EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A Bansal-McNulty		(1) Queens Park Rangers Football and Athletic Club Limited (2) John Yems (3) Crawley Town Football and Social Club Limited

Heard at: London Central (by video) **On**: 10 and 11 July 2023

Before: Employment Judge Stout (sitting alone)

Representations
For the claimant: Mr A Buchan (counsel)
For the first respondent (QPR): Mr J Wallace (counsel)
For the second respondent (JY): Mr A Ohringer (counsel)
For the third respondent (CTFC): Mr G Anderson (counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(1) The Claimant's unfair dismissal claim under Part IX of the Employment Rights Act 1996 against QPR has been brought out of time and is dismissed.
(2) It is just and equitable to extend time for all the Claimant's claims under the Equality Act 2010, s 123(1)(b) against each of the Respondents, on the terms and to the extent set out in this judgment.
(3) QPR's application to strike out under Rule 37(1)(a) and/or for a deposit order under Rule 39 in respect of the claims of direct race discrimination and/or race-related harassment is dismissed.
(4) The Claimant's claims of indirect religious discrimination, direct religious discrimination and religion-related harassment under the Equality Act 2010 against QPR are dismissed on withdrawal under Rule 52.

REASONS

1. Mr Bansal-McNulty (the Claimant) was employed by the first respondent, Queens Park Rangers Football and Athletics Club Limited (QPR) as a professional footballer until his last contract terminated on 30 June 2022. He was loaned to the third respondent, Crawley Town Football and Social Club Limited (CTFC) during the period that the second respondent, Mr Yems (JY) was club manager. In these proceedings, following an amendment application which I granted in part at this hearing and withdrawals of certain claims, he brings claims against each respondent under the following statutory headings:
    a. QPR –
        i. claim of unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996), and
        ii. under the Equality Act 2010 (EA 2010) in respect of alleged acts between 31 August 2021 and May 2022 (culminating in the non-renewal of his contract which consequently terminated on 30 June 2022) brought variously as claims of direct race discrimination (ss 13 and 39(2) Equality Act 2010 (EA 2010)), race-related harassment (ss 26 and 40 EA 2010) and victimisation (s 27 and 39(4) EA 2010);

    b. JY – claims of race- and religion-related harassment in respect of acts between September 2021 and 19 March 2022 (EA 2010, ss 26 and 40 EA 2010);

    c. CTFC – as vicariously liable for the claims against JY and also victimisation in respect of conduct by unknown/identified players/persons on unknown/unidentified dates between the suspension of JY on 23 April 2022, including not selecting him to play for CTFC between then and the last game of the season (which the Claimant confirmed at this hearing was 9 May 2022).

2. There were a number of case management matters that were dealt with at this hearing in private session. This judgment deals with the matters that were dealt with in the open part of the hearing, specifically:

    a. Whether the Claimant's claims have been brought out of time having regard the s 111 of the ERA 1996 and s 123 of the EA 2010; and,
    b. QPR's application to strike out the direct race discrimination and race-related harassment claims against it on the grounds that they stand no reasonable prospect of success (Rule 37(1)(a)), or alternatively for a deposit order in respect of the same claims (Rule 39).

3. This judgment also sets out my reserved reasons in relation to the question of whether certain of the Claimant's claims should be dismissed under withdrawal under Rule 52 or not.

The type of hearing

4. This has been a remote electronic hearing under by video under Rule 46.

5. The public was invited to observe the second day of the hearing via a notice on Courtserve.net. No members of the public joined. No significant issues arose with connectivity, save that what one witness (Mr Rehman) was unable to join by video and so gave his evidence audio-only (with the consent and agreement of all parties).

6. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

7. I received a bundle of 680 PDF pages, including the witness statements, together with skeleton arguments and authorities from all parties.

8. I received witness statements for the following witnesses for the Claimant:

    a. The Claimant;
    b. Mrs A Bansal-McNulty (his mother);
    c. Mr R Rehman (Equalities, Diversities and Inclusion Executive employed by the Professional Footballers Association (PFA));
    d. Mr F Shillingford (the Claimant's mentor);
    e. Mr M Javaid (the Claimant's solicitor).

9. I received witness statements for the following witnesses for the Respondents:

    a. Mr A Carroll (Academy Director, QPR);
    b. JY;
    c. Mrs C James (Club Secretary and Office and Team Admin, CTFC).

10. I also admitted by way of medical evidence most of the expert psychiatric report dated 16 June 2023 of Professor Fahy (save for paragraphs 5 and 6 of the opinion section of that report which purported to deal with the legal issue that was for me to decide), and a letter from Dr Gervis, formerly the QPR psychologist.

11. All the witnesses save for Mr Shillingford were tendered for cross-examination. JY and Professor Fahy were tendered for cross-examination, but it was agreed that cross-examination was not required.

12. As a result of the number of things that had to be dealt with in the course of this two-day hearing, the number of witnesses and the number of parties, we

were very pressed for time, sitting until 5.30pm both days. I am grateful to all counsel for their efforts to avoid the matter going part heard by co-operating in keeping oral submissions concise. I have considered carefully their oral submissions and skeleton arguments, and have also seen and take into account the further submissions sent by Mr Buchan and Mr Wallace after the hearing by email.

The facts

13. The facts that I have found to be material to the issues I need to decide on the time point and strike-out applications are as follows. If I do not mention a particular fact that was in evidence before me, it does not mean that I have not taken it into account. All my findings of fact are made on the balance of probabilities. Where appropriate, I also include in the recital of the facts below references to the parties' respective positions on issues that will need to be determined if this matters proceeds to substantive determination on the merits, but at the moment I merely record as they are relevant to the high level view of the merits of the case that I am invited to take for the purposes both of considering the time point and QPR's strike-out application.

Background

14. QPR and CTFC are professional football clubs. QPR fields squads in the Championship division and CTFC fields squads in League Two. JY was the manager of CTFC until his suspension on 23 April 2022.

15. The Claimant has been *"obsessed"* by football since a young child and, with talent and long hours of training, was successful in being selected aged 14 for QPR's Football Academy. When a third year scholar at the Academy he was selected by the then manager Steve McLaren (SM) to train with the first team squad and he was 'on the bench' for some away matches in the 2018/2019 season – a significant achievement for a young player.

16. QPR offered him a professional contract for the 2019/20 season, which he accepted. There is no dispute that, pursuant to this contract, the Claimant became an employee of QPR for the purposes of both the ERA 1996 and the EA 2010. (There is a dispute about his employment status prior to that contract.) During the season he was also loaned to Torquay Football Club and Dartford Football Club. The season was interrupted by the Covid-19 pandemic.

17. His professional contract was renewed for the 2020/2021 season, during which he was signed by Como Football Club and moved to Italy. This, too, was interrupted by the Covid-19 pandemic and he returned to the UK, cutting short his contract with Como.

18. SM left QPR and was replaced by Mark Warburton (MW). The Claimant's own evidence was that MW had a different philosophy to MW and did not let

any of the under-23 players play for the First Team. This was frustrating for the Claimant. QPR's position is slightly different: its pleaded case is that even SM had reached the view that the Claimant was not First Team standard and that MW agreed.

19. The Claimant's professional contract was renewed again for the 2021/2022 season. He was told at this time that if he was to get another club during the year QPR would not seek compensation. The Claimant acknowledges that this was an indication that he was not at that point expected to make the QPR First Team, but the Claimant thought that if MW was sacked or left he would go straight into the First Team and so he signed with QPR again. QPR's pleaded case is again different: it alleges that it was explicitly discussed and acknowledged in April 2021 with the Claimant and his intermediary that he was unlikely to be selected for the First Team. This was not just because of MW's views, but also because there were already at least two other players occupying the Claimant's potential position within the First Team who were significantly better than the Claimant, and because any new manager who replaced MW would not have had much opportunity of seeing the Claimant play. The Claimant was still under 21 in the 2021/2022 season, which was also significant as under 21 players do not count towards the Club's player quota under Football Association (FA) rules. Once over 21, they do and so players are not normally offered professional contracts beyond that point unless they are regarded as selectable for the First Team. QPR's case is therefore that it was always highly unlikely that the Claimant's contract would be renewed beyond the end of the 2021/2022 season.

20. I should also record here that the QPR professional contracts, including the Claimant's, are in a standard form dictated by the FA. They provide that the contract expires unless renewed by notice in writing sent no later than 15 May. There is no presumption in the contract that it will be renewed. (And I should add that there is no claim here under the *Fixed Term Workers (Prevention of Less Favourable) Treatment Regulations 2002*.)

