Appeal Nos. UKEAT/0559/12/DM
UKEAT/0560/12/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 2 & 3 September 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR B BEYNON

MR T STANWORTH

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(1) GILLINGHAM FOOTBALL CLUB LTD
(2) MR P SCALLY APPELLANT

MR M McCAMMON RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR MICHAEL DUGGAN (of Counsel) Instructed by: Bolt Burdon Solicitors Providence House Providence Place Islington London N1 0NT
For the Respondent	MR RAD KOHANZAD (of Counsel) Instructed by: VLS Solicitors Gibson House 800 High Street Tottenham London N17 0DH

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

VICTIMISATION DISCRIMINATION

Findings of unlawful victimisation and unfair dismissal upheld. Contrary to the submissions of the Appellants, the Tribunal sufficiently dealt with the issues which it was required to decide and gave proper reasons for doing so.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal against two judgments of the Employment Tribunal sitting in Ashford, Employment Judge Vowles presiding. By its first judgment dated 27 July 2012 the Tribunal upheld claims by Mr Mark McCammon that (1) his dismissal was an act of race victimisation, (2) his dismissal was unfair and (3) there had been a series of unauthorised deductions from his wages. By its second judgment dated 23 August 2012 the Tribunal awarded Mr McCammon in total the sum of £68,278.42 by way of remedy.

2. We emphasise at the outset that the Employment Appeal Tribunal is vested by Parliament with jurisdiction only to hear appeals on questions of law; see section 21(1) of the **Employment Tribunals Act 1996**. On appeal, therefore, we do not rehear evidence or revisit findings of fact. It is the task of Employment Tribunals to hear evidence and make the necessary findings of fact for its decision. If it carries out this process in accordance with the law, there is no appeal against its findings of fact to the Employment Appeal Tribunal.

3. We should also emphasise, for any readers of this judgment who are not familiar with equality law that "victimisation" has a particular meaning, which we shall explain below. In the circumstances of this case, the allegation with which we are concerned related to Mr McCammon's dismissal. For the avoidance of doubt, the Tribunal below was not concerned to make, and did not make, any finding of unlawful victimisation or discrimination against the manager and assistant manager of the first team – respectively Mr Hessenthaler and Mr Southall.

The background facts

4. Gillingham Football Club ("GFC") is a Football League club of long standing. Mr Scally has been its chairman since 1995. In the 2008-2009 season it played in League Two and won promotion. In the 2009-2010 season it played in League One but was demoted. So in the season 2010-2011 it played in League Two again. By this season its first-team manager was Mr Hessenthaler and his assistant was Mr Southall.

5. Mr McCammon was employed by GFC on a written contract of employment for three years from 1 July 2008 to 30 June 2011. The written contract was signed on 3 July 2008 by Mr Scally and Mr McCammon. The contract contained a provision whereby Mr McCammon's pay would be reduced if GFC was demoted to the Conference. It did not contain a provision whereby Mr McCammon's pay would be reduced if GFC remained in League Two for a second year or were again demoted to League Two. It was GFC's case that this provision had in fact been agreed and was omitted from the signed contract by accident. On this basis GFC reduced Mr McCammon's wages by 15 per cent in the 2010-2011 season. Mr McCammon immediately complained. One question for the Tribunal was whether GFC was entitled to reduce Mr McCammon's wages.

6. Early in the 2010-2011 season, Mr McCammon was told by Mr Hessenthaler that he did not have a future at GFC. Negotiations were ongoing to buy out his contract. On 27 October an offer of £30,000 to £35,000 was made to him; it was not accepted. In the meantime, he had played for GFC and suffered an ankle injury that required surgery.

7. On 30 November 2010, a key date in this case, Mr McCammon was sharing a house with two other players who were also injured, Mr Gowling and Mr Weston. All three were black or of mixed race. There had been a forecast the previous day of heavy snow overnight. Non-injured players were told that they did not have to report in for training. Mr Hessenthaler took a day off. Injured players were told to report for treatment as usual. At some point, however, an exception was made for a white player, Mr Payne, who lived near to the three black players. He was told that he could remain at home.

