EMPLOYMENT TRIBUNALS

Claimant:	**Mr. James Owuzu**
Respondent:	**The Hurlingham Club**
Heard at:	**London Central Employment Tribunal**
On:	**14, 15 and 16 November 2023.**
Before:	**Employment Judge Smart** **Ms H Craik** **Mrs L Simms**

Representation

Claimant:	Representing himself
Respondent:	Mr. K Zaman (Counsel).

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant was an employee during each individual assignment whilst working for the Respondent, within the meaning of section 230 of the Employment Rights Act 1996, section 83 of the Equality Act 2010 and at common law.

2. The Claimant did not have sufficient service to claim unfair dismissal. His claim for unfair dismissal is therefore dismissed.

3. The Claimant's claim of wrongful dismissal and notice pay fails and is dismissed.

4. The Claimant's claims of direct race discrimination are not well founded and are dismissed.

Written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. These are provided below.

REASONS

Preliminary matters

1. The Claimant identifies as a black man and brings claims of unfair dismissal, wrongful dismissal and direct race discrimination.

2. At the start of the hearing the issues were identified and the documents were checked to ensure that everyone had access to and could read all the documents and statements that were to be referred to in evidence.

3. At the start of the hearing, we had a bundle of documents of 110 pages in length.

4. We heard evidence from:

   4.1. Mr. James Owuzu (the Claimant).
   4.2. Mr. Kwame Ansu.
   4.3. Mr. Andre Friedrich; and
   4.4. Mrs Victoria Harris.

5. The parties said there were no preliminary issues.

6. Part way through the hearing, after the Claimant had started to give his evidence, it became apparent that the Claimant's payslips had not been put into the bundle. These appeared to be relevant evidence to the issues in dispute because the Claimant was a causal worker attempting to claim he was an employee for both the wrongful and unfair dismissal complaints. It also became apparent that there was a right to work issue that may have broken service. Both parties had documents that they wanted to include but which weren't included in the bundle.

7. Consequently, the parties discussed the issue outside of the hearing. They returned and the parties had agreed to include the following documents:

   7.1. A letter dated 1 December 2021 about the Claimant's casual work.

   7.2. A four page print out from the Companies HR system showing the Claimant's shifts and absences for the entire 4-year period he was working for the Respondent.

   7.3. A bundle of payslips from the Claimant for the whole of his working period.

8. By now it was 12.30 and ordered the parties to disclose any other outstanding documents that were relevant to the issues we needed to determine by the end of the lunch break. We also directed that after the lunch period, we would not entertain any other additional documents unless there was a material change in circumstances.

9. After lunch, the hearing reconvened with some additional documents. An additional bundle had been produced with documents relevant to the Claimant's immigration and right to work status. The Claimant had not yet had a chance to consider that bundle in its entirety. The parties were sent away again to see if they could agree about how, it would be dealt with and for the Respondent to paginate it.

10. The parties returned and the bundle was agreed to be admitted by the Claimant. The new documents were labelled in hard copy:

    10.1. The letter of 1 December 2021 would be pages 111 – 113.
    10.2. The absence record table would be pages 114 – 117.
    10.3. The new bundle would be called the Visa Bundle.
    10.4. And there was the payslip bundle.

11. The hearing then continued without any further issue.

The Issues

12. The Claimant brings claims of wrongful dismissal, unfair dismissal and direct race discrimination about his dismissal.

13. These issues were confirmed at a preliminary hearing for case management on the 22 June 2023 before employment Judge Kenwood. The case summary details the broad heads of claim at paragraph 52 – 53 in the Order at pages 39 – 42 in the bundle.

14. It is important to note here that there appeared to be an error in the list of issues in Judge Kenwood's order. This appears at paragraph 2.3.5 to 2.3.8 in the list which appear to be issues concerning a redundancy situation which both parties accepted at the final hearing was not a relevant situation in this case. By consent we therefore deleted those paragraphs from the list of issues.

15. The Respondent conceded at the final hearing that the Claimant was a worker under both the employment rights act 1996 and the Equality Act 2010. So, issue 1.2 was not pursued.

16. One important factor was the employment status of the employee for the purposes of not only the unfair dismissal complaint but also for the purposes of the notice pay complaint.

17. . It became apparent that there may have been breaks in the Claimant's service whilst hearing evidence. This was discussed with both parties so that, if they wished to, at the end of the hearing they could make submissions about it. No submissions were presented from either side.

18. The issues therefore were as follows when considering liability:

1. Employment status and service

1.1 Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996 or at common law?

1.2 Did the Claimant have a period of two years' continuous employment to enable him to bring an unfair dismissal complaint?

2. Unfair dismissal

2.1 Was the Claimant dismissed from employment?

2.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal? In so far as the reason was conduct, the Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

2.3 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 there were reasonable grounds for that belief;
2.3.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
2.3.3 the Respondent otherwise acted in a procedurally fair manner;
2.3.4 dismissal was within the range of reasonable responses.