21. After signing the 2021/2022 contract, the under-23s coach at QPR, Paul Hall (PH), introduced the Claimant to CTFC and he went on a pre-season trial with CTFC. This was successful and QPR agreed to loan the Claimant to CTFC for the first half of the season (August 2021 to January 2022). The Claimant was 'on the bench' for the whole of that time.

22. It was during this period (beginning in particular around Christmas 2022) that the Claimant on his case alleges JY made various racist comments to him and others, as set out in the pleadings and in the Claimant's witness statement. Some of those allegations were upheld by the FA's Disciplinary Commission in circumstances I deal with below, and are therefore admitted by CTFC, and some of them are also admitted by JY – but not all of them. In outline, JY continues to deny in these proceedings those allegations that he denied in the FA's internal proceedings.

23. In January 2022 the Claimant returned to QPR but MW was still there so he realised that First Team football was unlikely. He tried to go back on loan to

CTFC. His agent told him that JY was interested in offering him a permanent contract, and the possibility of a permanent transfer to CTFC was discussed with QPR, but in the end no offer was made by CTFC and the Claimant chose again to be loaned by QPR to CTFC for the second half of the season.

24. The Claimant alleges that on his return to CTFC what he describes as the *"abuse"* by JY got worse and began to affect his mental health. Having heard both the Claimant and his mother cross-examined about this period and what followed, I accept (for reasons set out further below) that the Claimant was badly affected by the way that he alleges JY was treating him. It got to the point where on his own evidence he feigned illness in order to avoid training with JY. The Claimant on his evidence told Paul Hall (PH), the Head Coach of the under-23 teams about what was happening and he encouraged the Claimant to speak to the Head of Coaching at QPR, Chris Ramsay (CR). QPR denies that the Claimant spoke to PH about these matters.

25. In March or April 2022 the Claimant (on his account) called CR to tell him that the racist banter was really bad at CTFC. He deliberately did not mention JY as he knew that CR and JY were friends. CR responded to say, as the Claimant put it in his witness statement, *"it is old school down there"*. This 'brush off' surprised and upset the Claimant as he had expected CR to be sympathetic because he is black. I record here that what the Claimant put in his witness statement about this conversation is not the same as what is pleaded in his particulars of claim. The Claimant was cross-examined on the nature of these differences. This conversation is, on the face of QPR's pleadings, denied and I have not received evidence from CR, nor has Mr Shillingford (whose account of his own conversations with both CR and the Claimant tends to support the Claimant's account) been cross-examined. I am not therefore making any findings about what was actually said in this conversation. The reason why the Claimant was cross-examined on it by Mr Wallace was, as I understood, to cast doubt on the merits of the Claimant's case and by way of illustration of the difficulties of remembering oral accounts after a passage of time. Dealing with that point, I record here that there was nothing about the Claimant's answers in cross-examination that gave me cause to doubt his recollection on this point. The differences between the pleading and the witness statement do not go to heart of the conversation and are the sort of differences that may arise naturally from recounting the same event on different occasions. The differences mean that, if the matter proceeds to trial, the Tribunal may only be able to make findings as to the gist of the conversation rather than as to specific words used, but if the gist is clear that does not weaken the merits of the Claimant's case. The fact that there are such differences between the pleading and the Claimant's witness statement speak if anything to a guilelessness on the part of the Claimant (and a refreshing lack of intervention by his lawyers) which was consistent with the picture of him that I formed from his evidence more generally about his mental health and reasons why he had not considered making a claim sooner, and also the picture I gained of his solicitor Mr Javaid in light of his frank answer about a month's delay in the context of employment tribunal time limits probably being 'too great'.

26. Picking up the chronology again, the next significant event was that other players made allegations of race discrimination against JY, which were picked up by the media and JY was suspended on 23 April 2022, pending an investigation by the FA.

27. In the light of the allegations, it is not disputed that CR called the Claimant twice. What is in dispute (and not for resolution by me at this stage) is what he said. The essence of the Claimant's case is that CR appeared to have assumed that the Claimant had made the allegations against JY, that CR was upset about this because JY was his friend and he felt that JY could lose his career and pension over such allegations, and that when the Claimant told him that he was not the one who had complained, he appeared not to believe him and said *"You need to remember that your contract ends at the end of the season"*. The essence of QPR's response is that in the first call, CR called the Claimant to confirm whether the story was correct and to *"ascertain the Claimant's level of involvement"*, but that the Claimant did not indicate that he was in any way involved or that he had been 'bullied'. Then, after JY had called CR asserting that the rumour was that the Claimant had complained and that *"he had been nothing but friendly"* with the Claimant, CR called the Claimant again out of concern for the Claimant's well-being and that he expressed concern about the 'abuse' the Claimant might have received. QPR specifically denies that CR ever threatened not to renew the Claimant's contract if the Claimant continued his involvement the FA investigation, or that the subsequent failure to renew had anything to do with JY or any involvement the Claimant had, or was believed to have had, in the allegations against JY.

28. The Claimant went back to CTFC for the last week of the season and felt himself to be 'blanked' by other players who he felt had also assumed that he was the one who had complained and resented him. He received a text message from the CTFC Captain, the whole text of which is set out in the pleadings, but was in short to the effect that he acknowledged that *"the gaffer"* was in talks with the Claimant prior to the allegations (a reference, I infer, to talks about a contract), but that nothing would be done while JY was being investigated although there would be discussions once the season had finished.

29. The last game of the season was 9 May 2022 and after that the Claimant went away to Ireland for a period (he confirmed in oral evidence that he was in Ireland on 14 May 2022 when he received a text message from someone at CTFC and he was still away on 29 May 2022 when he sent a WhatsApp to Mr Carroll about expenses).

30. QPR did not exercise its option to renew the Claimant's contract by 15 May 2022. The Claimant was (according to Mr Carroll) first included on an internal spreadsheet identifying him for 'release' on 4 May 2022. There was no meeting or conversation or other communication with the Claimant or his agent/intermediary about that decision around this time (save, on the Claimant's evidence, for what CR said in the disputed phonecall about his contract ending), but QPR asserts that the Claimant would have known that

his contract was not being renewed from the previous discussions about loaning him to CTFC, and also from the fact that he did not receive a notice that the option was being exercised. As it was, the Claimant himself felt that he found out when his agent, Leon Anderson, sent him a screenshot of the QPR website with the public announcement on 20 May 2022 that QPR was extending the contracts for Mr Armstrong and Mr McKenna but releasing the Claimant.

31. The Claimant relies on Mr Armstrong and Mr Duke-McKenna as evidential comparators as they had not been involved with the allegations against JY at CTFC. QPR explains the decision to retain Mr Armstrong as being because MW had selected him for the First Team and he made his debut on 40 July 2022 and subsequent managers (Mr Beale and Mr Critchley) have retained Mr Armstrong in the First Team. Mr Duke-McKenna had already played in the First Team in December 2020 and April 2021 and was a full international player, having played on eight occasions for the Guyana national team.

32. QPR produced an Academy Player Exit Strategy Checklist for the Claimant which provided for two phases: Phase 1 was to have happened by the end of March and included the holding of a decision/contract meeting with player and parents, a period of reflection and three follow-up meetings to discuss wellbeing and next steps. There is no dispute that none of the Phase 1 meetings happened in the Claimant's case. Phase 2 was to be a series of three follow-up phone calls by the end of July, September and second week of December and an invitation to a First Team alumni event after one year. QPR's case is that the Claimant was called by CR in July but did not answer. The Claimant accepts he received a call from QPR's welfare officer, Louise Huggins at some point but he was confused and upset and did not want to speak to her. Mr Patel, the Academy Player Care Officer & Sport Psychologist (who had not met the Claimant before) called on 1 September 2022. QPR's notes state that the Claimant was *"not very responsive"*, that he had engaged professional coaches but was yet to find a new club, and that he said *"now isn't a good time to chat but I'll call you back".* A follow-up WhatsApp message was sent but the Claimant did not call back. In oral evidence, the Claimant denied having told Mr Patel he was training at this stage, but I note from his WhatsApp exchanges with Mr Simpson (below) that he told Mr Simpson he was training as well, so I find that he was training at that stage. QPR's notes also record that in October 2022 the Claimant met up with PH. The notes state that the Claimant had been on trial at Torquay United FC, but Mr Wallace at this hearing confirmed that the Respondent accepts that is incorrect and does not rely on it.