8. There was indeed snow overnight, and the three players reported at 8.30am that they could not attend because of the snow. They had been in touch with Mr Payne; they knew that he was at home. The three players were not believed. Conditions had not prevented other members of club staff from getting to work. Mr Hessenthaler came in, photographs were taken of the home and cars of the players concerned, and they were ordered to come in. They arrived by taxi at about 1.00pm.

9. The Tribunal heard considerable evidence on the question of whether the three players were really unable to come in as they said. Their case was that they had attempted to do so, and they pointed to the fact that photographs taken by the club some time later still showed snowy conditions and showed that the show had been cleared from one of the vehicles. GFC's case was that they were untruthful. In this appeal it is part of the case for GFC and Mr Scally that the Tribunal was required to, but did not, make findings on this issue.

10. However, it is what happened when the three players arrived at the club that is central to the appeal. It is common ground that Mr McCammon immediately complained of the

difference in treatment between the black players and Mr Payne. He said to the physiotherapist, "Little white boy Jack Payne lives two minutes away, and I bet no one's been to take a photo of his car". It is also common ground that he went into the manager's office and made a complaint in general terms that the manager and assistant manager were racist.

11. There was, however, a sharp difference of evidence as to what happened in the manager's office. The Tribunal set out the evidence of both sides in some detail; we can summarise it more briefly. On Mr McCammon's account, Mr Hessenthaler flew into a rage, threatened to finish his career, said he would have to stay every day until 6.00pm and had to be restrained from hitting him by Mr Southall. On Mr Hessenthaler's account, Mr McCammon accused him of racism, was very angry and aggressive and had to be pushed away by Mr Southall.

12. The Tribunal found itself unable to accept the account given on either side. It said (paragraph 66):

> **"All that the Tribunal could reliably conclude from the evidence was that the Claimant was involved in a heated argument with Mr Hessenthaler in his office with both swearing and shouting taking place on both sides."**

13. It would overburden this judgment to set out the Tribunal's reasons in full on this point; suffice it to say that the Tribunal found real problems of credibility with all the witnesses. As regards GFC's witnesses, the Tribunal's faith in their credibility was shaken by answers they gave in evidence concerning the way they came to give statements. As regards Mr McCammon, the Tribunal considered that there was plainly exaggeration in his account.

14. GFC dealt with the three players for their failure to attend for treatment by fining them each two weeks' wages. As it happens, the fines were never collected. Mr McCammon appealed, and the collection of the fine was overtaken by events to which we shall come in a moment. The other two players were in due course forgiven by Mr Scally.

15. On 5 December 2010 Mr McCammon was suspended pending investigations concerning the events in the manager's office. Mr Scally had ordered Mr McCammon to attend on 30 November and had fined him two weeks' pay, as we have seen. He now involved himself in those investigations, interviewing Mr McCammon personally. Mr McCammon did not pursue his complaint of racism in any formal way with GFC, although the Professional Footballers' Association became involved on his behalf, and he wrote to them, setting out six particular respects in which he believed he had been subject to racial discrimination. Equally, however, when GFC suspended him, it did not ask him about or investigate the complaint of racism that he made.

16. By email dated 5 January 2011 Mr McCammon was called to a disciplinary hearing. The email did not set out any charges; it referred only to the "serious allegations against you in regard to an incident on Tuesday 30 November". Mr McCammon was represented by Mr Cusack from the Professional Footballers' Association. Although Mr Cusack had asked on 7 January and 13 January for statements and documentation, they were not sent to him until the day before the hearing.

17. The disciplinary hearing took place on 28 January. Mr Scally chaired the disciplinary panel. Mr McCammon made a covert recording of the hearing; the Tribunal had a verbatim

transcript of part of it. By letter dated 31 January Mr Scally confirmed that Mr McCammon had been summarily dismissed for gross misconduct. For the first time, he described the precise terms of the allegations, each of which were upheld:

> **"1. That on 30 November 2010, at the club premises, you acted in a manner that was aggressive, violent and threatening towards the team manager.**
>
> **2. That on 30 November 2010, at the club premises, you made very serious accusations of racism against both the team manager and the assistant manager."**

18. In the light of the second allegation it is hardly surprising that a claim of victimisation contrary to section 39(4)(c) of the **Equality Act 2010** (EqA) was central to the claim before the Tribunal and central to the appeal before us.

