EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4108351/2021 (V)

Heard by CVP on 30 August 2021

10 **Employment Judge J Young**

Antony Ryan	**Claimant** **Represented by:** **Ms A M Burgin LLB (Hons)**
R Robertson & Son Ltd	**Respondent** **Represented by:** **Mr J Franklin, of Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claims presented by the claimant have no reasonable prospect of success and are struck out under Rule 37(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013

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REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal which complained of "automatic" unfair dismissal under section 12 of the Employment Rights Act 1996; discrimination on the ground of the protected characteristic of race (national origin); breach of contract (failure to pay notice); unlawful deduction from wages/breach of contract; and "detriment".

2. The respondent admitted dismissal but that the reason was related to the claimant's conduct and was not because he accompanied another worker at a grievance hearing; that the claimant's employment terminated in accordance with his Contract of Employment and that all wages due and notice pay was paid. It was also denied that there was any discrimination involved in the dismissal of the claimant and that he had suffered no "detriment".

3. A Note of a preliminary hearing for case management purposes issued on 17 May 2021 directed that the claimant should provide Further and Better Particulars (FBCs) of his various claims. The claimant did so.

4. The respondent made an application under Rules 37 and 39 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Tribunal Rules") that either (a) the claims be "struck out" on the basis that they had no reasonable prospect of success or alternatively (b) that they had little reasonable prospect of success and so the Tribunal should make an Order requiring the claimant to pay a deposit as a condition of continuing to advance the claims.

5. This preliminary hearing was arranged to consider that application. By email of 16 July 2021 the parties were advised of the procedure to be followed at the preliminary hearing namely that oral submission from the parties representatives would be made on the basis that the claimant would be able to prove the facts that he alleged within the ET1 and FBCs lodged and so no evidence would be required.

Documentation

6. For the hearing there was lodged a "Joint List of Documents" paginated 1 - 282 (J1-282) Additionally there was lodged for the claimant further documentation being (i) a letter dated 25 August 2021 itemising a number of documents attached numbered a – g [i(a) – (g)]. There was also lodged for the respondent a skeleton argument in support of the application made. Subsequent to the hearing there was provided the respondent Employee Handbook.

The Nature of the Dispute

7. It is appropriate to set out from the papers the nature of the dispute between the parties.

8. There was no dispute that the claimant commenced employment with the respondent as a bus driver on 17 August 2020 and that employment was terminated with effect from 30 January 2021. He entered into a Contract of Employment with the respondent dated 2nd August 2020(J60/70). The Contract was for a fixed term and was to terminate on 17 August 2025. Clause 3 indicated that:-

> "Either the company or you may terminate your employment at any time before the expiry of the fixed term by giving the notice specified later in this document."

9. Clause 20 of the Contract provided that the claimant would be entitled to one week's notice from the respondent if length of service was between one month and two years.

10. Clause 21 of the Contract concerned "disciplinary procedure" and stated that:-

> "The company reserves the right to discipline or dismiss you without following a disciplinary procedure if you have less than a certain minimum period of continuous service as set out in the Employee Handbook".

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11. The Employee Handbook advises that the respondent reserves the right to discipline or dismiss without following the disciplinary procedure if "you are an employee with less than 24 months' continuous service".

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12. The claimant was asked by a colleague to accompany or be a witness at a grievance hearing involving Mr Lee Cox scheduled for 11 am on 29 January 2021. It was intended that this be a hearing "in person" but on the evening prior to the meeting the respondent maintained that their Managing Director Sonia Robertson had been requested to self-isolate by NHS Track and Trace. Sonia Robertson is married to the respondent's HR Manager Margaret Robertson who was due to hear the grievance.

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13. Accordingly it was intended that the meeting be conducted remotely by "Microsoft Teams". The intention was that Sonia Robertson would open the meeting and explain why it was taking place virtually as opposed to "in person" as had originally been planned and seek Mr Cox's agreement. Thereafter Margaret Robertson would hear the grievance.

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14. When the claimant and Mr Cox arrived at the hearing they found an open laptop and the respondent's Operation Manager Mr Sam Seatter in attendance. Sonia Robertson sought to explain that the meeting would need to take place "remotely".