33. The Claimant was also in touch with PH prior to October 2022. On 10 June 2022 PH sent the Claimant a WhatsApp message noting that they had not spoken in a while, but that he had put his name forward for a club abroad that could be a good deal for him. The Claimant did not reply for nearly a week. On 16 June, he responded to say that he had not been in touch not because of anything PH had done but because he had *"not been really focusing on football right now and my main priority has been my mental health"*.

34. In August and September 2022 WhatsApp messages in the bundle between the Claimant and a football agent, Fitzroy Simpson, show that there was a possibility of him going to play for a US football team, Tulsa FC, but that came to nothing. The Claimant in his witness statement he states that PH texted him in October 2022 *"out of the blue"* and said he wanted him to see an agent from an American football team. However, in oral evidence the Claimant accepted that conversations about Tulsa had started in August 2022. It was suggested to the Claimant that he had 'jumped' at this opportunity, but the Claimant denied this saying that PH had been 'nagging' him to sign a contract, but there was no contract to sign. I note that the Claimant's messages at the time show that he did meet with Mr Simpson on 19 August, but that he then 'back pedalled' after discussion with his family, pushing back a possible date for a trip to Tulsa and writing, *"I want to get as fit and strong as I can before I go into a place like Crawley for example [etc] then by the end of September I'll have an idea about whether or not it might [be] right for me to stay in England or if there's many options out there"*. A further message from the Claimant on 30 August 2022 indicates that he was training at this point.

The FA investigation

35. The Claimant was unwilling to join those who had complained about JY to the FA. He wanted to 'block it out' and was concerned about the impact that complaining would have on his career. However, two other players who had complained persuaded him to speak to the FA too because they felt it would make their case stronger.

36. After discussion with his family and Mr Shillingford, the Claimant went to a meeting with someone from the FA on 14 June 2022 and gave a statement. He was the last of the five players who complained to come forward. He became emotional during this meeting and found it very difficult. This statement is consistent with the allegations he makes against JY and CTFC in these proceedings. It does not deal with any part of his case against QPR.

37. A Disciplinary Commission of the FA was convened between 15 and 17 November 2022 to hear the case against JY. The Claimant was very worried about attending this but in the end attended on his own as a witness and was questioned.

38. There were 16 charges against JY, including 15 instances of speaking in a racist way, two of which concerned the Claimant. 13 charges were upheld, including both of those involving the Claimant. The Disciplinary Commission's decision states that all five complainants (including the Claimant) were *"impressive witnesses"* who *"came across as pleasant and measured individuals"*, that *"none of them seemed to be exaggerating, let alone telling deliberate falsehoods"*. The complainants were anonymised by the Disciplinary Commission. The Claimant is "Player 4" as referred to in the decision. The Commission accepted that the Claimant had become so upset

about JY's racist 'banter' that he suffered mentally and feigned illness in order not to return to the club.

39. I should interpolate here that some reliance was placed by the respondents on the Claimant having appeared to the Commission to be an 'impressive' witness, as if that meant that he had put on a particularly strong performance indicative of him not suffering from mental health difficulties. I very much doubt that this what the Commission meant in its decision. I suspect that they meant simply that he appeared honest, credible and pleasant – as, indeed, he appeared to me.

40. Although the Disciplinary Commission upheld most of the charges, it did not consider that JY had been consciously or deliberately racist. It banned JY until 1 June 2024. The FA appealed on the basis the sanction was insufficient and the appeal was upheld, JY's ban being increased to 1 June 2026.

41. The success of the proceedings against JY led to an improvement in the Claimant's mood, noted by his mother.

Contact with Mr Rehman and commencement of legal proceedings

42. Mr Rehman is the Equalities, Diversities and Inclusion Executive for the Professional Footballers Association (PFA). The PFA is a union for all current and former footballers and scholars in the Premier League, FA Women's Super League and the English Football Leagues. It provides information, advice and support members as well as a variety of educational, financial and wellbeing support services. He had known the Claimant since 2018. He did not contact him prior to the FA Disciplinary Commission hearing because he recognised that it was a difficult time for him and did not want to put him under any more pressure. The Claimant in oral evidence said that he did not contact Mr Rehman because he was not wanting to engage with football during this period.

43. Mr Rehman made contact after the hearing before Christmas 2022 and arranged to meet on 16 January 2023. That meeting lasted about three hours. The Claimant was still upset about the abuse he believed he had received from JY and Mr Rehman formed the opinion that the Claimant still appeared depressed, negative, extremely unhappy and angry at the way he had been treated, though he also noted that he was still finding it hard to talk about. Mr Rehman was so shocked by the impact on the Claimant that he called Mr Javaid part-way through the meeting as he thought the Claimant had a basis for a legal claim and wanted to give him some hope that he could gain redress for what had happened. Although Mr Rehman has often had to deal with disappointed footballers who have not made it in a professional career, his unchallenged evidence was that, *"in all my time I have never come across anyone who seemed so disheartened and dejected"*. The Claimant for his part found the conversation with Mr Rehman very helpful. The thought that he could perhaps take action about what had happened was itself a source of comfort for him and helped lift his mood, as he acknowledged in his later

interview with Professor Fahy (although I record here that insofar as the Claimant's account to Professor Fahy of the meeting with Mr Rehman differs to the evidence of the Claimant and Mr Rehman in these proceedings, I accept the evidence of the witnesses I have heard).

44. On 18 January 2023 the Claimant and his mother then met with Mr Javaid who advised him to contact ACAS and to ask for the conciliation period to be shortened. He also, I find (for reasons given below), advised the Claimant to obtain medical evidence.

45. The Claimant contacted ACAS the same day (18 January) and the Early Conciliation certificates for all Respondents were issued on 20 January 2023.

46. Mr Javaid carried out the various standard checks required for taking on a new client, obtained documentation from the Claimant and further instructions. Mr Javaid instructed Mr Buchan of counsel on 20 January 2023 and he held a conference with the Claimant and his mother on 24 January 2023. There was a question as to whether the Claimant would want to continue instructing Mr Javaid or switch to the PFA or another firm. Mr Buchan was on holiday between 25 January and 8 February 2023, but worked on what was in the end a lengthy pleading while he was away. The particulars were finalised on his return and the claim was received by the Employment Tribunal on 14 February 2023.

47. It had not occurred to the Claimant or his mother prior to the meeting with Mr Rehman on 16 January 2023 that the Claimant could take a claim to the Employment Tribunal. The Claimant had not heard of Employment Tribunals. His mother had no particular knowledge of them either and had not been to one. The Claimant had also not thought to look into whether and, if so, how to make a legal claim because he had found it so difficult to speak out about what had happened. Participating in the FA disciplinary proceedings had been a *"massive step"* for him and he feared retaliation and ostracism if he sought to challenge either club. He had not wanted to go to the PFA as he did not trust them as he felt they were friends of CR. Mr Rehman was an exception to that: he did trust him. What he perceives to have been CR's adverse reaction when he spoke to him about his experiences, and to the allegations being made against JY, had also deterred him from seeking help prior to the conversation with Mr Rehman. The Claimant had also been unaware prior to that conversation that at least one other individual who had been a complainant in the FA disciplinary proceedings had brought a Tribunal claim, and had not been included in a WhatsApp group in which someone at the PFA had provided advice to the other complainants about legal proceedings.

<u>The Claimant's mental health</u>

48. The Claimant and his mother's evidence is that after the end of the football season, the events with JY and his release by QPR his mental health was badly affected. He was not communicating with his family about what had

happened, he was quick to anger, he spent most of every day sleeping, he was drinking too much. His mother was worried that he might harm himself and cancelled a planned holiday to Ireland in August 2022 so that they could stay home with the Claimant. His mother suggested on a number of occasions that he should see his GP, but was conscious and respectful of the limits of what she as his mother could persuade him to, given that he is an adult and his mental state at the time. Although the Claimant had spoken to some people about what had happened (briefly with Mr Hall and CR as detailed above, and with his family and also non-footballing friends) he still found it difficult to talk about, and especially to go any further than what he had put in his statement to the FA about JY.

49. The Claimant's GP records show that on 8 June 2022 he consulted his GP about asthma and coughing. On 24 July 2022 he consulted his GP about a temperature and coughing. On 25 July 2022 a Covid test was advised. On none of these occasions did the Claimant mention his mental health to the doctor.