4. Wrongful dismissal / Notice pay

4.1 What was the Claimant's notice period, if any?

4.2 Was the Claimant paid for that notice period?

4.3 If not, was the Claimant guilty of gross misconduct? The Tribunal will decide whether the Claimant did something so serious that the Respondent was entitled to dismiss without notice?

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 Did the Respondent dismiss and / or bringing any working relationship with the Claimant to an end?

5.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than Martin Ivanov.

5.3 If so, was it because of race?

The facts

19. By letter dated 15 August 2019, the Claimant was engaged as a casual worker for the Respondent club. The terms of that engagement are set out in the document at pages 52 - 54 in the bundle.

20. The significant terms of the agreement are as follows:

20.1. at paragraph three the Claimant is paid by an hourly rate subject to the usual deductions of tax and National Insurance by the Respondent. It expressly states that the Claimant will only be paid for the hours that he works.

20.2. At paragraph four, under the heading annual leave, the contract expressly sets out that the Claimant will be paid in advance for any statutory leave entitlement.

20.3. Under the heading relationship with Hurlingham, the letter purports to state that the Respondent is not obliged to provide the Claimant with any minimum number of hours of work in any particular week or at all.

20.4. It also states that there is therefore no mutuality of obligation between the club and the Claimant, and the club was not obliged to offer any work and that the Claimant was not obliged to accept an offer of work.

20.5. The letter expressly states that offers of casual work may be at short notice and there is no contractual relationship between the Claimant and Respondent between occasions where the Claimant is actually undertaking casual work for the Respondent.

20.6. There are some rules in the letter that are binding on the Claimant when he is performing work. These include the safeguarding policy and code of conduct, the right for the Respondent to initiate its search procedure for any casual workers, presumably to try to deter theft, and data protection obligations.

20.7. Significantly, under the heading policies, the club has a casual worker handbook which is said to contain further information about the club most of which is of a policy nature only and does not form part of the terms of the Claimant's casual worker agreement.

20.8. The same paragraph, also significantly, states that the Claimant agrees to abide by the terms of all club policies. In this sentence, it does not refer simply to the casual worker handbook but refers to all club policies.

21. Unhelpfully, neither party to these proceedings has disclosed either the casual worker handbook or the club policies referred to in that paragraph. We therefore had to make decisions based upon what we had.

22. Finally, there is a paragraph headed “addressing concerns”. This provides that if the Claimant has any concern about the performance of an assignment, then the Claimant will be invited to a meeting to discuss it and that any outcome after the meeting will be provided in writing. The Claimant would be entitled to the right of appeal and to be heard at an appeal hearing.

23. This letter of engagement was issued by the back house manager Kwame Ansu and is signed by the Claimant on the 20th of August 2019.

24. Having considered the contract and the evidence put forward by the Respondent’s witnesses and the Claimant, we find the letter of engagement accurately reflects the nature of the relationship between the client and the Respondent. No evidence suggests otherwise.

25. The Respondent was not a customer or client of the Claimant, which was common ground.

26. We are also content that the relationship between the Claimants and the Respondent was not one where they Respondent was a client or customer of the client. This was clearly a situation where there was a flexible arrangement between an individual seeking work and the club.

27. The Claimant worked shifts on an ad hoc basis and refused to work past 8:00 in the evening. The reason why he refused to work past 8:00 in the evening is because the Claimant had a second job working as a security person for another business. It was therefore clear that because he had done this without any adverse consequences from the Respondent, the Claimant was not bound to any duty of compulsory service to the Respondent and indeed, the provisions of the letter of engagement make no reference to the Claimant needing to seek permission before working for others.

28. At various times throughout the Claimant’s engagement, he was not treated in the same way compared to permanent employees. For example, in late March 2020 when the COVID-19 pandemic wars commencing, the Respondent’s Mrs Harris said the Claimant was furloughed along with permanent employees. This was not disputed. However, the government minimum salary was paid to casual workers whereas for permanent employees, the Respondent topped up the payment from 80% to 100% using its own money. This was not disputed by the Claimant either.

29. Also undisputed was the furlough period logged in page 115 of the bundle. Here highlighted in yellow, the furlough pay period was marked as being from the 21 March 2020 through to the 31 August 2020.

30. The Claimant then undertook no work from the 1 September 2020 through to the 20 April 2021. His first shift back to work following this period of absence without undertaking any work for the Respondent was the 21 April 2021 shown by the same sheet and again undisputed.

31. The Claimant gave no explanation as to why there was that period of absence and indeed there are no pay slips for that period of absence. The Claimant simply did not and did not have to work for that period of time.

32. It is also noteworthy that from the period 25 July 2021 through 5 September 2021, the Claimant performed no work. The Claimant said that this was when he had a trip home to Ghana.

33. Given that the Claimant is Ghanaian, to work legally in the United Kingdom he needed appropriate immigration and work visa permissions and certification, which was not in dispute.

