Storch Solicitors) for the **Appellant**
CHRISTOPHER MILSOM (instructed by Didlaw) for the **First Respondent**
TOM COGHLIN KC (instructed by Howes Percival LLP) for the **Second Respondent**

Hearing dates: 12-14 December 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 06.03.2024

SUMMARY

Religion or belief – direct discrimination – section 13 Equality Act 2010
Harassment – section 26 Equality Act 2010
Breach of contract
Practice and procedure – costs
Practice and procedure – use of disclosed documents

The claimant was an actor, cast to play the role of Celie in the stage production of *The Color Purple*. Celie is seen as an iconic lesbian role and, when the claimant's casting was announced, a social media storm developed relating to a past Facebook post in which she had expressed her belief that homosexuality was a sin. The consequences of that storm led to the termination of the claimant's contracts with the theatre (the second respondent) and her agency (the first respondent). Arising out of those events, she brought Employment Tribunal ("ET") claims of religion and belief discrimination and harassment, and breach of contract. Shortly before the ET hearing, having only then read the script, the claimant volunteered she would never in fact have played the part of Celie, and would have resigned from the role in due course. She continued with her claims, but these were all dismissed and an award of costs made against her. The claimant appealed against those decisions, and against a further order relating to the continued use of the hearing documents. The respondents cross-appealed the ET's finding that the claimant had suffered detrimental treatment, its failure to find that there was an occupational requirement that the actor playing Celie had not manifested a belief such as that expressed in the claimant's Facebook post, and its failure to find that keeping the claimant on the books of the agency would effectively have amounted to compelled speech.

Held: *dismissing the appeals*

Although, contrary to the respondents' first ground of cross-appeal, it had been open to the ET to find that the claimant had suffered detrimental treatment, it had not fallen into the error of confusing reason and motive but had permissibly found that, whilst the claimant's belief formed part of the context, it was not a reason for either her dismissal by the theatre or the termination of her agency contract. In the circumstances, it was unnecessary to rule on the occupational requirement or compelled speech arguments.

As for the harassment claim, the ET had not failed to have regard to the impact on the claimant of the social medial storm (the "*other circumstances*" for the purposes of section 26(4)(b) **Equality Act 2010**), but had found that the respondents had not caused, or contributed to, that circumstance, and permissibly found that the claimant's treatment had not reasonably had the requisite effect. The ET had also been entitled to reject the

claimant's argument that any breach of **ECHR** rights would amount to a "*violation of dignity*"; that argument was academic, as the ET had not found that any of the claimant's **ECHR** rights had been infringed.

The ET had also been correct to dismiss the claimant's breach of contract claim against the second respondent. She had been offered the full contract fee, so there was no pecuniary loss. Moreover, as the claimant knew she would not play a lesbian character, but had not raised this with the theatre, or sought to inform herself as to the requirements of the role of Celie, she was in repudiatory breach of her express obligations, and of the implied term of trust and confidence. Although the second respondent was not aware of this at the date of termination, no damages (e.g. for loss of publicity/enhanced reputation) could be due.

In making a costs award against the claimant, the ET had been entitled to reach the conclusion that her claims either had no reasonable prospect of success from the outset, or that they had no reasonable prospect once the claimant realised that she would never in fact have played the role of Celie, or that the conduct of the claims had been unreasonable; as such it had permissibly found the threshold for a costs award was met. As for the claimant's objection to the amount of the award (the entirety of the respondents' costs, subject to detailed assessment), the ET: (i) was entitled to find that the change in the claimant's case had an effect on the entire proceedings, and (ii) had drawn inferences that were open to it on its findings as to the conduct of the claimant's case, such that it had permissibly taken into account the resources of those who had supported the litigation for their own purposes.

As for the order restricting the future publication of *all* hearing documents, that had been a decision open to the ET under its powers of case management. It had had due regard to the open justice principle and been entitled to exercise its discretion in the way that it had.

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The Honourable Mrs Justice Eady DBE, President:

Introduction

1. In 2019, a social media storm, relating to an old Facebook post, led to the termination of an actor's casting as Celie in the stage production of *The Color Purple*, and the ending of her agency contract. Arising out of those events, the actor brought claims of religion and belief discrimination and harassment; she also claimed breach of contract. Shortly before the hearing of her claims, however, the actor volunteered she would never in fact have played the part of Celie, and would have resigned from the role in due course. She continued with her claims, but these were all dismissed and an award of costs made against her. The actor appeals against those decisions, and against a further order relating to the continued use of the hearing documents. The liability appeal raises issues relating to the determination of *the reason why*, in a claim of direct discrimination, and of the evaluation of the effect required for a claim of harassment; questions are also raised concerning claims of breach of contract in this context. The theatre and the actor's former agency have raised cross-appeals on liability, asking whether the circumstances of this case could give rise to less favourable treatment, whether there was an occupational requirement in respect of the role of Celie, and whether the claim of direct discrimination gave rise to issues of forced speech. In addition, the costs appeal raises a question whether the resources of third parties can be taken into account in making an award against a party. The documents appeal gives rise to issues of case management and open justice after a trial has come to an end.

2. In giving this judgment, I refer to the parties as the claimant and as the first and second respondents, as they were below. The underlying proceedings were dealt with by the London Central Employment Tribunal ("ET"), with the liability hearing taking place by CVP before Employment Judge Goodman, sitting with lay members Ms Went and Ms Moreton, over six days in February 2021. Subsequently, a costs hearing took place before the same panel members on 18 March 2021. The appeals and cross-appeals before me are as follows:

(1) On liability (relating to the judgment of the ET, sent to the parties on 16 February 2021): (a) the claimant's appeal against the dismissal of her claims of direct discrimination and harassment; (b) the first respondent's cross-appeal from (i) the ET's failure to find that the termination of the claimant's agency contract could not be less favourable or unwanted treatment; and (ii) the absence of a finding that upholding the claimant's direct discrimination claim would constitute forced speech and a violation of the first respondent's rights under articles 9 and 10 **European Convention on Human Rights**

("ECHR"); (c) the second respondent's cross-appeal from (i) the ET's failure to find that the claimant's dismissal could not be less favourable or unwanted treatment; and (ii) the absence of a finding of an occupational requirement ("OR").

(2) In relation to costs: the claimant's appeal from the ET's decision (sent to the parties on 29 March 2021) ordering the claimant to pay the full costs of both respondents.

(3) In respect of the use of hearing documents: the claimant's appeal from the order, made on the last day of the full merits hearing before the ET (8 February 2021), requiring that she remove documents about the case published on the website of the Christian Legal Centre ("CLC") or Christian Concern Limited ("CCL").

3. There is a degree of overlap in the points raised by the liability and costs appeals, and I have adopted the same course as the parties in largely dealing with these together (albeit, the separate grounds of appeal are considered individually in my conclusions). After addressing those appeals, I have then gone on to consider the relevant legal framework and the parties' submissions on the documents appeal, before setting out my conclusions on the issues raised in that regard.

4. In the ET proceedings, the claimant was represented by Mr P Stroilov, a lay representative from the CLC, but she has appeared before the EAT by Mr Fetto KC and Mr Quintavalle of counsel. The first respondent was represented before the ET by Mr Milsom of counsel, as it is on the appeal; similarly, both before the ET and EAT, the second respondent has appeared by Mr Coghlin KC.

The Background Facts

5. The claimant is an actor. The first respondent was the claimant's agent and an employment services provider pursuant to section 55 of the **Equality Act 2010** ("EqA"). The second respondent operates the Curve Theatre in Leicester; it was the claimant's employer from 10 January to 21 March 2019.

6. The claimant grew up in a committed Christian family of Nigerian origin; her father is a pastor and a co-founder and director of CCL and its sister group, the CLC, which represented the claimant before the ET. As a child and young person, the claimant attended church and church school; it was her evidence that at the age of 17 she committed to Christ.

7. On 18 September 2014, when the claimant was a student and had just turned 20, she posted the

following on Facebook:

> "Some Christians have completely misconceived the issue of Homosexuality, they have begun to twist the word of God. it is clearly evident in 1 Corinthians 6:9 -11 what the bible says on this matter. I do not believe you can be born gay, and i do not believe homosexuality is right, though the law of this land has made it legal doesn't mean its right. I do believe that everyone sins and falls into temptation but its by the asking of forgiveness, repentance and the grace of God that we overcome and live how God ordained us too, which is that a man should leave his father and mother and be joined to his wife, and they shall become one flesh. Genesis 2:24. God loves everyone, just because he doesn't agree with your decisions doesn't mean he doesn't love you. Christians we need to step up and love but also tell the truth of God's word. I am tired of lukewarm Christianity, be inspired to stand up for what you believe and the truth # our God is three in one # God (Father) #Christ (son) #Holy Spirit"

8. As the ET noted, although addressed to Christians, the claimant's post was public and not restricted to any group of readers. It was common ground before the ET that this post was an expression of the claimant's belief, which the ET summarised as follows:

> "28. … she did not consider that sexual orientation was innate, or a given. It was something a human could will, control and alter, perhaps with God's help. They were to [be] held responsible, as sinners, for their sexual attraction to members of the same sex."

9. After university, the claimant attended drama school, specialising in musical theatre. She obtained her first job offer before graduating, and some 19 agents offered her work. She signed with the first respondent on 18 August 2016 and her agent was Ms Bobby Chatt, with whom she had a good working relationship. The claimant performed in *Hades Town*, *Little Shop Of Horrors*, *Junkyard*, *Boxed*, *The Little Beasts*, and *Voiceover*; she did backing vocals for Stormzy; in May 2017 she appeared in a concert production of *The Color Purple* at Cadogan Hall. As the ET observed, although still in the early days of her career, the claimant was considered to be very talented and to have a remarkable voice.

10. Early on, the claimant had explained to her agent that, as a Christian, she would not want to play certain parts and she had turned down an opportunity in *Book of Mormon* because of its satirical depiction of Christian belief. When accepted for a role in *Junkyard*, she raised her concern with Ms Chatt that her character was bisexual, but the production team was able to reassure her and she felt able to continue in the role. Sometimes the claimant turned parts down for other reasons, or for no reason. The ET found that Ms Chatt was content that the claimant's career should take the path she chose. As the ET recorded, the claimant accepted that many actors are gay. She had not experienced conflict with others in her career; colleagues knew she was Christian (she would pray before performances) but there was no discussion of her views and no suggestion of earlier difficulties due to the claimant's beliefs.

11. In November 2018, the claimant was invited to audition for a part in the stage musical production of

The Color Purple. The ET described this work in the following terms:

> "34. The Color Purple is an epistolary novel written by Alice Walker and published in 1983. It won the Pulitzer prize and has worldwide renown. It is often read as a school text. The central character is Celie, a woman growing up in the southern state of Georgia in brutal circumstances, raped by her father at the age of 14, bearing him two children who were taken away, and blamed by her mother who left the home. She was married to an older man to be his housekeeper and raise his children. She never knew love and affection. Growing up she was close to her sister, Nettie, who left to work in Africa as a Christian missionary; Nettie's letters to her were hidden by Celie's husband, so she felt abandoned by all who cared for her. She formed an attachment with a woman jazz and blues singer, Shug Avery, who was her husband's mistress. Shug awakens Celie to sexual desire, the first time she has experienced it, and they have a physical relationship. Then Shug marries, and Celie goes to live with the couple. Later Celie suffers when Shug has an affair with a man, but she attains acceptance and serenity."

12. As the ET noted, a popular film of the book was released in 1985, which had "*played down the physical relationship between Celie and Shug*" (ET liability decision, paragraph 35); the stage musical production, however, "*carried more focus on the physical relationship between Celie and Shug*" (ET liability decision, paragraph 38). Although it was the claimant's pleaded case that she had understood there were several interpretations of the relationship between Celie and Shug, and she would have interpreted the part in her own way, the ET was clear:

> "… the book is about a physical lesbian relationship, and, having been taken to several passages of the script in cross-examination, so was the musical production …" (ET liability decision, paragraph 43)

13. In 2017, the claimant had appeared as Nettie in the stage musical version of *The Color Purple* at Cadogan Hall. She had also read the book at school and had watched the film. It was her view that "*Celie was not a lesbian, nor was the play about lesbianism*". In cross examination, however, when taken to the relevant passages in the script for the stage production, the claimant agreed that portrayed Celie's relationship with Shug as a physical lesbian relationship; as the ET held:

> "It would have been difficult to interpret the role in the musical production in any other way" (ET liability decision, paragraph 43)

14. Returning to the narrative, the second respondent had acquired the rights to perform the stage musical production of *The Color Purple* and arranged a co-production with the Birmingham Hippodrome, with the hope of a tour after that if it was a success. With its themes of lesbianism and race oppression, this was seen as giving the second respondent a good score for the creative diversity criterion for public funding but it would require considerable financial investment and was likely to make a loss, even with good ticket sales, unless there was a profitable tour to follow.

15. This was the project for which the claimant auditioned, initially for the role of Nettie but on the understanding that she might also be considered for other parts. During the audition process, the claimant was sent a brief which said: "*Script is attached, please make sure you have read it before you come in this time around*". Subsequently, on 3 December 2018, she was offered the lead role of Celie, which - after negotiation of terms by her agent - the claimant accepted on 10 January 2019. A note of the agreed terms was sent by the theatre to Ms Chatt on 6 March 2019, and the claimant was to attend a publicity "*Q and A*" with the press on 18 March, with rehearsals starting on 28 May, and first performance on 28 June 2019.

16. On 14 March 2019, the cast for the Leicester production was announced. On Friday 15 March 2019, Aaron Lee Lambert, an actor in the musical production *Hamilton*, with no connection to either respondent, tweeted the claimant's 2014 Facebook post and added:

> "@Seyiomooba Do you still stand by this post? Or are you happy to remain a hypocrite? Seeing as you've now been announced to be playing an LGBTQ character, I think you owe your LGBTQ peers an explanation. Immediately"

17. Mr Lambert's tweet gained rapid traction and by early evening, when it came to the attention of Chris Stafford, the second respondent's chief executive officer, there was already comment from the Stage (the British weekly newspaper covering the entertainment industry, with a particular focus on the theatre), asking how the second respondent could offer someone with the views expressed by the claimant a role playing a woman who has an explicit lesbian relationship. Having agreed to take the lead in responding, Mr Stafford spoke to Ms Chatt, explaining that the social media reaction put the second respondent in a difficult position, and asking if the post still represented the claimant's views, or whether she could issue a retraction on which they could base a joint media statement. Meanwhile, Mr Stafford instructed his staff to make no comment.

18. Ms Chatt then spoke to the claimant, who had only just seen the message but said her views were unchanged. She was asked to say nothing until it was established what best to do. The claimant said she would speak to a lawyer known to her family and contact Ms Chatt again after that. She then consulted her family and a lawyer from the CLC.

19. On the next morning, Saturday 16 March, Ms Chatt messaged the claimant saying that the issue had gathered momentum overnight and she was being pressed for a statement, adding:

> "I think, without it, they will have no choice but to rescind the role. If this is the case then, professionally speaking, I would advise you to step down rather than have that taken out of your hands. Would definitely rather talk than text, so call me."

By this message, the ET considered that Ms Chatt was explaining to the claimant the context of the Facebook post now being made public from the second respondent's point of view.

20. Between 12:04 and 12:35 the same day, the claimant emailed Ms Chatt with four versions of a statement. The initial version included an apology ("*I sincerely apologise if what I wrote 5 years ago caused offence. My intention was to describe my views as a Christian, believing in God and in the bible. I am unable to retract my Facebook post as to do so would be to deny my faith*."), but that was removed from later versions, the claimant explaining (in sending the third version of her statement): "*we feel like using the word apology could be misconstrued."*. The final version of the claimant's statement was worded as follows:

> "The law protects my freedom of expression as well as freedom of thought, conscience and religion. With regard to the role of Celie, I will not disregard that Celie falls in love with Shug or that Celie believes in God and is black. There is so much to Celie. The role of an actor is to play characters different from myself. As for the *[sic]* personal faith I will stand firm."

21. In the afternoon of Saturday 16 March 2019, Ms Chatt relayed the claimant's last statement to Mr Stafford, who asked her to tell the claimant not to release it until they could take advice.

22. The next day, Sunday 17 March, at 1 p.m. Ms Chatt told the claimant that Mr Stafford wanted confirmation that the last statement "*remains your final position on the matter*". That evening, the claimant confirmed that it did.

23. While waiting to clarify the claimant's position, Mr Stafford was consulting with others, including lawyers, on what was to be done. Strong concerns were communicated by a wide range of those involved in the production, including the theatre's artistic director, the play's director, the actor playing Shug, and the musical director, as well as the second respondent's chairman. Some of those concerned were themselves gay and expressed their upset at what the claimant had said; more generally, it was apparent that there was a real concern about the social media storm and how this might impact on the audience's ability to connect with the claimant in the role of Celie. Mr Stafford had consulted the Arts Council (which partly funds the second respondent) and had also sought the views of the rights holder, Steve Spieler of Theatrical Rights Worldwide ("TRW") in New York, who represented the authors of the musical. In respect of the latter, Mr Stafford was concerned that if the claimant played the part as not involving a lesbian relationship there might be legal action arising from the copyright compliance term of the December 2016 licence agreement (which forbade, without prior approval, "*changes in the characters...including…any change in the gender or characterizations of any character in the play*"). In his reply, Mr Spieler said:

> "at times, an actor's skill set may call for the playing of a part which may not be in alignment with personal beliefs. However, the supportive environment of theatre cannot embrace a position, especially from the actor in the leading role of Celie, that creates a hostile atmosphere for the cast members and audiences alike."

As the ET found, the answer did not indicate that changes would be approved; rather, it supported a decision to drop the claimant.

24. On Thursday 21 March 2019, via Ms Chatt, Mr Stafford sent the claimant a letter terminating her engagement, and a copy of the public statement the second respondent was intending to release. The claimant was asked to comment if she wished, but, in the hour and a quarter before it went out, she did not reply and (as the ET recorded in its liability decision, at paragraph 109) did not read the explanation provided in the termination letter at this stage.

25. That letter informed the claimant that it had been decided to terminate her engagement in the role of Celie with immediate effect. It explained that the production explored issues of sexuality, with the lesbian relationship between Celie and Shug being an important part of the story, and that intimate scenes involving Celie and the actress playing Shug were intrinsic to the production. The letter stated that the play and production were: "*seeking to promote freedom and independence and to challenge views, including the view that homosexuality is a sin*", and went on to refer to the claimant's 2014 post, observing that this was in the public eye and she had made clear she would not distance herself from it. It was recorded that there was adverse negative publicity about the claimant's involvement in the production, which was expected to grow as time went on, and there was some evidence of potential boycott by LGBT groups; in the circumstances, the claimant's continued engagement was considered untenable as it would affect the harmony and cohesion of the cast, audience reception, the producers' reputation and the good standing and commercial success of the production. The claimant was told that she would be paid in full the contract sum of £4,309.71.

26. In its liability decision, the ET made the following findings as to Mr Stafford's thought processes in reaching this determination:

> "64. In our finding, Chris Stafford had recognised early on that if the claimant's 2014 views had not changed it would be hard to keep her on, and consultation had only confirmed what he thought was the case. His thinking about a decision to dismiss hardened when by Sunday evening he knew the claimant had nothing further to say. As well as internal dissension with cast and crew, he feared boycotts, audience booing, and demands for ticket refunds. The publicity would not sell tickets when a large section of the target audience was so hostile; it was not a family show.
> …
> 67. [By Tuesday 19 March 2019 the second respondent] was now under pressure from constant messages on social media to the theatre, to other actors, to the funders, and generally. A

> statement about dropping the claimant from the production went through many redrafts. … The final version of the statement was bland: it said the reposting of the 2014 comments had caused "*significant and widely expressed concerns both on social media and in the wider press. Following careful reflection it has been decided that Seyi will no longer be involved with the production. This decision was supported by the authors and Theatrical Rights Worldwide*". It concluded by saying (as an answer to criticism of how they had cast her in the first place) that they did not screen social media when casting actors."