50. On 1 August 2022 the GP records contain a fuller note of 'History' including the following: *"ex-footballer who was let go by his club after whistleblowing – the club is now subject to a racism investigation – traumatic experience for him and he has been offered counselling by the Professional Footballers Association* – [Covid symptoms] – *Pt says that he has kept up his nutrition but wakes up sweating at night and feels he has lost some weight – his mother had spoken to be earlier and was concerned that he may need antibiotics. Pt felt that his cough was much better and he did not need anything further – he is yet to book his counselling appt"*. It was suggested to both the Claimant and his mother in cross-examination that they had not really been concerned about the Claimant's mental health at this stage and, in particular, that all his mother had asked about was antibiotics. They denied it, and I accept their evidence. The GP notes are only a summary. The fact that the history reads as it does and that the Claimant is talking about trauma and counselling shows that he raised his mental health concerns and I accept that the Claimant's mother would not only have asked about antibiotics. The fact that she called the GP at all and thus set up this call indicates to me that she was indeed genuinely concerned about his mental health. Otherwise, I am satisfied that, given her respect for the Claimant's autonomy as an adult, she would not have been contacting the GP on his behalf at all. However, it is also clear that the Claimant did not present to the GP as asking for assistance with his mental health, and the GP has not recorded any significant mental health symptoms, or taken any action regarding his mental health, such as issuing him with a depression questionnaire (as happened subsequently) or prescribing anti-depressants.

51. I note that the Claimant in his interview with Professor Fahy (see below) considered that his mood had improved by September 2022 when he tried to get back into a training and fitness routine, it is evident that the Claimant was still struggling during this period because in October 2022 the Claimant got in contact with Dr Gervis, formerly the QPR psychologist, who he had worked with in the past. She has provided a letter (dated 26 January 2023) in which

she describes how prior to 2022 the Claimant had appeared to be emotionally stable and resilient, but that when he got in touch with her in October 2022 *"he was struggling with his mental health"* and she *"found him to be extremely vulnerable and experiencing depression. Through our conversation I found him Amrit to be very withdrawn and confused by what he was feeling. He had clearly been traumatised by his experiences and felt powerless and vulnerable. He was a very different person from the confident outgoing person that I knew before. The change was concerning to me".* She recounts how, in conversation with her, he linked the decline in his mental health to his treatment by JY and feelings of isolation and that no one could help him.

52. On 20 October 2022 the Claimant had another telephone appointment with the GP, this time the problem was noted as being an upper respiratory infection. The notes record that the Claimant again referred to *"stressful whistleblowing events"*, but again I infer that he did not present his mental health as being something he wanted assistance with and the GP did not enquire further.

53. On 26 January 2023 the Claimant attended the GP again. In oral evidence he denied that this had been on the advice of Mr Javaid, but Mr Javaid confirmed that he had advised the Claimant to obtain medical evidence and I find that it was because of this advice that the Claimant went to the GP. That is reflected in what the GP has noted as well which refers to *"solicitor [building] a case around his treatment by his ex club"* and *"solicitor will request medical history and some details in due course"*. On this occasion the Claimant evidently made mental health the focus of the appointment and this is reflected in the GP's notes which include details of the Claimant's symptoms (*"spends most of his days at home – feels low in mood and has lost confidence and motivation – [appetite] is variable and sleep is poor with initial insomnia and hypersomnia and fatigue – does socialise with friends which makes him feeling better – mood subjectively 5/10 – has felt that life is not worth living on 2 occasions but is future focused – has access to private therapy via the PFA – to start soon – prefers this option to NHS"*. The GP provided him with a PHQ9 (depression) questionnaire to complete.

54. Around this time (also, I find, on the advice of Mr Javaid) the Claimant asked Dr Gervis to provide a letter regarding her knowledge of his mental health, which she did dated 26 January 2023.

55. The Claimant has also obtained an expert psychiatric report from Professor Fahy in which Professor Fahy diagnoses the Claimant as having suffered, between about March 2022 and January 2023 from a Major Depressive Disorder, the diagnostic DSM-5 criteria being met on the basis of the Claimant's account of depressed mood, loss of interest, sleep disturbance, fatigue, difficulty concentrating, irritability and hopelessness, which was of moderate severity when symptoms were most severe. Professor Fahy's opinion was based on a two-hour interview with the Claimant on 16 May 2023, and review of various papers as detailed in Professor Fahy's report, including the Claimant's GP records.

56. I excluded from evidence (for reasons given orally at the hearing) two paragraphs of Professor Fahy's report where he purported to deal (as he had been instructed) with the legal question for me of whether it was 'reasonably practicable' for the Claimant to present a claim to the Employment Tribunal before he did. Professor Fahy's opinion on that issue was in my judgment wholly undermined by the fact that the instructions contained inaccurate information about what it takes to file a claim with an Employment Tribunal and also improperly guided him to the answer that was required in order to enable the Claimant to satisfy the applicable legal test. However, I do not consider that these elements of the instructions tainted Professor Fahy's approach or opinion to diagnosing the Claimant. I find Professor Fahy's report generally to be a high quality, thorough and reasonable assessment of the Claimant's case based on a comprehensive review of the evidence, including witness statements from the Claimant, his mother, brother, Mr Shillingford and Mr Rehman. The diagnosis of Major Depressive Disorder appears to be in accordance with the diagnostic criteria and is justified on the basis of the evidence in the report. Professor Fahy's opinion does, of course, depend on the credibility of the Claimant and his mother (in particular), and would be invalidated if I found them not to be credible.

57. I have therefore considered very carefully whether I find the Claimant and his mother to be credible witnesses as to his mental state between March 2022 and January 2023. I acknowledge that the Claimant's witness statement was not wholly accurate. Most notably, what he says in his statement about the conversations he had about Tulsa and what he said in oral evidence about not having told Mr Patel in September that he was training with other professionals, was inconsistent with the documentary evidence of his own WhatsApp messages around that time. However, those were the only significant respects in which I found the Claimant's evidence to be unreliable and I do not consider that he was lying or trying to mislead or even that these matters were particularly significant. I formed the impression that, for the Claimant, the Tulsa possibility was not something he regarded as realistic and I infer from the somewhat guarded WhatsApp in which he postpones making any visit to Tulsa and refers to what happened at CTFC and needing to be 'fit and strong' that he was in that message communicating that he was not mentally stable enough at that time to contemplate going to America (albeit that he – no doubt deliberately – wrote the message in a way that could be read as if he was talking about physical fitness). Likewise, I infer that although the Claimant was evidently making efforts to get back into training during that period, those efforts were probably not very effective or consistent and that is why his answers about that are inconsistent.

58. In other words, such inconsistencies as there were in the Claimant's evidence seem to me to be consistent with the larger picture that I gave from the evidence of his mother, the Claimant himself, Dr Gervis's letter and how the Claimant presented to Mr Rehman on 16 January 2023, that the Claimant's mental health was poor during the whole of the period from March 2022 to January 2023 and that he was suffering all the symptoms that led Professor Fahy to diagnose him as suffering from a Major Depressive Disorder during that period, i.e. as being sufficiently depressed to meet the clinical definition.

59. However, Professor Fahy considered that the Claimant's condition had been 'only' moderately severe even at its peak and this too is consistent with the evidence that the Claimant was able to continue functioning, maintaining his nutrition, engaging with his family *to an extent*, socialising with friends *to an extent*, responding to messages, engaging with football and training *to an extent*, and so on. I also do not consider that the Claimant's failure to consult his GP *specifically* about his mental health rather than other physical ailments at any point prior to 26 January 2023 undermines that picture. Indeed, it is broadly consistent with his evidence about the difficulties he had prior to the conversation with Mr Rehman on 16 January 2023 in talking in any detail about the impact of events on him, as opposed to the facts of what happened with JY. It is also consistent with Professor Fahy's view that the condition was 'only' moderately severe. And he did in the end cope and recover without either anti-depressant medication or counselling.

<u>The evidence of prejudice to the Respondents</u>

60. For QPR, Mr Carroll confirmed that some of the potential witnesses are still employed by QPR, including PH, CR, Mr Patel, and Mr Impey (who was responsible for liaising with players who were out on loan), but those who can give evidence as to the reasons why the Claimant was not selected for the First Team have left, including SM, MW, and Mr Beale. Ms Huggins (safeguarding officer) has also left. Mr Carroll also explains that the majority of conversations about players and who to select happen orally and there are few documentary records. Mr Carroll also provides evidence that QPR has already incurred significant legal costs in defending the claims, in part because of poor pleadings by the Claimant's representatives.

61. JY in his unchallenged statement explains the significant impact that the FA disciplinary proceedings had on his own mental and physical health.