34. On 22 November 2021, it was common ground that the Claimant's engagement was terminated by letter, because his biometric residence permit had expired, and the Respondent had not at that stage received a positive verification notice giving the Respondent a statutory excuse for employing someone without a valid residence permit or work visa.

35. It was common ground that after this termination of engagement, the Claimant re-commenced working for the Respondent on 1 December 2021 after a break of 8 days.

36. The Respondent received the positive verification notice back from the government on 26 November 2021, which gave the Respondent the six-month statutory excuse needed to offer the Claimant any further shifts.

37. From 1 December 2021, the Claimant was then re-engaged on the same letter of engagement terms signed by the Claimant.

38. During evidence, the Claimant disputed this letter, initially inferring that he hadn't signed it, which was readily disproven by the fact his signature is found at page 113 in the bundle and appears to be almost identical to other signatures in the bundle that are his. Eventually he conceded that he may have signed the agreement, but that he did not remember doing so.

39. For the avoidance of doubt, it is clear that this letter of engagement was signed by the Claimant and therefore governed the remainder of his engagement with the Respondent from the 1st of December 2021 onwards.

40. We now turn to the incident which resulted in the permanent termination of the Claimant's engagement.

41. It was common ground that on the 1st of October 2022 there was an altercation between the Claimant and the Claimant's colleague Mr. Martin Ivanov who was a permanent employee.

42. Both Mr Ivanov and the Claimant performed back of housework, which involved various kitchen duties such as tidying up, moving food items around the various kitchens at the club, washing up, taking out the bins and other back of house duties of a similar nature.

43. An argument broke out where the Claimant and Mr Ivanov were arguing about how much respective work each of them was carrying out. There is no doubt in our minds that both parties would have been swearing at one another and that there was a tussle between both Mr Ivanov and the Claimant.

44. It is also clear, from the statements taken by other witnesses at the time such as Mr. Siampis (page 88 in the bundle) and Ms Serrao (page 87 in the bundle) that the end result of the tussle, which amounted at best to, mutual pushing of each other in the Claimant's own words at his investigation meeting at page 89 in the bundle, was the Claimant striking Mr Ivanov in the face.

45. Both Mr Ivanov and the Claimant were invited to investigatory meetings. They were invited by letter and an investigation report was produced by Mr Ansu, for both colleagues which are at pages 92 to 95 in the bundle.

46. Both Mr Ivanov and the Claimant were invited to meetings to discuss their conduct. Equally, both received outcome letters about the situation.

47. Significantly, at least two of the independent statements collected by the Respondent from colleagues who witnessed the altercation, clearly evidenced that the aggressor in the situation according to them was the Claimant rather than Mr Ivanov. These statements confirm about the person who committed the ultimate physical act of violence in hitting the other was the Claimant.

48. One statement form a colleague Mr. Raymond Kennedy was more neutral. However, we heard evidence from Mr. Ansu that because Mr. Kennedy was black and because the Claimant was black, Mr. Kennedy said that writing a statement against the Claimant would be like going against one of his own. The Claimant confirmed that Mr. Kennedy was present at the time of the incident and witnessed it, yet Mr. Kennedy's statement only goes as far as describing Mr. Ivanov and the Claimant as exchanging words. Mr. Ansu says that verbally Mr. Kennedy informed him that he saw the Claimant's hit Mr. Ivanov but did not want to write this down. On balance, given that no other witness says that only words were exchanged including the Claimant, the Claimant's confirmation that Mr Kennedy was there and witnessed everything and the fact that Mr. Kennedy's reported conversation with Mr. Ansu confirms what the other witnesses who gave statements saw, we believe Mr. Ansu's version of events. Tragically, Mr. Kennedy died a few weeks after this incident, so the Claimant was unable to call him as a witness.

49. Consequently, Mr Ivanov received no sanction as a result of his disciplinary meeting because the cub decided that he had not used physical violence against the Claimant. Mr Ivanov's outcome letter is a page 106 in the bundle.

50. The Claimant on the other hand, was released from his engagement for using physical violence and has not worked for the Respondent since.

51. On 7 November 2022, the Respondent’s Mr Andre Friedrich, confirmed that the Claimant’s casual agreement with the Respondent was terminated, because he had used physical violence against another person at work, by letter at page 102 in the bundle.

52. Aside from the outcome of the investigation, dismissal and appeal process, the procedures followed for the Claimant and Mr Ivanov are almost identical and do not differ in our view to any significant extent.

53. The Claimant appealed against the decision to terminate his engagement and that appeal was heard by Mrs Victoria Harris who is the deputy secretary for the club.

54. Mrs Harris upheld the decision of Mr Friedrich to terminate the Claimant’s contract of engagement with the Respondent.

55. It is in this factual backdrop and in these circumstances that we have considered the issues in dispute in this case.

<u>The Law</u>

56. The starting point for determining employment status is always to look at the wording of the statute. This differs depending on the statute relied upon. The Employment Rights Act 1996 defines employee in section 230:

    “230 Employees, workers etc.
    (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

    (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

    (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

    (a) a contract of employment, or

    (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or

customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly."