27. The claimant told the ET that she did not understand why the second respondent had sided with a social media campaign labelling her as homophobic "*simply because I expressed my religious beliefs*". In her witness statement (exchanged in January 2021), however, the claimant said that, in fact, when she realised that the production focused on a lesbian relationship, she would have had to pull out, and would not have performed the role of Celie. As the ET found, the claimant had not read the script when she accepted the part and had still not read it when the storm blew up which led to her being dropped from the production; it was her intention to read it before rehearsals began in May, but ultimately she only began to read the script shortly before the full merits hearing before the ET. By the time she was giving her evidence, the claimant agreed this was not the role for her. Although the claimant had previously appeared in a stage production of *The Color Purple* (which had involved a 10 second kiss between Celie and Shug at a time when the claimant would have been on the stage), it was her evidence that she had been looking at the audience at the time and had only read Nettie's highlighted lines in preparing for that production, which was a one-off performance. In any event, the ET did not find that the claimant accepted the part in bad faith, to set up a discrimination claim as part of a campaign against homosexuality; rather, it concluded that she had not done her homework, had not been paying attention, and had thought of the work in the frame of the film.

28. Meanwhile Ms Chatt was keeping Michael Garrett, the first respondent's owner, abreast of the situation. He thought the position was "*unsustainable*", and that the Facebook post compromised the agency's overall standing with the public, its staff, and other clients, as it was "*offensive to the LGBTQ+ community and beyond*". As the ET recorded:

> "… He explained in evidence that he had built up the agency from nothing over the course of 20 years, five of his twelve staff were gay, that against the social media publicity two of his seven agents who were gay were talking of leaving, and agents took years to train and were hard to replace, he had 334 other clients to represent, and in the past he had seen an agency collapse when one by one its clients quietly left following a social media storm, and could see this happening too when actors did [not] want to be associated with what was now widely seen as bigotry. He feared for his financial viability. Quite apart from that, an ongoing relationship with the claimant would be "uncommercial", as they would struggle to place her in roles after the outcry." (ET liability decision, paragraph 74)

29. Mr Garrett had, however, still not made a final decision as to how to proceed when, on 24 March 2019,

he was shown a Twitter piece by Bernard Dayo of Y Naija, a newspaper aimed at young Nigerians, who had some 200,000 followers on Twitter; Mr Dayo had blue tick status, which at that time signified that he was authenticated on Twitter as a professional journalist. The article said that the claimant's publicist had released a statement saying she believed: "*homophobia is a natural reaction to homosexuality which is an aberration*"; Mr Garrett was concerned that the claimant had not first discussed this with the first respondent, which had firmly maintained a rule of silence in the face of enquiries, and that this could only aggravate what was already a difficult position. The ET found that this article "*expedited*" Mr Garrett's decision to end the claimant's contract, and he emailed her to say that the agreement for representation had been terminated, "*effective from today 24 March 2019*", saying she should invoice the theatre direct for payment, there would be no agency commission payable. The claimant's details were also removed from the agency website.

30. The claimant denied to Ms Chatt that she had given any statement to Mr Dayo and said the piece was satirical (and, 24 hours later, comment to that effect was added to the post). Mr Garrett did not, however, change his mind and, by email of 18 April 2019, he told the claimant that the relationship was "*beyond repair*" because she had not retracted the original Facebook post, was now unmarketable, and her continued association damaged the first respondent's commercial viability.

31. A few weeks later Mr Garrett noticed that the first respondent was no longer linked to the claimant's entry on Spotlight, an online directory where actors upload their details and theatres advertise roles. As the ET recorded, only an actor, or Spotlight, can remove details; an agency would have to ask Spotlight for their association with an actor to be deleted. The claimant denied removing her details but the ET did not find that this was done at the first respondent's behest.

32. Although the claimant found another agency, that relationship did not last long and she had had no further acting work as at the date of the ET hearing. As the ET noted, however, had the claimant continued in theatre, the pandemic restrictions that began in March 2020 would, in any event, have interrupted her employment as they had for others.

The ET Hearing

33. The claimant commenced her ET proceedings in August 2019, claiming direct discrimination and harassment because of, or related to, religious belief; and also making claims of indirect discrimination and

(against the second respondent) of breach of contract. The pleadings were detailed, with the legal issues being set out in a consolidated list of seven pages.

34. The ET heard evidence from the claimant and her father, Pastor Ade Omooba; the first respondent called Ms Chatt and Mr Garrett; Mr Stafford gave evidence for the second respondent. Each of the witnesses had provided a witness statement which, once the content was confirmed, was taken as read, and there was a main bundle of 1,577 pages, with a supplemental bundle of 107 pages. As the ET building was closed at the time, the hearing took place by remote video link, with a substantial number of observers, including members of the press, attending throughout; the proceedings were widely reported in the media, both within Great Britain and abroad.

35. In the normal course, the practice of the ET would be to ensure that a hard copy of the hearing bundle, the witness statements, the pleadings, skeleton arguments and other documents were available in court, so that those observing (whether members of the public or representatives of the media) could follow the proceedings. As that could not happen, on Friday 29 January 2021 (the working day before the full merits hearing was due to commence), Employment Judge Goodman emailed out to the parties' representatives, as follows:

> "I write to enquire whether any arrangements have been made for public access to the bundles and witness statements during the hearing, and what they are.
> In some cases, one of the parties' solicitors has hosted the witness statements on a website, and allowed access to a hard copy of the bundle in a public area of their office. In others the hard copies of both have been made available at the tribunal building, but as currently Victory House is closed not just to the public but to its staff as well, this is not an option. Screen sharing is not practical when there are more than one or two items to display.
> Can I invite the parties representatives to confer and then tell me if an arrangement has been agreed, and what it is."

36. Within six minutes, the claimant's representative from the CLC emailed those acting for the respondents, saying:

> "… in relation to the message from the Judge …
> Please note that the Christian Legal Centre is preparing to upload each witness statement on the web-site as soon as the witness begins to give evidence.
> We also propose to upload individual documents from the bundle once they have been mentioned in open court. Personal details such as email addresses and phone numbers will be redacted. …
> If you are content with this arrangement, I propose simply to inform the Judge about it. …"

37. Shortly thereafter, the respondents confirmed their agreement, provided only previously redacted documents would be uploaded.

38. EJ Goodman's understanding regarding the arrangements thus agreed between the parties was explained in the ET's liability judgment, as follows:

> "11. … Public access to written case materials was provided by the claimant's representative's Christian Legal Centre hosting on its website electronic copies of the witness statements. Documents referred to in the statements were uploaded as each witness was called; at the tribunal's request, the pleadings, list of issues and opening arguments were posted from the beginning of the hearing, so that the public could understand the issues being argued. This was arranged prior to the hearing and with the consent of both respondents. The Christian Legal Centre also hosted for public access during the hearing a hard copy of the witness statements and documents bundle at their premises in Wimpole Street. This would usually have been done at the Employment Tribunal's premises at Victory House, which is currently closed, to both staff and public, because of inadequate ventilation.
> 12. One document had to be redacted after uploading when it was noted that it contained information that should not be made public. The material was visible at most for 10 minutes. Those in the hearing were directed not to report the redacted content, formally or informally."

39. On the last day of the full merits hearing, the respondents became aware that, contrary to their understanding, those acting for the claimant were intending that the case materials were to continue to be accessible on the CLC and/or CCL website after the end of the hearing. This matter was raised with the ET, leading it to make an order (dated 8 February 2021) in the following terms:

> "The claimant and her representatives, whether Christian Concern Ltd or Christian Legal Centre, are directed to remove from their website(s), by 5 p.m. on 8 February 2021, all documents posted there for the hearing of this claim, to include the agreed bundle of documents, the various supplementary bundles added in the course of the hearing, the bundle of witness statements, the parties' openings, the closing arguments, the cast list and chronology."

40. The ET provided summary written reasons for this order, as follows:

> "2. … these materials were hosted by the claimant's team following enquiry by the judge as to public access for the remote hearing and an agreement by both respondents that such hosting would facilitate public access to the materials. The hearing having ended, they should be removed.
> 3. The respondents consented to hosting on the claimant's website on this understanding.
> 4. In a hearing in the tribunal building, they would only be available after the hearing by applying to the tribunal for permission to read them. Such permission is sometimes granted, and the reasons for access, or lack of it, are explained in **Cape Asbestos v Dring** …
> 5. The purpose of public access to written material is to enable understanding of what is said in the public hearing. After that, the public will in due course be able to read on the tribunal's website the written judgment and reasons of the tribunal, to include their findings of fact, a statement of relevant law, and how the law has been applied to the facts found. If there is some other reason for continuing public access, the person seeking access may apply to the tribunal."

41. In the first paragraph of the order of 8 February 2021, the ET had also recorded that:

> "1. There will be a hearing on 18 March 2021 to decide remedy, of *[sic]* appropriate, and any other application made in these proceedings."

42. On 16 February 2021, the ET's unanimous decision on liability was sent to the parties, dismissing each of the claimant's claims.

Liability: the ET's Findings and Conclusions

43. Although it was common ground that Christian religion, a belief in the truth of the Bible, and a belief

that homosexual acts are sinful, all fell within the protection of the **EqA**, the respondents disputed that was so in respect of other aspects of the claimant's beliefs, including her belief that you cannot be born gay. For the reasons set out at paragraphs 82-94 of its liability judgment, however, the ET concluded that all the beliefs relied on by the claimant met the tests set out in **Grainger v Nicholson** [2010] ICR 360 and were protected under the **EqA**. There is no appeal in this regard.

44. Turning to the substantive claims, the ET first considered the claimant's complaint of direct discrimination against the second respondent. It was the claimant's case that her religious belief was at the forefront of Mr Stafford's mind when he decided to dismiss her; the second respondent said, however, that as the claimant would not in fact have performed the role of Celie there could be no less favourable treatment, but, in any event, she was dropped not because of her belief but because her role in the production was untenable, alternatively, it was an occupational requirement ("OR") that the actor playing Celie should not have engaged in the manifestation of belief that the claimant had done, and this was a proportionate means of achieving a legitimate aim.

45. The ET acknowledged that, as the claimant would not in fact have performed the role of Celie, it was arguable that "*the only detrimental treatment experienced was that she was dropped some weeks before she would have decided to pull out*", it nevertheless concluded that:

> "… she will have experienced some hurt at being dropped for, as she saw it, expressing a deeply held religious belief, and that can be reflected when assessing remedy …" (ET liability decision, paragraph 102)

46. Examining the reason for the second respondent's decision, the ET considered that Mr Stafford's decision had to be seen in the context of the speed and savagery of the social media storm that arose after the Lambert tweet of 15 March. Accepting, as the claimant did, that actors can play the part of those with whose views or actions they would strongly disagree, the ET noted that the claimant's red line was that she would not play a lesbian. This was unknown to Mr Stafford and, although the ET considered that some sense of the difficulty of playing the role of Celie whilst holding the views expressed by the claimant might have "*informed the decision*", it was satisfied that it was:

> "not an explicit part of Mr Stafford's thinking. He made his decision on the basis that she would play the part, as she said she would." (ET liability decision, paragraph 104)

47. The ET also considered the degree to which Mr Stafford had been influenced by the upset expressed by many of the second respondent's staff and others involved in the production, holding:

> "… Had that been Mr Stafford's only concern we would have wanted to examine whether there was a way through, perhaps by discussion and mediation, given the Diversity policy. It would be difficult to hold that someone prepared to act a role in any production should be dropped just because others resented her beliefs – actors of her religious views might never find employment. It was not just that however." (ET liability decision, paragraph 106)

48. The ET then carried out a detailed examination of the further factors raised with Mr Stafford, assessing how these had impacted upon his decision:

> "… One result of the Twitter storm was that the play's director was concerned that the central relationship could not adequately be performed as a sexual one because of [the] claimant's belief impeding a convincing depiction. That may have been overcome if the claimant could commit to playing the part as directed (though now we know she would not). The controversy would also intrude on audience connection with the performance – their knowledge of the controversy because of the actress's views, which would surely have stayed in the forefront of publicity, would interfere with their suspension of disbelief essential for performance. Some members of the audience might disrupt the performance. Or there would be a boycott, or objectors demonstrate *[sic]* outside, and tickets would be returned or remain unsold. These were not fanciful possibilities. Some were already being mentioned in social media. Others have happened in other controversial productions. Its theme was not likely to appeal to a mass audience, despite being a musical and despite being a school text. If she had stayed in, there was a real possibility that the production would have had to be cancelled in the face of a building storm of protest. There was no way to stem the tide unless she could make a convincing statement to allay the vocal objections, and she could not. The decision had to be made quickly, before the theatre's hesitation led to accusations that it too was homophobic did more damage. What had been budgeted as a small loss, unless there were a tour, would become a very substantial loss. If the claimant had not been dropped there is no reason to hold that the production would have succeeded. The dismissal letter made clear that it was then *[sic]* effect of the publicity of her views in this particular production - the fact that her belief was "in the public eye", in a work centred on homosexuality not being sinful - that meant the production was "untenable" and her participation "not practicable". Mr Stafford, gay himself, may not have liked or agreed with the claimant's religious view on homosexuality, but we do not find that his personal view informed the decision. There is nothing to suggest that he would have made a similar decision if the production had not been centred on a lesbian relationship. He made a commercial decision as the theatre's chief executive." (ET liability decision, paragraph 106)

49. Thus analysing the various matters taken into account by Mr Stafford, the ET stated its conclusion on the reason for the second respondent's decision, as follows:

> "… while the situation would not have arisen but for the expression of her belief, it was the effect of the adverse publicity from its retweet, without modification or explanation, on the cohesion of the cast, the audience's reception, the reputation of the producers and "the good standing and commercial success" of the production, that were the reasons why she was dismissed. The centrality of authentic depiction of a lesbian role was a key part of the factual matrix. It was not necessary that she should be a lesbian, but it was important that she was not perceived by audience and company as hostile to lesbians. The decision to terminate was made to deal with the dysfunctional situation that arose from the context and circumstances of the public retweeting. The religious belief itself was not the reason why the theatre decided this. It was the commercial and artistic reality of the cluster of factors that it would not succeed." (ET liability decision, paragraph 107)

50. Having reached that conclusion, the ET did not consider it necessary to determine the second respondent's OR submission; which it wrongly characterised (see the liability decision at paragraph 108) as being "*for the role to be played by someone of a particular sexual orientation*".

51. As for the case of direct discrimination against the first respondent, the claimant argued that the agency had a contractual duty to promote her; far from terminating her contract, it should have continued to put her forward for parts even if others left. The first respondent contended, however, that this would amount to forced speech, in breach of its article 9 and/or 10 rights under the **ECHR**.

52. Considering Mr Garrett's evidence, the ET was satisfied that what had operated on his mind was not the fact of the claimant's belief but the commercial risk to his business. Noting that the agency contract explicitly required the claimant to acknowledge that it also represented other clients, the first respondent had to consider the extent to which its other clients would dislike the association with the claimant, and whether they would be damaged by this. Moreover, the claimant had made her view public and continued to give interviews defending her position, such that, had her agency contract continued, the adverse publicity meant it was unlikely she would have been offered other parts. Analysing the factors that had weighed on Mr Garrett's mind, the ET found:

> "… what operated on his mind was not the fact of her belief, but the commercial risk to his business if clients and agents walked. … It is hard to see how in the polarised situation that had come about the first respondent could dissociate itself from the claimant's public views without picking a side and voicing support not just for her but for the views she expressed, as that was now what she was known for. As for his fear of disintegration of the business, we cannot assess the extent to which his fears were justified, but we accept that they were real, and that they were based on experience and evidence, so not fanciful. That it was the Y Naija story that was the last straw for him confirms this. While initially he believed it was truthful, and that she was fanning the fire when she had been asked to be silent, he did not change his mind with her denial, and it probably matters not whether he believed her. The damage was done, the story had increased the commercial risk. He later said he could not trust her, meaning his belief that she was deliberately stoking the fire. The contract does not have an implied term of mutual confidence and trust as it is not a contract of employment, but did have an implied duty of good faith as it contemplated long-term collaboration and was relational …. He terminated in the belief she was in breach of this by going to Y Naija. The continuation of hostile posts (with an especially unpleasant one on 22 March) suggested the storm was increasing, and whether she did or did not encourage the story, he did not change his view because taking her back in would only renew the threat to the business from consequent loss of agents and clients. The business model included not only the claimant but other artists, and the contract stipulated that she acknowledge that the agency represented and continued to represent other clients. He had also to consider the effect of representing her on the agency's reputation and the effect on that on supply of work." (ET liability decision, paragraph 110)

53. Considering the reason why Mr Garrett had acted as he had, the ET concluded:

> "On the evidence he terminated the contract because he thought a continued association would damage the business. The contract was not terminated because of her religious belief, but because in his mind the publicity storm about her part in The Color Purple threatened the agency's survival." (ET liability decision, paragraph 112)

54. The claimant had also complained of direct discrimination arising from what she contended the first respondent had done to publicise its decision, by its refusal to reconsider that decision, and by suggesting that

her conduct had undermined its confidence in her.

55. In complaining that the first respondent had publicised its decision, the claimant relied on the removal of the agency's details from her Spotlight entry, and contended that the first respondent must have tipped off a journalist about her details being removed from its website. The ET did not, however, find these allegations to be made out on the facts:

> "… In our view it was far more plausible, given Mr Garrett's insistence on silence on the part of the agency and its staff in the face of many media enquiries, that the journalist went to the website to get some background information about Ms Omooba for a story, and found her missing. As for Spotlight, the agency denies removing its details, as it was not something they could do, and they did not ask Spotlight to do it for them, the claimant denies removing her details, and we are unable to make a finding as to who did." (ET liability decision, paragraph 113)

56. In relation to his refusal to reconsider his decision, the ET found that Mr Garrett had determined not to take the claimant back "*because of all the reasons concerning commercial viability, which had not changed as the media storm continued*". As for expressing a lack of confidence in the claimant (which suggested Mr Garrett did not believe she had had nothing to do with the Y Naija story), the ET rejected the suggestion that this was because of the claimant's belief.