62. For CTFC, Mrs James gives evidence that the Club was sold to new owners, US-based Wagmi United, in April 2022 and since the sale there has been an almost complete turnover in coaching and back office/management staff, with only her, Mr Allman (General Manager) and Ms Lampey (Ticket Office Manager) remaining in post. None of the coaching staff remain. All of them (three) left between June and September 2022 and CTFC does not remain in contact with them (although Mrs James confirmed that they have remained in professional football and could 'no doubt' be located through Google). She is not aware of anyone who can provide evidence on behalf of CTFC in relation to JY's behaviour or CTFC's knowledge and actions in relation to it. She is not aware of there being any contemporaneous documentary evidence about squad and team selections during the relevant period. If any existed (which she doubts), it has not been retained. The new owners have also threatened legal action against the old owners so the old owners would be unlikely voluntarily to assist the new owners.

Conclusions

Time limits: unfair dismissal

The law

63. Under s 111(2)(a) ERA 1996 there is a primary time limit of three months beginning with the effective date of termination. By virtue of s 111(2)(b), where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the primary time limit, a claim will fall within the Tribunal's jurisdiction if it was presented within such further period as the Tribunal considers reasonable. These provisions are subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 207B of the ERA 1996, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period. The early conciliation period does not extend time where the time limit has already expired: *Pearce v Bank of America Merrill Lynch and ors* (UKEAT/0067/19/lA) at [23].

64. The tribunal must first consider whether it was reasonably feasible to present the claim in time: *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129. That is not just a question of reasonableness, but of practicability: see *Cygnet Behavioural Health Ltd v Britton* [2022] EAT 108 at [20], citing from Browne-Wilkinson J (as he then was) in *Bodha (Wishnudut) v Hampshire AHA* [1982] ICR 2002. It is a much stricter test than the just and equitable test that applies to claims under the EA 2010, as Cavanagh J observed in *Cygnet* at [67].

65. The burden is on the employee, but the legislation is to be given a liberal interpretation in favour of the employee: *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] ICR 1283, approved most recently by the CA in *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490 at [12] per Underhill LJ giving the judgment of the Court.

66. If the tribunal finds it was not reasonably practicable to present the claim in time, then the tribunal should consider whether the claim has been brought within a reasonable further period, having regard to the reasons for the delay and all the circumstances: *Marley (UK) Ltd v Anderson* [1996] IRLR 163, CA.

67. It is not reasonably practicable for an employee to bring a complaint until they have (or could reasonably be expected to have acquired) knowledge of the facts giving grounds to apply to the tribunal, and knowledge of the right to make a claim: *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212. However, once an employee has knowledge of the relevant facts, they can be expected to take reasonable steps to obtain advice about their rights and how to enforce them: *Paczkowski v Sieradzka* [2017] ICR 62 at [23].

68. If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, CA: *"If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them."* This rule is commonly referred to as the 'Dedman principle'.

69. In *B.L.I.S.S. Residential Care Ltd v Fellows* [2023] EAT 8, HHJ Tayler emphasised that inexperience on the part of a solicitor was no excuse and did not render the *Dedman* principle inapplicable.

70. The fact that an employee is pursuing an internal appeal does not mean it is not reasonably practicable to present a claim: *Palmer v Southend* ibid.

71. Ill health or disability may make it not reasonably practicable to present a claim in time, but it is a question of fact for the Tribunal in each case as to whether it has had that effect: *cf*, by way of factual illustration, *Cygnet* at [54]-[55] and the first instance tribunal decision in *Pittuck v DST Output (London) Ltd* (Case No.2500963/15) to which Mr Buchan has referred.

Conclusions: unfair dismissal

72. The primary time limit for the Claimant's unfair dismissal claim against QPR in this case expired on 29 September 2022. He brought his claim on 14 February 2023 – four-and-a-half months late.

73. In my judgment, it would have been reasonably practicable for the Claimant to have presented his claim within the primary time limit. Although the Claimant was in poor mental health during that period, his condition was not so severe as to prevent him from making a claim if he had known that he could and if he wanted to. He managed, with the assistance of someone at the PFA, on 14 June 2022 to prepare a statement detailing most of the matters about which he now wants to claim in these proceedings, including acknowledging in that statement the impact that JY's conduct had had on his mental health. The only points of significance missing from that statement are his complaints about his treatment by QPR and his treatment by CTFC and other people at CTFC. However, the facts of those matters were also relatively simple and well known to the Claimant and he had discussed them with his family and non-footballing friends. If they had been relevant to the FA disciplinary proceedings, I have no doubt they could have been included in that statement. And if that statement had been appended to a completed ET1 and sent to the Tribunal, that would have been all that was necessary to commence proceedings and to bring all the claims that he now brings. A judge at the first case management hearing would then have identified the legal issues from that factual statement and through questioning the Claimant. People with much more severe mental health conditions than the Claimant can and do bring claims to the Tribunal in that sort of form every day within the time limit without legal assistance. During the primary limitation

period the Claimant also corresponded with Mr Simpson about playing for Tulsa and started training again. In short, he was in my judgment well enough for it to be reasonably practicable for him to put a claim in within the primary limitation period.

74. In this case, what prevented the Claimant from bringing a claim earlier was his ignorance of his legal rights and his concerns about 'speaking out' and coming forward to challenge the respondents.

75. As to his ignorance of his legal rights, the question is whether that ignorance was reasonable. I find that it was not. The Claimant is an intelligent young man who is well-supported by his family. If he had wanted to look for ways of challenging the respondents, he could have researched his rights online, or sought assistance from the PFA, or his agent or Mr Shillingford. It was not reasonable of the Claimant not to approach the PFA because he 'did not trust them'. He knew and trusted Mr Rehman. He could have contacted him at any time. He also 'trusted' the PFA enough to give a statement for the FA disciplinary proceedings, so I do not accept that lack of trust in the PFA was the real reason why he did not approach the PFA, or that it was reasonable for him not to trust the PFA as a whole based on a perception of friendship with CR. I appreciate that it was in part the Claimant's poor mental health which made him feel isolated and as if he could not seek assistance from anyone and also disinclined to look for ways to challenge the respondents, but – again – I do not consider that his mental health condition was so severe as to make it not reasonably practicable for him to make those enquiries, given the other things that the Claimant did manage to do during the period (including not only participating in the disciplinary proceedings, but also returning to training and communicating about a possible move to Tulsa FC, socialising with non-footballing friends, and so on).

76. It seems to me that the main reason why the Claimant did not make enquiries about his legal rights or how to enforce them earlier was because of his concerns about speaking out. It was those concerns that led him to be reluctant to complain about JY in the first place, and reluctant to join the complainants against JY in the FA disciplinary proceedings. I do not think it would be right to regard those concerns as being solely or even predominantly manifestations of the Claimant's Major Depressive Disorder, given that his reluctance to speak out was evident before he experienced any significant impact on his mental health. Also, he could and did overcome that reluctance enough to participate in the FA disciplinary proceedings and it would in my judgment have been reasonable for him also to overcome his fears about challenging the respondents enough to make enquiries about what his rights were and how he could enforce them. I infer that the fact that the disciplinary proceedings found JY guilty was a significant factor in giving the Claimant the courage to bring these legal proceedings. However, while I understand and am sympathetic about the Claimant gaining courage from the outcome of the disciplinary proceedings, it is well established that the fact that an internal process is ongoing does not normally make it not reasonably practicable to make a claim and I do not consider that it does in this case either. Everyone who brings a legal claim takes a risk and waiting for the

outcome of the disciplinary proceedings would not have been reasonable if the Claimant had taken a conscious decision to do so, and I do not see that it provides a reasonable excuse for the Claimant not enquiring about his legal rights earlier either. In so saying, I appreciate that the disciplinary proceedings were done on an anonymous basis, but I do not find that was a significant factor in the Claimant's thinking or reasons for delay. Indeed, he approached the disciplinary proceedings on the assumption that the football community would know that he was one of the complainants regardless of the anonymity. For all these reasons, in this case, it seems to me that the Claimant's participation in the FA disciplinary proceedings does not excuse his not bringing a claim earlier, but demonstrates the feasibility of him making the necessary enquiries about his rights, and then bringing a claim, at a much earlier stage.

77. In all these respects, even if I had admitted the whole of Professor Fahy's report, including his view that it was not reasonably practicable from a psychological perspective for the Claimant to bring this claim earlier, I would not have accepted that it followed that it was not reasonably practicable in the sense required to merit an extension of time under s 111 of the ERA 1996. For the reasons given above, in my judgment, applying the proper legal principles to the facts as I find them to be, I disagree with Professor Fahy's conclusion and find that it was reasonably practicable for the Claimant to have brought his claim within the primary time limit.