Submissions to the Tribunal

19. It is not necessary to set out all the submissions that the parties made to the Tribunal, but we should describe the manner in which GFC's case was put on the question of victimisation by dismissal. There were two elements to it.

20. Firstly, it was said that the dismissal was not "because of" the protected act. In part, this was a factual argument. It was said that the letter of dismissal should be read as a whole and really amounted to dismissing Mr McCammon for misconduct on the day in question, not to any significant extent for alleging racism. In part also reliance was placed on **Martin v Devonshires Solicitors** [2011] ICR 352. It was said that the reason for dismissal was the aggressive and abusive words and conduct with which the protected act was accompanied, which were severable from the protected act itself. We quote from paragraph 22 of the Judgment of Underhill P, as he then was, in that case:

> **"22. We prefer to approach the question first as one of principle, and without reference to the complex case-law which has developed in this area. The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the Managing Director at home at 3 o'clock in the morning. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. …Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately advanced made in some cases does not mean that it is wrong in principle."**

21. Secondly, it was said that Mr McCammon's complaint of racism was false and was not made in good faith; see section 27(3) of the **EqA 2010**, which we shall quote in a moment.

22. We should also say a word about the unlawful deduction claim. GFC's case was that there had been an oral agreement for a reduction in wages which by mistake was not reflected in the written agreement. It was argued that if the Tribunal found such an oral agreement to exist, it should stay the Tribunal claim pending a claim for rectification in the County Court. It was also argued that there was no unauthorised deduction, since there was an oral agreement as to the reduced level of remuneration.

The Tribunal's reasons

23. The claims and issues for the Tribunal to decide had already been clarified at a case management discussion. There are other issues with which we are not concerned but that the

Tribunal had to address in its reasons. The Tribunal heard evidence over four days in June 2012. Both sides were represented by counsel, as they are today. The Tribunal reserved judgement.

24. In its reasons the Tribunal set out findings of fact in considerable detail (paragraphs 9-58). It then turned to the individual claims. As regards race victimisation by dismissal, the Tribunal set out the law in terms to which no exception has been, or could be, taken. It identified the protected act as the allegation to Mr Hessenthaler and Mr Southall that they were racist. Its key reasoning then appears in the following paragraphs:

> **"65. The Respondent asserted that both the manner of the complaint, being aggressive and violently stated, and the fact that he did not genuinely believe that the managers were racist or that he had suffered racial discrimination, meant that his complaint was not made in good faith and could not therefore amount to a protected disclosure.**
>
> **66. The Tribunal found that the evidence of the events of 30 November 2010 were [sic] so unreliable that it could not find that the Claimant had made his complaints in a violent and aggressive manner. In particular, the Tribunal found that it could not rely upon the evidence of the Respondent's witnesses because their statements were clearly copied one from the other. They could not be considered to be credible witnesses when considering their accounts of the incident because, despite it being manifestly obvious on the face of the statements that they had been copied, they denied any such copying and insisted the statements had been completed separately by each witness. This was particularly so when the main similarities were at crucial parts of the evidence and were clearly designed to strengthen the adverse nature of their narrative against the Claimant and to put the Claimant in a bad light. All that the Tribunal could reliably conclude from the evidence was that the Claimant was involved in a heated argument with Mr Hessenthaler in his office with both swearing and shouting taking place on both sides. There was insufficient evidence for the Tribunal to conclude that the Claimant made his accusations of racial discrimination in a manner which amounted to bad faith.**
>
> **67. The dismissal letter dated 31 January 2011, set out in full above, clearly states that one of the reasons for dismissal was that the Claimant had made accusations of racism against the team manager and the assistant manager. Although Mr Duggan for the Respondent stated during the hearing that the letter was drafted without legal advice, he later confirmed in a letter dated 2 July 2012 (copied to the Claimant's representative) that the letter of dismissal was seen by Mr Waters, solicitor, who advised the Respondent on 28 January 2011, although it was stated that he was not an employment lawyer.**
>
> **68. The Tribunal found it notable that the paragraph simply referred to 'very serious accusations of racism'. That phrase was not qualified. It did not for example refer to 'false accusations' or 'accusations which you did not believe to be true' or 'accusations made in bad faith' as it might have done if that was the Respondents' case. The Claimant's alleged aggressive, violent and threatening manner was dealt with in the previous paragraph. The second paragraph therefore stood alone.**
>
> **69. The Tribunal also noted that, before this letter, there was no evidence of any allegation made by the Respondents that the Claimant had made the accusations knowing them to be false or not believing them to be true.**

