EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102218/20 (P)

Held on 21 December 2020

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Employment Judge N M Hosie

Mr S Uangbaoje	**Claimant** **In Person**
Wilson James Limited	**Respondent** **Represented by** **Mr P Chadwick,** **KLC Employment** **Law**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

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1. the unfair dismissal complaint is dismissed, for want of jurisdiction; and
2. the complaint of discrimination on the ground of race has no reasonable prospect of success and it is struck out in terms of Rule 37(1)(a,) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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REASONS

Introduction

1. The claimant, who is unrepresented, brought complaints of unfair dismissal and race discrimination. However, as he did not have the required two years' continuous service with the respondent, the Tribunal does not have jurisdiction to consider his unfair dismissal complaint. The claim was denied in its entirety by the respondent. The respondent's position is that the claimant's conduct was such that, in accordance with his "zero hour contract", he was not given any work for a three-month period and this meant his employment automatically came to an end on 14 December 2019.

2. I conducted a preliminary hearing to consider case management on 13 July 2020. The Note which I issued following that hearing is referred to for its terms. I recorded in my Note that the breach of contract and holiday pay complaints, which the claimant had referred to in his Agenda for the preliminary hearing, had not been intimated in the claim form.

3. The claimant replied to my direction to provide further and better particulars of his race discrimination complaint by e-mail on 27 July 2020. He advised that he had, "*no further and better particulars to be provided than what is in my Agenda for the Preliminary Hearing*".

"Prospects" of the claim succeeding

4. In para. 9 of my Note, I directed the parties to provide written submissions on the "prospects" of the the claim, succeeding. I advised that if I decided that a complaint had, *"no reasonable prospects of success"*, it would be struck out, in terms of Rule 37(1)(a), in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"); and if I decided that a complaint had, *"little reasonable prospect of success"*, I would consider whether the claimant should be required to pay

a deposit, as a condition of continuing to advance the complaint, in terms of Rule 39.

Respondent's submissions

5.	The submissions by the respondent's representative were attached to his e-mail of 27 August 2020 at 11:55.

Race discrimination

6.	In support of his submissions, the respondent's representative referred to the Judgment of LJ Mummery in ***Madarassy v. Nomura International Plc*** [2007] ICR 687.

7.	He submitted that:-

> "*The claimant has not provided in his grounds of complaint any particulars as to why or how he claims to have been discriminated against on the grounds of his race.*
>
> *The claimant's grounds of complaint do not contain the word "race". Whilst it is accepted that the words "harassment" and "discrimination" are included there are no particulars included which provide any basis for a claim of race discrimination.*"

8.	The respondent's representative then went on in his submissions to refer to the claimant's response, by e-mail dated 27 July 2020, to the direction in my Note, to provide further and better particulars:- "*I have no further and better particulars to be provided than what is in my Agenda for the preliminary hearing. As advised by Judge N M Hosie at the preliminary hearing on 13th July 2020 that my Complaints only constitute bad behaviour by the Respondent.*"

9.	The respondent's representative submitted, with reference to ***Madarassy***, that:-

"*Key to stage 1 in this process is whether the claimant has at any time provided any information or evidence to indicate the basis upon which he says the treatment is because of his race.*

5 *Despite being given an opportunity to do so after having not provided such information in his claim form, the claimant has still not given any information as to why he says the treatment is because of his race. He has now gone further than that in his e-mail of 27 July 2020 to state "the complaints only constitute bad behaviour". Read literally the claimant now concedes that his* 10 *claim is not one of race discrimination but general unfairness.*

Additionally, the basic facts of this case must be taken into account.

The claimant's termination arose from an incident he had with one of his 15 *colleagues. The claimant accepts that he has been charged by the Police with assault and that he is awaiting a date for the trial.*

The claimant was re-employed by the respondent after having been previously made redundant. Whilst the claimant suggests that action which 20 *he took in his previous time with the respondent has resulted in unfair treatment, the fact that he was re-employed by the respondent would clearly suggest otherwise.*

It is submitted that the claimant is bound to fail in showing a prima facie case 25 *of race discrimination.*

It is accepted that in discrimination cases it is only the clearest claim should be struck out. It is submitted in this case that test is fully met, particularly as the claimant has accepted that the respondent's alleged treatment of his was 30 *"bad behaviour".*

Unpaid holiday pay

35 10. The respondent's representative made the following submissions with regard to this complaint:-

"*The claimant made no claim in his ET1 relating to a failure to pay holiday pay.*

40 *The first reference by the claimant to a potential holiday pay claim was made in his preliminary hearing Agenda which was sent to the Employment Tribunal and respondent on 22 June 2020.*

Such a claim is an entirely new claim which could have and should have been 45 *included in the claim form if it was a matter that the claimant wanted to be determined by the employment tribunal.*

In order to be able to pursue this new complaint, the respondent submits that the claimant must make an application to amend his claim. On the basis that the claimant's reference in his Agenda is treated as such an application, the respondent can confirm that the application is resisted.