57. Although not before me on this appeal, the claimant also brought claims of indirect discrimination against both respondents, which the ET found to be fatally flawed as the identification of a provision, criterion or practice in each instance was simply a re-statement of the complaints of direct discrimination. In the alternative, however, the ET made clear it would have found the respondents' actions to be justified:

> "… The claimant does not dispute that the aims of both theatre and agency are legitimate. We would have judged that the response was proportionate. It is hard to see what other action could have saved the production had she been retained when she was unable to make any statement that would engage with publicly expressed concern about the particular nature of this production is portraying a lesbian relationship, or why LGBT people found it offensive. As for the agency, the same lack of engagement (quote *[sic]* apart from the alleged fanning of the flames) meant there was no other way to remove the risk of attrition of agents and clients by continued association with her." (ET liability decision, paragraph 121)

58. Turning to the harassment complaint against the second respondent, which related to the termination of the claimant's contract, the ET did not accept the requisite purpose had been demonstrated: Mr Stafford's purpose was simply to save the production. Going on to consider whether the termination of the contract nevertheless had the necessary effect, whilst allowing that the claimant experienced the decision as hostile, the ET did not accept it was reasonable for the second respondent's conduct to have had that effect:

> "… Ms Chatt had attempted to explain the seriousness of the situation from the theatre's point of view. The claimant had been offered extra time to consider whether she could meet them

> by changing the expression of her view. She had the opportunity to talk it over with Ms Chatt again, or even to ask talk direct to the theatre, including to the director if she wanted clarification of it being a gay production, but she made no approach. She was given an opportunity to comment on the theatre's brief public statement. The statement said that she was '*no longer involved'* with the production, rather than that she had been sacked, dropped or dismissed. The letter she received was careful and neutral and fully explained the reasons, and if she had read it, the effect of the decision may have been less hostile than she experienced it. Finally, it goes without saying that the hostility of social media towards the claimant (although in her evidence she was not reading much of it) -most of it was hostile, some of it was very nasty- whether before or after the termination, was not because of any action on the part of the second respondent. It was because of Aaron Lee Lambert's tweet." (ET liability decision, paragraph 123)

59. Thus concluding that the harassment claim against the second respondent must fail, the ET did not consider the theatre's additional argument that the conduct was not unwanted because the claimant would soon have realised that she did not want to play the part anyway and/or had actively chosen to be dismissed.

60. The harassment claim against the first respondent again referenced the three alleged episodes of unwanted conduct relied on as part of the claim of direct discrimination: publicising the termination, refusing to reconsider, and expressing inability to trust the claimant. As I have already recorded, in respect of the alleged publication, the ET did not accept this was made out on the facts. As for the refusal to reconsider and the lack of trust, the ET noted that the claimant had written asking the first respondent to reconsider and Mr Garrett had replied, politely refusing to do so. Accepting that the claimant was no doubt hurt by not being believed (the suggestion being that she had instructed a publicist to speak to Mr Dayo), the ET did not find Mr Garrett's purpose was to harass the claimant or that his actions could reasonably have had that effect:

> "… in circumstances where Mr Dayo had a blue tick on Twitter, there was no reason to think he was not reputable or had made it up, or that the story was satirical, or that someone connected with the claimant had not had an involvement, or that she had not engaged a publicist, when it was known she was taking legal advice. He had got Ms. Chatt to speak to her and noted her reported denial, but he still suspected she may have had a hand in it. Apart from that, he was speaking of the confidence of the industry in her, or his confidence that they could get her any work in the circumstances. In addition, her email was in effect an appeal, and he had considered the appeal, but maintained the earlier decision. He did so in polite terms. Viewed objectively, it did not add up to a violation of her dignity, or the intimidating (etcetera) environment required to establish that this was harassment. …" (ET liability decision, paragraph 102)

61. For completeness, the ET further recorded the claimant's argument that *any* breach of the **ECHR** would amount to a violation of her dignity, and thus harassment. The ET disagreed:

> "… If there was discrimination because of religious belief (we have of course found there was not) that would not mean that any violation would be substantial enough to amount to violation of dignity." (ET liability decision, paragraph 127)

62. As for the claimant's claim of breach of contract against the second respondent, although her revised schedule of loss recognised she would not have played the part of Celie once she had read the script, the

claimant claimed damages for loss of opportunity to add to her reputation as an actress. The second respondent defended the claim on the basis that, as she would not have been prepared to play the part required, the claimant was in prior repudiatory breach herself, albeit the respondent was unaware of it at the time of dismissal. In this respect, the second respondent relied on the implied term that the claimant would not without reasonable and proper cause conduct herself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. It also relied on what were accepted to be industry standards, express terms that the claimant conduct herself in a professional manner, fulfil all duties normally expected of a performer in a first-class theatrical production, and actively cooperate in publicising it.

63. The ET accepted the second respondent's case: there was no breach of contract in these circumstances because the claimant was in prior repudiatory breach:

> "... the contract was empty because the claimant would not have played the part, and her conduct, pulling out at a late stage, had she not been dropped when she was, would have wrecked the production. She [had] taken part in a similar production, she had the script, and knowing that a lesbian relationship was at least one interpretation, she should have considered much earlier whether a red line was to be crossed." (ET liability decision, paragraph 131)

64. In any case, the ET was satisfied that even if there had been a breach, no damages were due:

> "… There is no financial loss because she would not have played the part. There is no loss of opportunity to enhance her reputation by performing, because she would not have played the part. If there is damage to her reputation, it was not caused by being dropped from the production but by an unconnected person's tweeting in March 2016 of her Facebook post and the outcry resulting from that." (ET liability decision, paragraph 132)

65. Although the claimant brought no breach of contract claim against the first respondent, she relied on what she said was the limitation it had imposed on her freedom of thought, conscience and religion as not being "*prescribed by law*" (as would be required under either article 9(2) or 10(2) **ECHR**), because it had acted in breach of contract. The ET did not accept that argument. While the claimant's contract with the first respondent was not one of employment, it did contain an express term requiring her to:

> "carry out and perform all engagements conscientiously, to the best of your ability and in accordance with the terms of the applicable hirer" (ET liability decision, paragraph 133)

Furthermore, as a contract involving "*relations*", the ET held that there was also an implied term of good faith. The ET found that the claimant had herself acted in breach of these terms:

> "… the claimant knew that Celie falls in love with Shug, that there was at the very least a possibility of a lesbian relationship, she had appeared in the same production, and she had not read the script or clarified the direction, nor queried it with her agent. Bobbie Chatt knew that she had previously appeared in this play, and it is not reasonable to hold her responsible for not questioning the claimant whether she was prepared to play Celie." (ET liability decision, paragraph 134)

66. In these circumstances, although the first respondent had failed to give the claimant the required notice of the termination of the contract, the ET was satisfied that the measure of damages was nil (ET liability decision, paragraph 135).

The ET's Decision on Costs

67. As already recorded (paragraph 42, above), at the end of the liability hearing, the ET had listed a further hearing for 18 March 2021, to determine remedy (if appropriate) and any other applications. The liability decision having been sent out on 16 February 2021, the respondents applied for costs orders against the claimant, to be determined at that hearing. In making those applications, the respondents reminded the claimant of the need for evidence of her means, sending her a copy of the County Court debtor's form as a way of providing that information; she did not, however, provide any evidence relating to her ability to pay and did not attend the hearing on 18 March 2021, albeit that Mr Stroilov was present to represent her interests.

68. Considering whether the threshold was met for a costs award, the ET found that the claimant had been aware that the stage production of *The Color Purple* required Celie to be played as a lesbian, and that her red line would have prevented her from playing that part. While it could not be certain precisely *when* the claimant appreciated that the production could not bear another interpretation, the ET noted that, in her witness statement, she had mentioned being influenced by an open letter written to her by Alice Walker, in the autumn of 2019, which made clear that Celie and Shug had a lesbian sexual relationship. The ET further observed that, by September 2019, the claimant had the respondents' detailed grounds of resistance, which quoted the opinions of the director and Ms Walker in this regard. Also noting that, at the beginning of November 2019, the respondents had made a "*drop hands*" offer to the claimant, the ET concluded:

> "… In any litigation the combination of the two could and should have prompted careful re-evaluation of what was known about the case from each side's perspective and the likely success of the claimant's view. If there was a discussion [between the claimant and her advisers], it does not seem to have included considering whether a non-sexual interpretation of the relationship between Celie and Shug was possible. At this point most advisers would have recognised that complaining of discrimination where the treatment complained of (dropping out of the production) was something that would happen anyway a few weeks on, and on the claimant's initiative, was going to be difficult. It would certainly massively alter the value of the claim. There would be no financial loss, and even if belief was held to be the reason for being dropped rather than dropping out, less for injury to feelings." (ET costs decision, paragraph 33)

69. The ET considered it likely that, in relation to the claims of direct and indirect discrimination, there

was a failure on the claimant's side to re-think the case. It also disagreed with the suggestion, made in the claimant's submissions, that the decision of the ECtHR in **Eweida v UK** [2013] ECHR 37 had overruled domestic law, and felt that there had been legal confusion on the claimant's part in speaking of "*motive*" rather than "*reasons why*", seemingly confusing that with "*but for*" causation (ET costs decision, paragraph 35).

70. As for the harassment claim, the ET found this had had no reasonable prospect of success, reasoning:

> "… The real harassment of the claimant was in the social media campaign. In oral submissions … the claimant's representative said that both respondents made their decisions in the context of the social media campaign, and therefore were "parties to what went on… more than a bystander", when what was going on was a campaign to cancel her. We do not accept that by making their decisions in the context of the social media campaign they became parties to it. To reiterate, they neither participated in the social media campaign nor encouraged it. They just had to make decisions about what to do now it was happening. The claimant herself may have felt that they were all part of it, but an adviser must have a measure of objectivity to give useful advice, and objectively there was no evidence that either respondent engaged in behaviour which created a hostile environment for her. That environment was already there. Had there been objective analysis, either by the claimant when things had calmed down, or on reading the grounds of resistance, it would have been appreciated that a harassment claim against either respondent was unlikely to succeed. We also reject as misconceived the specific argument advanced for the claimant that violation of her human right of freedom of expression meant there was the violation of dignity required to show harassment. The short answer is that while "violation" is used in both contexts, they are not both about dignity. A violation (meaning interference with) a human right may be an act of discrimination, which cannot, by statute, be harassment." (ET costs decision, paragraph 36)

71. Turning to the breach of contract claim, the ET considered that the claimant's representative appeared not to have appreciated that the question was whether the terms of the contract had been broken, not whether a protected characteristic was the reason why. Further noting that the second respondent had, in any event, offered the claimant the full contract fee, the ET reasoned:

> "40. … Payment of money is the remedy for breach, and if the money is offered in full there is nothing to gain from going to a hearing. She could still have a hearing of the other claims to obtain a declaration. On the claimant's case, she had lost not just performance fees, but also the opportunity of enhancing reputation by performing; the claimant's representative was unable to explain why even if he thought from March 2019 or in November 2019 that she would have performed the part, he should not have gone back to the second respondent to invite an increase in the offer to reflect this. This indicates the claimant's objective was not to get a remedy for breach of contract, but have a trial for its own sake, with the attendant publicity. By the time the claim reached a hearing, the fact that she now recognized she would not have played the part meant the contract claim was without value.
> …
> 42. The additional and disturbing feature on this part of the claim is the public pronouncement just before the hearing by Christian Legal Centre that the theatre was trying to stifle a finding on unlawful discrimination by offering to pay (it also said she had turned it down when in fact she had not replied). Legal advisers, though perhaps not a publicist, will have known that settling the contract claim would not compromise the discrimination claim, and that the offer expressly did not compromise anything but the contract claim. They must have had some input into or control of the publicity. Turning down the offer to settle in full so as to have days in court, when a hearing could achieve no more (in fact less) than the offer is vexatious if it was done not to get redress for the claimant for a broken contract but as part of a campaign. The reason is not known, but the result, with respect to the contract claim, is vexatious …."

72. The ET concluded that the threshold test was thus met as, in the light of facts known to the claimant the claims had no reasonable prospect of success. Even if the claim had had some prospect of success when it commenced, the conduct of the claim was unreasonable in not re-evaluating the case properly when the respondent's grounds of resistance were available.

73. Turning to the question whether it was appropriate to make an order for costs, the ET considered there had been a lack of communication between the claimant and her advisers and a lack of attention to the merit of the case being put. It also considered the claimant's approach to settlement offers was relevant:

> "… The costs letter discusses the merit of the claim, the lack of financial value, and whether taking the claim to hearing was likely to vindicate her position or have the opposite effect on her reputation, while still maintaining the unconditional offer to pay the performance fees. Had she re-evaluated the case properly at the beginning of November 2019 she should have recognised the weakness of the case, and she had the opportunity then to get out at no cost. … At that point the respondent was prepared not to seek costs if she withdrew, but the claimant pressed on. Even if she thought it was reasonable (despite the discussion of merits and the reference to Alice Walker's view) to go to a hearing to obtain a declaration of discrimination, it was not reasonable to refuse the offer of her fees, which had been on offer ever since her contract with the second respondent was broken. …." (ET costs decision, paragraph 50)

74. As for the claimant's ability to pay a costs award, the ET noted she had not provided any information about her means and had not attended the costs hearing (there was no application to adjourn). It considered the CLC, would have been able to advise the claimant of the need to give evidence about her means, and it did not agree with the suggestion that it should assume impecuniosity on her part, not least as her prospects might improve over time. More than that, however, the ET was satisfied that both the CCL and the CLC were deeply invested in bringing and continuing the claimant's claims, finding:

> "61. … Using the case as a publicity opportunity, rather than fighting it on its merits to redress wrong, transferred Christian Concern's public relations budget to the respondents.
> 62. … there must be a suspicion that Christian Legal Centre did not want to engage in close study of the respondents' case and revaluation of the merit of its own because of the campaigning opportunity. … We concluded that this did mean we should take their resources into account when exercising discretion to make a costs order. …"

Finding that this case was close to the facts of **Beynon v Scadden** [1999] IRLR 700, the ET rejected the argument that the introduction of the ability to make an award of wasted costs against a representative, pursuant to rule 80 schedule 1 **ET (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"), made any difference in this regard, continuing:

> "Rule 76 clearly covers the actions of representatives as well as parties. We well understand the claimant's point on the chilling effect of costs orders on an organisation's willingness to support cases in the public interest, but there has to be some restraint on the support of weak claims as a vehicle to promote a cause." (ET costs decision, paragraph 62)

75. Noting that it did not have evidence of the financial resources of the CCL or CLC, the ET nevertheless inferred that those organisations had access to substantial resources and it recorded that Mr Stroilov had suggested that, if there was an order against the claimant, one or both organisations would initiate a campaign for donations for her (ET costs decision, paragraph 63).

76. As for the amount of any award, the ET noted that specific costs had been incurred as a result of the false understanding of the claimant's evidence, but it did not consider that its order should thus be limited to any particular expenditure, finding:

> "65. … When the claimant started proceedings she may have viewed the case subjectively, and, stunned by events, failed to read the second respondent's letter, and felt injured by the rejection of her agent, the first respondent, and the imputation she had told a lie about Y Naija. But with the November 2019 offer she had the chance to end the litigation without cost, and independently of that, be paid the performance fees if she invoiced. By then she had a very detailed response from each, setting out large parts of the evidence relied on, as well as legal argument, and a letter inviting her to consider what she stood to gain from a hearing. She did not take that offer. She did not even reply to it. Nothing else in the litigation changed until the claimant prepared her witness statement, and nothing had 'evolved', as her representative put it, save that the claimant at last stated her understanding that the respondent was right about it being a lesbian role. If she, young, stunned and knowing little of the law, did not think about it, a responsible adviser would discuss what [the] case looked like when viewed objectively. That it was a lesbian role, as she eventually conceded, she and her advisers could have known if they had thought about the case properly in November 2019." (ET costs decision, paragraph 65)

77. In the circumstances, the ET concluded that the claimant should bear the whole cost of the respondents' defence, subject to detailed assessment.

Liability and Costs Appeals

The Relevant Legal Framework and Principles

The Equality Act Claims

78. Under domestic law, protection against certain forms of discrimination is provided by the **Equality Act 2010** ("the EqA"); protected characteristics under the **EqA** include religion or belief (section 4 **EqA**), which, by section 10, are defined (relevantly), as follows:

> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

79. Pursuant to section 3(1) **Human Rights Act 1998** ("HRA"), the ET (and EAT) must, so far as possible, give effect to domestic law in a way which is compatible with the **European Convention on Human Rights** ("ECHR"). In the present proceedings, reliance has been placed on articles 9 and 10 **ECHR**, which provide:

> Article 9 Freedom of thought, conscience and religion
> 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
>
> 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. …
> 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.

80. The rights thus expressed by articles 9 and 10 **ECHR** include the right *not* to hold a religious belief or practise, or *not* to practise a religion (**Burscarini v San Marino** (1999) 30 EHRR 208 at paragraph 34), and the freedom *not* to express (**RT (Zimbabwe) v Secretary of State for the Home Department (UN High Commissioner for Refugees Intervening)** [2013] 1 AC 152. As Lord Dyson MR opined in **RT (Zimbabwe)**:

> "42. … the right not to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and … the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. …
> 43. … it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. …"

And see per Lady Hale at paragraphs 50-53 **Lee v Ashers Baking Company Ltd and ors** [2018] UKSC 39, [2020] AC 413.

81. The domestic protections relied on by the claimant (so far as relevant to this appeal) were those provided by the **EqA** at sections 13 (direct discrimination) and 26 (harassment).

82. Section 13 defines direct discrimination, as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

83. Harassment is defined by section 26(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.

84. A comparison for section 13 **EqA** purposes must involve no material difference between the circumstances of each case (section 23(1)). Where no actual comparator has been identified the comparison may involve the construction of a hypothetical comparator, albeit the ET may (as in the present case) permissibly consider it appropriate to focus on *the reason why* the complainant was treated as she was (see **Shamoon v Royal Ulster Constabulary** [2003] UKHL 11, [2003] ICR 337).

85. In seeking to determine the reason why the respondents had acted as they had in the present proceedings, the ET noted that it needed to be careful "*not to confuse "but for" causation with an examination of the "reason why" treatment occurred*" (ET liability decision, paragraph 97). This distinction refers back to the reasoning of Lord Nicolls in the cases of **Nagarajan v London Regional Transport** [2000] AC 501 HL and **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 HL; as explained at paragraph 29 of **Khan**, as follows:

> "29… Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

86. A "*but for*" approach was adopted in **James v Eastleigh Borough Council** [1990] 2 AC 751, HL, where the discriminatory reason for the treatment complained of was inherent in the treatment itself (the rule in issue necessarily discriminated against men aged 60-65 in comparison to women of that age): no further inquiry was needed. Where that is not so, however, it is necessary to apply a subjective test to discern the mental processes (conscious or unconscious) that led the putative discriminator to act as they did; as Underhill P (as he then was) put the point in **Amnesty International v Ahmed** [2009] ICR 1450 EAT:

> "36. … the ultimate question is – necessarily – what was the ground of the treatment complained of … the reason why it occurred …"

87. Thus having regard to the mental processes of the alleged discriminator, it is important to distinguish between motive and reason; as Underhill P also observed in **Amnesty International**:

> "34. … the subject of the inquiry is the ground or, or reason for, the putative discriminator's action, not his motive … a benign motive is irrelevant. …"

And see **R (oao E) v Governing Body of JFS and ors** [2009] UKSC 15, per Lord Philips at paragraph 20 (and his framing of the relevant question, at paragraph 27), and Baroness Hale at paragraphs 64-66.

88. **Nagarajan**, **Khan**, **Amnesty International** and **JFS** were all cases determined under the **Race Relations Act 1976**, which required the treatment in issue to be "*on racial grounds*". The "*because of*" formulation now found in the **EqA** does not, however, alter that approach; see paragraph 61 of the **Explanatory Notes** to the **EqA** and the observations of Underhill LJ in **Onu v Akwiwu** [2014] ICR 571 CA (affirmed on different grounds by the Supreme Court at [2016] UKSC 31).