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15. There is clear dispute between the parties in relation to what occurred at this meeting. The position of the respondent is that Mr Cox was "disruptive and unreasonable" at the start of the meeting towards Sonia Robertson and that his conduct degenerated and he became confrontational towards Margaret Robertson. In response Mrs Margaret Robertson asked Mr Cox to "calm down". The claimant then left the meeting with Mr Cox and on returning to

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the room the claimant became agitated and by "raising his arms above his head and slapping them down at his sides" demonstrated "frustration and agitation". As he was wearing a mask nothing was audible to Margaret Robertson from the claimant and there was no direct dialogue between the claimant and Margaret Robertson. The respondent's position was that due to the degeneration of the behaviour from both the claimant and Mr Cox the decision was made by Margaret Robertson to close the meeting.

16. The position of the claimant is that Mr Cox had not been informed of the change of plan to hear the grievance remotely; was unhappy with the change and according to the claimant if he had been so aware he "could have prepared better for it the night before"; was willing to make further arrangements to ensure an in person meeting and therefore postpone the meeting but "the respondent was not willing to do so".

17. The claimant denied that either he or Mr Cox were disruptive or unreasonable but both were calm. He denies that he was "raising his arms above his head and slapping them down". He does recall "placing his hands onto his head in disbelief and disgust at the way Mrs Margaret Robertson expressed herself in conducting a professional meeting as the Human Resource and Development Manager".

18. He also states that Mr Seatter advised Mrs Margaret Robertson that Mr Cox was "not aggressive, swearing and was calm".

19. The claimant states that the comment made by Margaret Robertson in the course of the meeting was "you boys need to go and calm down, calm down"; and that he was "extremely offended, insulted and believes he was discriminated against and ridiculed due to the language and tone used by Mrs Margaret Robertson". He goes on to state that the "words/phrase was formerly used by the comedian Harry Enfield in the 1990s". He claims that this was an act of direct discrimination as he was "born and grew up" in Liverpool and that the "Liverpudlian accent was mocked by Mrs Margaret

Robertson". The claimant maintains that Mr Seatter at this point "looked shocked at what had been said".

20. The claimant maintains that Mr Cox then asked for the laptop to be closed "after what had been said by Mrs Robertson" and that she could be seen "getting out of the seat she sat in to conduct the meeting after being introduced by Sonia Robertson" who could not be seen on the screen at that time. No grievance hearing therefore took place at that time.

21. The claimant was due to commence his shift at 12.15pm that day. However he states he was so stressed by the comment made by Margaret Robertson that he told Mr Seatter that he would be "self certificating" and would "speak with his GP" on the following Monday. His case is that to have driven that day would have put himself and others at risk in contravention of the Health and Safety at Work Acts and Road Traffic Acts. He was driven home that day by Mr Cox and did not appear for shift the following day.

22. On 1 February 2021 the claimant received a letter from the respondent dated 31 January 2021 (J76/77) stating:-

> "Dear Antony
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> **Dismissal**
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> I am writing to confirm that your employment with the company was terminated on 30/01/2021 due to inappropriate conduct and an unauthorised absence dated 29/01/2021 and again on the 30/01/2021.
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> You are entitled to one week's notice but, as explained to you, you are not required to work your notice period and instead will be paid in lieu.

You will have accrued 2 days holiday up to your date of termination and have taken this.

Any outstanding payments will be made to you following your last day of employment. Your P45 will be sent to your home address in due course."

23. The claimant responded to that letter on 1 February 2021 (J78/80) making various points including that the comments of Margaret Robertson were "derogatory and discriminatory"

24. Arrangements were made for an appeal hearing but issues arose regarding the claimant wishing to record the hearing which request was refused by the respondent. While the initial intended appeal was postponed to a later date it did not take place due to the dispute over the issue of the recording and the "lack of trust" it was claimed that engendered.

25. The claimant received his payment in lieu of notice and P45 on 5 March 2021.

Submissions

26. Each party made full submissions on the matter and no discourtesy is intended in making a summary.

For the Respondent

27. It was submitted for the respondent that all the claims should be struck out as having no reasonable prospect of success or in the alternative that a deposit should be found because the claims had little reasonable prospect of success.

Automatic Unfair Dismissal

28. It was emphasised that the claimant had the burden of proof in showing that on the balance of probability the reason or principal reason for dismissal was that the claimant accompanied another worker at the grievance hearing. It was necessary to show that dismissal was because of his attendance at the grievance hearing accompanying Mr Cox.