The claim relating to holiday pay is an entirely new ground of complaint. There is no link to the facts described in the claim form and the proposed amendment.

Furthermore, the respondent has previously sent to the Employment Tribunal a copy of the claimant's pay slip with its e-mail dated 6 August 2020. This pay slip shows that in calculating the claimant's final pay he was credited the sum of £131.22 being 14.5 hours of accrued but untaken holiday at the rate of £9.50 per hour.

In these circumstances above, taking particular note that the claimant made no reference in his claim form to any claim for holiday pay and the evidence that a payment was credited to the claimant in his pay slip, it is asserted that not only should any application to amend be refused, but if it was granted, the claim has no reasonable prospect of success.

We make an application for this claim to be struck out pursuant to Rule 37(1)(a)."

Breach of contract

11. The respondent's representative made the following submissions with regard to this complaint:-

"*The claimant did not make a claim in his claim form for breach of contract.*

The claimant was directed to provide further and better particulars of his complaint relating to breach of contract, to advise what is the legal basis for the complaint and what damages and financial loss did the claimant suffer as a result of the alleged breach.

The claimant has failed to provide any particulars, and he has not provided the other information directed by the Employment Tribunal. He has not provided any detail of what remedy or damages he believes are due to him because of any alleged breach.

It is the responsibility of the claimant when claiming breach of contract to clearly identify the alleged breach and the alleged damage suffered. As the claimant has been unable to do either, the respondent submits that there is

no case to answer and that the claim can have no reasonable prospect of success.

The respondent makes an application for the claim of breach of contract to be struck out pursuant to Rule 37(1)(a).”

Claimant’s submissions

12. The claimant made submissions by way of an e-mail dated 11 September 2020 at 19:32.

Unfair dismissal

13. The claimant accepted that he was unable to proceed with this complaint as he did not have the required two years’ continuous service with the respondent.

Race discrimination

14. The claimant referred to the burden of proof provisions in s.136 of the Equality Act 2010 (“the 2010 Act”) and to ***Igen Ltd v. Wong*** [2005] ICR 931 CA and ***Madarassy***.

15. He made the following submissions :-

“*The evidence attached to the claimant’s e-mail to the Tribunal on 9 August 2020 See the description used in the termination letter dated 27 March 2020 that was signed by the respondent’s staff Hannah Bury could not reasonably be characterised as alleged assault or gross misconduct issue at all; but rather referring to a clause 6.1 on contract that was not provided to me by the respondent during my Employment.*

The fact that the termination letter dated 27 March 2020 was not in accordance with the employment offer letter (see document attached to the claimant’s email of 27 July 2020 to the Tribunal) is sufficient to shift the burden of proof.

In the respondent’s grounds of resistance signed and dated 4 June 2020 to the Tribunal in Glasgow, the respondent stated at paragraph 17, ‘the claimant’s zero hours at section 6.1 states: ‘should no work be provided for a period of three months, or you refuse work for a period of three months or

more then it is agreed that the contract will be deemed to have terminated at the end of the last day of paid work, with no further notice of having been given.'

5 *As noted by Employment Judge Hosie on email correspondence to both parties on 30 July 2020 that the contract of employment that was sent to the Tribunal by the respondent's representative, by way of attachment to his e-mail of 21 July 2020 was not signed by the claimant, neither the Employment offer document sent to the Tribunal on 27 July 2020 was signed by the* 10 *claimant.*

In the respondent's grounds of resistance, the respondent stated at paragraph 15 'CCTV footage showed that the claimant had knocked the supervisor's phone quite violent from his hand'. This Evidence was not 15 *shown to the claimant. CCTV does not tell everything that happened on a matter. The respondent is overly reliant upon CCTV based on incomplete information at the expense of other material which was in the claimant's favour.*

20 *In the respondent's grounds of resistance at paragraph 14, the respondent stated 'a complaint was made to Police Scotland and the claimant was removed from site'. This was not only a fabricated statement but a stereotypical prejudice I feel the respondent held against me being a black person in a manner portrayed me as violent person that Police removed me* 25 *from site, this statements was signed by the respondent's representative to be made in good faith to the Tribunal. The Police came to my home to speak to me."*

30 16. He then went on in his submissions to refer to the ACAS Code of Practice and, *"the standards of a reasonable employer"*, with reference to ***Glasgow City Council v. Zafar*** [1998] IRLR 36.