78. I add that, even if I had been persuaded that it was not reasonably practicable for the Claimant to put his claim in before he had the conversation with Mr Rehman on 16 January 2023, I would have held that the claim was not put in within a reasonable period thereafter. From 18 January 2023 onwards the Claimant had instructed lawyers and the *Dedman* principle applies. In my judgment, it was not reasonable for there to be nearly a further month's delay before the claim was put in. As I have already noted, there was in the Claimant's statement for the FA disciplinary proceedings a nearly ready-made particulars of claim that required very few additions to stand as a claim in these proceedings. An experienced employment lawyer ought reasonably to have been able to identify the legal claims and add them to those particulars in a matter of hours. While it would obviously have been reasonable to take the time necessary to do client checks and take instructions, the whole process ought reasonably to have taken no longer than one week. As Mr Javaid frankly accepted in cross-examination, a further month was 'not good enough' in the context of Employment Tribunal time limits.

79. It follows that the Claimant's unfair dismissal claim against QPR is out of time and outside the Tribunal's jurisdiction and must be dismissed.

<u>Time limits: Equality Act 2010</u>

The law

80. The general rule under s 123(1)(a) EA 2010 is that a claim concerning work-related discrimination under Part 5 of the EA 2010 (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained. For this purpose: conduct extending over a period is to be treated as done at the end of that period (s 123(3)(a)); failure to do something is to be treated as done when the person in question decided on it (s 123(3)(b)); in the absence of evidence to the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it (s 123(4)).

81. The primary time limit is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 140B of the EA 2010, but as with unfair dismissal, the early conciliation period does not extend time where the time limit has already expired.

82. If a claim is not brought within the primary time limit, the Tribunal has a discretion under s 123(1)(b) to extend time if it considers it is just and equitable to do so.

83. The burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time: *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576, [2003] IRLR 434 at [24]. The discretion whether or not to extend time is a broad one to be exercised taking account of all relevant circumstances, in particular the length of and reasons for the delay, and balancing the hardship, justice or injustice to each of the parties: see *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23. In that case, Underhill LJ, giving the judgment of the Court of Appeal at [37] deprecated the practice that developed following the judgment of the EAT in *British Coal Corporation v Keeble* [1997] IRLR 336 of referring to the checklist in section 33 of the Limitation Act 1980, holding that while it would not be an error of law for a Tribunal to consider those factors, *"I would not recommend taking it as the framework for its thinking"* when considering the exercise of discretion under section 123(1)(b) of the EA 2010.

84. Although the length and reasons for the delay will always be relevant, there is no rule of law that time cannot be extended even where there is no explanation for the delay: *Concentrix CVG Intelligent Contact Ltd v Obi* [2022] EAT 149, [2023] ICR 1 at [50] *per* Auerbach J.

85. In an appropriate case, the substantive merits may be relevant, provided that the Tribunal is properly in a position to make an assessment of them: *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132 at [63]. The fact that an internal appeal is ongoing is not ordinarily sufficient of itself for time to be extended, although it is one factor to be taken into account: see *Apelogun-Gabriels v Lambeth* [2001] EWCA Civ 1853, [2002] ICR 713 at [16].

86. The EAT has held that where delay in presenting a claim is attributable to incorrect legal advice from the claimant's solicitor, this should not be visited on the claimant by refusing an extension of time, notwithstanding that the claimant may have a valid claim in negligence against the solicitor, since this would confer a windfall on the respondent: *Chohan v Derby Law Centre* [2004] IRLR 685. This does not mean that time should be extended in all such cases, but that all other factors must also be considered.

87. When considering whether time should be extended to hear a complaint about a series of acts constituting a course of conduct, the Tribunal should consider the prejudice suffered by the Respondent if it has to deal with the early allegations as well as the most recent ones, and may reach different conclusions in respect of different parts of the same case as to whether time should be extended: *Concentrix* ibid at [68]-[72].

Conclusions: Equality Act 2010

88. In this case, the parties are agreed that I should assume for the purposes of this hearing that the Claimant has a reasonably arguable case that each of the alleged contraventions of the EA 2010 as regards each respondent form a continuing act up to the date of the last act alleged against each respondent. It follows that, even if I decide to extend time in relation to all or part of the claims, the issue of time limits may remain live for the final hearing if the Tribunal at that hearing finds that there are not continuing acts.

89. In relation to QPR, there are allegations of direct race discrimination about conduct beginning on 31 August 2021 with QPR loaning the Claimant to CTFC in the knowledge (it is alleged) that JY uses racist banter, then the failure to act to protect the Claimant from JY's racist banter after he complained to CR in March/April 2022 and failure to renew the Claimant's contract, which as a failure to act is to be treated by virtue of s 123(4) and (5) as having been done on 15 May 2022, being the day when QPR failed to exercise the option and thus did an act inconsistent with exercising the option. There are also claims of race-related harassment in relation to the two calls from CR on 23 April 2022 and the failure to renew the Claimant's contract. Those same matters are relied on as victimisation, together with certain alleged procedural failures in relation to the non-renewal of the Claimant's contract. The primary time limit in relation to QPR therefore expired, at the latest, on 14 August 2022. The claim against QPR is therefore 7 months out of time.

90. In relation to JY, the claims of race- and religion-related harassment span the period between September 2021 and 19 March 2022, so the primary time limit expired on 18 June 2022. The claims against JY are therefore nearly 9 months out of time.

91. In relation to CTFC, the claims are that it is vicariously liable for the acts of JY, and there are also additional claims of victimisation relating to the period between 23 April 2022 and the last game of the season on 9 May 2022. The

primary time limit against CTFC therefore expired on 8 August 2022 and the claim is slightly more than 7 months out of time.

92. On the draft list of issues prepared by the parties for this hearing, there are particulars missing that the Claimant has not yet supplied for several of the allegations, as a result it appeared to me of Mr Buchan's unfamiliarity with the process of agreeing a list of issues in Employment Tribunal proceedings. I was, however, satisfied that the particulars were sufficient to enable me to decide the time point, and no party sought to dissuade me of that provisional view when I expressed it. I see no reason why particulars cannot and will not be provided in relation to all the allegations, save for the victimisation allegations against CTFC where I was left in doubt, given Mr Buchan's response to my question on this issue, as to whether the necessary particulars would be provided to enable the alleged perpetrators of the victimisation to be identified so that consideration can be given to whether those individuals were indeed influenced by a belief that the Claimant had done a protected act so as to establish liability for the acts of those individuals on the part of CTFC, as is required for claims under the EA 2010 (see *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 at [36] *per* Underhill LJ). I return to this concern further below.

93. I now turn to consider the factors that appear to me in this case to be relevant to the exercise of the discretion under s 123(1)(b) EA 2010. In the light of Underhill LJ's observations in *Adedeji*, I decline Mr Buchan's invitation to proceed by reference to the checklist in s 33 of the Limitation Act 1980, or the other authorities on s 33 to which he refers. I have, however, considered carefully all the factors that each of the parties urges me to take into account.

94. The period of delay in this case is substantial – between two and three times the primary statutory time limit for all respondents.

95. The reasons for the delay I have considered in detail when addressing the question of time limits for the unfair dismissal claim. Although I concluded that it would have been reasonably practicable for the Claimant to put his claim in within the primary time limit for the purposes of s 111 of the ERA 1996, when I come to consider the same facts through the prism of the just and equitable test, they appear very different. There is a complete explanation for the delay in that the Claimant was unaware of his legal rights or how to enforce them until 16/18 January 2023, and he had not made enquiries earlier because of a combination of suffering from a Major Depressive Disorder and fear of speaking out – a fear that had on his evidence been stoked by the alleged acts of victimisation about which he wishes to claim in these proceedings, in particular the phonecalls with CR. He had plucked up the courage belatedly to join the complainants in the FA disciplinary proceedings, but even that process, in which he was granted anonymity, was a source of significant stress to him and he evidently found it very difficult to see beyond those proceedings, or to engage with others in the footballing community (even people he trusted like Mr Rehman) to any significant extent until those proceedings were over and JY had been found guilty. Even though I have found that if he had acted reasonably he could

have brought the claim earlier, it remains the case that the Claimant was as I find genuinely ignorant of his rights until 16/18 January 2023 and the other elements I have identified conspired together to make it difficult for him to act previously. All of those factors weigh in favour of a just and equitable extension of time under s 123.

96. In the context of s 123, the further delay between 16/18 January 2023 and the submission of the claim on 14 February 2023 is not significant. That delay was the fault of the Claimant's lawyers and in the context of the EA 2010 that normally counts in the Claimant's favour rather than against him, and I find that it does in this case, particularly given that the further period of delay by the Claimant's lawyers was relatively short compared to the delay that had already occurred as a result of the other factors I have identified.