70. The Tribunal found that the Respondent was in no position to assert that the accusations were either false, or that the Claimant did not believe them to be true, because there was no investigation whatsoever into the accusations. Mr Scally had discounted them from the start as being without merit and not worthy of investigation.

71. The Tribunal found that the accusation made by the Claimant on 30 November 2010 to Mr Hessenthaler and Mr Southall that they were racist and that the Claimant had been the subject of racial discrimination was a protected act within section 27 of the Act.

72. The Tribunal rejected the Respondent's assertion that even if there was a protected act on 30 November 2010, the reason why the Claimant was dismissed was nothing to do with any protected Act but was because of the behaviour and manner of the Claimant, relying upon [*Martin*].

73. The Respondent had clearly stated that making accusations of racism was a principal reason for dismissal. The Respondents had failed to comply with the CRE Code of Practice, paragraphs 3.8 and 4.65 above. From these facts the Tribunal inferred that the Respondents regarded the Claimant's accusations of race discrimination as a permissible reason for dismissal.

74. The Tribunal found that the Claimant had proved facts from which it could conclude that the dismissal was because of the protected act. The Respondent had failed to show that it was in no sense whatsoever on the grounds of a protected act.

75. It is rare that a letter of dismissal overtly states that a protected act is the reason for dismissal, especially when the Respondent has had the benefit of legal advice. However, it was done in this case. There was no reasonable conclusion other than that in the circumstances it was an act of victimisation by dismissal.

76. The complaint of victimisation by dismissal succeeds."

25. As regards unfair dismissal, the Tribunal again set out the law in terms to which no exception has been, or can be, taken. In its reasons it first said the following (paragraph 91):

> **"In view of the finding above that a significant reason for the dismissal was unlawful victimisation under Section 27 Equality Act 2010, the Tribunal found that the dismissal was unfair because this was not a potentially unfair reason under Section 98(2) Employment Rights Act 1996."**

26. Later it said that it found proved the allegation that GFC dismissed Mr McCammon for making an allegation of race discrimination. The Tribunal also made specific findings that the dismissal was procedurally unfair for the following reasons:

(1) Mr McCammon was not sent a letter inviting him to the disciplinary meeting setting out the nature of the allegations he was to face, nor were statements and documents sent in good time (paragraph 93);

(2) Mr Scally had pre-judged him and decided he was never going to play again and was not a fit person to chair the disciplinary meeting because of conflicts of interest and bias. The Tribunal said it was clear from the record of the meeting that he did not adopt an impartial or detached approach to the evidence but acted more like a prosecutor (paragraph 94).

(3) There was interaction between witnesses in the drafting of their statements. The Tribunal found that this had occurred for reasons that it set out in some detail (paragraphs 95-102). It said this reflected adversely on the credibility of Mr Hessenthaler, Mr Southall and another witness, who denied in their evidence that any interaction had occurred. The Tribunal also noted that there were very similar passages in statements prepared by Mr Hessenthaler and Mr Southall for the Tribunal.