Holiday pay

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17. The claimant commented on the respondent's response as follows:-

"*By e-mail dated 6 August 2020 the respondent's representative responded to the Employment Tribunal's directions. The respondent's representative stated 'the claimant was credited with 14.5 hours of untaken but accrued* 40 *holiday pay in his final payslip. His pay rate was £9.05 per hour. We have attached payslips. It will be noted that a deduction has been made for the equivalent amount for a failure to return the company uniform. Under contract this deduction would have been £150 but due to only £131.22 being available that was the figure deducted.'*

The claimant submits that the respondent has no authorisation to make a deduction from the claimant's holiday pay for failure to return uniforms. The claimant cannot be bound to a contract that was not provided by the respondent to me during employment and which I did not signed (sic) *to consent to its terms.*

As noted by Employment Judge Hosie on e-mail correspondence to both parties on 30 July 2020 that the contract of employment that was sent to the Tribunal by the respondent's representative, by way of attachment to his e-mail of 21 July 2020 was not signed by the claimant, neither the employment offered document sent to the Tribunal on 27 July 2020 by the claimant was signed by the claimant as well. The employment offer letter which is the only employment document provided by the respondent during my employment did not mention £150 failure to return uniform neither cost of uniform to be £150."

Breach of contract

18. The claimant made the following submissions:-

"*The claimant disagree* (sic) *with the respondent that there is no case to answer.*

The termination of the claimant's employment was wrongful. This was not in accordance with the employment offer document (see attached to claimant e-mail of 27 July sent to Tribunal) provided to the claimant. In the employment offer letter, it states: 'It is the responsibility of the employee to work with the screening team to ensure that full written screening is completed by the end of a 12 week period following your start date. If the full written screening is not completed within this time frame the offer of employment will be withdrawn and your employment will be terminated.' The condition set out was not follow (sic) *by the respondent for termination. As a result of this, the claimant had not yet obtained new employment and had loss of earnings.*

The unauthorised deduction of £131.22 by the respondent as holiday pay has caused consequential financial loss of £82.50 deducted from my Universal Credit Jobseekers' Allowance for the month of April 2020.

The respondent did not provide me with any payslips during my employment for me to see if the promise made or kept in the employment offer letter. For instance, paying pension contributions."

Respondent's response

19. The respondent's representative responded by e-mail on 25 September 2020 at 11:44 with the following comments, by way of reference to the numbered paragraphs in the claimant's e-mail:-

"***Unfair dismissal***

1-3 The claimant in terms consents to the withdrawal and dismissal of the complaint of ordinary unfair dismissal and we invite the Employment Tribunal to dismiss this claim.

Holiday pay

5-9 The claimant has failed to address the issue regarding the respondent's submission that he is required to make an application to amend his claim in order for the Tribunal to consider it. Furthermore the respondent states that the claimant's contract did authorise the deduction of pay for the purposes of the failure to return the respondent's uniform. The claimant does not state that the uniform was returned.

Breach of contract

11-14 Again the claimant does not address the respondent's position that the claimant is required to make an application to amend his claim in order for the Tribunal to consider the claim. The claimant has had ample opportunity to specify what his breach of contract complaint is and save for referring again to the holiday pay amount has failed to specify what damages have been caused by any alleged breach.

Race discrimination

16-41 The claimant has still failed to provide any submissions or evidence as to why he says the treatment afforded to him was because of his race. He has chosen not to address that fundamental issue. Whilst he states that he has been treated unreasonably and he has referred to the "Zafar" case, with respect that case does not assist him at all. In Zafar the judgment is clear that unreasonable conduct by itself cannot lead to any presumption that the conduct was discriminatory. There has to be some evidence to shift any burden on to the employer in order to make a determination that the conduct was discriminatory. In this case the respondent has a clear explanation as to why the claimant was treated the way he was. The claimant was in an altercation with a colleague and violent conduct by him was seen on CCTV. The claimant accepts that he has been charged by the Police which in itself strongly infers that the claimant's conduct was as alleged, particularly bearing in mind the higher burden of proof required in criminal proceedings. Additionally, it is not disputed by the claimant that he was employed under a zero hours contract. Whilst the claimant disputes that he received a copy of that contract the terms applied to him were wholly consistent with all other

zero hours contracts operated by the respondent. The respondent is not obliged to offer any work to the claimant and as a result of the incident no further work was understandably offered to him and after a period of 3 months, the contract was terminated. Nothing in this had anything to do with the claimant's race and the claimant has not suggested how it could be related to his race.