97. I then have to weigh up the relative prejudice to the parties. I take as my starting point that time limits are important and are there for a reason and that Parliament has deliberately set a very short time limit for employment claims so that in the ordinary run of things employees and employers are entitled to expect that they will not face claims about matters that occurred more than a few months before they are notified of a claim. However, it is nonetheless the case that claims do frequently span lengthy periods of employment and that Tribunals wrestle daily with decisions about matters that occurred years earlier.

98. It also goes without saying that all respondents suffer prejudice if time is extended so that they have to incur the time, trouble and expense of a trial that they would not otherwise have had and, if they lose, that they have to pay compensation for acts in respect of which they would otherwise have had a limitation defence. I also take into account in this case that the approach that has been taken to pleading the Claimant's case has increased costs to the respondents in a way that ought not to have been necessary. The claim could have been expressed much more concisely, and the legal claims better identified, from the outset and there ought not to have been a need to amend. However, if the Respondents consider the Rule 76 threshold is met, they can apply to recover those costs.

99. The parties' arguments about the balance of prejudice in the light of the Claimant's stated intention of pursuing alternative claims in the civil courts for harassment and/or seeking arbitration in relation to wrongful dismissal cut both ways to a certain extent, but also marginally tip the balance in the Claimant's favour. There remains in my judgment very significant prejudice to the Claimant from not being permitted to proceed with these claims as the Employment Tribunal is obviously the better forum for his claims, because of the favourable costs regime, because all his claims can be brought here whereas only the harassment claims could be brought under the 1997 Act, and because there are more legal hurdles to be overcome to succeed on a harassment claim under the 1997 Act than under the EA 2010 for the reasons identified by Mr Buchan. On the other hand, the fact that the Claimant may bring claims in other forums also lessens the weight to be given to the claimed prejudices to the respondents in granting an extension of time in this case

since if I refuse to extend time they may still face claims elsewhere, albeit claims that would probably be weaker.

100. I now consider the specific position of each respondent.

101. For QPR, the claims go back the longest to 31 August 2021, but the substantive issue in respect of that earliest claim is a fairly discrete point about whether QPR 'knew' before loaning the Claimant to CTFC that he would face racist abuse there. The people who will be able to answer that claim are principally PH and CR and they are still employed by QPR and will, I anticipate, have no difficulty recalling their evidence on that issue. Indeed, all that is really needed by way of response is already pleaded in the ET3. The allegations against CR in relation to the phonecalls are somewhat more recent, but I do accept that the delay will have caused prejudice to CR and QPR because the first time CR will have been asked to recall what he said in those phonecalls will be when QPR was pleading its response to these proceedings, approximately a year after the events in question, rather than approximately 5 months after the events as would have been the case if the Claimant had put his claim in in time (or earlier if he had raised a grievance). I do not, however, think that in memory terms the difference between 5 months and 1 year is necessarily all that significant. The quality of memory is so variable as between individuals, and events can often be misremembered after a few days. Nonetheless, I accept that memory is likely to be worse after a year than it is after five months, although the difference may be marginal.

102. The more significant potential prejudice to QPR concerns the evidence it wishes to give about why the Claimant was not selected for the First Team – evidence which will be relevant to the Claimant's claims relating to the non-renewal of his contract. I accept that most of the witnesses who can speak to that have left. However, Mr Carroll has not suggested that there is any 'bad feeling' between QPR and SM, MW and Mr Beale such that they would be unwilling to return voluntarily to act as witnesses if required. Even if they are not willing to return voluntarily, witness orders could be issued if necessary (although I acknowledge that if that were necessary that could be prejudicial to QPR because evidence from a witness who is ordered to attend may not be favourable). The main reason, though, why I give less weight to the claimed prejudice from these potential witnesses having left is that it seems to me that their evidence may not be that crucial to QPR's case, first, because I note that QPR has already managed to plead in detail the reasons why the Claimant was not selected for the First Team. Those instructions must have come from someone who is still involved with QPR and who can therefore presumably attend Tribunal to give that evidence, even if it is 'second hand'. Secondly, because the thrust of the Claimant's case is that it is CR (who remains employed) who was principal 'victimiser' and that it would therefore have been him who steered the decision not to renew the Claimant's contract – that decision being, at least in principle (although not on QPR's case) separable from the question of whether the Claimant was selectable for the First Team.

103. The absence of documentary evidence really adds nothing given that it was (probably) not there in the first place and so is not a prejudice that results from the delay. I also note that the prejudice said to result from the departure of witnesses is also prejudice that would have been there in any event as they would all have left even if the Claimant had put a claim in within the limitation period. Indeed, many of them had left before that.

104. As to JY, the claims against him are the longest out of time and also go back for some months before that. However, because of the disciplinary proceedings he had the opportunity of recalling his evidence in response to (most of) the Claimant's allegations at a much earlier stage than the other respondents. I appreciate that the disciplinary proceedings have taken a significant toll on his mental and physical health and that it must have been very distressing to find he was belatedly to be subject to another claim by the Claimant in respect of these matters. There is an element of 'double jeopardy' here for JY, but it is a double jeopardy for which there was always potential and which he would have faced even if this claim had been commenced within the primary time limit. I accept that he might have difficulty locating and persuading witnesses to give evidence voluntarily on his behalf, but it seems to me that that is more likely to be because he was found guilty of many of the charges by the FA than because of the passage of time *per se* (indeed, Mr Anderson effectively made that very submission on behalf of CTFC and it applies equally to JY). All the evidence that was given on his behalf in the disciplinary proceedings is likely to be available for use in these proceedings. Even if that is not the case, the Commission's decision records the key evidence that was given on his behalf and which can be considered by this Tribunal too.

105. I acknowledge Mr Ohringer's argument that it will not make much difference to the Claimant if JY is not retained as an individual respondent to these proceedings because he can recover against CTFC as vicariously liable, and that not extending time against JY would mean he may not personally be facing liability for compensating the Claimant if he succeeds. However, that would not save JY from having to participate as a witness, either voluntarily or under witness order, and Mr Anderson may be right that CTFC would be able to seek a contribution from him in any event under the Civil Liability (Contribution) Act 1978 (although only if CTFC could establish that Underhill J's obiter view in *Sunderland City Council v Brennan* [2012] ICR 1183 that the 1978 Act does not apply to discrimination claims was wrong, which it may well be as it turned on his view that a tribunal was not a 'court' within the meaning of that Act – a view that requires to be revisited in the light of the Court of Appeal's decision in *Irwell Insurance Co Ltd v (1) Neil Watson (2) Hemingway Design Ltd (in liquidation) (3) Darren Draycott* [2021] EWCA Civ 67, [2021] ICR 1034 that the tribunal is a 'court' within the meaning of the *Third Parties (Rights against Insurers) Act 2010*).

106. As to CTFC, it undoubtedly has the strongest arguments on prejudice, both because of the change of ownership (and consequent departure of staff) and because of the unparticularised nature of the claims against it. However, the change of ownership and departure of most of the staff happened during the

primary limitation period so that is prejudice that would have been suffered in any event. As with all the respondents, the fact that the prejudice would have occurred even if the claim was brought in time does not mean that I discount that prejudice altogether because it is still prejudicial and while a respondent who has a claim brought against them in time cannot pray in aid prejudice in order to have that claim struck out, a respondent who has a claim brought *prima facie* out of time can rely on that prejudice. The delay has caused prejudice because there was no opportunity for CTFC to investigate the claim with those individuals before they left. However, if those individuals are required (which will not be known unless and until the Claimant particularises his claims), I anticipate that it will be possible to locate those individuals and that they could be ordered to attend if they did not attend voluntarily. The absence of documentary evidence again seems to me to be likely to be prejudice that would have occurred in any event as I accept the evidence that key conversations and decisions in this arena generally happen orally rather than in writing.