57. There can be no substitute for applying the words of the statute to the facts of each case **Clyde & Co v Bates Van Winkelhof, [2014] UKSC 32.**

There must be a contract

58. There also must be a contract in existence between the parties for there to be a contract of service in the first place **Cotswold Developments Construction limited and Williams [2006] IRLR 181.**

The Tribunal must decide whether the contract reflected the reality of the situation

59. After **Autoclenz v Belcher [2011] UKSC 41,** the reality of the situation must be the focus, not just the words of the contract even if they are agreed between the parties to be applicable.

60. A contract will be a sham if both parties intend to deceive another **Consistent Group Limited v Kalwak [2008] EWCA Civ 430**, where both parties intended the clause not to apply **Redrow homes (Yorkshire) Limited v Buckborough and Sewell [2009] IRLR 34** or where the written clause does not reflect the true relationship between the parties **Protectacoat Firthglow Limited v Szilagyi [2009] EWCA Civ 98.** The true relationship may change over time; therefore, the Tribunal needs to look at the contract at the time it is breached, or a party wished to insist on performance of the clause.

The Tribunal must then follow a structured approach to the statutory wording

61. Once it has been established that there is a contract between the parties, it is then for the Tribunal to determined what type of contract it is. This is best done by following a structure approach to the relevant statutory wording **Sejpal v Rodericks Dental Ltd [2022] EAT 91.**

62. After the case of **Johnson Underwood Ltd v Montgomery [2001] EWCA Civ 318,** the correct approach is to start by considering the **Ready Mixed Concrete** points of (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. Sufficient control is a necessary part of the irreducible minimum factors required for a contract of employment to exist.

63. For a contract to be a contract of service and therefore of employment, there must be the following core features:

    63.1. The requirement to do the work personally.
    63.2. Mutuality of obligation.
    63.3. A sufficient degree of control.
    63.4. Overall, the provisions of the contract are consistent with it being a contract of employment. This will involve weighing the factors for the contract being one of employment and the factors that appear to be against it being a contract of employment.

64. Points 1 and 2 make up the test at i) in **Ready Mixed Concrete.**

The contract must not be one where the employer is a customer or client of the alleged employee or worker

65. The Tribunal is obliged to make a finding on this point because if the relationship is a business one where the individual is in business on their own account with the alleged employer being a client or customer, which is fatal to both employee and worker status.

Provision of work personally

66. The Respondent conceded that the Claimant was a worker at all material times and consequently conceded the point of personal service.

Mutuality of obligation

67. Here, for a contract of employment to exist (as compared to a worker contract for provision of personal services) there must be legal obligations between the employer and employee for the entirety of the duration of the contract **Clark v Oxfordshire Health Authority [1998] IRLR 125.**

68. In **Clark**, the Claimant was a bank nurse. There were periods where she was offered no work. No retainer was paid for those periods. She was not obliged to accept work offered to her and the Respondent was not obliged to offer her any work. The Court of appeal held that, because there were no overarching obligations between assignments, there could not be a contract of employment over the entire period.

69. That is precisely the situation of the Claimant in this case.

70. However, it also decided that there could be a series of individual assignments where, during each one, the Claimant was an employee. The Tribunal therefore needed to focus on what the situation was during each individual assignment, if no umbrella contract spanned the whole period.

71. A similar conclusion was reached in the case of **Carmichael and another v National Power Plc [2000] IRLR 43.** In this case, the fact that one of the Claimants wanted the arrangement to be one of personal convenience rather than obliging her to accept work when it was offered, was a significant factor pointing against an overarching employment contract. It indicated an intention on the parties that there would be no contractual obligations during periods when the Claimants weren't actually working.

72. Mutuality of obligations is often cited as being the obligation on the employee to provide their skill or expertise personally, and for the employer to either pay for that work done or be required to offer work to be done. Consideration of this question is, therefore, relevant to whether there was any contract at all after **Cotswold Developments.**

73. Then there is the enlightening case of **HMRC v PGMOL [2022] 1 All ER 971.** This case highlights the following key principles:

    73.1. Where there are issues of intermittent work that give rise to whether the Claimant has sufficient continuity of service and/or whether they were a worker or employee, this is where the cases about the existence of an overarching contract of employment are relevant, as per Laing LJ:

    "48 Where an employee works seasonally, or intermittently, he may need to establish, in order to show that he has the necessary continuity of employment, that his relationship with his employer was governed by an overarching contract during the periods when he is not actually working. It is necessary to recognise, when considering the reasoning in any decision of the EAT (or of the Court of Appeal on appeal from the EAT), that in some cases, the employee had to establish that there was an overarching contract between him and his putative employer which bridged any gap between periods of work, and that in other cases, he did not, and that the criteria which apply to overarching contracts do not necessarily apply to contracts for a specific piece of work or engagement. It is further necessary to recognise that the legal reasoning in these decisions may not apply across the board, and to recognise which parts of the reasoning were essential to the actual decision in the case, and which parts were obiter."