It is strongly submitted that the claimant's claim of race discrimination is bound to fail and should be struck out as having no prospect of success."

Claimant's response

20. The claimant responded by e-mail on 6 October 2020 at 22:51.

Unfair dismissal

21. The claimant confirmed he accepted that the Tribunal did not have jurisdiction to consider this complaint as he did not have two years' continuous service.

Holiday pay

22. The claimant made the following submissions:-

"*……………..the respondent has no authorisation to make a deduction from the claimant's holiday pay for failure to return uniform. The claimant cannot be bound to a contract that was not provided by the respondent to me during my employment which I did not sign to consent to its terms. The only employment offer letter provided by the respondent during my employment did not mention £150 failure to return uniform neither cost of uniform to be £150.*"

Breach of contract

23. The claimant made the following submissions:-

"*Again the termination of the claimant's employment was wrongful. This is not in accordance with the employment offer document provided to the claimant. The condition set out was not follow* (sic) *by the respondent for termination. As a result of this the claimant had not yet obtained new employment and has loss of earnings. The unauthorised deduction of £131.22 by the respondent as holiday pay has consequential financial loss of £82.50 deducted from my Universal Credit Jobseeker's Allowance for the month of April 2020. The respondent did not provide me with any payslips during my employment for me to see if the promise made are kept in the employment offer letter. For instance, paying pension contributions."*

Race discrimination

24. The claimant referred to s.136 of the 2010 Act and the following cases:-

Igen
Madarassy
Zafar
Nagarajan v. London Regional Transport & Others [1991] IRLR 513
King v. Great Britain China Centre [191] IRLR 513
Din v. Carrington Viyella Ltd [1982] ICR 256
Chattopadhyay v. Headmaster of Holloway School and Others [1981] IRLR 487
Qureshi v. Victoria University of Manchester and Another [2001] ICR 863
Hussain v. Vision Security Ltd and Another [2011] EqLR 699
Dattani v. Chief Constable of West Mercia UKEAT/0385/04/RN

25. The claimant then made the following submissions:-

"*Again the reason for terminating the claimant employment* (sic) *was confirmed in the termination letter dated 27 March 2020 that was signed by the respondent's staff Hannah Bury which is clearly inconsistent with the respondent explanations. This is clearly because the claimant has no awaiting trial or any case in court with the respondent (Wilson James Ltd) or the respondent's clients. In the respondent's grounds of resistance, the respondent stated at paragraph 15 'CCTV footage showed that the claimant had knocked the supervisor's phone quite violent from his hand' and at paragraph 14, the respondent stated that 'a complaint was made to Police Scotland and the claimant was removed from site'. This was not only a fabricated statement but a stereotypical prejudice I feel the respondent held against me being a black person in a manner to portray me as a violent person that Police removed me from site, this statements was signed by the respondent's representative to be made in good faith to the Tribunal in Glasgow. The Police came to my home to speak with me.*

The claimant's claim of race discrimination as against the respondent was that the respondent had treated the claimant so unlawfully and unfairly, it raised an inference of race discrimination."

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Claimant's further submissions

26. The claimant made further submissions by way of e-mail on 12 October 2020 at 22:36. In that e-mail he specified a number of alleged acts of less favourable treatment. He also made the following submissions:-

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"*The respondent did not provide any explanation to me on why my complaint against Ershad Chowdhury (day supervisor) was not dealt other than termination. The incident that happened on 14 December 2019 between the claimant and Ershad Chowdhury (day supervisor) arose following a telephone incident that the respondent female security control room intervened to resolve between me and Ershad Chowdhury (day supervisor), but the day supervisor refused to let the incident go away and came to where I was at work with anger. Ershad Chowdhury (day supervisor) had a personal animosity towards me am being victimised which I had reported to the Manager which he acted unreasonably.*

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The respondent explanation that I was charged by the Police was not the reason stated on my termination letter or gross misconduct issue. I don't have a case in court or awaiting trial with the respondent or its client but with Ershad Chowdhury which the Police informed me that they told Ershad Chowdhury to report the matter to the respondent when they came to my home but Ershad Chowdhury (day supervisor) said he wants case. I was not removed by the Police from the site where I was at work. This was a stereotypical prejudice I feel the respondent held against me of being black person to portray me as a violent person. However, as advice (sic) *by ACAS Guide 'an employee should not be dismissed or disciplined solely because he or she has been charged with or convicted of a criminal offence'. The suspension, investigation and termination were tainted by racial bias and discrimination, if it was another race, a white colleague the respondent would have treated him differently."*

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Discussion and decision

Unfair dismissal complaint

27. I shall dismiss the unfair dismissal complaint as the Tribunal does not have jurisdiction. This was accepted by the claimant.