89. If the relevant protected characteristic is an operative reason why the alleged discriminator treated the complainant less favourably, it matters not that it is not the main reason; as Lord Nicholls made clear in **Nagarajan** (see p 513A-B), it is sufficient if the protected characteristic had a "*significant influence*" on the decision to act in the manner complained of, whether that influence was conscious or unconscious (pp 511A-512C). The protected characteristic must, however, be part of the reason for the less favourable treatment, it is not sufficient for it to simply be part of the context. As Underhill P held in **Amnesty International**:

> "37. … The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

And Linden J explained in **Gould v St John's Downshire Hill** [2021] ICR 1, EAT:

> "66. … the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied - but for the protected characteristic or step the act complained of would not have happened - and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. This point is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e.g. the cases on the distinction between dismissals related to *"conduct"* and dismissals for *"some other substantial reason",* such as *Perkin v St Georges Healthcare NHS Trust* [2006] 617 CA; and the cases in relation to public interest disclosures such as *Fecitt & Others v NHS Manchester (Public Concern at Work Intervening)* [2012] ICR 372 CA and *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500 EAT)."

90. Separating reason from context will be for the ET as the first instance, fact-finding tribunal, see per Simler LJ (as she then was) paragraph 56 **Kong v Gulf International Bank (UK) Ltd** [2022] IRLR 854 CA; albeit this may be an exercise that requires the ET to "*look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer*" is indeed the real explanation, per Elias LJ paragraph 51 **Fecitt & Others v NHS Manchester (Public Concern at Work Intervening)** [2012] ICR 372 CA.

91. **Kong** and **Fecitt** were both whistleblowing cases, but the approach is the same in the field of equality law; see **Martin v Devonshires Solicitors** [2011] ICR 351, and **Amnesty International**. The determination

of the real reason for the impugned conduct may require a carefully nuanced evaluation of the evidence. Thus, in some cases it may be found that the relevant protected characteristic was an operative cause of the less favourable treatment, notwithstanding an otherwise benign intent to thereby avoid workforce unrest (see **Din v Carrington Viyella Ltd** [1982] ICR 256, EAT (albeit, in **Din**, that question was remitted) and **R v Commission for Racial Equality, ex p Westminster City Council** [1985] ICR 827 CA); in others, although the protected characteristic in issue might have formed part of the relevant background to a decision taken in an attempt to resolve a workplace dispute, it might nevertheless be held not to have been a significant influence on that decision (**Seide v Gillette Industries Ltd** [1980] IRLR 427 EAT).

92. The distinctions in question have long been recognised in cases involving allegations of religion and belief discrimination, even allowing for the particular challenges that can arise, given that there will often be no clear dividing line between holding and manifesting a belief and it can thus be necessary to test whether the decision-taker's reason was in fact the complainant's religion or belief (as made manifest in some way) *or* its objectionable manifestation; see **Chondol v Liverpool City Council** [2009] UKEAT/0298/08; **Grace v Places for Children** UKEAT/0217/13; **Wastney v East London NHS Foundation Trust** [2016] ICR 643 EAT; **Page v NHS Trust Development Authority** [2021] ICR 941 CA; **Higgs v Farmor's School** [2023] ICR 89 EAT. More generally, the importance of distinguishing between that which forms part of the context, and that which is the operative reason, can be seen in **Lee v Ashers**, where Lady Hale held that the respondent's refusal to supply a cake with a political message iced onto it was less favourable treatment "*afforded to the message not to the man*" (paragraph 47): Mr Lee's political opinion was part of the context (it was why he commissioned the cake), but it was not the reason why the respondent refused to serve him.

93. The claimant's claim of less favourable treatment against the second respondent related to her dismissal and, as such, was brought under section 39(2)(b) **EqA**. This protection may be contrasted with that afforded by sub-section 39(2)(d), which prohibits discrimination by the employer by subjecting the employee "*to any other detriment*". Although, therefore, the claimant was not required to demonstrate that she had been subjected to "*any other detriment*" to show any discrimination was unlawful, it has been held that the definition of direct discrimination under section 13 **EqA** still connotes a need to show a comparative detriment by virtue of the requirement that the complainant has been treated "*less favourably*"; see **Keane v Investigo and ors** UKEAT/0389/09 at paragraphs 19-22, **Berry v Recruitment Revolution** UKEAT/0190/10 at paragraph 15,

and **Garcia v The Leadership Factor** [2022] EAT 22 at paragraph 48. The point being made in **Keane**, **Berry**, and **Garcia** was that an applicant for a job in which they in fact had no interest could not sensibly complain of having been treated "*less favourably*" if refused the appointment, even if that was because of a relevant protected characteristic. Those cases were brought under section 39(1)(a) of the **EqA** (and the relevant predecessor provisions of the legacy enactments), relating to the arrangements made for deciding to whom to offer employment, but it is not suggested that there is any material distinction in respect of a claim under section 39(2)(c).

94. The same points arise under section 55 **EqA**, which prohibits discrimination by employment service-providers such as the first respondent. To the extent that the claimant was complaining of the termination of the provision of the first respondent's agency service, her claim fell under section 55(2)(c) **EqA**; otherwise her claims fell under subsection 55(2)(d), as subjecting her to "*any other detriment*". In either case, the claimant needed to demonstrate that she had suffered a detriment or treatment that could properly be described as less favourable (as to which, see the points made relating to section 39, above).

95. As for whether a complainant has suffered a detriment, it has been held that this will exist:

> "… if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment" **MoD v Jeremiah** [1980] ICR 13 CA, at p 31

There is, however, a distinction between the question whether treatment is less favourable and whether it has damaging consequences; **Khan** at paragraph 52;

Moreover:

> "… an unjustified sense of grievance cannot amount to 'detriment'" **Shamoon** at paragraph 35 (see also **St Helens MBC v Derbyshire** [2007] UKHL 16)

96. By paragraph 1 of schedule 9 **EqA**, it is provided that liability under (relevantly) section 39(2)(c) will not arise where a person ("A") applies:

> (1) … in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work— (*a*) it is an occupational requirement, (*b*) the application of the requirement is a proportionate means of achieving a legitimate aim, and (*c*) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

97. There must thus be a requirement to have a particular protected characteristic; but this cannot be for purely subjective considerations: see **Bougnaoui and anor v Micropole SA** [2018] ICR 139 ECJ, where it was held that the requirement must be one that is:

> "40. … objectively dictated by the nature of the occupational activities concerned or of the

> context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the wishes of the customer."

98. As for the claimant's claim of harassment, section 26 **EqA** requires that the conduct must: (i) be unwanted; (ii) be "*related to*" the relevant protected characteristic; and (iii) have either the proscribed purpose or the proscribed effect.

99. In determining whether the conduct is "*related to*" the protected characteristic in issue, whilst of potentially very broad application, this still requires there to be some feature of the factual matrix identified by the ET which has led it to the conclusion that the conduct is related to that protected characteristic (paragraph 25 **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor** [2020] IRLR 495 EAT). That will not extend to the acts of third parties for whom the respondent would not otherwise be vicariously liable: **Unite the Union v Nailard** [2019] ICR 28 CA.

100. In the present case, there is no appeal against the ET's finding that neither respondent had the requisite purpose under either section 26(1)(b)(i) or (ii) **EqA**. The question is whether the ET erred in finding that the conduct in issue (in either case) did not have the required *effect*. In this regard, section 26(4) provides:

> "In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

101. In **Pemberton v Inwood** [2018] ICR 1291, Underhill LJ provided guidance in relation to the application of section 26(4), as follows:

> "88. … In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

102. Although Underhill LJ's observations in **Pemberton** were strictly *obiter*, they have been followed and applied by the EAT in **Ahmed v The Cardinal Hume Academies** UKEAT/0196/18, in which Choudhury P confirmed that the question whether it is reasonable for the impugned conduct to have the proscribed effect "*is effectively determinative*" (see paragraphs 36-39).

103. As for the relevant effect, the case-law has made clear that the language used - "*violation of dignity*" and "*intimidating, hostile, degrading, humiliating, or offensive*" – is significant:

> "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." (per Elias LJ **Grant v HM Land Registry** [2011] EWCA Civ 769 at paragraph 47)

> "The word 'violating' is a strong word. Offending against dignity, hurting it, is insufficient. 'Violating' may be a word the strength of which is sometimes overlooked. The same might be said of the words 'intimidating' etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence." (per Langstaff P **Betsi Cadwaladr University v Hughes** UKEAT/0179/13 at paragraph 12)

104. For the claimant, it is urged that "*dignity*" is a concept imported from European human rights law. Article 1 of the **European Charter of Fundamental Rights** states that "*Human dignity is inviolable. It must be respected and protected*", and the case-law of the European Court of Human Rights makes clear that dignity underlies **ECHR** rights (see paragraph 65 **Pretty v United Kingdom** (2002) 35 EHRR 1, where it was emphasised that: "*The very essence of the Convention is respect for human dignity and human freedom*"). It is the claimant's case that it necessarily follows that an unjustified interference with a right under the **ECHR** must amount to a violation of dignity for the purposes of article 2.3 of **EU Directive 2000/78/EC** ("the Framework Directive"), which defines "*harassment*" and which was transposed into domestic law by section 26 **EqA**, which (in turn) must be interpreted purposively (and as required by section 3 **HRA**) to similarly require that an unjustified interference with a right under the **ECHR** is encompassed by section 26(1)(b)(i).

105. It is not clear to me that this is a point that can arise in the present case. First, unless the claimant can demonstrate that the ET erred in its conclusions on her claims of direct discrimination, I am unable to see that she can make good her argument that there has been an unjustified interference with her rights under articles 9 or 10 **ECHR**. Second, to the extent that the claimant is successful in her challenge to the decision on direct discrimination detriment, no claim of harassment would arise in respect of the conduct in question (section 212(1) **EqA**). In any event, I am not persuaded that the claimant is right in her contention that every unjustified interference with a right under the **ECHR** must necessarily be treated as harassment for section 26 **EqA** purposes, not least as that would: (i) fail to give meaning to the statutory language, in particular the need for a violation of dignity; (ii) ignore the discretion afforded under article 2.3 of the **Framework Directive**, such that "*the concept of harassment may be defined in accordance with the national laws and practice of the Member States*"; and (iii) suggest, absent any prescription under domestic or international law, that section 26 is required to be a means of enforcement of rights under the **ECHR** for these purposes.

106. As for the requirement that the environment must be created by the conduct in issue, that suggests a focus on what caused the environment to begin to be as it was; per Langstaff P paragraph 27 **Conteh v Parking Partners Ltd** [2011] ICR 341 EAT. In **Conteh**, the EAT considered what this might mean where the environment in issue was initially created by the conduct of a third party, holding as follows:

> "28. … 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. The extent to which the employer had by his actions assisted in that process of creation would be relevant when one came to the question of compensation, but not for the purposes of liability. 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 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 will 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 as 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.
> 30. The "unwanted conduct", as it seems to us, therefore can (but not necessarily will) include inaction: but that conduct has to be taken on the grounds of race or ethnic or national origins if it is to create the hostile environment and thereby come within the heading of harassment. …"

Breach of Contract

107. The claimant also pursued a claim for breach of contract against the second respondent. In general, damages in such a claim will be assessed according to the principle that the party who has suffered loss as a result of the breach is, so far as money can do it, to be placed in the same situation as if the contract had been performed (per Parke B in **Robinson v Harman** (1848) 1 Ex 850 at p 855). As such, the normal measure of damages for breach of a contract of employment will be limited to the amount the employee would have earned under that contract for the period until the employer could lawfully have terminated it. If, however, the contract contains an obligation (express or implied) that the employee should also be given an opportunity of publicity or to enhance their reputation as a performer, damages may be awarded in respect of that loss; **Herbert Clayton and Jack Waller Ltd and ors v Oliver** [1930] AC 209 HL.

108. In any event, where an employee has acted in repudiatory breach of contract, such that it would be open to the employer to accept that repudiation and terminate the employment summarily, that will provide a defence to a claim for contractual damages for early termination even if the employer was not aware of the

repudiatory conduct at the time of the dismissal (**Boston Deep Sea Fishing Co v Ansell** (1988) 39 ChD 339). If the breach in issue is of the implied obligation not, without reasonable and proper cause, to act in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (**Malik v BCCI** [1998] AC 20 HL; **Baldwin v Brighton & Hove CC** [2007] ICR 680), that will necessarily go to the root of the contract and amount to a repudiatory breach (see **Morrow v Safeway Stores plc** [2002] IRLR 9 EAT). Whether such a breach has occurred will always be highly context-specific; the question is ultimately whether:

> "looking at all the circumstances objectively, … the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract", per Etherton LJ at paragraph 61 **Eminence Property Developments Ltd v Heaney** [2020] EWCA Civ 1168

And see per Maurice Kay LJ at paragraphs 20-21 **Tullett Prebon plc v BGC Brokers** [2011] IRLR 420 (emphasising that this will be a question of fact for the judge at trial, see per Singh LJ paragraph 61 **London Borough of Lambeth v Agoreyo** [2019] EWCA Civ 322, [2019] ICR 1572).

109. Breaches of other terms may, however, require the ET to grapple with the question whether the breach goes to the root of the contract such that it makes further performance impossible (**Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 2 QB 26 CA).

Costs

110. In proceedings before the ET, costs do not simply follow the event and orders for costs are "*not the norm*" (see paragraph 10.8 **ET Presidential Guidance on General Case Management: Guidance Note 5**). By rules 74-84 of the **ET Rules**, however, the power to make awards of costs is afforded to the ET in specified circumstances. By rule 76 it is provided (relevantly):

> (1) A Tribunal may make a costs order …, and shall consider whether to do so, where it considers that— (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success; …

111. A costs order may be made on the ET's own initiative or on the application of a party (made up to 28 days after the promulgation of the final judgment determining the proceedings), provided the proposed paying party has been given a reasonable opportunity to make representations (rule 77). The order may be for a specified amount not exceeding £20,000, in respect of the receiving party's costs, or for the whole or a specified

part of that party's costs, determined by way of a detailed assessment (rule 78). By rule 84, it is provided that:

> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

112. Although there is no requirement to complete such a form in ET proceedings, at paragraph 46 **Oni v NHS Leicester City** UKEAT/0144/12, it was suggested that completion of the County Court debtor's form might be a useful way for a proposed paying party to provide relevant information as to their ability to pay. Rule 84 is, however, permissive: the ET *may* have regard to a paying party's means but is not required to do so. Notwithstanding the discretion thus permitted, as the ability to pay might go to the exercise of the ET's discretion to make a costs award, it has been held that, if it is decided not to take means into account, the ET ought to explain why, see **Jilley v Birmingham & Solihull Mental Health NHS Trust** UKEAT/0584/06.

113. Rule 76 relates to a costs order made against a party. By rule 80, however, the ET is also given the power to make a wasted costs order against a representative in favour of any party.

114. Although the ET thus has the ability to make a wasted costs order against a representative, under rule 76 the principle still remains that a party may themselves be liable in costs because of the way their representative has conducted the proceedings. That is apparent from the wording of rule 76, but was also expressly found to be a proper basis for a costs award in the case of **Beynon and ors v Scadden and ors** [1999] IRLR 700, where the EAT upheld such an award where proceedings were supported by the claimants' trade union with a collateral purpose in mind, when it should have been apparent to the union that the claims had no reasonable prospects of success.

115. In rejecting the appeal in **Beynon**, the EAT further made clear that the ET had not erred by taking account of the means of the trade union in making the order against the individual claimants, ruling (after having reviewed the relevant authorities), as follows:

> "24. … that general review of the authorities provides, in our view, no reason for disturbing the chairman's exercise of the unfettered discretion conferred upon him. He took into account Unison's means and involvement but it was not necessarily wrong to have done so. He did not overlook the applicants' means; he specifically refers to no evidence on the subject being produced to him. Even if he had not had their means in mind it would not necessarily have been wrong not to have considered them. … Further, and very materially, the chairman had grounds for a fair inference that the union was pursuing not merely hopeless cases but was doing so with the collateral purpose of achieving the union's recognition, even perhaps as an alternative to the litigation. There was, we add, no evidence given to the employment tribunal or that the applicant-employees could not severally or jointly afford the costs. … the employees produced no evidence of means but it was said that all were still in employment. ... No adjournment, it seems, was sought in order that any such evidence could be adduced. Nor was it said that the union would not pay the individual applicant's costs if the applicants were ordered to pay costs but only that no indemnity had been given. The chairman's expectation

> that Unison would pick up the tab has not been said to be groundless; [counsel for Unison] …, on instructions, was not able to tell us whether or not the union would pick it up (although his argument, that we shall come to below, that the order was tantamount to a wasted costs order, was surely premised upon a view that it would). True it is that the chairman took into account both the actions and motives of the union and the fact that it is a very large union with substantial means but nothing in [the] rule … outlaws such considerations and the authorities, properly regarded, not only do not, but could not, fetter the discretion conferred by the legislature. …"

116. In **Beynon**, the EAT expressly rejected the submission that the ET's order was effectively a wasted costs order "*by the back door*", observing:

> "25. … It is no such thing; under a wasted costs order a non-party is either disallowed costs or is ordered to pay them, neither of which results obtains here."

117. The ET has a broad discretion as to both the decision to make an award of costs and the amount of such an award. The purpose of a costs order is, however, purely compensatory: questions of punishment are irrelevant both to the exercise of the discretion whether to award costs and to the nature of the order that is made (**Beynon** paragraph 31). That said, when making a costs order on the ground of unreasonable conduct, the ET's discretion is not fettered by the requirement to precisely link the award to specific costs incurred as a result of that particular conduct (**McPherson v PNP Paribas (London Branch)** [2004] EWCA Civ 569, [2004] ICR 1398; **Sunuva Ltd v Martin** UKEAT/0174/17), although that is not to say that questions of causation are to be disregarded, as Mummery LJ stated in **Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ 1255, [2012] IRLR 78:

> "41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had. …"

The Approach of the EAT

118. In considering the reasoning of the ET, I remind myself of the guidance provided by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021 IRLR 1016 at paragraphs 57-58, as follows (I summarise): (1) the decision is to be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical (an ET is not sitting an examination; see per Singh LJ paragraph 42 **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, [2021] IRLR 159); (2) the ET is not required to identify all the evidence relied on in reaching its conclusions of fact, nor express every step of its reasoning in any greater degree of detail than that necessary to be **Meek**-compliant (**Meek v Birmingham City Council** [1987] EWCA Civ 7, [1987] IRLR 250); (3) it should not be inferred that a failure to refer to

evidence means that it did not exist, or was not taken into account: what is out of sight in the language of the decision is not to be presumed to be out of mind; (4) when an ET has correctly stated the legal principles, an appellate court should be slow to conclude that it has not applied those principles, and should generally only do so when it is clear from the language used that a different principle has been applied to the facts found – a presumption that ought to be all the stronger where the decision is that of an experienced, specialist tribunal, applying very familiar principles whose application forms a significant part of its day-to-day judicial workload.

119. In considering appeals from decisions of the ET, the jurisdiction of the EAT is limited to questions of law (section 21 **Employment Tribunals Act 1996**). In thus determining what is properly open to challenge by way of appeal to the EAT, I bear in mind the observations of Singh LJ in **London Borough of Lambeth v Agoreyo** [2019] ICR 1572 at paragraphs 62-68, and remind myself of the approach recommended by Lord Hoffman in **Biogen Inc v Medeva plc** [1997] RPC 1:

> "45. … The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. … Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

And see per Lewison LJ paragraphs 114-115 **Fage UK Ltd v Chobani UK Ltd** [2014] EWCA Civ 5.

120. As for the approach to be taken on appeals against costs awards made in the ET, as Mummery LJ observed in **Yerrakalva**:

> "7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.
> 8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. …
> 9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will

> ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."