    73.2. Following **McMeechan v Secretary of State for Employment [1997] ICR 549,** in intermittent cases, the correct approach was to consider the mutuality of obligation point only in relation to an overarching agreement. This is because whilst a person was actually doing the work, whether or not they could accept or refuse work makes no difference. The worker was present, had accepted the work and was working. Consequently, status is

to be considered in two contexts, namely the overall picture covering periods of work and periods of no work on the one hand, and the points at which the worker was actually performing work in an individual assignment or shift on the other. The court also specifically refers to **Clark** and **Carmichael** above in support of this conclusion.

73.3. The concluding 3 propositions from the authorities, were decided at paragraph 118 of the case as being:

73.3.1. The question of whether a single engagement gives rise to a contract of employment, is not resolved by a decision that the overarching contract does not give rise to a contract of employment.

73.3.2. In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negativing such obligations) does not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.

73.3.3. A single engagement can give rise to a contract of employment if work which has in fact been offered, is in fact done for payment.

73.4. Looking at these authorities, mutuality of obligation is therefore only relevant to whether there was a contract at all or, in intermittent work cases, whether there were contractual obligations during periods of no work, which were sufficient to create an overarching contract of employment for the whole of the period during which the worker was intermittently working.

73.5. When looking at individual assignments, the correct analysis is as per paragraph 122 of **PGMOL** *"The correct analysis is that if there is a contract, the fact that its terms permit either side to terminate the contract before it is performed, without breaching it, is immaterial. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other."*

Sufficient Control

74. If there is a contract to provide services personally with mutuality of obligation to bring it into the employment field, it must then be decided whether there was a sufficient degree of control **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 1 All ER 433.** In the absence of sufficient control, there cannot be a contract of employment.

75. The correct question to ask here, is whether the relationship between the worker and alleged employer created general control rather than actual day to day control whilst on shift. **White and another (Respondents) v. Troutbeck SA (appellant) [2013] IRLR 949.**

76. After **Humberstone v Northern timber Mills (1949) 79 CLR 389** the correct test is described thus, *"The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."*

The overall picture

77. If there is a contract, personal service, mutual obligations where relevant and sufficient control, there *may* be a contract of employment.

78. The Tribunal must then weigh up all relevant facts and circumstances to decide if any factors point towards or away from full employment and then come to an overall decision. This is point iii) in the **Ready mixed concrete** test.

79. When performing this more general analysis, once the other three tests have been satisfied so that there *may* be a contract of employment, the facts that can be taken into account are those which were, or ought reasonably to have been, known by the parties at the time **HMRC v Atholl House Productions Limited [2022] EWCA Civ 501.**

80. Some cases have focused on factors that distinguish an employee from a person in business on his own account. The sorts of details that may be relevant include whether (or how far) he:

    80.1. is employed as part of the business of the employer and his work is done as an integral part of that business.
    80.2. provides his own equipment.
    80.3. hires his own helpers.
    80.4. takes a degree of financial risk.
    80.5. has responsibility for investment and management; and
    80.6. has the opportunity of profiting from sound management in performing his task.

81. This list comes from the case of **Market Investigations Ltd v Minister of Social Security [1968] 3 All ER 732, per Cooke J at 185.**

82. In **Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374, [1990] IRLR 236, [1990] ICR 409**, the Privy Council said that the best expression of the test was that stated in the Market Investigations case: is the person concerned in business on his own account?

83. This test was again applied in **Andrews v King (Inspector of Taxes) [1991] STC 481, [1991] ICR 846**, where it was held that the essence of business was that it was carried on with a view to profit (whereas it was not open to the employee there to make an increased profit from the way in which he carried out his tasks).

84. The importance of this criterion has been emphasised by the Court of Appeal in **Quashie v Stringfellow Restaurants Limited [2012] EWCA Civ 1735, [2013]**

IRLR 99. However, it is not a matter of running through these indicia as if they were an all-purpose checklist.

85. Part of the function of painting the picture, is to determine what the significant details are in the instant case and to look at the whole arrangement.

86. Thus, in **Hall (Inspector of Taxes) v Lorimer [1994] 1 All ER 250, [1994] ICR 218**, a vision mixer who supplied no tools, equipment or money to his business and did not hire staff was still self-employed. The key factor was that he was a professional person who worked for a variety of people for short periods and was not dependent on any one paymaster (see also **Suhail v Barking Havering and Redbridge NHS Trust [2015] All ER (D) 211 (Jul) (UKEAT 0536/13),** where a similar analysis was applied to a locum working in the NHS).

87. In **Pimlico Plumbers Ltd v Smith [2014] All ER (D) 88 (Dec) (UKEAT 0495/12)** the EAT held that a plumber was not an employee, a key point being that he assumed the financial risk of non-payment by customers (a case that was subsequently litigated to the Supreme Court on the different issue of whether Mr Smith was a 'worker').