5 **Race discrimination complaint**

Relevant law

28. A discrimination complaint requires the claimant first to establish facts that amount to a *prima facie* case. S.136 of the Equality Act ("the 2010 Act")
10 provides that, once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to provide a non-discriminatory explanation.

29. ***Igen Ltd v. Wong*** [2005] IRLR 258 remains one of the leading cases in this
15 area. In that case, the Court of Appeal established that the correct approach for an Employment Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage, the claimant has to prove facts, from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e. on the balance of
20 probabilities), is the second stage engaged, whereby the burden then "shifts" to the respondent to prove – again on the balance of probabilities – that the treatment in question was, "*in no sense whatsoever*", on the protected ground.

25 30. The Court of Appeal in ***Igen*** explicitly endorsed the guidelines set down previously by the EAT in ***Barton v. Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205. Although these cases concern the application of s.63A of the Sex Discrimination Act 1976, the guidelines are equally applicable to all other forms of discrimination. They can be
30 summarised as follows:-

- It is for the claimant to prove, on the balance of probabilities, facts from which the Employment Tribunal could conclude, in the

absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.

- In deciding whether the claimant has proved such facts, it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases, the discrimination will not be intentional but merely based on the assumption that "he or she would not have fitted in".
- The outcome at this stage will usually depend on what inferences it is proper to draw on the primary facts found by the Tribunal.
- The Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination – it merely has to decide what inferences could be drawn.
- In considering what inferences or conclusions could be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
- Those inferences could include any that it is just and equitable to be drawn from an evasive or equivocal reply to a request for information.
- Inferences may also be drawn from any failure to comply with a relevant Code of Practice.
- When the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent.
- It is then for the respondent to prove that it did not commit or, as the case may be, it is not to be treated as having committed that act.
- To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that it's treatment of the claimant was in no sense whatsoever on the protected ground.

- Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment.
- Since the respondent would generally be in possession of the facts necessary to provide an explanation, the Tribunal would normally expect cogent evidence to discharge that burden – in particular, the Tribunal will need to examine carefully explanations where there is a failure to deal with the questionnaire procedure and/or any Code of Practice.

31. Further, in ***Bahl v. The Law society and Others*** [2004] IRLR 799, the Court of Appeal upheld the reasoning of the EAT and emphasised that unreasonable treatment cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to the changes to the burden of proof, the principle is still valid. In other words, unreasonable treatment alone is insufficient to establish a *prima facie* case, requiring an answer. As the EAT said in ***Bahl*** at para 89*"……merely to identify detrimental conduct tells us nothing about whether it has resulted from discriminatory conduct"*

32. In a more recent case, ***Chief Constable of Kent Constabulary v. Bowler*** UKEAT/0214/16/RN, the EAT held that the incompetent handling of a grievance and a lackadaisical attitude of the investigator was insufficient to give rise to an inference of discrimination. The EAT also reiterated the caution expressed in ***Igen*** against too readily inferring discrimination, merely from unreasonable conduct, where there is no evidence of other discriminatory behaviour.

33. The guidelines in ***Barton*** and other cases clearly require the claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer.

34. That point was further emphasised by LJ Mummery, giving the Judgment of the Court of Appeal in ***Madarassy v. Nomura International Plc*** [2007] IRLR 246: -"*For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination nothing more. So the bare facts of a difference in his status and a difference in treatment – for example, in a direct discrimination claim evidence that a female claimant had been treated less favourably than a male comparator would not be sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of.*"

Present case

Race discrimination

35. For the purposes of the exercise with which I was concerned, namely considering the "prospects" of the race discrimination complaint succeeding, I took the claimant's factual averments at their highest value. In other words, I proceeded on the basis that the claimant would be able to prove all the facts he averred. However, he is required to: "*set out with the utmost clarity the primary facts on which an inference of discrimination is drawn*"; and "*it is the act complained of and no other that the Tribunal must consider and rule upon.*" (***Bahl***)

36. I also remained mindful throughout my deliberations that the claimant is unrepresented and, as I understand it, has no experience of Employment Tribunal proceedings.