The Liability and Costs Appeals and the Cross-Appeals

The Claimant's Case

121. By her first two grounds of appeal on liability, the claimant contends that the ET erred in its approach to the direct discrimination claim, failing to distinguish between *motives* and *reasons* (a benign motive being no defence; **Amnesty International**; **Din**; **JFS**). She further says that this error infected the ET's costs decision: it was reasonable for her to argue that the respondents' commercial, managerial, and artistic considerations went to motive rather than reason; the suggestion that she had confused "*reason why*" with "*but for*" causation showed a basic misunderstanding by the ET.

122. The claimant points out this was not a case where the detrimental treatment was held to be because of the manner of her manifestation of her beliefs; she says, the ET ought to have held that the treatment was because of her straightforward expression of protected beliefs. That was the reason for the "*storm*", and her maintenance of her views prompted the termination of both contracts: for all the respondents were motivated by pragmatic and commercial considerations, they took the steps they did because they saw her views as incompatible with her continued engagement. For the second respondent: the director's concern was "*because of the claimant's belief*"; the controversy of which audiences were aware was "*because of the actress's views*"; and the reason why there was an ongoing problem was because she maintained her protected beliefs: "*There was no way to stem the tide unless she could make a convincing statement to allay the vocal objections, and she could not*" (ET liability decision, paragraph 106). As for the first respondent: the risk of damage "*by association*" meant association with the claimant's beliefs; the reason there was an ongoing problem was because she "*had made her view public and had stood by it*"; and the first respondent felt it needed to act to "*disassociate itself from the claimant's public views*" (ET liability decision, paragraphs 110 and 112).

123. In addition, as part of the challenge to the costs decision, it is contended the ET erred in finding it was unreasonable for the claimant to argue that the case of **Eweida v UK** [2013] ECHR 37 had overruled domestic case-law on comparators (ET costs decision, paragraph 35). More generally, the prominence given to the claimant's admission, that she would not have played the role of Celie as a lesbian, was inconsistent with its

treatment of that issue at the liability stage, the ET not having accepted the argument that she had suffered no detriment or less favourable treatment. Ultimately this could only have gone to quantum; the ET wrongly made an order in respect of *all* costs.

124. The claimant's third and fourth grounds of appeal on liability relate to the ET's determination of her harassment claims. Again, she also pursues related appeals relevant to the decision on costs.

125. By the third ground of challenge on liability, the claimant contends the ET misdirected itself when assessing whether it had been reasonable for the treatment to have had the effect that it (subjectively) had had. By section 26(4)(b) **EqA**, the ET was required to have regard to the "*other circumstances of the case*"; thus to recognise that, in different factual contexts, the same action may or may not give rise to the requisite effect (**Richmond v Dhaliwal** [2009] ICR 724, paragraph 15; **Grant v Land Registry**, paragraph 13). In the present case, the context was the vicious social media campaign against the claimant; seeing the respondents' decisions in that context, she had reasonably perceived their actions as betrayal. Moreover, where a hostile environment already exists, the actions of an employer can make things worse (**Conteh**, paragraphs 28-30); here, the respondents' actions had a significant effect on the public campaign. Relatedly, the claimant says the ET erred in its decision on costs, in finding that the harassment claim had no reasonable prospect of success: her argument was not "*misconceived*".

126. The claimant's fourth ground of appeal asserts that the ET erred in rejecting her argument that a violation of her **ECHR** rights necessarily amounted to a violation of dignity for the purposes of section 26 **EqA**: not only did the ET mischaracterise her case, but its interpretation and application of section 26 was not compatible with her **ECHR** rights (contrary to sections 3 and 6 of the **Human Rights Act 1998** ("HRA")). The claimant notes there is no clear definition of "*dignity*" in domestic law and says the case law goes little beyond cautioning against finding a violation of dignity too lightly (**Richmond v Dhaliwal**). "*Dignity*" was a concept imported from European human rights law (article 1 of the **EU Charter of Fundamental Rights**), and "*human dignity*" underlies **ECHR** rights (**Pretty v United Kingdom** (2002) 35 EHRR 1, at paragraph 65; **SW v United Kingdom** (A/355-B) (1996) 21 E.H.R.R. 363, at paragraph 44; and the Advocate-General's analysis in **Omega Spielhallen und Automatenaufstellung Gmbh v Oberburgermeisterin der Bundesstadt Bonn** [2004] ECR I – 9609, at paragraphs 74-91); a violation of **ECHR**/**Charter** rights thus amounts to a violation of dignity under article 2(3) of **Framework Directive**, as transposed by section 26

EqA, which must be purposively interpreted consistent with EU jurisprudence. Moreover, in finding her argument was "*misconceived*" (see the ET's costs decision), the ET had misinterpreted the claimant's case: she was not saying *any* interference with **ECHR** rights amounted to a violation, but an *unjustified* interference would; the ET had also wrongly characterised article 14 **ECHR** as being "*about discrimination*" in general terms, rather than unequal respect for **ECHR** rights.

127. The remaining grounds of appeal on liability relate to the ET's decision on the claimant's breach of contract claim. By the fifth ground (originally ground 6), she says the ET misdirected itself in respect of the second respondents' allegation of a repudiatory breach of contract, by having regard to (a) her omissions (to read the script/raise issues with the second respondent) *prior* to entering the contract; and (b) her "*red line*", which might have led to breach of the contract in the future: only acts or omissions during the life of the contract were capable of amounting to a repudiatory breach; there was no contractual requirement to read the script from 10 January 2019 to 21 March 2019, or to be proactive in discussing the interpretation of the play. Alternatively, by her sixth ground of appeal (previously ground 7), the claimant says the ET failed to consider whether any breach was sufficiently serious to amount to a repudiatory breach: any contractual failure to read the script between January and March 2019 did not demonstrate an intention, objectively judged, to abandon and altogether refuse to perform the contract (**Tullett Prebon**). In any event, it was for the second respondent to give an adequate job description and properly assess the claimant's suitability for the role, but, prior to the dismissal, it failed to notify her that the lesbian romance was a non-negotiable aspect of the production. Finally, by her seventh ground of appeal on liability (previously ground 8), the claimant relies on these points in respect of the finding that she committed a repudiatory breach of contract with the first respondent.

128. Relatedly, the claimant challenges the ET's costs decision insofar as that relates to her breach of contract claim, contending it erred in holding this was unreasonable or vexatious, failing to take into account: (i) damages for breach of contract between a theatre and an actor can include reputational damage (**Herbert Clayton**); (ii) pursuing a claim to resolve a point of principle or achieve vindication was not vexatious; (iii) the implication of its decision was that (despite knowing she would ultimately not play the role) the claimant was unreasonable in declining the offer to pay the fee; and (iv) (regarding the first respondent) that an action taken in breach of contract could not be "*prescribed by law*" under articles 9 or 10 **ECHR**.

129. The claimant also pursues a stand-alone ground of appeal against the ET's decision on costs,

contending it erred in assuming she would be able to use the resources of her *pro bono* representatives (the CLC or the CCL) to pay any costs; the CLC's, or CCL's, ability to pay was not a relevant consideration, and there was no basis for the inference that those organisations were driving the litigation and/or doing so for an improper purpose, or that either would pay any award of costs; the case of **Beynon** was plainly distinguishable and should not be used to circumvent the stringent test for wasted costs under rule 80(1)(a) **ET Rules**.

The Case for the Second Respondent

130. In addressing the first two grounds of appeal on liability, the second respondent accepts that the ET's decision did not depend on a distinction between a belief and its (manner of) manifestation; rather, it found the reason for the second respondent's treatment of the claimant was neither her belief nor its manifestation (nor manner), but the effect of the adverse publicity (specifically holding that Mr Stafford's views about the claimant's beliefs did not affect his decision). The reason for the treatment was thus separable from the protected characteristic, and was not a "*motive*". This was a finding of fact, against which there was no perversity challenge. In so finding, the ET clearly had the relevant test well in mind, correctly directing itself of the need to identify the reason for the treatment. It found the essential context of the decision to dismiss was not the claimant's Facebook post (as tweeted by Mr Lambert) but "*the speed and savagery of the social media storm on the back of the Lambert tweet*"; whilst, at a further remove, the expression of belief formed part of the relevant context in which the decision was taken, the ET rightly recognised that was not enough to establish that the belief (or its manifestation) was the reason why she was dismissed (**Amnesty International; Gould**). Its decision was in line with authority confirming the legitimacy of a distinction between a protected characteristic and a real reason which, although linked in some way with that characteristic, is to be regarded as properly separable from it (see, e.g., **Page**; **Chondol**; **Wastney**; **McFarlane v Relate Avon Ltd** [2010] IRLR 196; **Grace v Places for Children**). The distinction was a question of fact and judgement for the ET (**Martin v Devonshires**). More particularly (per **Fecitt**), the need to resolve a difficult and dysfunctional situation may provide a lawful explanation for detrimental treatment: the need for resolution being the reason for the treatment. In such circumstances, the **Higgs** proportionality assessment was not required but, if it had been, the ET's answer was clear, given it had found justification was made out on the claim of indirect discrimination. In the alternative, the second respondent would argue **Higgs** was wrongly decided.

131. As for the claimant's challenge to the ET's costs decision in relation to direct discrimination, that was largely parasitic on the first and second grounds of the liability appeal and should fail for the same reasons. In addition, the ET had not erred in its characterisation of the claimant's reliance on **Eweida**: the claimant had asserted that the case-law on comparators had been "*superseded by **Eweida***", but ECtHR judgments do not overrule domestic law, and, in any event, **Eweida** was not a decision of the Grand Chamber and did not form part of "*a clear and constant line of decisions*" (per Lord Neuberger, paragraph 48 **Pinnock v Manchester City Council** [2011] 2 AC 104).

132. Turning to the third ground of appeal, relating to the rejection of the harassment claim. The second respondent says the ET's reasons demonstrated it had well in mind: (i) the context in which the respondents' decisions were taken and (ii) the claimant's perception that she had been betrayed. It did not find, however, that the respondents had created the hostile environment, and a sense of hurt or betrayal was not an environment (**Pemberton v Inwood** [2017] ICR 929 EAT, paragraph 111). The respondents were not liable for the actions of third parties (**Unite v Nailard**) and an environment was not created by the mere continuation of an existing state of affairs (**Conteh**, paragraphs 27-29). Here the ET permissibly found as a fact that the claimant's perception was not reasonable. There was no perversity challenge to that finding (which would be bound to fail). Similarly, the costs appeal in this regard was also without merit: the circumstances of the case were such that the complaint of harassment was hopeless.

133. As for the fourth ground of appeal, the second respondent says the ET did not mischaracterise the claimant's case, which was based on the non-sequitur that, because **ECHR** rights are concerned with the protection of dignity, any violation of a right under the **ECHR** would necessarily entail a violation of dignity. This proposition was unsupported by authority and required that any unjustified interference with a right under the **ECHR** (however trivial) must automatically amount to harassment; such an automatic theory of harassment was at odds with the language of section 26 **EqA** (adopting the definition provided by the **Framework Directive**) and how that had consistently been interpreted (e.g., **Pemberton v Inwood** CA, paragraphs 75 and 88). Not every unjustified breach of a right under the **ECHR** would violate dignity (see how those words are to be understood: **Grant v Land Registry**; **Betsi Cadwaladr v Hughes**) and there was no requirement that the protection of contended **ECHR** rights be provided through a claim of harassment (the reliance on section 3 **HRA** was thus misplaced). In any event, on the ET's findings, there was no interference with the claimant's

ECHR rights, alternatively any such interference was prescribed by law and was proportionate. Relatedly, the challenge to the ET's decision on costs in this regard should fail for the same reasons.

134. Addressing the fifth and sixth grounds of appeal (formerly grounds 6 and 7), the second respondent contends that the ET's findings plainly related to the claimant's conduct *during* the lifetime of the contract and were unimpeachable. As for holding that her breach was repudiatory, that was a finding of fact which had not been challenged on perversity grounds, and could not have been: the claimant was in breach of the implied duty of mutual trust and confidence, which was inevitably repudiatory (**Morrow v Safeway**); and the express terms that had breached were of a similar nature, or (to the extent that these were intermediate/innominate terms) the nature and consequence of the breach was such as to render it repudiatory (**Hongkong Fir**). As for the ET's costs decision relevant to the breach of contract claim, it had been alive to the claimed head of loss (reputational damage), but the claimant had never explained how the alleged breach (termination without notice) damaged her reputation, there was no evidence of reputational damage (see **Malik v BCCI**, at p 41F), and the ET had found that, if there was any damage to the claimant's reputation, it was caused by third parties. The claimant's case was different to **Herbert Clayton**: she could not complain of her reputation being harmed by loss of the chance to perform a role that (on her own case) she would never in fact have performed. As for the contention that the claimant was entitled to pursue her claim as a point of principle: offered the full contract sum she had chosen not to invoice for it but, instead, to bring a claim for the same sum, while her advisers made a public statement that the offer to pay the contract sum was to stifle her discrimination claims; the ET was entitled to distinguish this from the proper pursuit of litigation on a point of principle.

135. Separately, on the challenge to the ET's costs decision on the basis that it had improperly had regard to the resources of the CLC and/or CCL, the second respondent says this is academic, as the ET exercised its discretion not to take account of the claimant's ability to pay. In any event, the ET had a broad discretion (per **Beynon**) and was entitled to have regard to the role played by the CLC and CCL in the litigation.

136. The second respondent also pursues two grounds of cross-appeal, contending the ET erred: (1) in failing to find that the claimant's dismissal was not less favourable treatment; and (2) (contingent on the claimant succeeding in her appeal on direct discrimination) in failing to find that a discriminatory dismissal would nevertheless have been lawful because of the application of the OR defence provided by paragraph 1 of schedule 9 **EqA**.

137. Addressing the first ground of cross-appeal, the second respondent relies on the case it pursued before the ET that, when faced with the outcry to the public exposure of her Facebook post, the claimant deliberately chose to be dismissed by the second respondent; as such, she could not demonstrate less favourable treatment (**Keane**; **Garcia**). The test in this regard was objective, the claimant's mere belief (even if honestly held) was insufficient (**Burrett v West Birmingham Health Authority** [1994] IRLR 7). Even if not characterised as a choice, the question whether dismissal was less favourable treatment required consideration of all the circumstances (by analogy with the approach to detriment; see **Shamoon**, paragraph 35), which would include the fact that the claimant was dropped from a role she would not have wished to play and it would have been more damaging for her if she had left voluntarily at a later stage.

138. Turning to the OR argument raised by the second ground of cross-appeal, the second respondent contends that the defence would apply to the manifestation of a belief, and that it was an OR that the actor playing Celie, in the circumstances existing in March 2019, should not have engaged in the manifestation of belief as the claimant had done by her Facebook post. It is further submitted that the application of this OR was a proportionate means of achieving a legitimate aim (as the ET had found, by analogy, in respect of the second respondent's defence of justification to the claimant's claim of indirect discrimination).

The Case for the First Respondent

139. In respect of the first four grounds of appeal (direct discrimination and harassment), and all grounds relating to the costs appeal, the first respondent adopts the submissions of the second. In relation to the specific claims against the first respondent, it was emphasised that, in concluding that the reasons for termination of the agency contract were truly separable from the claimant's protected characteristic – the genuine belief that she had acted in breach of contract, and the effect of continued association with her on other clients, employees, and the survival of the business – the ET had answered the "*reason why*" question. None of those separable matters were motives; they formed the reason itself. To the extent it might have been said that the ET had been required to undertake a proportionality assessment (per **Higgs**) – albeit the claimant had rightly accepted that **Higgs** did not apply to the facts found by the ET – the first respondent also relied on the findings made on the indirect discrimination claim, and further developed submissions as to why **Higgs** was wrongly decided.

As for the harassment grounds, the ET had made findings of fact that could not be challenged: the claimant had identified no misdirection by the ET, other than reaching a conclusion with which she disagreed.

140. Turning to the seventh ground of appeal (previously ground 8), the first respondent observes that the claimant's sole purpose of advancing a breach of contract case against it was to suggest that any interference with her rights under article 9 **ECHR** was not "*prescribed by law*" in accordance with article 9(2) (no separate contract claim was pursued against the first respondent). As, on the ET's findings (see points already made on direct discrimination/harassment, above), there was no interference with the claimant's article 9 rights, this point was academic and/or misconceived.

141. In resisting the liability appeal, the first respondent further advances two grounds of cross-appeal/alternative grounds for upholding the decision: (1) that the ET ought to have found that there was no less favourable treatment; and (2) that it was required to construe the provisions of the **EqA** so as to respect the first respondent's rights under articles 9 and 10 **ECHR** and avoid forced speech.

142. In relation to the first ground of cross-appeal, the first respondent adopts the submissions of the second, but also makes the following points specific to its position. First, there was no less favourable treatment because the claimant was in repudiatory breach of the agency contract, which, in any event, could give her nothing of value as there was no realistic prospect of it leading to work (the claimant conceded she had no prospect of obtaining work for "*an initial period*"). Second, the first respondent's evidence was that it would have behaved in the same way to a client who made comments adverse to Christians with similar consequences.

143. As for the second ground of cross-appeal, the first respondent points out that, as a theatrical agency, it was contractually required to *promote* the claimant; as the ET accepted, it was hard to see how the first respondent could dissociate itself from the claimant's public views. The first respondent's rights under articles 9 and 10 **ECHR** included, however, the right *not* to hold a religious belief or practice or *not* to practice a religion (**Burscarini**; **Commodore of the Royal Bahamas Defence Force v Laramore** [2017] 1 WLR 2752) and the freedom *not* to express (**RT (Zimbabwe)**). Pursuant to section 3 **HRA** 1998, the ET was bound to construe the **EqA** so as to accord with these rights and it should not be construed so as to force compelled speech; see per Baroness Hale at paragraphs 55 and 62 **Lee v Ashers**.

The Claimant's Response to the Respondents' Cross-Appeals

144. On the question of less favourable treatment (a ground of cross-appeal for both respondents), the claimant says the ET made findings of fact supporting its conclusion that she suffered a detriment (and, thus, less favourable treatment). Whether an alternative course might have had less adverse consequences was not the point; it was sufficient that she could reasonably say she would have preferred not to have been treated that way (per Lord Hoffman paragraph 52 **Khan**; and, to similar effect, paragraph 3.5 **ECHR Code of Practice**).

145. As for the second respondent's reliance on the OR defence, this would inevitably have failed. Paragraph 1(1) schedule 9 **EqA** requires the OR to be a requirement to have a particular protected characteristic but the OR advanced by the second respondent did not do that. In any event, the argument was contradicted by the second respondent's case on direct discrimination: if the claimant's retraction of the views expressed in her Facebook post meant she could have kept the role, the fact she had once manifested those views could not amount to an OR. Additionally, the justification relied on by the second respondent related to the (subjective) views of others; it would not meet the requirement that the OR be "*objectively dictated*" (**Bougnaoui**).

146. Finally, in relation to the first respondent's compelled speech objection, the claimant contends that a finding of direct discrimination against the agency did not mean it would thereby be forced to express or support her views. The services provided by the first respondent (which, as a limited company, did not have article 9 rights, per Lady Hale **Lee v Ashers** at paragraph 57) did not include promoting the claimant's religious beliefs (and see the distinction made in **Lee v Ashers** at paragraph 47).