27. As regards unauthorised deduction from wages, the Tribunal said that it was asserted on behalf of GFC that the Tribunal should rectify the contract by giving effect to the intention of the parties at the time the contract was signed. It cited from *Chitty on Contracts: 28th Edition*, paragraphs 5-065 and 5-069:

> **"Rectification naturally only applies to contracts which have been reduced to writing. It has long been an established rule of equity that where a contract has by reason of a mistake common to the contracting parties been drawn up so as by reason of a mistake common to the contracting parties been drawn up so as to militate against the intentions of both as revealed in their previous oral understanding, the Court will rectify the contract so as to carry out such intentions so long as there is an issue between the parties as to their legal rights per se. If there is no such issue or if no substantive relief is sought and no practical purpose will be achieved, rectification may be refused. It will also be refused if a written agreement fails to mention a matter because the parties simply overlooked it, having no intention on the point at all. In such a case, the written agreement must be construed as it stands. […]**
>
> **The burden of proof is not on the party seeking rectification. He must produce convincing proof not only that the document is to be rectified was not in accordance with the parties' true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions. It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract. The denial of one of the parties that the deed as it stands is contrary to his intention ought to have considerable weight, and unless the other party can convince the Court that the document**

> **does not represent both parties' intentions at the time of execution, rectification will only exceptionally be ordered.**
>
> **Indeed, it has been said that it is not sufficient that the written contract does not represent the true intention of the parties; it must be shown that the written contract was actually contrary to the intention of the parties. Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document."**

28. The Tribunal then noted that the Respondents' case was that the 15 per cent reduction clause must have been accidentally deleted. It went through the evidence relied on in support of that proposition in some detail (paragraphs 112-116 of its reasons). It is not necessary to repeat all that evidence in this judgment; it is sufficient to cite the concluding paragraphs:

> **"117. The Tribunal found it implausible that Mr Scally and Ms Poynter (Club Secretary) would, on two separate occasions, put their signatures immediately below a paragraph which was incomplete and which had omitted a crucial part of the agreement between the parties.**
>
> **118. The Claimant insisted that he had not agreed a 15 percent reduction clause or intended that such a clause should be included in the contract. When the deduction from his pay was made in June 2010, he complained promptly and formally in writing.**
>
> **119. In these circumstances, the Tribunal found that there were insufficient grounds for rectification and concluded that it must give effect to the signed contact as it stands."**

29. Finally, it is relevant to quote the following paragraph (paragraph 6) from the remedies judgment:

> **"The Tribunal found no contributory or blameworthy conduct by the Claimant. Due to the poor quality of the evidence during the main hearing, the finding regarding the Claimant's conduct was that at most he took part in a heated argument on arriving at work on 30 November 2010. The Tribunal made no finding that he was at fault in not coming to work on that day, or that he was untruthful when challenged. The Tribunal found no conduct on the part of the Claimant which contributed to his dismissal or to the act of victimisation."**

Victimisation

30. It is convenient first to consider the claim of victimisation by dismissal that was placed by Mr Michael Duggan, on behalf of GFC and Mr Scally, at the forefront of his submissions before us.

Submissions

31. Mr Duggan's principal submission is that the Employment Tribunal abrogated its duty to adjudicate upon the issues before it. He puts his case in the following ways. The case for the Respondents before the Tribunal was that Mr McCammon was dismissed for gross misconduct by reason of his aggressive and abusive behaviour in the manager's office on 30 November. This required the Tribunal to make findings of three kinds, which it failed to make.

32. Firstly, he submitted that the Tribunal was required to find, but did not find, what GFC honestly believed had happened in the incident in question. This finding was necessary because it was GFC's case that Mr McCammon was not dismissed to any significant extent because of the allegation of race discrimination itself (see **Martin**, already quoted).

33. Secondly, he submitted that the Tribunal was required to find, but did not find, whether Mr McCammon was in fact guilty of the aggressive and abusive behaviour alleged in the manager's office. He submitted that the Tribunal was deflected from making proper findings by its conclusion that it could not rely on the evidence of the Respondents' witnesses because there had been interaction in the process of taking the statements. He did no suggest that the Tribunal's findings on credibility were perverse as such but rather that the findings did not discharge the duty of the Tribunal to reach proper conclusions on the evidence as a whole.