88. But we must not focus on any of these tests being decisive. The only decisive factors are tests 1 (contract and mutuality) and 2 (sufficient control) from the **Ready Mixed Concrete** case.

89. When you get to test 3, weighing factors pointing toward or away from employment, the whole context, circumstances and factual matrix must be considered. The above factors are indicative only.

At Common Law

90. The situation is different when considering common law claims such as breach of contract and wrongful dismissal. Wrongful dismissal and breach of contract are claims that are founded on the common law, not statutes like the Employment Rights Act 1996.

91. The employment status of “worker” is not found outside an act of parliament and is relatively new concept to UK employment law because it stems from EU law. It is therefore only informative to the general picture when determining common law employment status.

92. At common law, you are either an employee, an agency worker, an apprentice or an independent self-employed contractor. There is therefore no statutory wording that assists us in determining the common law test. We must turn to the case law and the tests laid out there starting with **Ready Mixed Concrete** and simply ignore any points of law in those cases that are unique to any statutory wording.

93. Indeed, it seems the only relevant wording to be considered in this case, is the wording of the [Employment] Tribunals Extension of Jurisdiction Order (England and Wales) 1994, which gives the Tribunal the power to consider breach of contract claims in limited circumstances. This order says:

"Extension of jurisdiction

3. Proceedings may be brought before an industrial Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b)the claim is not one to which article 5 applies; and

(c)the claim arises or is outstanding on the termination of the employee's employment."

94. Clearly here, if the other jurisdiction criteria are met, the relevant paragraph is paragraph 3 (c). This section clearly reads that it is only applicable to employees.

95. Consequently, if the Claimant is not an employee at common law, then we have no jurisdiction to hear the complaint of wrongful dismissal and that jurisdiction lies with the County courts for wrongful termination of the contract. This is important, because it might therefore be a reason why the Employment Tribunal might resist dismissing the claim for notice pay, if it is intimated that a claim may be brought in the future to a different court.

Unfair dismissal

96. All employees, subject to some prerequisite conditions, have the right not to be unfairly dismissed under section 94 of the Employment Rights Act 1996, which says:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

97. To bring a complaint of unfair dismissal, an employee must have at least two years continuous service in accordance with s108 of the Employment Rights Act 1996, which says:

"108 Qualifying period of employment.

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years] ending with the effective date of termination."

Wrongful dismissal as a claim

98. This is purely an issue of contract law and can be summarised as follows:

98.1. Was there an express or implied condition in the contract of employment allowing a party to terminate it immediately without notice?

98.2. If so, was that condition breached?

98.3. If so, was it a deliberate and serious breach to amount to, in this case, gross misconduct giving rise to a repudiatory breach entitling the Respondent to terminate the contract?

98.4. If so, did the Respondent accept the breach by terminating the contract?

98.5. If so, had any breach been affirmed or waived prior to its termination?

99. It is important for the Tribunal not to be lured into the trap of considering general fairness, reasonableness and decency when considering a wrongful dismissal case. So long as the above legal tests are satisfied, the reasonableness or fairness of the decision is irrelevant. Wrongful dismissal is not an unfair dismissal claim and must not be decided as one.

Direct discrimination

Burden of proof

100. Section 136 of the Act provides as follows:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment Tribunals] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision"

101. Direct evidence of discrimination is rare and Tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.**

102. The Claimant bears the initial burden of proof.

103. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them.

104. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable Tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the Tribunal must assume that there is no adequate explanation for those facts.

105. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

106. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act.

107. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a Tribunal would normally expect cogent evidence.

108. All of the above having been said, the courts have warned Tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**.

109. In some cases, it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination **Laing v Manchester City Council UKEAT/0128/06/DA**.

Definition of direct discrimination

110. The Equality Act 2010 defines direct discrimination as:

"13. Direct discrimination

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

111. There are two aspects to direct discrimination that must be considered by the Tribunal. One is less favourable treatment and the other is the reason for the treatment complained about with the associated causal link between the two.

112. Unreasonable behaviour should not give rise to an inference of discrimination **Strathclyde Regional Council v. Zafar [1997] UKHL 54** it is usually an irrelevant factor. However, it has been held by the EAT that unreasonable behaviour can go to the credibility of a witness who is trying to argue that their

motives were not motivated by the characteristic in question **Law Society v Bahl [2003] IRLR 640 EAT.**

113. In the same way that less favourable treatment does not mean unreasonable treatment, it also does not mean detrimental treatment or unfavourable treatment **T-System Ltd v Lewis UKEAT/0042/15 (22 May 2015, unreported)** or simply different treatment **Shmidt v Austicks Bookshops Limited [1977] IRLR 360 EAT**. There must be a comparison either actually or hypothetically that shows less favourable treatment.

