



Neutral Citation Number: [2026] EWCA Civ 253

Case No: CA-2024-000691

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MRS JUSTICE EADY
[2024] EAT 30

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2026

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE MOYLAN
and
LADY JUSTICE FALK

Between:

SEYI OMOOBA

Appellant

- and -

(1) MICHAEL GARRETT ASSOCIATES LIMITED
(T/A GLOBAL ARTISTS)
(2) LEICESTER THEATRE TRUST LIMITED

Respondents

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**) for the **Second Respondent**

Hearing date: 3 March 2026

Approved Judgment

This judgment was handed down remotely at 10.00am on 13 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Falk:

Introduction

1. The Appellant, Miss Seyi Omooba, is seeking to appeal from a decision of the Employment Appeal Tribunal (“EAT”). In that decision ([2024] EAT 30, [2024] IRLR 440) the President of the EAT, Eady J, dismissed Miss Omooba’s appeal from a decision of the Employment Tribunal (“ET”). The ET had rejected Miss Omooba’s claims for direct discrimination within section 13 of the Equality Act 2010 (“EqA”), harassment within section 26 EqA, indirect discrimination and breach of contract, had awarded costs against her and had also made an order about the publication of documents from the trial with which Miss Omooba disagreed.
2. Permission to appeal from the EAT to this court was refused by Bean LJ by an order dated 10 July 2024, but on 11 April 2025 Miss Omooba applied to reopen 7 of the 8 grounds of appeal under CPR 52.30. The application to reopen relied on an asserted inconsistency between Bean LJ’s refusal of permission and the later decision of this court in *Higgs v Farmor’s School* [2025] EWCA Civ 109, [2025] ICR 1172 (“*Higgs*”). By an order dated 13 October 2025, Elisabeth Laing LJ ordered a rolled-up hearing of the application and, if granted, the application for permission to appeal.
3. In summary, the argument that there is an inconsistency with *Higgs* is misconceived, and none of the other submissions made in support of the application come close to meeting the high threshold required before a decision may be reopened under CPR 52.30.

Factual background

4. The unfortunate background to the proceedings may be summarised briefly. Miss Omooba is a talented young actress. From 2016 she was on the books of the First Respondent agent, Michael Garrett Associates (the “Agent”), and was building a successful career. In December 2018, at the age of 24, she was offered the leading part of Celie in a stage musical production of Alice Walker’s novel *The Color Purple* at the Curve Theatre in Leicester, the theatre belonging to the Second Respondent (the “Theatre”). Ms Omooba accepted the role and on 10 January 2019 entered into an employment contract with the Theatre.
5. On 14 March 2019 the Theatre announced the cast for the production. The following day, an actor unconnected to any of the parties tweeted a screenshot of a Facebook post that Miss Omooba had published in 2014, expressing her religious beliefs regarding homosexuality, which she believes to be sinful and contrary to biblical teaching. The tweet asked whether Miss Omooba stood by the post or was “happy to remain a hypocrite ... seeing as you’ve now been announced to be playing an LGBTQ character”.
6. This led to what the ET described as a savage and speedy social media storm. After some interactions between the parties about the nature of any statement that Miss Omooba could make in response, the Theatre terminated its contract with Miss Omooba on 21 March 2019. The Agent terminated its contract with her three days later.
7. The position of both the Theatre and the Agent in these proceedings is that the part of Celie is an “iconic gay role”. As far as Miss Omooba was concerned, she said that she had not appreciated that Celie would be portrayed in that way before she took the part on, and (although she had been asked to do so) she had not read the script, having

originally auditioned for a different part. When Miss Omooba did read the script close to trial she concluded, as she accepted in her evidence, that she could not have played the part of Celie in any event because it crossed what the ET described as a “red line”, so she would have had to pull out anyway once she appreciated what was required.

The ET’s findings

8. In a careful liability judgment following a 6-day hearing in February 2021, the ET rejected all of Miss Omooba’s claims. For present purposes the most significant findings are that the “reason why” each contract was terminated did not comprise or include the protected characteristic of Miss Omooba’s beliefs or her manifestation of them. Those findings were expressed as follows, at [107] in relation to the Theatre and at [110] and [112] in relation to the Agent:

“107. We concluded that 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 [the production] would not succeed.

...