29. It was maintained that the argument for the claimant was circuitous in that:-

    1) he was present as a witness

    2) because he was a witness he should not have been spoken to by Margaret Robertson unless in acknowledgement of anything he may have said and the focus should have been on Lee Cox and not him

    3) but for his attendance he would not have been spoken to directly and in the alleged unprofessional manner by Margaret Robertson

    4) but for having been spoken to in that alleged unprofessional manner he would not have felt insulted, ridiculed and offended and would therefore not have been absent from work on 29 January 2021 and 30 January 2021

    5) but for his absence he would not have been dismissed

30. Section 12 of the Employment Relations Act 1999 was there as a protection from being victimised by accompanying a worker at a disciplinary or grievance hearing and not from the consequences of their reaction to the way the grievance hearing played out. The Act did not provide for such an indirect or two stage approach in ascertaining the reason for dismissal. That was not the purpose of the legislation.

31. The claimant's case was that he required to take time off work because he was offended by what happened in the grievance hearing. The reason given by the respondent in the letter of dismissal related to his conduct in the hearing and his absence. There was support for the claimant's conduct even on his own version of events in admitting to placing his hands into his head "in disbelief and disgust". He also accepted that he did not work his shift from 12.15pm. He had been fit enough to attend work to act as a companion. His text message dated 29 January 2021 (163 of documents) stated "I feel so insulted and disgusted at present and am in no frame of mind to work at present" did not display a genuine medical reason not to perform a shift. The respondent needed the service to run and the absence disrupted this service.

32. In short it was indicated that there was no victimisation because the claimant had accompanied Mr Cox at the grievance hearing. The factual dispute related to what happened at and after the hearing and it was the absence which triggered dismissal. It was submitted that many of the issues raised by the claimant may have been relevant had this been a case of "ordinary" unfair dismissal but they were not relevant to the claim of automatic unfair dismissal under section 12 of the Employment Relations Act 1999.

Detriment Claim

33. Within the ET1 (box 15) the claimant had indicated that he had a claim for "detriment". In the direction of 17 May 2021 it was stated that no particulars of any detriment had been provided and that if this was an additional complaint then further and better particulars of the legal and factual basis for that complaint required to be provided.

34. It was submitted that those particulars (J40/59) under "Detriment" (J56/58) and what was stated in further information submitted for the claimant (J98) all related to the financial consequences of being dismissed. Inevitably there would be adverse consequences for an individual on dismissal but such detriments were distinct from a legally recognised "detriment" claim. As such any claim of "detriment" should be struck out.

Claim of Discrimination

35. The discrimination claims had been taken as direct discrimination under section 13 of the Equality Act 2010 and harassment in terms of section 27 of the Equality Act 2010. It was submitted that the less favourable treatment appeared to be Margaret Robertson alleging to have said "you boys need to go and calm down, calm down". The claimant believed that was a reference to the words or phrases used by Harry Enfield. This was understood to be a reference to the "Scousers characters" namely (as it was put) "permed, moustached, shell suited, permanently combative brothers from Liverpool that were based on stereotypes of Liverpudlians". It was maintained that these stereotypes were very specific to Liverpool (Scousers) and not a wider class of English people. It was noted that one of the comparators (Lee Cox) was also English but not offended. Only the claimant being Liverpudlian was offended.

36. Reference was made to a passage within IDS: Discrimination at Work (page 123 – Vol 4) which indicated that the protected characteristic did not cover "local or regional distinctions". The phrase used was not indicative of discrimination against English people and so the claimant could not have been discriminated against under section 13 or section 27 of the Equality Act 2010 on the grounds of national origin.

Unlawful Deductions/Wrongful Dismissal

37. The claim in respect of deduction of wages appeared to be that the claimant was not paid for one week's wages in lieu of notice until 5 March 2021 rather than on 19 February 2021. However non-payment of wages in lieu of notice after termination does not fall under the Employment Rights Act 1996 (ERA) because it does not cover the period of employment (***Delaney v Staples*** [1991] IRLR 112).

38. So far as the wrongful dismissal claim was concerned there was no breach of contract as the contract provided that it could be lawfully terminated with one week's notice. Also the company reserved the right to dismiss without any disciplinary procedure being followed where an employee had less than 24 months service. That was the case here.