Liability and Costs: Analysis and Conclusions

The Liability Decision – Appeal and Cross-Appeals

147. The ET in this case was faced with an unusual factual matrix: the claimant was complaining that her dismissal from the role of Celie in the stage production of *The Color Purple* amounted to discrimination and/or harassment because of/related to her beliefs, and was in breach of contract; she was, however, also clear that, after reading the script, she would not in fact have played the role. As the ET found, in contrast to the 1985 film, the stage production of *The Color Purple* more clearly presents the relationship between Celie and Shug as one that is sexual. That gave rise to a difficulty for the claimant as it crossed a red line for her as an actor: she would not play a lesbian role. That was not something known by the theatre that had employed her to play

Celie (the second respondent), and her agent (the first respondent) was content to leave it to the claimant to determine what roles she would, or would not, play. Equally, however, although the claimant had previously performed the role of Nettie in a stage production of *The Color Purple*, as at the time of the decisions the ET was concerned with, she had neither read the script nor engaged with how that production (in contrast to the film) portrayed the relationship between Celie and Shug. The claimant's position had changed by the time of the ET hearing, by when she had seen the open letter from the author, Alice Walker (making clear that the stage production was true to the novel), and read the script; but the claims before the ET related to decisions and actions taken at a time when the claimant still thought she would be able to play the role.

148. For the respondents, it is said that the fact of the claimant's red line meant she never suffered any less favourable treatment. By analogy with cases concerned with applications for jobs that the putative candidate never wished to take up (**Keane**; **Berry**; **Garcia**), the claimant could not sensibly complain of having been treated "*less favourably*" because she could ultimately have no interest in the role of Celie in the production in question. The ET rejected that argument, however, because it found the claimant "*experienced some hurt at being dropped*", notwithstanding that she would, in any event, have decided to pull out of the production some weeks later. This finding is the subject of cross-appeals by both respondents, who contend that – objectively assessed - the claimant's treatment could not be considered to be a detriment such as to amount to less favourable treatment; similarly, to the extent that the claimant relied on her dismissal from the role of Celie as an act of harassment, she could not properly complain that the treatment was unwanted.

149. In **Keane**, the point was made that the requirement that the treatment be less favourable necessarily connoted a need to show a comparative detriment; if the complainant had not been interested in the jobs she applied for, she could not, in any ordinary sense of the word, be said to have suffered a detriment or to have been (comparatively) unfavourably treated (**Keane**, paragraph 19). In **Garcia**, the EAT adopted the same approach, holding that, in claims concerning allegedly discriminatory job advertisements, a complainant was required to show they were genuinely interested in the vacancy in issue (**Garcia**, paragraph 74). Although those cases were thus concerned with claims brought under section 39(1)(a) **EqA** (and the equivalent legacy provisions) I accept that the same principle could apply to claims relating to an allegedly discriminatory dismissal under section 39(2)(b), or termination of an agreement with a service provider under section 55(2)(c). At the time of the dismissal or termination in the present case, however, the ET did not find that the claimant

was anything other than genuinely interested in playing the role of Celie; indeed, it expressly rejected the suggestion that she had accepted the part in bad faith, finding she was thinking of the production in the frame of the film and, therefore, as involving a friendship between two women that could be construed as something other than a lesbian relationship. That was a permissible finding of fact by the ET and it distinguished the claimant's claims from those in **Keane**, **Berry** and **Garcia**.

150. Given that finding, I cannot say it was not open to the ET – assessing this question as at the time of the alleged discrimination – to conclude that the treatment of the claimant was comparatively detrimental and thus less favourable. Even allowing for the fact that she had not engaged with the explanation provided in the dismissal letter (as might have been expected of a reasonable employee), the ET determined that the claimant will have experienced "*some hurt*". That was a matter of evaluation and, taking into account the circumstances known to the claimant at the time (which included her erroneous view as to how the role of Celie could be played), the ET could permissibly find that a reasonable actor in that position might take the view that she had suffered detrimental treatment (**MoD v Jeremiah**). The fact that the claimant's sense of hurt could not reasonably have continued once she realised that she would not, after all, wish to play the role of Celie, did not mean the ET was bound to find that, at the time of the treatment in issue, her sense of grievance was unjustified (**Shamoon**), albeit that was something it would need to take into account when assessing remedy. Equally, it would not be determinative that dismissal might in fact have been less damaging for the claimant than if she had voluntarily left at a later stage (when she realised what the role entailed): whether the treatment was less favourable is a separate question from whether it has damaging consequences (**Khan**).

151. Moreover, although not expressly addressed in its reasoning, I cannot see that the ET would have been bound to find that the claimant could have suffered no less favourable treatment through being dropped by the first respondent. That the claimant was herself in repudiatory breach of the agency contract would not necessarily mean she could not suffer a comparative detriment from the first respondent's decision to end the relationship: whether there has been less favourable treatment is not a question that will necessarily be answered through the prism of the law of contract. Similarly, the fact that there was no immediate prospect of the claimant being offered work did not mean the ET was bound to find she had suffered no detriment from losing her connection with an established theatrical agent.

152. The same analysis would also apply in relation to the further cross-appeals on the harassment claim,

and the respondents' complaint that their treatment of the claimant could not have been "*unwanted*" for the purposes of section 26(1) **EqA**. Focusing on the position as at the time of the conduct in issue, given that the ET had found that the claimant still genuinely thought she could continue to play Celie, I do not consider it could be said that the ET would have been bound to find that the claimant *wanted* to be dropped from the role, or from her relationship with her agent.

153. Returning to the claim of direct discrimination, and thus assuming less favourable treatment, the real issue for the ET was whether this was *because of* the claimant's religion or belief. Answering that question required the ET to consider the mental processes of the relevant decision-takers – Mr Stafford for the second respondent, Mr Garrett for the first – to determine the reason why they had taken the decisions they had. If the claimant's religion or belief was an operative reason for those decisions – a "*significant influence*" (per **Nagarajan**) - it would not matter that it was not the only reason, or that there was also some other motive for the actions taken.

154. That all concerned were aware this was the crucial issue in the case is apparent from the various parts of the notes of evidence to which I was taken during the appeal hearing, and from the ET's detailed reasoning. In determining the reason for the second respondent's decision to drop the claimant from the play, the ET was clear: it was the effect of the adverse publicity arising from Mr Lambert's tweet on the cohesion of the case, audience reception, the reputation of the producers, and the standing and commercial success of the production (ET liability decision, paragraph 107). As for the first respondent's decision, that was because, in Mr Garrett's mind, the publicity storm threatened the agency's survival (ET liability decision, paragraph 112).

155. For the claimant it is said that, in finding that her religion or belief was not an operative reason for the respondents' decisions, the ET was confusing reason with motive. It is her case that the real motivation for both Mr Stafford and Mr Garrett was what was seen to be her objectionable belief, albeit both also had other motives for acting in the way that they did, informed by the commercial and pragmatic considerations that the ET had identified. The straightforward answer to that submission is, however, that it is simply not what the ET found. In considering what had been in Mr Stafford's mind, the ET was clear: the claimant's belief was not the reason for his decision, the need to deal with the dysfunctional situation that had arisen was; similarly, the ET found that what had operated on Mr Garrett's mind was not the claimant's belief but the commercial risk to the business he had built up if clients and agents left.

156. The claimant seeks to compare this case to **Din** and **JFS**, but neither provide an apt analogy. In contrast to the position in **Din**, the ET in the present proceedings did not fail to engage with the background to the respondents' decisions, and to ask whether prohibited discrimination by others had significantly influenced the mental processes of Messrs Stafford and Garrett. On the contrary, the ET carefully examined the background to each of the decisions in issue, before determining, in each case, that the claimant's belief was not an operative part of the reasoning. In **JFS**, there was a similar need to look behind the explanation provided for the operation of the school's entrance policy (to comply with Jewish religious law), and, when that was done, it was clear that the criteria applied were dependent on a distinction based upon the racial origins of the children concerned. That is not the position in the present case: looking behind the explanations provided by the respondents (as the ET carefully did), the operative reasons (the commercial reality facing the theatre; the threat to the agency's survival) were not informed by, or dependent upon, the claimant's belief: faced with a similar reality or threat arising from an equivalent social media storm, but relating to an entirely different belief, the ET was plainly satisfied that the decisions would have been the same.

157. The claimant nevertheless argues that, on the findings made by the ET, it ought properly to have held that her religion or belief significantly influenced the decisions taken: even if the social media storm, and the commercial and other risks that arose as a consequence, were part of the reason, those matters were related to the claimant's belief, which therefore was, she submits, an operative reason for the treatment.

158. As the respondents observe, however, this submission confuses reason with context. At the risk of repetition of points already made, although it was undoubtedly the case that the re-posting of the claimant's Facebook statement of belief was part of the context, this was not a case where, on the ET's findings, either the claimant's belief, or its manifestation, was an operative reason for the decisions complained of. The ET was clear in its conclusions on this point, expressly finding that the claimant's contracts were *not* terminated because of her belief: "*the religious belief itself was not the reason why the theatre decided this*" (ET liability decision paragraph 107); "*The [agency] contract was not terminated because of her religious belief*" (ET liability decision paragraph 112). Moreover, the logic of the claimant's position would mean that, as the respondents sought to resolve the difficult and dysfunctional situation in which they found themselves, *any* adverse treatment she suffered as a result would necessarily be by reason of the statement of her belief that had led to the original social media storm. That argument is, however, akin to the submission firmly rejected

by the Court of Appeal in the whistleblowing cases **Fecitt** and **Kong**; it seeks to import a "*but for*" approach into cases where, although forming a very important part of the context, on the evidence, the protected characteristic in issue did not in fact materially impact on the thinking of the decision-maker and was not, therefore, a subjective reason for the treatment (**Gould**).

159. For the reasons provided, I am satisfied that the first two grounds of appeal against the ET's liability decision must fail. Distinctions between context and reason are fact-sensitive and can require nuanced judgements by the first instance tribunal (see the cases cited at paragraph 91 above). This is not a case where the ET shirked that task; having carried out a detailed evaluation of the evidence, it reached permissible conclusions as to the operative reasons for each of the decisions in issue, which were not the claimant's beliefs. By her first two grounds of appeal, the claimant is seeking to go behind that evaluation by the first instance tribunal of fact; that does not provide a proper basis of challenge and I duly dismiss these grounds of appeal.

160. Turning then to the appeal against the ET's rejection of the harassment claims, by the third ground, the claimant argues that, when determining whether it had been reasonable for the impugned treatment to have had the effect that it subjectively had had, the ET failed to have regard to the "*other circumstances of the case*" (section 26(4)(b) **EqA**), failing to consider the effect of the respondents' actions in the broader context of the public campaign against the claimant.

161. This is, however, an objection that fails to engage with the ET's reasoning. First, it is apparent that the ET had well in mind the need to consider the "*other circumstances*" when assessing what would have been the reasonable effect of the treatment in issue (it had expressly reminded itself of this part of the statutory test at an early stage of its reasoning under the head of '*Harassment*'). Second, in then applying the law to the facts it had found, the ET made clear that it had indeed had regard to *all* relevant circumstances, including the hostile social media campaign (although it was the claimant's evidence that she was not reading much of this at the time), but that it did not find that the public hostility towards the claimant was in any way due to the actions of the respondents. Thus, the ET expressly found that the hostile social media was "*not because of any action on the part of the second respondent*" (ET liability decision, paragraph 123), and it rejected the various allegations made against the first respondent that might have impacted upon any wider perception of the claimant (ET liability decision, paragraphs 113 and 126). On the ET's findings of fact, there was thus no basis (per **Conteh**) for considering that the actions of either respondent might have contributed to (still less created)

the hostile environment that had arisen. In determining whether the harassment claim was made out, the claimant's subjective view could not be determinative: if (as the ET found in this case) it was not reasonable for the conduct to be regarded as having the relevant effect, then it was bound to find that it had not done so (per Underhill LJ, **Pemberton**). The third ground of appeal must therefore be dismissed.

162. By her fourth ground of challenge, the claimant says that the ET erred in its approach to the question whether there had been a violation of her dignity for the purposes of section 26(1)(b)(i) **EqA**, failing to construe this purposively, so as to hold that any unjustified interference with a right under the **ECHR** must thus be taken to give rise to an act of harassment. I have already addressed this argument, when considering the legal principles relevant to the appeals (see paragraphs 104-105 above). The simple point is, however, that, as the ET's findings demonstrate no unjustified interference with the claimant's rights under articles 9 or 10 **ECHR**, this argument is rendered academic and the fourth ground of appeal must fail.

163. Before I leave the first four grounds of appeal on liability, however, it is necessary to consider whether the claimant's seventh ground of appeal might in any way change the conclusions I have reached. Although addressed by the parties alongside the fifth and sixth grounds of appeal (relating to the decision on the breach of contract claim against the second respondent), the claimant's argument in this regard was that the first respondent's breach of contract (failure to give the required notice) meant that any interference with her rights under article 9 **ECHR** could not have been "*prescribed by law*". Given, however, the ET's findings of fact relevant to the first respondent's reason for acting as it did, this ground fails at the first hurdle: there simply was no interference with the claimant's rights under the **ECHR**.

164. It is also convenient at this stage to consider the points raised by the respondents by way of cross-appeal and/or alternative grounds on which to uphold the ET's conclusions.

165. Strictly speaking, given my conclusions on the claimant's grounds of challenge relating to her **EqA** claims, the cross-appeals/alternative grounds do not arise for determination. For the reasons already provided, however, had it been necessary to do so, I would have dismissed the cross-appeals relating to less favourable treatment (direct discrimination) and unwanted conduct (harassment). As for the second respondent's OR appeal, however, the defence under schedule 9 **EqA** would raise a number of issues requiring careful evaluation by the ET, not least as to the particular nature of the protected characteristic said to be the OR in this case, and whether that was a requirement objectively dictated by the nature of the occupational activities

concerned or the context in which they were carried out (**Bougnaoui**). The ET made no findings in relation to the OR defence and I cannot see that it would be helpful for me to speculate as to the possible conclusions that it might have reached had it done so. Similarly, given my dismissal of the claimant's appeal against the ET's decision on direct discrimination, it is unnecessary for me to address the first respondent's cross-appeal (more properly characterised as an alternative ground of argument) on the issue of forced speech. Whilst I can see that the issue was potentially relevant to the determination of the first respondent's reason for acting as it did (as the ET recognised, the first respondent's contractual obligation to promote the claimant would have made it difficult for it to dissociate itself from her views without picking a side), the ET in fact found that Mr Garrett's reason for terminating the contract was to ensure the agency's survival. In the circumstances, I express no view on the first respondent's arguments in this regard.

166. Turning then to the fifth and sixth grounds of appeal, which relate to the claimant's breach of contract claims against the second respondent, it is helpful to keep in mind the basic legal principles that, as is common ground, apply in this case. First, as this was a contract that provided the claimant with opportunities for publicity and to enhance her reputation, potential damages were not limited to contractual notice (**Herbert Clayton**). Second, as, however, this was also a contract of employment, it was subject to the implied obligation that the parties would not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the necessary relationship of confidence and trust (**Malik v BCCI**). Third, a breach of the implied term of trust and confidence would necessarily be a repudiatory breach of that contract (**Morrow v Safeway**). Fourth, the fact that the second respondent was relying on what was said to have been a repudiatory breach of contract of which it had not been aware at the time of the decision to dismiss would not be fatal to its defence to any claim for damages (**Boston Deep Sea Fishing**).

167. By her fifth ground of challenge, the claimant says the ET failed to confine its consideration of her conduct to the lifetime of the contract and the existence of any relevant contractual obligation: to the extent she had failed to read the script, and/or notify the second respondent of her red line, *prior to* any contractual obligation to do so, that could not have given rise to any repudiatory breach. Relatedly, by the sixth ground, the claimant contends that, in any event, any failure on her part could not, objectively assessed, be found to demonstrate an intention to abandon and altogether refuse to perform the contract (**Tullett Prebon**).

168. Addressing the first of those points, there is no suggestion that the claimant could have been found to

have acted in repudiatory breach of contract prior to the coming into force of any relevant contractual obligation; thus, although the claimant had been directed to read the script as part of the audition process, it was not said that she had been under any contractual obligation to do so at that stage. Upon entering into the employment contract with the second respondent on 10 January 2019, however, the claimant was subject to what were agreed to be express industry standard terms: to conduct herself in a professional manner, to fulfil all duties normally expected of a performer in a first-class theatrical production, and to actively co-operate in publicising that production. Moreover, the claimant was then also subject to the implied obligation not to act in a way that was likely to destroy or seriously damage the relationship of trust and confidence. As from 10 January 2019, therefore, the claimant's red line (unknown to the second respondent) became highly relevant, because, on her own case, once she had engaged with the script, the requirement that Celie be played as a lesbian necessarily meant the claimant would refuse to perform the contract.

169. The claimant has sought to suggest that in fact any obligation rested with the respondents: it was for the second respondent to ensure that the claimant was aware of the requirements of the role, and, because her red line was known to Ms Chatt, as her agent, that meant she (the claimant) was entitled to assume it was also known to the theatre. Neither of these arguments, however, withstands scrutiny. As the ET found, Ms Chatt was content to leave it to the claimant to make her own decisions as to the parts she would, or would not, take. When the claimant had had concerns in the past, she had specifically raised these with Ms Chatt and either refused the role (*Book of Mormon*) or obtained reassurance from the production team (*Junkyard*). More generally, as the claimant accepted in evidence, actors can, and do, play the parts of characters with whose views or actions they strongly disagree. The second respondent had provided the claimant with the script for the stage production of *The Color Purple*, which, as she agreed, made plain that the relationship between Celie and Shug was to be played as a physical lesbian relationship; when the claimant then accepted the part, the second respondent was entitled to understand that she had accepted it on that basis.

170. The job description had thus been made clear to the claimant in advance of her entering into the contract. The obligation upon her was to fulfil her professional duty to play the role she had agreed to undertake, and the second respondent was entitled to have trust and confidence that she would do so. In fact, however, the claimant had a self-imposed red line which meant that she would not play the part of Celie in the way required. Applying an objective test, it is hard to see how that did other than demonstrate an intention to

abandon and altogether refuse to perform the contract. Indeed, on the claimant's own case, had she not already been dismissed from the production, she would in due course have pulled out, abandoning and refusing to perform the contract she had entered into. In the circumstances, the ET was plainly entitled to find that the claimant had acted in repudiatory breach throughout the lifetime of the contract: "*the contract was empty*".

171. The breach of contract claim was thus hopeless. The claimant had been offered the fee due under her contract with the theatre such that there could be no claim for damages for breach of notice in any event. To the extent, however, that she might have had any residual claim in damages for loss of opportunities for publicity or to enhance her reputation, the second respondent was entitled to rely on the claimant's repudiatory breach as a complete defence. The fifth and sixth grounds of appeal on liability must be dismissed.

The Appeal Against the Decision on Costs

172. The various grounds of appeal against the ET's costs decision essentially fall under two heads: the majority of objections relate to the ET's conclusion that the threshold requirements for a costs award had been met; there are, however, two points that go to the further decision, that it was appropriate to make an award in respect of the entirety of the respondents' costs (subject to detailed assessment).

173. Considering the threshold requirements laid down by rule 76 **ET Rules**, the ET was satisfied both that the claimant had pursued claims which had no reasonable prospect of success, and that there had been unreasonable conduct of the case. Before reaching those conclusions, however, the ET first explained how it had analysed each of the claims brought; as the grounds of appeal relevant to the costs decision address the different heads of claim separately, I have sought to adopt the same approach.