34. Thirdly, he submitted that the Tribunal was required to find, but did not find, whether Mr McCammon had lied about his inability to come in by reason of snow. This, he submitted, was essential background to the Respondents' allegation that the complaint of racism was false and made in bad faith. It was also essential background to the making of findings about

Mr McCammon's credibility. He took us in considerable detail through the Respondents' case concerning Mr McCammon's credibility.

35. Mr Kohanzad in reply submitted that the Tribunal had made findings about the Respondents' reasons for dismissal, holding that, contrary to their case, the dismissal had been to a significant extent because Mr McCammon complained of racism. He submitted that the Tribunal made findings, so far as it properly could, on the evidence concerning what happened in the manager's office; it was under no duty to go further. Credibility of the Respondents' witnesses was affected because they insisted under oath that the words in their statements were their own words without reference to others and this was plainly not the case. He submitted that the Tribunal was not required by law to make findings as to what occurred in the morning; it was no more than background to the questions that the Tribunal was required by section 27 to decide. In any event, the Tribunal did not accept that the allegations were false or that Mr McCammon did not believe them to be false (see paragraph 70 of the reasons).

Discussion and conclusions

36. By virtue of section 39(4)(c) of the **EqA 2010**, an employer is forbidden to victimise his employee by dismissing him. The Tribunal correctly took as its starting point the wording of section 27 of the **EqA 2010**, which defines victimisation. This provides as follows:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**

> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **(4) This section applies only where the person subjected to a detriment is an individual.**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."**

37. The burden-of-proof provisions in section 136 of the 2010 Act are applicable to claims of victimisation; see section 136(1)-(3).

38. In this case it was accepted that Mr McCammon had done a protected act by alleging race discrimination on the part of the manager and assistant manager. There were, in essence, two questions for the Tribunal to decide.

39. The first was whether GFC and Mr Scally dismissed Mr McCammon because he had done the protected act. This, on the authorities, was a "reason why" question. The Tribunal was required to decide whether to any significant extent the Respondents had dismissed Mr McCammon for making an allegation of race discrimination. To our mind, the Tribunal correctly focused on this question and answered it properly in paragraphs 67-76 of its reasons. It committed no error of law by taking the dismissal letter as its starting point. It was part of the case for the Respondents that by this letter Mr Scally meant that Mr McCammon had made the allegations knowing them to be false or not believing them to be true, but the Tribunal did not accept that this was the case, for reasons that it gave in paragraphs 68, 69 and 73. It specifically rejected the Respondents' case that the reason for dismissal had nothing to do with any protected act (see paragraphs 72 and 74). To the contrary, it found that victimisation was, as

the Tribunal put it, a significant reason for the dismissal (see paragraphs 91 and 103 of its reasons).

40. In this way the Tribunal dealt fully and clearly with the Respondents' case that it did not dismiss Mr McCammon because of the protected act. We see no error of law in the way the Tribunal approached the matter and no want of proper reasoning. In truth the letter dated 31 January was a significant obstacle for the Respondents that they did not overcome. Despite Mr Duggan's submissions, we do not think the true question was simply whether the Respondents honestly believed that Mr McCammon had committed gross misconduct in the manager's office. The true question was the one posed by section 27, as we have explained it above: was the dismissal because of – that is to say, to any significant extent by reason of – the protected act?

41. Nor do we accept Mr Duggan's criticism that the Tribunal was bound to make further findings concerning the events in the manager's office. The Tribunal was faced with something close to polar-opposite accounts of what happened during what was, on any view, a short and sharp incident. It was entitled, as it did, to doubt the credibility of the witnesses on either side and to conclude that it was satisfied of no more than that there was a heated argument with swearing and shouting taking place on both sides. We do not accept Mr Duggan's submission that the Tribunal decided the case against the Respondents because the statements of Mr Hessenthaler and Mr Southall were similar. The Tribunal was concerned about their credibility because they insisted on oath that the statements had been composed separately, which the Tribunal did not find plausible.