For the Claimant

Automatic Unfair Dismissal

39. A number of matters were raised by the claimant as regards to circumstances surrounding the grievance meeting when the claimant accompanied Mr Cox.

40. It was maintained that despite requests no evidence had been produced to show that Sonia Robertson did require to self-isolate and indeed it was suggested that she had been seen on the island around the relevant time in breach of any self-isolation rules. Thus there was no evidence to show that the grievance meeting required to be conducted remotely contrary to the arrangement to hold the meeting "in person". There had been no communication with the claimant and Mr Cox before they arrived at the meeting that there had been a change of plan. There seemed no reason why that could not have been done.

41. There was correspondence to show that CCTV was to be installed by the respondent as from 25 January 2021. It was maintained however by the respondent that the installation was not in working order on 29 January 2021. This was doubted.

42. There had been a previous occasion (Saturday 7 November 2020) when mistakenly the claimant had been "pulled up" for unauthorised absence That matter had been put on the claimant's personnel file. Although it had been stated that the incident would be removed from the file that had not happened. That would colour the respondent's approach.

43. The claimant had been made ill by what had happened that morning with reference to the comment made by Margaret Robertson and so could not commence his shift. If the claimant had gone on shift then there would have been a breach of Health and Safety and Road Traffic legislation. Passengers and the public would have been at risk.

Discrimination Claims

44. It was maintained that the reference to the comment made by Margaret Robertson only referring to Liverpool was too narrow. It was self-evident that was an English city and mockery of inhabitants in a city in England was mockery of those of that national origin.

45. That was why the claimant had put his hands on his head in disbelief at what was being said and was offended. At the time he took this to be a reference to the Enfield stereotype.

46. There was no need for that comment to be made and it was insulting of the claimant on racial grounds.

Unlawful Deduction from Wages

47. The claimant should have been paid his week's notice 7 days from the date of dismissal. It was maintained that had the claimant not gone to ACAS he would not have been paid that amount when eventually paid on 5 March 2021. Mr Cox (who had also apparently been dismissed) received his payments earlier on 19 February 2021.

48. Mr Lee (an employee of the respondent) had promised the claimant payment on 26 February 2021 but yet no payment was made until 5 March 2021.

49. Albeit there was reference in the letter of dismissal to payment in lieu “being explained” to the claimant there had been no conversation with him prior to receipt of the letter of dismissal.

5 50. The claimant was still unaware of any conduct which would merit dismissal.

Wrongful Dismissal

51. In this respect it was claimed that the claimant self-certified his absence to
10 the Operations Manager. There had been no hearing in relation to the dismissal. There had been no appeal hearing consequent on the respondent’s decision to refuse any recording of the proceedings.

52. There had been a “sick note” provided to the respondent on 1st February
15 2021 indicating that the claimant was suffering from work place stress. That had never been accepted by Sonia Robertson. If it was not accepted why was the appeal not held within the period of 5 days which would be the contractual provision breached in the Employment Handbook.

20 53. This was a case where a claimant had a glowing probationary report and had no chance to defend himself.

Detriment

25 54. Reference was made to section 44 of the Employment Relations Act 1996. It was stated that the claimant had a right not to be subjected to detriment on health and safety issues.

55. There had been extreme detriment suffered as a consequence of this
30 decision. Those were matters all listed within the FBCs. The claimant had been led to suicidal thoughts as a consequence and a great strain had been placed on his relationship. The claimant felt he should not have agreed to be a witness at all given the outcome and he felt he had been “charged with a crime” in which he had had no chance to defend himself.

56. Given that the application included as an alternative to strike out that a Deposit Order be made some detail of the financial position of the claimant was given namely that his present earnings amounted to approximately £1600 net per month with rental accounting for approximately £595 per month; utilities £80 per month; insurance £40 per month; Council tax £33 per month; food and petrol approximately £55 per month.

Discussion and Decision

57. A claim or response (or part) can be struck out on the basis that it has no reasonable prospect of success – Rule 37(1)(a) of the Tribunal Rules.