107. Finally, I need to consider the merits of the case insofar as I am able and insofar as I am specifically invited to do by Mr Wallace in QPR's strike-out application. It seems to me that the core of the Claimant's case is a relatively strong one. Some of his allegations against JY were upheld by the FA Disciplinary Commission, and some of them are admitted by JY in these proceedings, and more of them are admitted by CTFC. The core of his victimisation claim against QPR is also relatively strong. Taking the Claimant's case at its highest, in accordance with the usual approach when considering a claim at the early stages (including whether to strike out or make a deposit order), if his evidence of the calls with CR is accepted, it is likely they will be found to be victimisation because, in particular for the calls on 23 April, if the Claimant's account is accepted, the victimisation is essentially explicit in what the Claimant says CR said. The claim of victimisation in relation to the non-renewal of his contract will be much more difficult because of the very persuasive alternative reasons that QPR pleads for that decision. However, the Claimant only has to show that the belief that he had done a protected act was a material part of the reason for the decision, not that it was the only reason. If the Claimant's evidence as to CR's reaction is accepted, then that coupled with the failure by QPR to follow any part of Phase 1 of its exit strategy, would provide in my judgment a much more than arguable basis for an inference of victimisation. Indeed, even if the Respondent is right that it is inevitable that the Claimant's contract was not going to be renewed, it seems to me that the elements of the Claimant's claim that relate to the lack of procedure followed in relation to the non-renewal are also important because of the role those procedural failures played in the deterioration of the Claimant's mental health. I add that, although QPR's arguments about why the Claimant was not selected for the First Team are strong, and I understand the point made about the Claimant's age meaning there would be an 'opportunity cost' for the Claimant if he was kept on despite not being selectable for the First Team, I am not satisfied on the basis of the pleadings that it was inevitable that these factors meant that his contract would not be renewed and that there was no scope for discretion at all. In this regard, it seems to me that QPR places too much weight at this stage on the

Claimant's acknowledgment in his witness statement that MW did not regard him as selectable for the First Team – while that is a significant admission by the Claimant, it is not a complete answer to the Claimant's claim, both because it did not necessarily mean the Claimant's contract could not be renewed, and because MW was leaving so there was to be a change of regime. While there is also force in Mr Wallace's submission that an incoming manager would have known even less about the Claimant and been less likely to pick him, that does not preclude the Claimant's case that CR's belief that he had made protected disclosures about JY influenced decision-making in relation to the Claimant in May 2022. These are all matters of disputed fact for evidence. In the circumstances, I am satisfied that most of the Claimant's victimisation claims are strong claims, with prospects of success substantially above the threshold for a deposit order. The victimisation claim in relation to the non-renewal of the contract itself is weaker, but even that in my judgment stands more than little prospect of success when the Claimant's case is taken at its highest.

108. The other claims are weaker. The unparticularised claims against CTFC as they stand have no reasonable prospect of success and/or should be struck out because a fair trial is not possible unless the Claimant identifies which individuals allegedly contravened the EA 2010 (see my remarks about the *CLFIS* case above). However, I do not consider it would be right for me to treat those claims differently in the context of dealing with the time point at this stage because the Claimant should be given an opportunity to provide the missing particulars and only if he fails to do so should those claims be struck out. I have made directions accordingly in a separate case management order.

109. As to the direct race discrimination and race-related harassment claims against QPR, I consider them in the light of Mr Wallace's strike out/deposit order application and taking into account the authorities that he has referred to. I agree with Mr Wallace that those claims are weak because I agree that QPR's arguments about why it was inevitable that the Claimant's contract would not be renewed are strong, but the non-renewal of the Claimant's contract is only one element of the race claim made by the Claimant against QPR. I also agree that the Claimant's pleaded case has failed to identify the 'something more' that would be needed to infer that CR and others at the Respondent were themselves influenced by the Claimant's race or acting for reasons related to the Claimant's race. However, I am – just – persuaded that the Claimant's claims in this regard stand more than little prospect of success (i.e. that they do not even meet the threshold for a deposit order) because, as Mr Buchan put it, 'this case is all about race'. He was referring, of course, to the treatment of the Claimant by JY, and he did not identify the potentially relevant legal principle that might save the race claims as against QPR, but I am prepared to accept that it is more than arguable, taking the Claimant's case at its highest, that it was so well known that JY subjected his players to racist banter that the failure by QPR to protect him from that was inevitably race-related because it was 'race-specific' (cf the discussion of the authorities on this sort of direct discrimination in *Earl Shilton Town Council v Miller* [2023] EAT 5 at [12]-[27] per HHJ Tayler). I also bear in mind that this is a fact-

sensitive case that will depend on witness evidence and that, taking the cautious approach urged in the authorities, I am not at this stage satisfied even that the deposit order threshold is met in relation to the Claimant's race claims taken as a whole, and the strike out threshold certainly is not.

110. In any event, even if I considered that the deposit order threshold was met in relation to one or more of the race claims against QPR, I do not consider it would be appropriate as a matter of discretion in this case to order the Claimant to pay a deposit on these allegations. That is because they are a relatively small part of the whole claim, and will take up little extra time as the factual basis of the race discrimination allegations will be covered under other heads of claim in any event. It also seems to me that in this case, given the Claimant's fears about bringing these proceedings, and the level of costs already apparently being incurred by all parties, that there would be too great a risk of even a small deposit order unjustly stifling this claim because of the costs risk that it would create for the Claimant. I trust, however, that the Claimant and his lawyers will reflect on this judgment and withdraw any claims they consider it would no longer be prudent to pursue.

111. Finally, I draw all those threads together to consider the overall balance of prejudice. As will be apparent from what I have already said, in this case I consider that the prejudice to the Claimant of not being permitted to proceed with this claim (which is important to him given his career aspirations, and potentially of significant financial value to him and which he has struggled to pluck up the courage to bring) significantly outweighs the prejudice to each of the respondents that has resulted from his delay in bringing the claim. Given the hurdles of mental health, ignorance as to his rights and fear of speaking out that the Claimant has overcome to bring this claim, I consider it is just and equitable in this case to extend time for all the Claimant's claims under the EA 2010 against all respondents. However, I will list for consideration at the next preliminary hearing the question of whether the unparticularised claims against CTFC should be struck out.

QPR's strike out/deposit order application

112. It follows for the reasons set out above that QPR's strike out/deposit order application is refused.

Whether withdrawn claims should be dismissed

113. The Claimant at and before this hearing withdrew certain claims that he had brought.

114. Rule 52 provides that a claim must be dismissed on withdrawal unless the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be a legitimate reason for doing so, or it would not be in the interests of justice to issue a judgment.

115. The claimant agrees that I should issue judgments dismissing on withdrawal the indirect discrimination, direct religious discrimination and religion-related harassment claims against QPR, but asks me not to issue a judgment dismissing the claims of post-employment termination direct discrimination, harassment and victimisation in relation to what JW said in the TalkSport interview and on the evidence he gave to the FA Disciplinary Commission because the Claimant reserved the right when commencing those claims to pursue them in the civil courts if the Tribunal found it did not have jurisdiction and may still wish to do so. The Claimant also asks me not to issue a judgment in relation to the wrongful dismissal claim against QPR as there is an arbitration clause in the contract that he may wish to exercise.

116. It is clear from older authorities such as *Verdin v Harrods Ltd* [2006] IRLR 339 that there will no be a legitimate reason for resurrecting a claim in fresh proceedings if it would be an abuse of process to do so. It is clear from *Nayif v High Commission of Brunei Darussalam* [2014] EWCA Civ 1521, [2015] ICR 517 that even where a claim has been dismissed by an Employment Tribunal on jurisdictional grounds, it will not for that reason alone be an abuse of process to pursue the same claims in the civil courts.

117. In the light of the authorities, I am satisfied that the Claimant has a legitimate basis for reserving his right to bring alternative civil claims, or indeed, to pursue arbitration rather than this Tribunal claim, if he wishes to do so.

118. As to the wrongful dismissal claim, the fact that he has changed his mind after starting proceedings and only after arbitration had been raised by the Respondent in relation to the wrongful dismissal claim, and before any determination has been made on jurisdictional grounds, does not mean it would be an abuse of process to pursue those alternatives. Indeed, it shows the Claimant has reasonably considered the arguments raised against him by the Respondents in these proceedings and acted accordingly to exercise an option legitimately open to him and which QPR in fact considered he should have exercised first.

119. As to the post-employment termination claims, as the *Nayif* case makes clear that it will not even be an abuse of process to pursue a claim to a strike out hearing and then pursue it elsewhere if it is dismissed for want of jurisdiction in the Tribunal, I do not see how it can be an abuse of process for the Claimant to make a decision to do that at an earlier stage, thus saving time and costs for all parties. The fact that the Claimant's counsel himself recognises the potential weaknesses of the civil court claims does not mean that it is an abuse of process to seek to pursue those in default of what are presumably accepted to be even weaker claims in the Employment Tribunal because of the jurisdictional issues identified.

120. I therefore decline to issue judgments on withdrawal in respect of these claims, but do issue judgments on withdrawal in respect of those claims that the Claimant invites me to.

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Employment Judge Stout

17 July 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

17/07/2023

FOR THE TRIBUNAL OFFICE