42. This brings us to Mr Duggan's third criticism, namely that the Tribunal was required to make findings concerning whether Mr McCammon had lied about being unable to come in by reason of snow that morning. This, if it had any bearing on the victimisation question, must bear on the second matter that the Tribunal had to decide. This was the following: once granted that the dismissal was because of the allegations of race discrimination, had the Respondents established (1) that the allegations were false and (2) that they were made in bad faith (see section 27(3))?

43. It is plain from the Tribunal's reasons that the Respondents failed on both counts. Mr McCammon had a number of reasons for saying that the club management had treated him in a way that was racist. The Respondents had not even asked him why he made the accusation, still less investigated it or adduced material relating to them (see paragraph 70 of the Tribunal's reasons). The Respondents' principal way of putting the case, his aggressive and violent behaviour at the meeting, had not been accepted. The Tribunal was not satisfied that the elements of section 27(3) were made out.

44. The Tribunal has a duty in law to give reasons for its decision. This means that the parties and an appellate court must be able to see why the Tribunal reached its conclusions on the essential issues before it. It does not mean that the Tribunal has to address every potential dispute in the case. Where, as here, both parties were represented by skilled and experienced counsel, few stones will be left unturned in the course of a hearing lasting several days. The key question is whether the Tribunal sufficiently addressed the issues to which we have referred so we and the parties know how it reached its conclusion. Having rejected the main planks in the Respondents' case, we do not think the Tribunal was required by law in order to deal with

the section 27(3) defence to address the snow incident earlier in the day. We would add that the remark of Mr McCammon, to the effect that he did not believe cameras would have been used to investigate the matter in the case of the white player, does not depend on whether he was or was not caught out in claiming an unauthorised absence. In our judgment the Tribunal gave proper and sufficient reasons for rejecting the section 27(3) defence put forward by the Respondents.

45. For these reasons we reject the main thrust of the submissions that Mr Duggan put forward on the Respondents' behalf. We have considered all his submissions on this point; we conclude that the Tribunal approached the matter properly in law.

46. As we leave this part of the case, we should finally note that counsel referred us to the recent decision of the Appeal Tribunal in **Woodhouse v West North West Homes Leeds Ltd** UKEAT/0007/12, in which HHJ Hand QC discussed **Martin** and emphasised the importance of giving primacy to the statutory language and treating as exceptional cases that might have properly severable features (see paragraphs 95-102, especially paragraph 102). As regards intemperate language, the matter is to our mind covered by **Martin** itself, which we have already quoted. The mere fact that Mr McCammon shouted and used abusive language would not have justified a finding of any severable feature for the purposes of section 27 of the **EqA 2010**.

Unfair dismissal

47. Mr Duggan accepted that if the Tribunal's finding on victimisation stood, the dismissal was unfair. In our judgment, he was plainly right to accept that this was the case. The Tribunal

said that because victimisation was a "significant reason" for the dismissal, the dismissal was unfair "because this was not a potentially fair reason under Section 98(2) **Employment Rights Act 1996**". Of course, subsections 98(1) and (2) of the **Employment Rights Act 1996** focus upon the principal reason for dismissal, and it is possible, for the principal reason for dismissal to be one that relates to conduct, even if the dismissal was to a significant extent because of the employee's protected act. However even if the Tribunal had found that the principal reason was one relating to conduct, it is inevitable that the Tribunal would have found the dismissal to be unfair, applying section 98(4) of the Act.

48. Mr Duggan, however, criticised the remaining reasons of the Tribunal for finding the dismissal to be unfair. Mr Kohanzad defended them. We shall deal with them briefly in turn. In our judgment, the Tribunal was plainly right to hold that GFC was in breach of the ACAS Code 2009 by failing to set out the nature of the allegations Mr McCammon had to face (see paragraph 9 of the Code). It was also correct to find that this was unfair. Neither Mr McCammon nor his representative knew that he was being dismissed to a significant extent for making racial allegations; they had no proper opportunity to address that matter before dismissal took place. Of less significance, but still unfair, was GFC's failure to provide documents and statements until the day prior to the disciplinary hearing despite polite, proper and reasonable requests by Mr McCammon's representative.