174. The ET first considered the complaints of direct discrimination. In so doing, it allowed that there might still have been some basis for the claims, even after the claimant's position had changed so as to acknowledge that she would, in fact, never have played the role of Celie; it also found, however, that there would have been no financial loss, and far less for injury to feelings than had initially been envisaged. That was an entirely unobjectionable finding by the ET and it is wrong to suggest (as the claimant's appeal in this respect seeks to do) that it thereby adopted a position that was inconsistent with its rejection (at the liability stage) of the respondents' argument that there could have been no less favourable treatment. While it is correct to note that the ET also made a passing criticism of the claimant's reliance on the case of **Eweida**, that was

merely addressing a point made in argument; it was not identified as a material part of the reasoning. Similarly, the reference to the apparent confusion in the claimant's case on "*reason*" has to be seen in the context of the submissions. The point the ET was making was that this was not a case where the major difficulty for the claimant arose from any uncertainty as to the respondents' evidence on reason; a more fundamental difficulty (which made this case about principle rather than damages) was the claimant's own acknowledgment that she would, in fact, never have wished to play the role from which she was complaining of being dropped.

175. Turning to the harassment claim, the ET found that this had had no reasonable prospect of success, not because, as the claimant contends, it failed to consider the effect of the respondents' conduct in context (or, having regard to the "*other circumstances of the case*" per section 26(4)(b) **EqA**), but because it firmly rejected the contention that the respondents could reasonably have been seen to have been parties to that context, rather than bystanders who had to deal with the consequences: objectively, there was no evidence that either respondent engaged in behaviour which created a hostile environment for the claimant. The ET also went on to find that it was misconceived to argue that the violation of the claimant's right to freedom of expression meant there was a violation of dignity for the purposes of section 26 **EqA** (and, for completeness, the characterisation of the harassment case as "*misconceived*" was limited to this point; the claimant is wrong to suggest it also related to her argument under section 26(4)(b)). In explaining its reasoning on this particular point, it may be correct that the ET did not properly set out how the claimant was seeking to put her argument, based on the concept of dignity as the principle that underpins rights under the **ECHR**. As I have already found, however, given its conclusions on direct discrimination, it is hard to see how this point could have made any difference to its analysis of the merits of the harassment case.

176. As for the breach of contract, the ET found that the basis for such a claim had not been properly understood by those acting for the claimant: she had been offered her full fee and, if the claim had really been about the loss of opportunity for publicity/enhanced reputation, there was no explanation why the second respondent had not been asked to increase its offer to reflect this. Moreover, once the claimant had acknowledged that she would, in fact, never have fulfilled the contract, it ought to have been obvious that this claim had no prospect of success. The ET further found that the facts demonstrated that this claim had been pursued vexatiously, for an improper motive: "*to have a trial for its own sake, with the attendant publicity*" (hence the entirely erroneous public characterisation of the second respondent's offer as an attempt to stifle a

finding on unlawful discrimination). As the ET's reasoning thus makes clear, it manifestly did not fail to take into account the possibility of a damages claim along the lines envisaged in **Herbert Clayton**; it permissibly concluded, however, that this was not what was actually being sought by the claimant in this case.

177. Having thus analysed the different claims, the ET concluded that the threshold requirements of rule 76 were met: the claims either had no reasonable prospect of success and/or were conducted unreasonably. Although it was prepared to accept that there had been a failure to re-evaluate the complaint of direct discrimination after the change in the claimant's case (when she conceded that she would never have played the part of Celie), it was more disturbed by the continued pursuit of the breach of contract claim. More generally, as the claimant had always known that she would not play a lesbian character, the ET was critical of her failure to engage with the respondents' pleaded case, which made clear that this was the requirement of the role (and included quotes to this effect from Alice Walker, and from the writers and director of the stage production). That had had significant consequences for the conduct of the proceedings, not least as it meant the respondents could not consider the potential repercussions of the claimant's position, which might have led them to apply for the claims to be struck out or made subject to deposit orders.

178. These were all conclusions that were open to the ET on the evidence and information before it, which warranted its finding that the threshold requirements for a costs award had been met. There is no proper basis on which it would be open to the EAT to interfere with that conclusion (**Yerrakalva**).

179. Turning then to the decision that the claimant should bear the whole cost of the respondents' defence of the proceedings, I do not accept the criticism that the ET erred by failing to find that the change in the claimant's position (arising when she served her witness statement, which contained her admission that she would never have played the role of Celie in the stage production) could only go to quantum. First, that was manifestly not the case in relation to the breach of contract claim. Second, and more generally, that submission fails to engage with the repercussions of the claimant's admission for the conduct of the proceedings as a whole. As the ET put it, that was an admission that would "*detonate her own case*", and it permissibly saw this as a matter that, had it been raised at the outset, would have had an important impact on the overall conduct of the litigation. The ET was not required to carry out a more detailed assessment of the particular costs incurred as a result of the claimant's unreasonable conduct (**McPherson**; **Sunuva**); its evaluation of the effect of that conduct was one that it was best placed to make (**Yerrakalva**).

180. Finally, in determining to make an award for the entirety of the respondents' costs, the claimant complains that the ET was wrong to take into account the resources of the CC and CLC: there was no basis on which to infer that those organisations were driving the litigation for an improper purpose; the case was distinguishable from that of **Beynon**, which should not be used to circumvent the wasted costs regime under rule 80(1)(a) **ET Rules**.

181. For the second respondent it is argued that this ground of challenge is academic, as the ET determined not to have regard to the claimant's ability to pay (a course permitted under rule 84 **ET Rules**). I do not think that is an entirely correct analysis. While the ET referred to its discretion not to have regard to the claimant's ability to pay, it did so in the negative sense: it considered it could only have regard to any suggested inability to pay *if* the proposed paying party had provided some evidence in that regard (see ET costs decision, paragraph 52). Having thus rejected the suggestion that it should assume impecuniosity on the part of the claimant, it is apparent that the ET then went on to take into account not only the possibility that her personal position might change in the future, but also the resources that were available to the CCL and CLC, which it found to be deeply invested in bringing and continuing the claimant's claims. The claimant does not suggest that the ET would have been wrong to take into account her future earning potential, but she does say that it erred in having regard to the resources of others.

182. In approaching the making of an award of costs, the ET had what was described in **Beynon** as an "*unfettered discretion*". Not only did it *not* have to have regard to the claimant's personal ability to pay, it had a broad discretion as to what it did consider relevant in terms of the wider resources that might be available to her. In so doing, the ET was not circumventing the wasted costs regime now provided under rule 80 **ET Rules**; as the EAT observed in **Beynon**, a wasted costs order is made against the representative (with all that that implies); that is not the effect of the award made against the claimant as a party to the litigation.

183. In thus approaching its task, the ET was, therefore, entitled to have regard to the suggestion made by Mr Stroilov that the CCL and/or CLC would initiate a campaign for donations for the claimant if an order was made against her. More than that, however, it was open to the ET to look at the nature of the support that had been provided by those organisations and their involvement, and interest, in the proceedings. In this regard, the ET's findings were clear: the CCL and CLC were "*deeply invested in both bringing the claim and in continuing it*"; there was a suspicion that the CLC had chosen not to engage with the merits of the case because

it saw this as a "*campaigning opportunity*"; and, thus using the litigation as an opportunity for publicity rather than fighting it on its merits to redress a wrong, the CCL's public relations budget had effectively been transferred to the respondents.

184. These were all inferences that the ET was entitled to draw from the findings it had made as to the conduct of the litigation. As such, this was a case where the ET could properly conclude that the claim had been encouraged and pursued by the CCL and CLC for a collateral purpose, that had improperly taken precedence over any reasonable evaluation of the merits of the case. Where a supporting organisation is thus deeply invested in litigation used for the benefit of some collateral purpose in which that organisation itself has an interest, I cannot see that the ET would err, in the exercise of its broad costs discretion, in considering the resources of that organisation when determining the quantum of any costs award.

185. For all the reasons given, I therefore dismiss the appeal on costs.

The Hearing Documents Appeal

Events Post 8 February 2021

186. Although the ET's order of 8 February 2021 had: (1) directed that there would be a further hearing on 18 March 2021 at which any further applications might be made; and (2) allowed that any person seeking continued access to the hearing documents could apply to the ET to do so, in fact no application was (or has been) made, other than as subsequently occurred as a direct result of this appeal.

187. On 19 March 2021, Mr Stroilov settled grounds of appeal against the order of 8 February 2021; that notice of appeal was lodged with the EAT on 22 March 2021. Considering the appeal on the papers, by order of 14 February 2022, His Honour Judge Auerbach directed it should be stayed to allow the claimant to write to the ET "*seeking clarification or variation of the order*", on the basis:

> "It is clear … that the Tribunal had agreed that the claimant's representatives were permitted to post documents relating to the hearing on the website, during the hearing, specifically for the purposes of facilitating open justice … However, the claimant argues that the website in question was her representatives' own website, on which they would have been entitled, in any event, to post certain documents relating to the litigation, …
> The claimant's representatives also say that the order was made without the opportunity for full argument. However, if it is their case that they did not have the opportunity to raise this concern at the time, it does not appear that they have made any attempt to raise their concern with the Tribunal (or the respondents) since the order was made."

188. On 23 February 2022, the claimant duly wrote to the ET, enclosing a copy of her notice of appeal and referring to the EAT's order, submitting that:

> "…there are no proper grounds for a restriction on publication apparently contained in para 2 of the Order of 8 February 2021. Given the passage of time, the Claimant respectfully invites the Tribunal to discharge the said para 2 of the Order forthwith. In the alternative, the Claimant respectfully invites the Tribunal to amend the Order, to insert the following after para 2: "Paragraph 2 of this Order does not preclude any publication, otherwise permitted by law, on a web-site of the Claimant's representatives or otherwise, of any documents previously posted on the web-site of the Claimant's representatives, including in particular (a) documents referred to or read by the Tribunal at the hearing of this claim, (b) any record of evidence given in open court." Given that the EAT has only granted a stay until 14 March 2022, we would be most grateful for a decision before that date."

189. Given the limited period of time allowed, the Employment Judge did not wait for any representations by the respondents but proceeded on the basis that they did not agree to the claimant's request. Having referred to the guidance provided by the Supreme Court in **Cape Intermediate Holdings Ltd v Dring** [2019] UKSC 38, and to the subsequent application of that guidance by the High Court in **Dring v Cape Intermediate Holdings Ltd** [2020] EWHC 1873, EJ Goodman considered the particular circumstances of the application that had been made, referring to the relevant history (and see paragraphs 34-41 above), and explaining:

> "17. I was wholly unaware that Christian Legal Centre had created its dedicated webpage "to report on the trial" as stated in paragraph 2 grounds of appeal … My understanding was that the arrangement outlined in their email, in reply to my enquiry about public access, and to which the respondents had consented, was an offer to host the public access case materials which in other circumstances would have been left in the hearing room and removed at the end of the hearing. It was on the basis of that understanding that the direction was made at the conclusion of the hearing that the case materials were now to be taken down from the website."

190. Noting that there had been no application for a restricted reporting order, and that both the evidence at the hearing and the ET's judgment could thus be reported without restriction, EJ Goodman refused the claimant's application, reasoning as follows:

> "20. The claimant's representative's letter proceeds on the basis that once the documents have been made publicly available for the hearing they are to be available for all time to all people. It is not suggested how making them available after the hearing, and after the judgement has been published, will enable better understanding of the trial process and the reasons given for the decisions made. It proceeds on the basis that open justice is absolute. There is no attention given to the countervailing right to privacy of people who were not themselves party to the proceedings, many of whom did not give evidence. Many of the emails which circulated at the time of the events and were later disclosed and inserted in the hearing bundle were drafted in haste and sent in the expectation of privacy. Some of course were quoted in the judgement, but I have some concern that the entire contents of the hearing bundle may not have been carefully reviewed ahead of the hearing or in consultation with the authors of the emails, with a mind to public access, as shown by the unfortunate episode mentioned in paragraph 12 of the substantive judgement. This was probably because the parties' solicitors were considering public access at short notice, and in circumstances where a public website was in practice far more public than a paper bundle in the hearing room which is usually little read. I was told that materials such as telephone numbers and email addresses had been or were to be redacted from the public copy, but I have not been able to check that even this was done. I consider there would need to be a hearing, as envisaged in **Dring**, to balance whether ongoing publication would advance the open justice principle, by elaborating on or quoting extensively from the material described in the judgement itself, to facilitate readers' understanding, against the legitimate interest of the respondents in privacy in their commercial affairs, and of other individuals with concern as to their own privacy in emails which were disclosed as part of the tribunal process, very likely without their knowledge, but which may not have been available

> to the claimant, either at all, or in redacted form, under a Data Protection Act subject access request.
> 21.The request for … publication of "any record of evidence given in open court" is problematic for a different reason. The evidence in chief appears in the witness statements. There is no recording of cross-examination in the employment tribunal because the technical facilities for recording do not exist. In a court they would have been recorded, and a transcript could be prepared at the expense of the person applying for it. A record of the evidence given in the employment tribunal for post-hearing public consumption must be produced by transcribing the chairman's note, cross-checked where necessary against the panel members' notes, and this is a difficult and laborious process. It may be that the claimant's representative intended publication of the witness statements only, but this is unlikely to assist public understanding of the trial process, because the public would not be aware of concessions and contradictions which became apparent in cross examination. Observers would of course have been able to understand the cross-examination better with sight of the statements, but not those who come after the event.
> 22.Had an application been made in the weeks following 8 February 2021, when the claimant's representative had had an opportunity to take instructions and reflect, it would have been possible to invite representations, with a more detailed account of the reasons for seeking access, or to hold a further hearing, or both, to consider the request for access. Thirteen months after disposal it is too late for reconsideration (14 days is the normal time allowed, which can be extended under rule 5 if it furthers the overriding objective). There is no account of why the claimant, or Christian Legal Centre, did not apply before now, or whether there are any grounds other than open justice being an absolute."

191. EJ Goodman further clarified that it would, in any event, be open to the claimant to publish certain documents where, for example, others' rights of privacy did not arise:

> "23.Finally, It may be that the claimant's representative understands not that the order required taking down case materials displayed on the website for public access during the hearing, but that it restricts publication of materials which are the claimant's own which had been included in those case materials. There seems no reason why emails which she (or Christian Legal Centre) sent cannot be published, or her own witness statement. For emails sent to her by others it will be necessary to obtain their permission or consider whether they had a reasonable expectation of privacy. Documents which came into her possession through disclosure in the tribunal proceedings should be the subject of an application to the tribunal as envisaged in **Dring**. The statement of case (here, the claim form, particulars of claim, amendments thereto, the responses and amendments thereto) are available to non-parties as they would be under CPR, as is the judgment (which is in any case on the public website). I cannot see that any agreed chronology should not be public, though it is unlikely to promote understanding when the sequence of events is set out in the judgement. Expert evidence was not taken at the hearing so they *[sic]* can be disregarded."

192. There has been no appeal against EJ Goodman's decision on the 23 February 2022 application.

Relevant Legal Principles

193. In the ET, as elsewhere, the starting point is the common law principle of open justice: justice should be administered in public and fully reportable save in certain limited circumstances (**Clifford v Millicom Services UK Ltd** [2023] EWCA Civ 50). There is a distinction, however, between the reporting of proceedings and the public nature of proceedings; as Lord Diplock observed in **Attorney General v Leveller Magazine Ltd** [1979] AC 440, at 449-450, the open justice principle has two aspects:

> "As respects proceedings in the court itself it requires that they should be held in open court

> to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

See also per Lord Sumption JSC in **Khuja v Times Newspapers Ltd and ors** [2017] UKSC 49 at paragraph 16.

194. In **Khuja**, Lord Sumption further emphasised that:

> "18. The inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court. Any power to do that must be found in legislation…"

195. Although there is thus a distinction between how the open justice principle operates in relation to the conduct of proceedings and as to how such proceedings are reported, both will be relevant when considering how evidence adduced in legal proceedings is to be communicated; as the Supreme Court held in **Cape Intermediate Holdings Ltd v Dring** [2019] UKSC 38:

> "41. The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case."

196. The Court went on to set that general statement in context, explaining the (relevant) underlying purposes of the open justice principle as follows:

> "42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corpn*, Lord Reed reminded us of the comment of Lord Shaw of Dunfermline, in *Scott v Scott* [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para 24).
> 43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. …"

197. As the Court identified, that second principle has important implications in relation to documentary materials adduced in court or tribunal proceedings:

> "43. … In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.

> 44. It was held in *Guardian News and Media* [*R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420] that the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be limited to those which the judge has been asked to read or has said that he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which was before him. It is not impossible, though it must be rare, that the judge has forgotten or ignored some important piece of information which was before him. If access is limited to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her decision."

198. The principle of open justice is also an aspect of the right to fair trial protected by article 6(1) of the **ECHR**, which provides (*inter alia*) that, in the determination of a person's civil rights and obligations, everyone is entitled to a public hearing and judgment shall be pronounced publicly. The principle is further reflected in the article 10 right to freedom of expression, encompassing the right to receive and impart information without state interference, unless that interference is necessary in pursuit of one of the legitimate aims identified in article 10(2). In the context of litigation, this plainly extends to the right (not limited to the parties to the proceedings) to report legal proceedings; **Clifford v Millicom** paragraph 3; **Ameyaw v Pricewaterhousecoopers Services Ltd** [2019] ICR 976 EAT, paragraphs 32-33. Rights under the **ECHR**, including those under articles 6 and 10, are enforceable domestically by virtue of section 6 of the **HRA**, which prohibits a court or other public authority from acting incompatibly with the **ECHR**.

199. The position at common law broadly reflects the position under the **ECHR**, see **Yalland v Secretary of State for Exiting the European Union** [2017] EWHC 629, Div Ct, paragraph 22. In this area, the **ECHR** and domestic law can be seen to "*walk in step*", albeit, to the extent that the **ECHR** would lead to a different outcome when balancing competing values, effect must be given to rights under the **ECHR** pursuant to section 6 **HRA**, per Lord Reed at paragraph 57 **A v British Broadcasting Corporation (Scotland)** [2015] AC 588 SC. Moreover, where a court or tribunal is considering whether to grant any relief that might affect the article 10 right to freedom of expression, particular regard must be given to the importance of that right, consistent with section 12 **HRA**.

200. There can be exceptions to the open justice principle but these must be justified by some more important principle and represent the minimum necessary to be effective for the purpose for which the derogation is sought; see **Scott v Scott** [1913] AC 417 HL; **R (Guardian News & Media Ltd) v Westminster Magistrates Court and Another** [2012] EWCA Civ 420, [2013] QB 618 CA. Whether a departure from the principle of open justice is justified will require a fact-specific balancing exercise, central to which will be the

purpose of the open justice principle, the potential value of the information in question in advancing that purpose, and conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others; **A v BBC**, paragraph 41.

201. Given the fact-specific nature of the decision made, an appellate tribunal will not interfere if the first-instance judge has adopted the correct approach in determining the application before them; **R v Legal Aid Board ex p Kaim Todner** [1999] QB 966, CA, p 977 A-B. The scope of challenge on appeal is thus limited to those cases in which it can be said that the first-instance judge erred in principle or reached a conclusion that was plainly wrong or outside the range of conclusions that might reasonably be open to the court in the circumstances of the case; **AAA v Associated Newspapers Ltd** [2013] EWCA Civ 554, paragraphs 8-9, and **Fallows v News Group Newspapers** [2016] ICR 801 EAT, paragraph 51.