110. ... what operated on [Michael Garrett’s] mind was not the fact of her belief, but the commercial risk to his business if clients and agents walked. The contract explicitly required the claimant to acknowledge that the agency represented other clients too. The agency had to consider the extent to which other clients would dislike the association with the claimant and whether they would be damaged by association. The claimant had made her view public and had¹ stood by it when it attracted adverse comment. She continued to give interviews (after termination) defending her position. It is hard to see how in the polarised situation that had come about the [Agent] 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

¹ The original has a “not” here but it is common ground that that is a slip.

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 [of] that on supply of work.

...

112. On the evidence [Mr Garrett] terminated the contract because he thought a continued association would damage the business. The contract was not terminated because of [Miss Omooba's] religious belief, but because in his mind the publicity storm about her part in *The Color Purple* threatened the agency's survival."

9. A separate costs judgment in March 2021 ordered Miss Omooba to pay costs, subject to detailed assessment, applying the rule that costs may be ordered where the ET consider that a party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" or where their claim had no reasonable prospects of success.
10. In addition, at the conclusion of the hearing on liability on 8 February 2021, the ET ordered that Miss Omooba and her representatives (the Christian Legal Centre or Christian Concern) remove from their websites "all documents posted there for the hearing of this claim", including the trial bundles and witness statements. The reasons, which were later elaborated by reference to *Cape Intermediate Holdings Limited v Dring* [2019] UKSC 38, [2020] AC 629, explained that the materials had been hosted by the claimant's team following an enquiry by the judge as to public access for the hearing, which was held remotely, and should be removed because the hearing had ended. The arrangement was, effectively, a substitute for the usual one at in-person hearings where physical access to documents can be provided while a hearing is ongoing. The later reasoning pointed out that an application could have been made for the order to be reconsidered, but any such application should have been made on a timely basis in accordance with the ET's rules.

The EAT's decision

11. In a comprehensive 76 page judgment following a 3 day hearing in December 2023, Eady J dismissed Miss Omooba's appeal on all grounds, making it unnecessary to address a cross-appeal that there was an occupational requirement that an actor playing Celie should not have manifested such beliefs, and that keeping Miss Omooba on the books of the Agent would in effect amount to compelled speech (*Lee v Ashers Baking Co Ltd* [2018] UKSC 49, [2020] AC 413). The scope of the appeal to the EAT was extensive, in broad terms covering all of the ET's decisions apart from its rejection of the indirect discrimination claim.

12. Eady J decided that the ET had not erred in confusing reason with motive, as Miss Omooba maintained that it had. Rather, the ET had concluded that Miss Omooba's belief was part of the context but not the reason that the contracts were terminated. As to the harassment claim and the impact of the social media storm, the ET had been entitled to conclude that the Respondents had not caused or contributed to that impact and to reject the argument that any breach of rights under the European Convention on Human Rights (the "Convention") – of which none had been found – would amount to a "violation of dignity" for the purposes of section 26 EqA. The ET had also correctly rejected the breach of contract claim, which was brought only against the Theatre, in circumstances where Miss Omooba would not in fact have played the part (so the contract was "empty", with Miss Omooba being in prior repudiatory breach) and she was also in receipt of an open offer to pay the full contract fee. Further, the ET had reached permissible conclusions as regards costs and the publication of hearing documents, with due regard to the open justice principle.

The appeal to this court

13. The grounds of appeal to this court may be summarised as follows:

Direct discrimination

Ground 1: The EAT erred in holding that the ET had properly distinguished between the Respondents' "reasons" and "motives" when treating Miss Omooba less favourably. Its findings compelled the conclusion that her protected beliefs or their manifestation were operative reasons for that treatment.

Ground 2: The ET's finding that the Respondents were motivated by concern about discriminatory reactions to Miss Omooba's beliefs by colleagues, customers/clients and others amounted to a finding of direct discrimination by the Respondents because of those beliefs.

Harassment

Ground 3: The ET misdirected itself with regard to whether the Respondents had, by their failure to provide support or express disapproval of public hostility, "created" a prohibited environment for the Appellant.

Ground 4: The EAT also erred in upholding the conclusion that there was no violation of dignity, including in failing to recognise that a harassment claim could succeed where a direct discrimination claim did not and in holding that a violation of rights under Articles 9 and 10 of the Convention did not necessarily entail a violation of dignity.