58. This requires a Tribunal to form a view on the merits of a case. In ***Shestak v Royal College of Nursing and others*** EAT0270/08 Lady Smith indicated that where strike out is sought on the grounds that the claim has no reasonable prospect of success a Tribunal must first consider whether on careful consideration of all the available material it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

59. It would be unfair to strike out a claim where there are crucial facts in dispute and without the opportunity for evidence to be led. That position is emphasised where an employee claims discrimination where a Tribunal requires to deal with inferences that might arise. Also if a claimant is able to make a *prima facie* case then the burden of proof might reverse to the employer to show that the dismissal was not discriminatory. In discrimination claims ***Anyanwu v South Bank Students Union 2001 ICR 391*** emphasised the importance of not striking out discrimination claims except in the most obvious of cases.

Automatic Unfair Dismissal under section 12 of the Employment Relations Act 1999

5 60. There are numerous categories of automatically unfair dismissal. In such a case where an employee lacks the requisite continuous service to claim ordinary unfair dismissal then he/she acquires the burden of proving on the balance of probabilities that the reason for dismissal was an automatically unfair reason (***Smith v Hayle Town Council*** 1978 ICR 996 and ***Ross v*** 10 ***Eddie Stobart Limited*** EAT0068/13).

61. Thus in this case it is for the claimant to prove on the balance of probabilities that the reason for dismissal was an automatically unfair reason. The issue was whether he has any reasonable prospect of success in proving that 15 claim.

62. To ensure that workers are not dissuaded from exercising their rights under section 10 of the Employment Relations Act 199 for fear of reprisals from their employer section 12(3) provides that an employee will be treated as 20 having been automatically unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal was that "he or she accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section".

25 63. The FBCs lodged by the claimant does indicate that:-

(1) he should not have been directly spoken to by Mrs Margaret Robertson as he being a "witness" the focus should have been on the former colleague Mr Lee Cox and the grievances to be 30 addressed (J40)

(2) if he had not attended the grievance meeting he would not have been directly spoken to in the alleged unprofessional manner of

Mrs Margaret Robertson and discriminated as well as "insulted, ridiculed and offended" with his accent being mocked (J40)

(3) he would not then have been so distressed that he required to call off from his shift commencing 12.15pm that day (J46)

(4) there was no advance warning of the change of plan in respect of the grievance hearing and there was no evidence to show that self-isolation was necessary (J42)

(5) that the failure to attend the shift could not be viewed as a "unauthorised absence" because the claimant had told Mr Seatter that he was "self-certificating" and would be getting a "doctor's note after the weekend"

64. The essence of the submission made for the claimant in this aspect of matters was if he had not been at the grievance hearing then he would not have been spoken to in the way that he was and not offended and so able to carry out the shift at 12.15pm that day. That would have avoided any issue with his employer.

65. The essence of the protection afforded by section 12 is to protect against dismissals because an employee accompanied another at a disciplinary or grievance hearing. It does not deal with conduct issues which might arise as a consequence.

66. Had this been a case of "ordinary" unfair dismissal then it would have been very relevant to consider lack of procedure and investigation and any disciplinary procedure in an assessment of whether there was a fair or unfair dismissal.

67. However it is not a case of ordinary unfair dismissal but one where the claimant has to establish that the reason for dismissal was because he accompanied an employee at a grievance hearing. While there are many

matters in dispute on the conduct of the grievance hearing there is no allegation from the claimant that he was victimised simply because he acted as a companion or a witness. He does not suggest that dismissal was simply because he was in attendance. His position is that none of this would have occurred had he not been at the hearing and he is aggrieved about that. No offensive comment would have been made; he would not have got upset; he would not have required to cancel his shift; there would have been no dismissal.

68. The terms of the letter of dismissal do not assist him in the claim that he was dismissed because he acting as a witness/companion. It states that he was dismissed for unauthorised absence. He does not claim that is a sham or a smokescreen for the real reason namely he was dismissed because he agreed to be a companion or witness. There is no dispute he was not on shift on 29 or 30 January 2021.The claimant clearly regards the dismissal was unfair. He may well have reason to feel aggrieved but the consequence of matters arising in the hearing are not circumstances which would trigger the protection afforded by section 10/12 of the Employment Relations Act 1999. In my view there is no reasonable prospect of success in him being able to establish the claim of automatic unfair dismissal.

Discrimination Claim under section 13 and 27 of the Equality Act 2010

69. The claimant is able to bring a claim of race discrimination under the "national origins" umbrella in s9 of the Equality Act 2010 on the basis that he is English. It has been decided that English and Scots are separate racial groups by reference to their national origins on the basis that Scotland and England are both nations. Despite being absorbed into the UK each country retains a separate status and identity.