114. It is the treatment rather than the consequences of the treatment that are the subject of the comparison **Balgobin v Tower Hamlets London Borough Council [1987] ICR 829.**

115. Whether less favourable treatment is proven requires a comparison to a suitable comparator. There is a general requirement that there be no material difference between the people being compared either actually or hypothetically. Section 23 Equality Act 2010 says:

“23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.”

116. The comparators need not be identical **Hewage v Grampian Health Board [2012] UKSC 37** because if every single aspect of a comparator was the same between the complainant and comparator, then the less favourable treatment could only be because of the protected characteristic, which would be make it almost impossible to defend a direct discrimination claim.

117. Following the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**, it will often be appropriate to consider the reason for the treatment first and then decide whether that reason meant the treatment was less favourable. Therefore, if the reason for the treatment was because of the protected characteristic, then it might be that the finding of less favourable treatment is inevitable.

118. Whether something is less favourable treatment is an objective test **Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT,** but if a subjective view is being put forward as showing why the complainant says the treatment was less favourable, then such a view can be upheld as evidencing less favourable treatment so long as the view held was reasonable **Birmingham City Council v Equal Opportunities Commission [1989] IRLR 173 HL.**

119. In all cases, it is irrelevant whether the alleged discriminator has the same protected characteristic as the complainant s24 Equality Act 2010.

120. When considering whether the less favourable treatment was because of the protected characteristic, the Equality Act wording of “because of” has exactly the same meaning as the old legislation wording of “on grounds of” **Onu v Akwiwu [2014] EWCA Civ 279.**

121. In addition, there is no legal causal link as such. Instead, the Tribunal should focus on the “real reason” why the alleged discriminator subjected the complainant to the treatment they allege was direct discrimination **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48,** which is a subjective rather than legal test.

122. To sum up the current situation about causation in direct discrimination cases, Underhill LJ said in the case of **CLFIS (UK) Limited [2015] IRLR 562:**

“As regards direct discrimination, it is now well-established that a person may be less favourably treated "on the grounds of" a protected characteristic either if the act complained of is inherently discriminatory (e.g. the imposition of an age limit) or if the characteristic in question influenced the "mental processes" of the putative discriminator, whether consciously or unconsciously, to any significant extent…”

<u>Conclusions</u>

Employment status

123. We first turn to the situation of employment status.

124. It was conceded that the Claimant was a worker within the meaning of the Equality Act 2010 section 83. This allows us to consider the race discrimination claims.

125. Having heard the evidence from both the Claimant and the response witnesses we conclude that there was certainly a contract between the parties.

126. As this was a case of intermittent working, it is necessary when applying the **Clark** and **PGMOL** case, to consider whether there was mutuality of obligation between the individual assignments the Claimant was working when he was given shifts.

127. When considering that case, during periods where a worker is not working, an umbrella contract can only be present to create an employment contract during those non-work periods, if:

    127.1. there is an obligation on the Respondent to provide work; or

    127.2. for the Claimant to accept work when offered to him; or

127.3. there is some sort of financial retainer covering the non-work periods such as for example the contracts of employment of teachers where they are paid during half term and end of term breaks.

128. Given that we have found the Claimant did not have to accept any work, the Respondent did not have to provide any work, and the Respondent was certainly not paying a retainer for non-work periods, we conclude there was no overarching umbrella contract of employment covering the periods of time when the Claimant wasn’t working.

129. However, we now need to turn our attention to whether each individual assignment was a short-term employment contract.

130. Having already found that there was mutuality of obligation during these periods, given that once an assignment was accepted, the Claimant worked that assignment and therefore the Respondent was obliged to pay for that work done, the first part of the **Ready Mixed Concrete** test is satisfied.

131. Turning to the second point in the **Ready Mixed Concrete** test, we now need to consider whether there was sufficient control over the worker at the time when he was doing work.

132. Applying **White** and **Humberstone,** we find there was sufficient control by the Respondent of the Claimant to satisfy that part of the test. We say this because:

132.1. whilst he was carrying out his activities on shift the Claimant was clearly under relatively close supervision of the supervisors of the Respondent.

132.2. Clearly, the Claimant was subject to all of the policies of the club which were also written into his contract and not limited to those in the casual worker handbook.

132.3. Similarly, rather than there being a bare termination of the casual contract, if the Claimant was found to have done something wrong in breach of the club's general rules, he was subjected to the same disciplinary investigation and procedure process that Mister Ivanov was who was a non-casual employee.

133. Consequently, the first parts of the **Ready Mixed Concrete** test have been fulfilled.

134. We then need to assess Part 3 of the **Ready Mixed Concrete** test and that is whether there are any factors which are inconsistent with the contractual arrangement being a contract of employment. In doing this, we have reminded ourselves that no one individual factor is determinative and we need to take into account all of the relevant circumstances in the context of the job role whilst also taking into account the factual backdrop of the arrangements between the Claimant and the Respondent for the provision of work and the doing of that work.

135. Looking at the **Market Investigations** case, there was no evidence that any of those factors listed in the law section of this judgment were proven. Indeed, no submissions were put forward by the respondent claiming they were because they had conceded personal service.