Breach of contract

Ground 5: The EAT erred in upholding the rejection of the breach of contract claim. The, at the time unknown, internal "red line" did not demonstrate an intention to abandon the contract.

Costs

Ground 6: The EAT should not have upheld the conclusion that the costs threshold was met, for reasons that included the direct discrimination claims wrongly being held not to have a reasonable prospect of success.

Documents

Ground 7: The EAT wrongly held that the ET had jurisdiction under its general case management power to prohibit the continued publication of documents.

Ground 8: The EAT also erred in finding that the ET properly exercised its discretion in relation to documents and properly balanced the relevant Convention rights.

14. By an order dated 10 July 2024 Bean LJ refused permission to appeal. The reasons for his order warrant being set out in full:

“1. The ‘reason why’ issue was a question of fact for the employment tribunal. Like the President of the EAT, I am satisfied that the ET reached permissible conclusions as to the reasons why the Claimant was dismissed/had her contract terminated and were entitled to find that the Claimant’s religious beliefs and manifestations of those beliefs were not operative reasons.

2. As to discriminatory conduct by others, I accept the Respondents’ submission that it is open to an employer to take action, in an appropriate case, to address a dysfunctional situation without being fixed with the motivations of third parties: see the judgment of Simler LJ (as she then was) in *Kong v Gulf International Bank* [2022] ICR 1513. This is how the ET analysed what occurred in the present case.

3. The ET found that the actions of the Respondents did not contribute to, still less create, the hostility to which the Claimant was subjected on social media. It does not appear that before the ET the case was put (or at any rate pleaded) on the basis of harassment by inaction. Quite apart from any legal difficulties this ground has no prospect of success given the findings of the ET that social media hostility to the Appellant was not because of any action on the part of the Respondents. Harassment by inaction is a controversial concept which requires cogent evidence that inaction made the position worse: see *Conteh v Parking Partners* [2011] ICR 341 at paragraph 33.

4. Ground 4 appears, as the Respondents observe, to put forward an argument whereby every unjustified interference with a Convention right will of itself amount to an actionable violation of the claimant’s dignity. There is no authority to this effect and the harassment provision of section 26 [EqA] cannot be interpreted in this way. Moreover, as the President noted in her judgment there were no findings in this case by the ET of any unjustified interference by either of the Respondents with the Appellant’s rights under Article 9. As to the attempt to rely on the Framework Directive, this was dealt with by the President at paragraph 105 of her judgment which in my view is not arguably open to criticism.

5. The breach of contract claim against the Second Respondents was correctly described as hopeless. The ET was entitled to find that the contract was ‘empty’ because the Appellant would not have played the part, and, if she had not been dropped when she was, she would have pulled out at a late stage and wrecked the production. There was no financial loss and the ET were entitled to find at paragraph 132 of their decision that there was no loss of opportunity to enhance her reputation by performing because she would not have played the part.

6. Appeals from decisions of the ET on costs are rarely open to a successful appeal. In this case the ET were entitled to find that the claims had no real prospect of success and that in the case of the contract claim, it was vexatious and pursued unreasonably. The ET's costs judgment is impressively argued and in my view is unassailable on appeal.

7. (and 8). The documents appeal does not, on the facts, raise any issue of principle. It is plain from EJ Sarah Goodman’s order of 8 February 2021 that the reason why the Appellant or CLC on her behalf were originally allowed, or even asked, to host the documents on the website was as a temporary measure to allow public access while the oral hearing was going on. After the hearing was over the documents should have been removed from the website. It was then open to anyone seeking public access to any or all of the documents to make an application to the ET: see paragraph 5 of EJ Goodman’s order. It does not appear that any such application was made. What did happen is that in February 2022 EJ Goodman was asked to revoke her order of 8 February 2021 entirely. Her reasons for refusing that application, in particular paragraphs 20 to 23, are an impeccable exercise of discretion. *Cape v Dring* raises some interesting issues which have yet to be resolved, but as the law stands it is not arguable, in my view, that a party to whom a bundle of documents is disclosed has an absolute right to publish the whole bundle to the world.”

CPR 52.30: the law

15. CPR Part 52.30(1) provides as follows:

“The Court of Appeal or the High Court will not reopen a final determination of any appeal unless— (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.”

Paragraph (2) clarifies that references to “appeal” include an application for permission to appeal.