70. The issue then is whether or not discrimination on the ground of national origin can be made out on the basis of the comment allegedly made by Mrs Margaret Robertson that "you boys need to go and calm down, calm down"

which the claimant believed was a reference to "words/phrase used by Harry Enfield".

71. Reference was made to the ACAS guidance on "Race Discrimination: Key Points for the Workplace" issued July 2016 which states under the heading "National and Regional Identity":-

> "However, the law does not cover more local or regional distinctions. For example an employee working in the south of England who feels they are being treated unfairly solely because they are a "Geordie" or an employee treated unfairly solely because they are a "Southerner" with an Essex accent working in the north of England are unlikely to succeed in claims of race discrimination."

72. I was also directed to the passage in "IDS: Discrimination at Work" (Volume 4 page 123) which referred to this guidance and stated:-

> "It is interesting to note the contrary views taken by the Scottish High Court of Justiciary in the criminal case of ***Moscrop v McLintock*** [2011] SCCR 621. There it was held that insults and threats directed by a Scot at a person from Gateshead including use of the term "Geordie" could amount to racially aggravated harassment on the ground of the victim's English national origin. The Court considered that to hold otherwise would allow the legislation to be circumvented by the simple device of referring to the town or region of origin of the victim, whereas if the offender had in identical circumstances referred to the victim's country of origin there would be no doubt about his or her criminality. However as a Scottish criminal case the ***Moscrop*** case is not directly applicable in the employment law context and we consider it more likely that Employment Tribunals will follow the ACAS guidance on this point".

73. The claim made by the clamant in this case is undoubtedly that he was being mocked as a "Scouser" on the portrayal of a Liverpudlian character by Harry

Enfield. The description given by Mr Franklin of the character portrayed was accurate and not disputed. The "catchphrase" seemed to relate to use of the words "calm down, calm down" in a Liverpool accent. The discrimination claim is wholly reliant on the use of those words. The claimant is from Liverpool and it is because he hails from that city that he took offence. I agree that the alleged comment could mock the claimant as a Liverpudlian but not as an English person. I do not consider that simply because that city is based in England that the claimant was being mocked for being English and so mocked on account of his national origin. I agree with the ACAS guidance and the passage in IDS to which I was referred. The alleged words used could only refer to a very specific comic stereotype of a Liverpudlian and not directly or by inference a reference to national origin.

74. It is an essential requirement in this race discrimination complaint under the Equality Act that the claimant was treated less favourably (in this case being mocked) on account of his national origin. The comment may well have been unprofessional or uncalled for but it is not in my view discriminatory because there was no mocking of the claimant on account of his national origin namely being English. Thus there is no protected characteristic upon which he can make a claim. I consider that the discrimination claim is one of the obvious cases which would allow strike out on the basis that it has no reasonable prospect of success.

Detriment

75. Within the ET1 the claimant indicated that he wished to make a claim of "detriment". The Note of the preliminary hearing issued 17 May 2021 indicated that no particulars of that claim had been provided and if that was a complaint which was to advance then further particulars should be lodged. The FBCs lodged (J56/57) indicated that the consequence of dismissal was a significant deduction of income for the claimant and his partner who required to sell assets; the Citizens Advice Bureau suggested a claim for benefits; and contact required to be made with the landlord of the property in which he resided at the time.

76. There were no particulars given of the statutory provision upon which the claimant relied for his claim of "detriment". That was a matter raised by the respondent in their response to the FBCs and that matter was taken up by the claimant in a further response (J149). There it was repeated that the detriment related to financial detriment caused by the dismissal.

77. At the hearing reference was made for the first time to detriment being suffered under section 44 of ERA which deals with health and safety cases. The section advises that an employee has the right not to be subject to a detriment as a result of action taken by an employer where the worker believes that there were circumstances of danger which were "reasonably serious and imminent" and so took appropriate steps to protect himself or herself.

78. However the section does not apply where the "worker is an employee and the detriment in question amounts to dismissal". (s44(4) of ERA). In this case the detriment that is narrated by the claimant all comes as a consequence of dismissal. Accordingly even if the claimant were to seek to amend his claim to specifically include a claim under s 44 of ERA and even if that amendment were allowed at this stage then given his complaint of "detriment" arises because of dismissal he would be unable to proceed with that claim in virtue of section 44(4). I consider that there is no reasonable prospect of success in this claim.