49. Further in our judgment the Tribunal was entitled to hold that Mr Scally should not have chaired the disciplinary panel. His involvement with Mr McCammon had been substantial, as the Tribunal set out in its reasons. The Code provides (paragraph 6) that in misconduct cases, where practicable, different people should carry out the investigation and the disciplinary

hearing. As the Tribunal observed, GFC employed 300 people and had a board of directors. It was plainly practicable to arrange for an independent person to chair the hearing. The Tribunal was also entitled to find that Mr Scally did not adopt an impartial approach to the evidence and behaved like a prosecutor. We note from GFC's transcript that Mr Scally referred to the witnesses against Mr McCammon as "our witnesses" and that he called them and questioned them first. The Tribunal was also entitled to criticise GFC's witnesses who had not been prepared to accept that there had been any interaction in the preparation of their statements.

Unlawful deductions

50. Mr Duggan's submissions on this part of the case were relatively brief; he took two points. Firstly, he criticised the Tribunal for approaching the issue as one of rectification at all. He said that he did not ask the Tribunal to rectify the contract; the furthest he went was to say that if the Tribunal found there had been an oral agreement accidentally omitted from the written contract, it should stay the matter to enable the County Court to deal with it. He also submitted, more faintly, that the Tribunal should not have adopted rectification principles because the contract was partly written and partly oral, or that the Tribunal should have dealt with the matter as one where there was an oral agreement for a lower level of pay and therefore no unauthorised deduction.

51. We reject these submissions. The starting point is that the agreement between GFC and Mr McCammon was a formal written agreement intended by the parties to embody the essential terms of the contract between them. Such formal written agreements are relatively rare in the employment world, but where they exist they are subject to normal contractual principles. It was not open to GFC simply to bypass the written agreement by asserting that the agreement

was partly oral and partly in writing; this was never the intention of the parties. Nor was it open to GFC to deny that it was making deductions from that which was due under the written agreement merely by asserting that an orally agreed term had been left out of the written agreement. If it wished to assert that a term had been omitted by mistake, it had to abide by the normal contractual rules. In this case, the true question was whether the agreement should be rectified by treating an orally agreed term as part of it. Therefore, the principles that the Tribunal cited were apposite.

52. We should make it clear that there are interesting underlying questions as to whether: (1) the Tribunal should have considered at all whether the contract ought to be rectified; and (2) if so, whether the Tribunal could itself have given effect to its conclusion or whether, as Mr Duggan evidently thought, there would have to be a stay for the County Court to give effect to the conclusion. They do not arise for decision today. It is sufficient to say that GFC sought to resist payment of the sums due under the written contract by relying on an oral promise, and it cannot then complain if the Tribunal, when deciding that point, applied correct contractual principles.

53. Mr Duggan also briefly argued that the Tribunal's factual conclusion was not open to it or was insufficiently reasoned. He particularly criticised the Tribunal for doubting the evidence of a witness who had acted as intermediary between Mr Scally and Mr McCammon. It is sufficient for us to say that we are far from persuaded that the Tribunal's conclusion on this question was either perverse or insufficiently reasoned. The Tribunal gave considerable detail in its reasons, it saw and heard witnesses whom we have not heard, and it had access to and examined documents that we have not seen.

Contributory fault

54. Finally, Mr Duggan argued that the Tribunal's reasoning on the question of contributory fault was inadequate. He rightly addressed us very shortly on this point, as he accepted any deduction for contributory fault would apply only to the very small award for unfair dismissal, the bulk of the award being for victimisation and for unlawful deductions. He submitted that the Tribunal was bound to make a finding of contributory fault by reason of Mr McCammon's behaviour in the manager's office and by reason of the snow incident. We see no error of law in the Tribunal's reasons. It was not bound to make a deduction merely because Mr McCammon took part in a heated argument. It was certainly not bound to make a deduction because of a single unauthorised absence that did not form part of the disciplinary charge and had been dealt with by a fine.

Conclusion

55. For these reasons, the appeal will be dismissed.