16. The principles now reflected in CPR Part 52.30 were first established in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528. They were comprehensively reconsidered by this court in *Municipio de Mariana v BHP Group plc* [2021] EWCA Civ 1156, [2022] 1 WLR 919 (“*Municipio de Mariana*”) at [57]-[64], in a passage in the judgment of the Master of the Rolls which considers both *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council (Practice Note)* [2018] EWCA Civ 860,

[2018] 1WLR 5161 (“*Goring*”) and *R (Wingfield) v Canterbury City Council (Practice Note)* [2020] EWCA Civ 1588, [2021] 1WLR 286.

17. There is no need to restate the position at any length. For present purposes the key points that can be derived from *Municipio de Mariana* are as follows:
- a) The circumstances described in CPR Part 52.30 are truly exceptional. The jurisdiction can only be invoked if it is shown that the integrity of the earlier proceedings has been critically undermined.
 - b) There must be a powerful probability that a significant injustice has occurred, such as to overbear the pressing claim of finality in litigation.
 - c) In considering applications for permission to appeal a judge must grapple with the issues raised, in the sense of addressing the essential points raised by the grounds.
 - d) If the judge either failed to grapple with the issues on an application for permission to appeal, or did do so but made a mistake which corrupted the whole process (such as wholly failing to understand a clearly articulated point) and there is a powerful probability that there would otherwise have been a different result, then the requirements of CPR Part 52.30 may be met.
 - e) The concept of “grappling” with the issues does not connote any particular degree of detail. What is required depends on the circumstances of the case.

The application to reopen

18. The written submissions in support of the application to reopen Bean LJ’s decision to refuse permission to appeal were based firmly on this court’s decision in *Higgs*, which had been handed down shortly before the application was made. Bean LJ had been part of the constitution in *Higgs* and had agreed both with the leading judgment of Underhill LJ and with my concurring judgment. The facts and issues in *Higgs* were said to be “remarkably similar” to those of Miss Omooba’s case, but Bean LJ had reached opposite conclusions. The inconsistency was said to be so striking as to “demand the conclusion that his refusal of PTA in this case must have arisen from a fundamental misunderstanding of the issues”. Reopening was sought on all grounds apart from Ground 8, on the basis that Bean LJ had “wholly failed to grapple with the issues”. The incompatibility of his decisions on Grounds 1, 2 and 6 with *Higgs* affected those grounds but was also “likely to have affected the others”.
19. I disagree with the assertions as to inconsistency with *Higgs*, which were also not pursued by Mr Fetto KC, for Miss Omooba, orally. However, given the nature of the allegation it is necessary to explain why those assertions are wrong and also to say something about the “reasons why” test and the so-called “separability approach”, before going on to explain that the criticism that Bean LJ failed to grapple with the issues is entirely misplaced.

Higgs

20. *Higgs* concerned a suspension, disciplinary investigation and summary dismissal from a school of a pastoral administrator who had posted items on a private Facebook page expressing her objection to aspects of the government’s policy on relationships and sex

education which related to same-sex marriage and “gender fluidity”. Mrs Higgs brought a claim of direct discrimination on the ground of religion or belief, under section 13 EqA.