Unlawful Deduction from Wages

79. It is accepted that the claimant received all wages due to him to date of termination. It was also acknowledged that the notice pay of one week's wages was paid to the claimant but exception is taken to the late payment.

80. However non-payment of pay in lieu of notice does not give rise to a claim under the protection of wages provisions contained in Part 2 of ERA. (***Delaney v Staples (t/a de Montfort Recruitment)*** [1992] ICR 483).

Accordingly there is no claim for unlawful deduction of wages as the payment in lieu of notice is treated as a debt due to the employee. Thus there can be no successful claim for unlawful deduction of wages under section 13 of ERA.

81. Given that the payment in lieu of notice is not treated as "wages" there could be no late payment of "wages".

82. Thus the claim for unlawful deduction of wages because of late payment has no reasonable prospect of success.

Breach of Contract

83. The elements that relate to this claim appear to be:-

(a) the notice payment was made late whether or not it was to be characterised as "wages" and that was a breach of the contract.

(b) that the dismissal was "wrongful" and so in breach of contract

(c) that no proper procedure had been conducted by the respondent. The matter had not been investigated and the claimant had been given no chance to make representation and the dismissal was in breach of contract.

84. So far as alleged late payment is concerned there is no time specified within the contract for payments in lieu of notice. Neither is there any statutory time within which notice payments are to be paid. The contract (J63/70) at Clause 20 advises that there is an entitlement to a notice period of one week and that the company "reserves the right to make a payment in lieu of notice for all or any part of your notice period upon the termination of your employment …" and that the payment in lieu would be equal to the base salary to which the employee would have been entitled during the notice period. There is nothing to state when that debt (which it becomes) would be payable. The

fact that the payment was not made until 5 March 2021 some weeks after the event did not entitle the claimant to make a claim of breach of contract and so this element has no reasonable prospect of success.

85. If an employee is dismissed with no notice or inadequate notice in terms of his contract (or statute) in circumstances which do not entitle the employer to dismiss summarily that would amount to a wrongful dismissal and the employee entitled to claim damages in respect of the contractual notice period. However in this case the contract was lawfully brought to an end by the respondent giving notice in terms of the contract i.e. one week with a week's pay being paid in lieu of notice. The contract was therefore terminated in its terms and as a contractual matter lawfully. Thus there could be no "wrongful dismissal" in that respect and so that claim has no reasonable prospect of success.

86. The alternative claim is that no procedure was followed by the respondent in terminating the contract. The contract in its terms advises (Clause 21) that the company reserves the right to "discipline or dismiss" without following the "disciplinary procedure if you have less than a certain minimum period of continuous service as set out in the Employee Handbook". The Employee Handbook advises that the "minimum period of continuous service" is 24 months. That was the position here. Accordingly there was an entitlement in terms of the contract to dismiss without going through a disciplinary procedure and in those circumstances the claim of breach of contract on those grounds has no reasonable prospect of success.

Miscellaneous Matters

87. Reference was made to incidents in November 2020 involving the claimant and an allegation that he had been absent without authorisation. Despite that matter being clarified to apportion no blame on the claimant he maintained that his personnel record had not been updated to take that matter into account. I did not see that matter being capable of impacting on any of the claims made such that they might have a reasonable prospect of success.

88. The same is true of the reference made to the disputed absence of CCTV. It was maintained that the claimant was doubtful about the alleged absence of CCTV coverage of matters which took place on 29 January 2021. Again I did not see that as impacting on the claims in dispute given what required to be proved to establish the claim of automatic unfair dismissal.

89. Reference was also made to the lack of appeal because of the dispute over whether the appeal proceedings should be recorded. Again given there was no right to follow a disciplinary procedure which would include an appeal within the contract there could be no breach of contract.

90. Neither did I consider the lack of evidence of the need for Mrs Sonia Robertson to self-isolate resulting in the grievance hearing being converted to a "remote hearing" affected the claims made and the possibility of success.

Decision

91. In all the circumstances and for the reasons given I would consider that the claims made by the claimant have no reasonable prospect of success and so are struck out.

Employment Judge **J Young**

Date of Judgement **27 September 2021**

Date sent to parties **28 September 2021**