202. In **Dring**, the Supreme Court went on to consider the way in which this evaluation will work in practice when considering the question of non-party access to documents adduced in court or tribunal proceedings, making clear that the principle of open justice does not mean that such a person has a right to such access:

> "45. However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both *Kennedy* [*Kennedy v Charity Commission* [2014] UKSC 25], at para 113, and *A v British Broadcasting Corpn*, at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose".
> 46. On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.
> 47. Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day to day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access. People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge. On the other hand, increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request

> will not be impracticable or disproportionate."

203. By way of postscript in **Dring**, the Supreme Court observed that it had heard no argument on the extent of any continuing obligation on the parties to co-operate in furthering the open justice principle once the proceedings have come to an end. That, it considered, was a question "*more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case*" (**Dring**, paragraph 51).

204. Having considered the nature and implications of the open justice principle, I turn to the ET's express powers, as provided by the **ET Rules**, the overriding objective of which is explained by rule 2:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

205. By rule 29, the ET is given broad case management powers:

> "The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

206. The ET is also given powers to prevent or restrict public disclosure of any aspect of its proceedings to the extent it considers that necessary in the interests of justice, or to protect rights under the **ECHR**, or for the protection of confidentiality (rule 50 **ET Rules**).

207. At common law, the disclosure of documents in legal proceedings has been held to be subject to an implied undertaking not to use those documents save for the purposes of the proceedings in which they were disclosed, unless granted permission to do so by the court or with the consent of the document owner (**Home Office v Harman** [1983] 1 AC 280 HL). In the civil courts, that position was reversed by the introduction of a procedural rule, now **CPR** 31.22, providing (relevantly) that:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where- (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree.
> (2) The court may make an order restricting or prohibiting the use of a document which has

> been disclosed even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
> (3) An application for such an order may be made- (a) by a party; or (b) by any person to whom the document belongs.
> …"

208. In ET proceedings, the ability to make orders for disclosure between parties falls under the general power of case management provided by rule 29 **ET Rules**; **Sarnoff v YZ** [2021] ICR 545 CA. In **Sarnoff**, it was further made clear that it would be wrong to view the **ET Rules** "*through the prism of the CPR …*" (per Underhill LJ at paragraph 23). Indeed, as the EAT held in **Harris v Academies Enterprise Trust** [2015] ICR 617, it is not to be assumed that the **ET Rules** should be read as being subject to the **CPR**: the ET is a creature of statute and Parliament has made a conscious decision to provide for a different regime to operate within that jurisdiction, with rules that apply across Great Britain, not solely in England and Wales.

209. All that said, the Court of Appeal has held it to be implicit that disclosure before the ET will import the same restrictions as would (or could) arise under **CPR** 31.22; see **IG Index Ltd v Cloete** [2014] EWCA Civ 1128. In that case, Mr Cloete had successfully applied to strike out his former employer's High Court claim based on information obtained from the disclosure process in Mr Cloete's unfair dismissal case before the ET. Considering the employer's appeal, the Court of Appeal explained its approach as follows (see per Christopher Clarke LJ, with whom Arden LJ and Barling J agreed):

> "24. The terms of CPR 31.22 (1) reflect the terms of the implied undertaking as to the use of documents that arose at common law. However in *Smithkline Beecham v Generics* [2004] 1 WLR 1479 this court held that CPR 31.22 is now a complete code in relation to the use of disclosed documents. It was common ground before us: i) that that was so; ii) that the implied undertaking and, now the rule, applies not merely to the documents themselves but also to the information derived from those documents…; and iii) that the rule applied when disclosure was given in the employment tribunal.
> …
> 28. There is, however, no express provision in [the ET Rules] restricting the use of disclosed documents. I would, however, regard it as implicit that the same restriction on disclosure by the recipient should apply as arises under CPR 31.22. The common law would necessarily imply some form of undertaking and the appropriate implication is that the person to whom disclosure is made pursuant to these Regulations should be under the same restriction as if he had given disclosure in the county court."

210. Although the Court of Appeal in **Cloete** allowed the appeal (ultimately concluding that any invasion of Mr Cloete's privacy was outweighed by the interests of his former employer), it accepted Mr Cloete's argument that IG Index had not been entitled to use the information obtained from his disclosure without the court's permission, explaining:

> "42. … One of the reasons for the rule [CPR 31:22] is that compulsory disclosure is an invasion of a person's private right to keep one's documents to oneself and should be matched by a corresponding limitation on the use of the document disclosed …"

211. From that discussion of the relevant legal context, I consider the principles applicable to this appeal can be summarised as follows:

(1) The ET's powers relating to interparty disclosure, and the use to which such disclosure can be put, arise from rule 29 **ET Rules** (**Sarnoff** paragraphs 13-22).

(2) Those powers enable the ET to grant or refuse permission for the wider use of disclosed documents in a manner akin to the powers afforded the civil courts pursuant to **CPR** 31.22 (**Cloete** paragraph 28).

(3) This is consistent with the inherent jurisdiction afforded to the ET by reason of the constitutional principle of open justice, which both requires and allows it to determine what that principle requires in terms of access to documents or other information placed before it (**Dring** paragraph 41).

(4) Application of the open justice principle will normally also meet the requirement that the ET must give effect to the **ECHR**, consistent with its obligations under the **HRA**, albeit where a different balance would be struck, section 6 **HRA** requires the ET to give preference to the result achieved under the **ECHR** (**A v BBC** paragraph 57).

(5) The ET's power to permit wider public access to hearing materials does not, however, give rise to an automatic right to such access. It will be for the ET to evaluate the competing considerations arising in the case before it: on the one hand, it will need to consider the purpose of the open justice principle and the potential value of the wider access in advancing that purpose; on the other, it will need to weigh the risk of harm to the administration of justice and/or the legitimate interests of others, bearing in mind the practicalities and proportionality of allowing such access (**Dring** paragraphs 45-47).

(6) Given the fact-specific nature of the balancing exercise required, the scope of any challenge by way of appeal is limited to those cases in which it can be said that the ET erred in principle or reached a conclusion that was plainly wrong or outside the range of conclusions that might reasonably be open to it in the circumstances of the case (**Fallows**, paragraph 51).

The Appeal and the Claimant's Submissions in Support

212. For the claimant, it is contended that this appeal has to be seen in context. The legal proceedings in question took place in open court, with no reporting restrictions and the documents to which the appeal relates were: before the ET; expressly referred to by the parties; and (at the request of the Employment Judge and with

the consent of all parties) published to the world on the website of the claimant's legal representatives (albeit the claimant allows that there might be scope for further redactions to be made). The ET's order to remove the documents at the end of the hearing effectively took the form of a restricted reporting order and the challenge to that order was brought by the claimant (it was wrong to see this as a request by the CLC/CCL to publish the documents) on the following four grounds of appeal.

213. First, the ET had erred in confusing its discretion under its inherent jurisdiction to permit access to documents on the one hand, and its power to restrict the publishing of certain information on the other. Subject to the powers afforded to the ET to restrict reporting (rule 50 **ET Rules**) - which were not invoked in this case - there was no power to impose restrictions on publication (per Lord Sumption, paragraph 18 **Khuja**). Second, **CPR** rule 31.22 provides a complete code that applies to ET proceedings as much as the civil courts (**Cloete** paragraphs 24 and 28). Given that the hearing took place in open court and the documents were (with the permission of the ET and the parties) published to the world (albeit for a few days), the ET had no power to restrict further publication. Third, in the alternative, if the ET was empowered to restrict publication, its discretion was improperly exercised: the proper assessment of proportionality (see the approach laid down in **Abbasi and anor v Newcastle upon Tyne Hospitals NHS Foundation Trust** [2023] EWCA Civ 331) would not have led to the imposition of a perpetual injunction in circumstances in which there could have been no reasonable continuing expectation of privacy (which, in any event, had been lost once the jurisdiction of the tribunal had been invoked; **Khuja** at paragraphs 34(1) and (3)). This did not leave the respondents without remedy: if there was a concern that documents were wrongly published, they could apply to the High Court for injunctive relief. Fourth, the ET's order was in breach of section 12(4)(a) **HRA**, as it "*might effect the exercise of the [**ECHR**] right to freedom of expression*" (section 12(1) **HRA**) and the ET had failed to have "*particular regard to the importance*" of that right and had failed to undertake the requisite balancing exercise (see **Re S (A Child)** [2004] UKHL 47; **Abbasi**; **Khuja**).

The Respondents' Submissions

214. The respondents observe that the ET's order of 8 February 2021 was directed at the claimant, the CLC and the CCL; the claimant's appeal could not directly challenge the order against the CLC or CCL. As for the circumstances in which the order had been made, as the ET's reasoning made clear, publication of the

documents had only been allowed for public access during the hearing; there was no understanding or agreement to general publication. The order of 8 February 2021 effectively held the ring; it was clear that there would be a further hearing on 18 March 2021 and it had been open to the claimant to make any application for variation/discharge at that stage but she had not. More than that, the claimant had never identified any document that she sought to publicise that would assist in the public understanding of the proceedings or the judgment; in these circumstances – and accepting that the rights of others might also be engaged – how could the ET weigh the claimant's rights in the balance or assess the possible impact on the open justice principle?

215. The ET had exercised its powers relating to interparty disclosure under rule 29 **ET Rules** (**Sarnoff**), which enabled the ET to grant or refuse permission as to the use of disclosed documents, even when deployed in open court, in a manner akin to **CPR** 31.22(2) (**Cloete** paragraph 28); the inherent jurisdiction of the ET demanded no less (**Dring** paragraph 41). As for the ET's exercise of discretion, it had had regard to all relevant factors, namely: the open justice principle, the public nature of the hearing, the degree of infringement with the claimant's article 10 rights, the possible infringement of the rights of others (including the privacy rights of non-parties), data protection and issues of commercial confidentiality (in particular, arising from the contract between the second respondent and the rights' holders of *The Color Purple*), the timing and circumstances of the application, and the reality of the ET process and the overriding objective. By analogy with rule 50, the ET enjoyed a broad discretion which could not be overturned on appeal unless plainly wrong or perverse; see **AAA** paragraphs 8-9 and **Fallows** paragraphs 51-52.

Analysis and Conclusions

216. I start by considering the nature of the decision under appeal; that is, the decision of the ET made on 8 February 2021. At that stage, the ET was addressing a question as to the continued use of documents either disclosed for the purpose of the proceedings or created for use at the hearing (the obvious example of this latter category being the statements of the various witnesses). With the respondents' agreement, the ET had previously allowed that these materials were to be made available at the premises of the claimant's representatives and posted on their website. It was clear to all concerned that that permission had been granted, consistent with the principle of open justice, to ensure public access to the relevant documentation during the course of the hearing: any interested person could follow the proceedings by referring to witness statements

(otherwise taken "*as read*"), and to documents referenced during the hearing, as well as the pleadings and written submissions setting out the parties' respective positions. The ET had, however, said nothing about any continued publication or use of such materials once the hearing had concluded.

217. Although not expressly articulated in the pre-hearing communications between the ET and the parties, in thus allowing the claimant (through her representatives) to post documents that had been provided by the respondents for the purposes of the full merits hearing, I consider the ET was exercising its case management powers pursuant to rule 29 **ET Rules** (**Sarnoff**) and as provided by the inherent jurisdiction afforded to it by reason of the constitutional principle of open justice (**Dring**). Rule 29 was again brought into play when the ET exercised its case management powers to make an order restricting the continued use of those documents by the claimant (and her representatives) after the hearing had finished: by analogy with the power afforded the civil courts in England and Wales, rule 29 **ET Rules** permitted the ET, "*at any stage of the proceedings*", to restrict or prohibit the use of a document disclosed for the purpose of its proceedings (**Cloete**). That, in my judgement, was also consistent with the ET's inherent jurisdiction to determine what the open justice principle required in terms of any continued access to the hearing materials (**Dring**), in particular given the recognition in the 8 February 2021 order that there might be further application to the ET, either (as might be implied) by the parties at the hearing on 18 March 2021, or (expressly) by any person where there was "*some other reason for continuing public access*".

218. The claimant objects that, in the absence of any order made under rule 50 **ET Rules**, the ET had no power to restrict publication of information that had already been adduced in the course of a public hearing. It seems to me, however, that this objection confuses the reporting of the proceedings (which had been allowed during the course of the hearing and which the ET's order of 8 February 2021 did not prevent) and the use of documents disclosed for the purposes of that hearing. The ET's order was not analogous to the restricted reporting orders at issue in **Abbasi**: no-one named or in any way involved in these proceedings had been anonymised, and there was (and is) nothing in the order under appeal that would prohibit or restrict any reporting of the proceedings. While the right to report legal proceedings may require allowing access to the hearing documents so as to ensure a proper understanding of the evidence, it will be for the ET to determine what is required in any particular case. Refusing continued public access to hearing documents after the

conclusion of a hearing does not amount to a reporting restriction, albeit, even then, the ET may conclude that such access is required in order to enable proper reporting in certain circumstances.

219. Accepting (as I do) that the ET was entitled to place restrictions upon the claimant's continued use of documents disclosed to her by the respondents, pursuant to the broad case management powers afforded under rule 29 **ET Rules** and the inherent jurisdiction provided by the constitutional principle of open justice, it is then necessary to consider whether it was right to do so. In this case, the ET had plainly considered that open justice required that the documents should be made widely available – including by means of publication on the CLC's website – during the course of the full merits hearing, but its jurisdiction in this regard did not come to an end when that hearing was over. Although the Supreme Court in **Dring** left open the question of any continuing obligation on the parties in relation to the furtherance of the open justice principle once proceedings have come to an end (**Dring** paragraph 51), the need to ensure public understanding of the decision reached may require there is continued access to the materials adduced during the hearing (**Dring** paragraphs 42 and 44). Although the hearing had finished, I therefore accept that the ET was still required to have regard to the open justice principle, and to the rights of the claimant and others under the **ECHR**, in determining whether it should exercise the powers afforded to it.

220. In the summary reasons attached to the order of 8 February 2021, the ET observed that public understanding of the proceedings had been ensured during the hearing by the measures put in place to allow public access to the documentary materials that the parties had adduced. Thereafter, it considered that the public would be able to read the written judgment and reasons, which would set out the issues, findings of fact, the relevant legal principles, and an explanation of how the law had been applied to the facts found, culminating in the ET's conclusions. The ET also accepted, however, that further application might still be made, either (implicitly) at the hearing on 18 March 2021 or (expressly) by anyone who could identify a reason for continuing public access (this possibility apparently being envisaged as without any limit of time).

221. Although the ET's subsequent decision relating to the application of 23 February 2022 is not the subject of any appeal before me, its reasoning in that regard has been referred to by all parties, accepting that this should be seen as providing a fuller explanation for the order made on 8 February 2021. Those fuller reasons make plain that the ET also had regard to the rights of others who were not parties to the litigation and might not have been called as witnesses or consulted as to the content of the hearing bundle, but who had

created many of the documents in question ("*emails … drafted in haste and sent in the expectation of privacy*"). Similarly, it considered the respondents' rights to privacy regarding their commercial affairs were also relevant considerations. The ET further explained how it considered that difficulties might arise from the stated desire to publicise "*any record of evidence given in open court*", as there had been no recording of the proceedings, and the publication of witness statements without any record of cross-examination might be misleading.

222. For the claimant it is objected that there could have been no reasonable continuing expectation of privacy or confidence: that was removed once the jurisdiction of the ET was invoked, but, in any event, had certainly been lost with the publication of the hearing materials to the world during the period of the full merits hearing. The respondents object that those who were not parties to the proceedings cannot sensibly be said to have invoked the ET's jurisdiction, but also argue that there is an obvious difference between making documentary materials publicly available for the duration of a hearing and making those materials publicly available for an infinite period.

223. To some extent what the claimant says is obviously true: there can be no reasonable expectation of privacy in relation to proceedings in open court, even for those who are not parties to the litigation in question (**Khuja** at paragraph 34(3)). There must also be a risk that the publication of the hearing materials on the CCL's/CLC's website during the course of the full merits hearing has meant that, even if the entirety of the document was not actually referred to in evidence, much of the content has already been made public. I do not, however, consider that questions of privacy and confidentiality were wholly irrelevant. There is a difference between posting documents on a website over the course of six days, where these are identified as relating to an on-going hearing, and most likely to be viewed by those who are trying to follow the proceedings, and the continued publication of those documents on the same website thereafter. Whilst always a matter of scale, the temporary posting of materials on a website will not always mean that all expectation of privacy or confidentiality is lost (as, indeed, was recognised in the present case in relation to the document mistakenly uploaded for ten minutes during the course of the hearing, see paragraph 12, ET liability decision).

224. Relatedly, it was not irrelevant for the ET to consider the risk of other errors having been made in the uploading of documents during the course of the hearing. Although the parties had sought to ensure appropriate redactions had been made to avoid the inadvertent disclosure of personal or commercially sensitive information unnecessary for the hearing, the ET could not be sure that this had been comprehensively carried

out. Indeed, in oral submissions, Mr Quintavalle effectively conceded this point, acknowledging that there might be a need for further redactions to be made.

225. Although the risks of harm to the legitimate rights of others, in particular pursuant to article 8 **ECHR**, might well have been limited, I therefore do not consider it can be said that the ET erred in giving some weight to these concerns.

226. As for the other side of the balance, it is apparent that the ET had in mind the purposes of the open justice principle, in particular to enable understanding of the issues in the case and the evidence adduced in support. In weighing this factor, however, the ET permissibly had regard to the fact that, following the hearing, those who were interested would have the benefit of the fully reasoned judgment, which included references to the evidence. Subsequently addressing the 23 February 2022 application, EJ Goodman also expressed concern as to whether it would assist public understanding of the trial process for witness statements to be left on the website post-hearing when that would not reflect any concessions or contradictions made during the live testimony. When proceedings are recorded, this issue might be addressed by the publication of a full transcript of the hearing; that, however, was not possible in this case (there had been no recording) and it would be disproportionate to require the Employment Judge to create a full record from her notes. Having regard to the context, I do not consider the ET erred in considering that, after the hearing, continued public access to these documents might not in fact provide for greater understanding of the evidence given during the hearing; in these circumstances, it was entitled to see the means of achieving open justice to be more nuanced.

227. In this case, by putting steps in place to enable public access to the hearing materials for the duration of the trial, the ET had both ensured this was a hearing conducted fully in public and had better enabled the fair and accurate reporting of the proceedings. I am told that, during the course of the hearing, there were media reports relating to the case across the world; there can be no suggestion that the ET did anything other than give full effect to the open justice principle in its conduct of this hearing. Although the claimant's representatives had assisted the ET in furthering the open justice principle during the course of the trial, the ET had only ever given permission for the wider use of the respondents' disclosure documents so as to ensure public access to the hearing materials during the trial. Thereafter, it was entitled to take the view that the open justice principle no longer required the continuation of that access, and the claimant's use of the respondent's documents should then be restricted. The ET did not thereby rule out the possibility of further, post-trial,

access to the hearing documents: to the extent the documents belonged to the claimant, she was entitled to continue to publish them as she saw fit; more generally, the ET expressly provided that an application might be made for continuing public access by any person who considered there was some reason for this.

228. Having applied the correct legal principles, and carried out the requisite balancing exercise, the ET thus arrived at a decision that permissibly restricted continued wholescale publication of the hearing materials, while allowing for the possibility of further public access to the documentation if there was a proper reason for doing so. That was a fact-sensitive decision, falling within the proper exercise of the ET's discretion and there is no basis for interference with that determination on appeal. I therefore dismiss this appeal.