21. In sharp contrast to this case, at least by the time the case was heard in the EAT (also by Eady J, [2023] EAT 89, [2023] ICR 1072), the “reason why” question was not what was in issue. Instead, the key issues before the EAT on Mrs Higgs’ appeal were whether the posts were to be viewed as manifestations of her beliefs and, if so, whether the manner in which they were expressed was objectionable, potentially engaging the need for an assessment of the proportionality of the school’s reaction. The EAT answered the first question in the affirmative and, on the second, concluded that a proportionality assessment was required and remitted the case for that purpose.
22. On Mrs Higgs’ further appeal to this court against the remittal (a cross-appeal having been refused permission), the only substantive issue related to the second question and, critically, how scope for objective justification was to be treated as reflected in the apparently subjective test in section 13 EqA and how it should be applied to the facts. We concluded that Mrs Higgs’ dismissal was on any basis a disproportionate response on the facts, which included that she was a long-serving employee about whose work there was no complaint and that the school’s concerns about reputational damage had not materialised.
23. In a comprehensive judgment, Underhill LJ explained the earlier case of *Page v NHS Trust Development Authority* [2021] EWCA Civ 255, [2021] ICR 941 (“*Page*”). He summarised *Page* at [74] and [175(5)] as having decided that adverse treatment in response to something objectionable in the way in which a belief was manifested, determined objectively, would be lawful if the employer shows that the treatment was objectively justified, so introducing a requirement of objective justification into the causation element in section 13(1) EqA. Underhill LJ considered the jurisprudential basis for that ratio in detail at [80]-[97].
24. The ET had found that Mrs Higgs had not been dismissed because she held or expressed protected beliefs, but because the school feared that the way in which she had expressed those beliefs would be perceived as showing that she had homophobic and transphobic views ([105]). It had found the language used in material that Mrs Higgs had re-posted to be “florid and provocative” (see at [102] and [163]). That the school’s complaint was the manner in which Mrs Higgs had expressed her beliefs (and thus what it saw as a potential effect on its reputation) is further emphasised at [135], where Underhill LJ explained that it was “no part of [the school’s] case that it was entitled to object to [Mrs Higgs] publicly expressing her protected beliefs ... This is not therefore a case about whether an employee can be dismissed simply for expressing those views on Facebook: it is about the terms in which she did so”.
25. In other words, the uncontroversial answer to the “reason why” question in *Higgs* was that it was the manner in which she expressed her beliefs. Section 13 EqA was therefore engaged, but subject to an assessment of the proportionality of the school’s response. In contrast, the “reason why” question is the key issue in Miss Omooba’s direct discrimination claim.

Section 13(1) EqA, the “reason why” and the “separability approach”

26. Section 13(1) EqA defines direct discrimination in terms of less favourable treatment “because of” a protected characteristic. In *Nagarajan v London Regional Transport* [2000] 1 AC 501 (“*Nagarajan*”), at pp.510-511, Lord Nicholls said this when considering predecessor legislation which referred to less favourable treatment “on racial grounds”:

“...in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.

The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination ... the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negated by the discriminator’s motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant’s job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant’s life a misery. If racial grounds were the reason for the less favourable treatment, direct discrimination ... is established.”

Lord Nicholls also made clear at p.513 that it was sufficient to make out a discrimination claim if racial grounds had a “significant influence on the outcome”.

27. Although not cited in *Nagarajan*, the distinction that Lord Nicholls drew between a) “grounds” (what would now be referred to as the “reason why”) and b) motive (somewhat confusingly referred to by Lord Nicholls as the “why” question), can be seen emerging, perhaps more clearly, in the judgment of the EAT (Browne-Wilkinson J) in the much earlier case of *Din (Ghulam) v Carrington Viyella Ltd* [1982] ICR 256 (“*Din*”) at p.259:

“It must be stressed that in considering discrimination cases ... the motive for taking a particular course of action, whilst it may be relevant, is not the decisive factor. What has to be inquired into is the reason why a particular course was adopted: the question is ‘Was it on racial grounds?’ If the decision involved drawing a distinction between, for example, coloured and white employees, then it will be discriminatory even though the motive lying behind it did not necessarily involve a prejudice of a racial kind...”

28. In that case an employee of Pakistani origin was not taken on again, as had been the usual practice, following a trip to Pakistan. There had been an unhappy incident shortly before he left for his trip which the industrial tribunal found to have involved racial motivation on the part of the foreman. The tribunal further found that the decision not to re-engage was made on the ground of the potential unrest which a re-engagement would have involved, rather than any racial discrimination that lay behind it.
29. On that point, Browne-Wilkinson J said this at p.260:

“In our view, if an act of racial discrimination gives rise to actual or potential industrial unrest, an employer will or may be liable for unlawful discrimination if he simply seeks to remove that unrest by getting rid of, or not re-employing, the person against whom racial discrimination has been shown.”
30. The industrial tribunal had therefore erred in focusing on the point when Mr Din was refused re-employment without considering the earlier event. If that earlier event involved racial discrimination by another employee and the reason not to re-engage was to prevent a recurrence of racially prejudiced acts, then that would amount to racial discrimination by the employer (p.261). The case was remitted for further consideration. The tribunal had not given reasons for finding that the earlier event involved discrimination and had also appeared to have confused motive and reason.
31. The next case I must consider is *Amnesty International v Ahmed* [2009] ICR 1450 (“*Ahmed*”), a decision of Underhill J as President of the EAT. In that case Ms Ahmed, who was of Sudanese origin, was refused a promotion at the respondent charity to the post of “researcher” for Sudan on grounds that, since she would be identified as coming from the north of the country, she could be perceived to present a conflict of interest and be exposed to an increased safety risk. The ET held that there was direct discrimination based on Ms Ahmed’s ethnic origin, a conclusion which the EAT upheld.
32. Underhill J observed at [24] that the ET had made the “plainest possible” finding of treatment on racial grounds. The reason for the charity’s concerns about safety and about whether Ms Ahmed would be perceived as impartial was her ethnicity. The concerns expressed about health and safety were motives, not grounds. He went on to consider *Nagarajan*, the earlier House of Lords decision in *James v Eastleigh Borough Council* [1990] 2 AC 751 (“*James*”) and *Chief Constable of the West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 (“*Khan*”). In his illuminating analysis at [31]-[40], Underhill J noted that while some direct discrimination cases are “criterion” based, requiring no subjective enquiry (for example the free swimming for pensioners in *James*, which necessarily involved gender discrimination due to different pensionable ages), others did require it. In the latter kind of case “tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances”, although it remained important to bear in mind that “the subject of the inquiry is the ground of, or reason for, the putative discriminator’s action, not his motive”, a benign motive being irrelevant, as Lord Nicholls had explained in *Nagarajan* (see above at [26], second paragraph) (*Ahmed* at [34] and [35]).
33. Underhill J also referred to the use of a “but for” test, counselling caution at [37]. He pointed out that the fact that a protected characteristic 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”. I agree.

34. Returning to *Higgs*, in the course of his judgment Underhill LJ discussed what he called the “separability approach”, which is also relevant to this appeal: see at [57]-[60]. Underhill LJ cited the following passage from Simler LJ’s judgment in *Kong v Gulf International Bank (UK) Ltd* [2022] EWCA Civ 941, [2022] ICR 1513 (“*Kong*”), a case relating to an alleged dismissal for making a protected disclosure. Having considered relevant case law, including the judgments of Underhill J as President of the EAT in *Martin v Devonshires Solicitors* [2011] ICR 352 and Elias LJ in *Fecitt and others v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 (“*Fecitt*”, see below), Simler LJ had said this:

“56. I would endorse and gratefully adopt the passages I have cited as correct statements of law. They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer’s computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the *real* reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in *Page* [2021] ICR 912, the protected disclosure is the context for the impugned treatment, but it is not the reason itself.

57. Thus the ‘separability principle’ is not a rule of law or a basis for deeming an employer’s reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistleblowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct.”

35. In *Higgs*, Underhill LJ re-emphasised that what he preferred to call the “separability approach” was not a rule of law. Rather, it simply draws attention to the potential need to distinguish between adverse treatment because of a protected characteristic (or protected disclosure, as in *Kong*) and adverse treatment for some other reason.
36. *Fecitt* concerned nurses who made protected disclosures but, dissatisfied with the outcome, continued to press their concerns. The ET found that the NHS Trust had

concluded that the only feasible way of resolving the workplace conflict that had developed was to redeploy two of them and remove another. While the ET considered that response to be open to criticism it concluded that the reason for moving the whistleblowers was not the making of the protected disclosures but the dysfunctional workplace situation that could not feasibly be resolved in another way.

37. In *Fecitt* this court reinstated the ET's conclusion that the claims for detriment on the ground of making a protected disclosure should be dismissed. Elias LJ confirmed at [49] that the question the ET must determine is the "reason why" the nurses were treated as they were. The passage of his judgment to which Simler LJ referred in *Kong* emphasised the need for tribunals to look with a "critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation", but it could not be correct that the "need to resolve a difficult and dysfunctional situation could never provide a lawful explanation for imposing detrimental treatment...", because that would mean that "the reason why the employer acted as he did must be deemed to be the protected disclosure even where the tribunal is wholly satisfied on the facts that it was not" (*Fecitt* at [51] and [52]).
38. For present purposes, I would draw together the following threads from the case law:
- a) The question whether a person has been treated less favourably "because of" a protected characteristic, within section 13(1) EqA (in predecessor legislation "on grounds of") requires a determination of the "reason why" a person was treated less favourably.
 - b) Except in "criterion" cases (where the position should be obvious from the criterion used to discriminate), a subjective enquiry is required, usually involving inference rather than direct evidence.
 - c) There is a firmly established distinction in the case law between (i) the "reason why" a person was treated less favourably and (ii) a motive or motives that may lie behind that reason.
 - d) It is sufficient to establish direct discrimination if the existence of a protected characteristic had a significant influence, or in other words if it was a material part of the "reason why".
 - e) Further, a respondent cannot simply shelter behind concerns about discriminatory reactions by others. A wish to avoid such reactions may be a motivating factor but will not by itself prevent discrimination.
 - f) However, there is a distinction between a circumstance or factor that is or forms part of the "reason why", and other contextual circumstances. The fact that a protected characteristic is part of the circumstances or sequence of events leading to the act complained of, or even that the act complained of would not have occurred but for that characteristic, is not enough.
 - g) The "separability approach" may be a helpful tool in determining the "reason why", because it recognises that distinctions may need to be drawn between a protected characteristic (or protected disclosure, as in *Kong*) and something else which can