37. I started by examining the terms of the claim form. While the claimant had intimated at para. 8.1 that he wished to complain of race discrimination, in the "statement attached", with particulars of the complaint there are no averments to support such a complaint. The claimant only makes allegations of unreasonable treatment by the respondent. He alleges that this treatment was "unfair and unlawful" but he does not explain why he was treated "less favourably" or "unfavourably" because of a prohibited characteristic, in his case his race. The only possible hint of discrimination is his use of the words "harassment" and "discrimination", but he provides no details; he does not explain why this was because of his race. Indeed, "race" is not mentioned.

Termination of claimant's contract

38. The respondent wrote to the claimant on 27 March 2020 to intimate the termination of the claimant's contract. In my view, the terms of that letter do not give rise to an inference of discrimination, as the claimant alleged.

Further and better particulars of the claim

39. The claimant was afforded the opportunity of submitting further and better particulars. However, in his e-mail of 27 July 2020 he advised that he did not wish to do so. He referred in his e-mail to the Agenda he had submitted for the case management preliminary hearing on 13 July 2020. Although not part of his pleadings, as the claimant is unrepresented and having regard to the "overriding objective" in the Rules of Procedure, I considered the terms of his Agenda. However, as with the claim form, I could only find allegations of unreasonable behaviour.

40. As I recorded above, the case law is quite clear: unreasonable behaviour is insufficient, in itself, to establish a *prima facie* case which the claimant is required to do, in the first instance, in the terms of the burden of proof provisions.

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41. That being so, the burden cannot shift to the respondent even if the claimant proves all that he avers. I arrived at the view, therefore, and I am bound to say without a great deal of difficulty, that the race discrimination complaint has no reasonable prospect of success and it should be struck out in terms of Rule 37(1)(a) in the Rules of Procedure. I was satisfied that, by and large, the submissions by the respondent's representative in this regard were well-founded.

42. I should add that, in arriving at this view, I was mindful not only that the claimant was unrepresented, but also of the caution expressed in the case law about striking out discrimination cases. Lord Steyn said in ***Anyanwu & Others v. South Bank Student Union & Others*** [2001] 2 All ER353 that as discrimination cases tend to "*fact sensitive*" strike-outs should only be ordered: "*in the most obvious and clearest cases*". In my view, the present case falls into that category.

Holiday pay

43. As I understand the position, it is accepted by the respondent that the claimant was due accrued holiday pay of £131.22 when his employment with the respondent ended. However, it is alleged that the claimant failed to return his uniform and that the respondent was thereby entitled, in terms of Clause 9.3 of the Contract of Employment, to deduct £150 for the cost of the uniform.

44. However, the claimant denies that he ever received the Contract of Employment and the copy which was produced by the respondent's representative is unsigned. The claimant maintains that all that he received was the offer of employment dated 2 August 2009, which contains no provision for such a deduction.

45. Whether or not the claimant received and signed the Contract of Employment, as alleged by the respondent, is matter which can only properly be determined by hearing evidence. I am unable, therefore, to make a decision on the prospects of this “complaint” succeeding “on the papers”.

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Amendment

46. In any event, this complaint was not included in the claim form and, should he wish to pursue such a complaint, it will be necessary for the claimant to make an application to amend.

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Breach of contract

47. I remain unclear as to the basis for this complaint. The respondent maintains that the claimant’s employment was brought to an end in terms of s.6(1) in the Contract of Employment. However, this is denied by the claimant.

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48. In any event, even if the claimant is able to establish that he did not receive the Contract and he is able to rely on the offer letter, it is not disputed that he had a “zero hour contract” which meant that the respondent was not obliged to offer him work and he was not obliged to accept any work offered. The offer letter is silent so far as termination is concerned; the claimant only worked for the respondent for some 7 months. I am unable to identify a basis for this complaint.

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Amendment

49. In any event, as the respondent's representative submitted, this complaint was not intimated in the claim form and it will be necessary for the claimant to apply to amend to include such a complaint. At the same time, he will require to satisfy the Tribunal that there is a proper basis, in law, for such a complaint and how any award of damages for the alleged breach would fall to be quantified given that he had a zero hour contract.

Employment Judge Hosie

Dated: 11 January 2021

Date sent to parties: 11 January 2021