be separated from it, which might include the manner in which the person expressed themselves or otherwise acted, or some other feature.

- h) An example of such other feature would be the sort of dysfunctional situation that was found to have arisen in *Fecitt*.
- i) The determination of the “reason why” is a question of fact for the ET.

If further authority is needed for the last of these points, it is definitively confirmed by Lord Nicholls in *Khan* at [29]. It is also why the “separability approach” is no more than a tool, and not a rule of law.

39. That last point bears emphasis. Determination of the “reason why” is frequently not straightforward and there may be plenty of scope for disagreement, but it is a question of fact. The task of determining it is allocated to the ET, appeals from which are limited to errors of law. This is well illustrated by *Din*, where the difficult task of resolving whether discrimination really was the reason for the refusal to re-engage (or part of it) was remitted to what was then the industrial tribunal, by *Ahmed* where it was the ET’s findings of fact that were determinative, and by *Fecitt* where this court saw no reason to go behind the ET’s finding that the sole reason for the action was to resolve the dysfunctional situation.

Discussion of the application to reopen

40. I have already explained why *Higgs* provides no proper basis to maintain that Bean LJ failed to grapple with the issues on this appeal. That was the basis on which the application to reopen was put.
41. In his oral submissions, Mr Fetto took a different approach. He submitted that, in making the findings in the paragraphs set out at [8] above, the ET made errors of law. In essence, he submitted that the ET was not entitled to conclude that the sole reasons for the Theatre’s action were the dysfunctional situation and the fact that the production would not succeed, and in the case of the Agency the threat to its survival. As I understood it, this was on the basis that the ET’s findings earlier in the relevant paragraphs required a conclusion that the real reason (or at least one of the real reasons) was Miss Omooba’s beliefs or their manifestation. Put another way, the only conclusion open to the ET as a matter of law was that there had been direct discrimination. This was a case where Miss Omooba was singled out for less favourable treatment in order to appease third parties’ objections to her beliefs, and the commercial risks were no more than motives.
42. I do not agree that there is any such rule of law. The determination of the “reason why” has repeatedly been held to be a question of fact. The EAT gave detailed consideration to whether the ET had misdirected itself as to the law, and concluded that there was no error.
43. Further, and more importantly in the present context, it is obvious from paragraphs 1 and 2 of his reasons that Bean LJ grappled with the issues raised by Grounds 1 and 2 of the application for permission to appeal. The reasoning is shortly expressed but the careful cross-references show that he had considered both the EAT’s comprehensive analysis, the ET’s decision and the submissions. In the circumstances no additional detail was required.

44. Mr Fetto maintained that his further oral submissions are reflected in the skeleton argument that was before Bean LJ on the permission application. However, the fact that none of the Master of the Rolls, Moylan LJ or I appreciated those points before they were developed orally shows that they were not the sort of “clearly articulated” point (*Goring* at [13]) which, if not understood, might allow a reopening under CPR 52.30 if it was combined with a powerful probability that there would have been a different result (which there is not, see [42] above).
45. What I have said so far relates to Grounds 1 and 2. As far as the other grounds are concerned, the arguments raised come nowhere near arguably meeting the threshold under CPR 52.30. Other than possibly in relation to costs, Bean LJ’s decision on those grounds could not possibly be affected by *Higgs*, which was the basis on which the application was brought. Having taken careful account of both the written and oral submissions on the other grounds, I am wholly satisfied that Bean LJ’s reasoning shows that he did grapple with the issues. Indeed, I would have reached the same conclusions.
46. In these circumstances, and bearing in mind the EAT’s very comprehensive judgment, I do not consider that anything more than some very limited additional observations are warranted.
47. Grounds 3 and 4, relating to the harassment claim, raise issues that were fully considered by the EAT, including the difficulty in showing (even if it had been pleaded) that inaction was “unwanted conduct” that had the effect of “creating” a prohibited environment within section 26(1)(b)(ii) EqA, but also the fact that it cannot be the case that any violation of Convention rights necessarily involves a violation of dignity within section 26(1)(b)(i). Further, Miss Omooba’s claims that her Convention rights were violated must now be viewed against the backdrop that, following Bean LJ’s decision, Miss Omooba made an application to the European Court of Human Rights in relation to the events in question and the outcome of the tribunal proceedings. In March 2025 that application was ruled inadmissible by a single judge on the ground that it did not disclose any appearance of a violation of Convention rights.
48. As to Ground 5 (breach of contract), I can see that the concept of a repudiatory breach being found to exist where the party said to be in breach was not in fact aware at the relevant time of the matter said to constitute the breach – namely the crossing of the “red line” that the required depiction of Celie would involve – raises interesting issues, but on the facts it is academic. Miss Omooba was offered her full contract fee. No additional damages for a loss of opportunity to enhance her reputation by performing could have been awarded, because she would not have played the part.
49. In relation to costs, Mr Fetto submitted that the ET wrongly treated Miss Omooba’s claim in direct discrimination as having no real prospect of success, whereas it evidently raised a difficult “reason why” issue. However, that does not reflect a fair analysis of the ET’s nuanced and careful costs judgment. Properly read, the primary basis of its decision so far as the direct discrimination claim was concerned was unreasonable conduct in pursuing the proceedings. The ET placed emphasis on Miss Omooba’s failure to appreciate what the part involved, and therefore the significance of her “red line”, until close to the trial. Miss Omooba had neither read the script when she should have done, nor had she paid attention to a letter she had received from Alice Walker (the novel’s author) in the autumn of 2019 which also made the position clear. Further, a drop-hands offer had been made at around the same time, and there had been a failure properly to

reassess the claim at that time by reference to the offer and the detailed grounds of resistance, which had also repeated the author's views and those of the director.

50. I should add to this that a significant share of the criticism should be seen as addressed to Miss Omooba's advisers. It was they who should have initiated and supported a re-evaluation of her case, and should have ensured that the implications of what was being said in the grounds of resistance were properly understood by a client who is, evidently, both young and inexperienced and has been subjected to very unfortunate events which are likely to have had a material impact on her.
51. As far as Ground 7 is concerned, there is nothing in the point. The ET was correct to conclude that it had jurisdiction under its general case management power to make the documents-related order that it did: see *IG Index PLC v Cloete* [2014] EWCA Civ 1128, [2014] CP Rep 44 at [28], where Christopher Clarke LJ held that it was implicit in the ET's rules that the restrictions imposed by CPR 31.22 on the use of documents should apply. CPR 31.22(2) expressly permits a court to make an order restricting or prohibiting the use of a document which has been disclosed, even where it has been referred to at a hearing held in public. The submission by Mr Quintavalle, who made submissions on this issues for Miss Omooba, that any jurisdiction had to be derived from what was then rule 50 of the Employment Tribunals Rules of Procedure 2013 (rule 49 of the current version of the rules), and that since it did not apply the ET had no power to do what it did, is misconceived. That rule relates to privacy and restrictions on disclosure in respect of the proceedings themselves (in particular, hearings) and documents on the ET's public record, including anonymity and other reporting restrictions. Neither that rule nor the comments of Lord Sumption on which Mr Quintavalle relied in *Khuja v Times Newspapers Limited* [2017] UKSC 49, [2019] AC 161 at [14] and [18] are concerned with the publication of the sort of documents with which the ET was concerned, and the existence of the rule does not limit the scope of the ET's case management powers in the way that Mr Quintavalle submitted.

Conclusion

52. In conclusion, I would dismiss the application to reopen Bean LJ's refusal of permission to appeal.

Lord Justice Moylan:

53. I agree.

Sir Geoffrey Vos, Master of the Rolls:

54. I also agree.