136. Looking at all the circumstances, there are some factors that point away from the contract being one of a contract of employment. For example:

136.1. there is no exclusivity clause either actual or enforced by the Respondent.

136.2. The Claimant worked for another security business, without any detriment or disciplinary procedure being applied by the Respondent. There is no permission in the letter of engagement needed for the Claimant to work for a second employer.

136.3. the Claimant appears to be able to dictate when he finishes his work. This was evidenced by the fact that the Claimant said, and the Respondent accepted that he would not work past 8:00 in the evening. The Claimant said, and we believe, that this is because he had a family to bring up and he wanted to be able to work his security job for additional income. Of course, in the normal course of an employment contract employees do not have the right to dictate to the company when the shifts will start and end.

136.4. There was certainly one instance where the Claimant, as an alleged casual worker, was treated differently to permanent full employees. One example is in the pay arrangements where full employees were paid on a monthly basis whereas casual workers and up to the pandemic were paid on a weekly basis. Similarly, when considering the furlough scheme during the pandemic full employees had their wages topped up from 80% to 100% with the club’s own money whereas casual workers were furloughed at the government minimum which was 80% of pay.

137. However, we must also bear in mind that if we take, for example the situation of a part time employee where their employment status is not in doubt, it is commonplace for part time employees to have two jobs. Usually, the work is then carried out for one employer whilst they are off work for the other employer.

138. Counter to this there are also a few indicators that suggested the Claimant was a full employee. For example:

138.1. We cannot ignore the fact that under the engagement he was subject to all the club's policies.

138.2. Similarly, he was subject to full procedures for disciplinary situation which even included the right of appeal. In our view and experience, which was unusual for a true casual worker.

138.3. In addition, under the heading addressing concerns, if the Claimant had a complaint arising out of any casual work that he undertook at the club the letter of engagement recommends that the Claimant put any concerns in writing to it and says that the same procedure will apply namely that he would be invited to a meeting to discuss it. That was akin to an employee grievance procedure.

138.4. When considering his day-to-day supervision, it seemed to us that he was supervised and allocated tasks in the same way as Mr. Ivanov and was therefore integrated into the team like an employee.

139. All these circumstances are virtually identical to ordinary grievance and disciplinary procedures applied to full employees. Consequently, when looking at all the circumstances we have concluded that during each individual assignment, the Claimant was a full employee.

140. This means that we now need to turn our minds to both the unfair dismissal complaint and the wrongful dismissal complaint.

Unfair dismissal

141. When considering unfair dismissal, simply being an employee is not sufficient to bring a claim in the normal course of events. You also need to have at least two years continuous service otherwise the employment Tribunal has no jurisdiction to hear that complaint.

142. We have noted that there were a number of periods, which we consider were breaks in continuous service. The first was after furlough ended, namely 1 September 2020 through to 20 April 2021. The Claimant has not explained why he did not work during that period. It simply appears to us that he chose not to work for the Respondent during that period.

143. Even if we are wrong in that, there is also a six-week period from the end of July 2021 through to the beginning of September 2021 where, again, the Claimant was absent for a six-week period. That too, in our view, amounts to a break in service given our finding that there is no umbrella contract covering the periods where the Claimant was not at work.

144. Finally, there is the issue of the immigration, residence status and work permit. It is clear to us that the visa the Claimant had and therefore his right to work in the UK, expired on the 22 November 2021. Consequently, his contract of engagement was terminated at that point and that was a final termination of the engagement. We have concluded this because, if a positive verification notice had not been received after that date, the engagement would not have been renewed by the Respondent because it would have been unlawful to do so. There was then evidence of a complete re-engagement by way of the letter of 1 December 2021 at page 111 in the bundle, which is signed by the Claimant.

145. Consequently, we find that this was another break in service rather than simply a cessation of work.

146. At best, the Claimant's continuous service was from 21 April 2021 – 7 November 2022 and at worst was from 1 December 2021 until 7 November 2022. Therefore, because the Claimant does not have the requisite 2 years continuous service required to bring an unfair dismissal complaint, the unfair dismissal complaint fails.

Wrongful dismissal

147. We then turn to the wrongful dismissal complaint. Given we have found that during each assignment the Claimant was an employee, we are able to consider this claim under the **Extension of Jurisdiction Order**.

148. First, we need to establish whether there was an express or implied term indicating that the Claimant should not have used any physical violence against Mr Ivanov. We conclude that there was such term. Every contract of employment has an express or implied term that you should not use violence against another employee.

149. Secondly, we need to decide whether that term was breached and, if it was breached, whether it was a deliberate and serious breach. We conclude there was a deliberate and serious breach. We say this because violence in any workplace is a serious issue. This is not a situation where somebody has accidentally bumped into another person and that might have been misconstrued or misinterpreted by the person who was injured or upset about the situation. It is clear to us from the evidence that we have seen that, at the very least, the Claimant deliberately pushed Mr Ivanov and there was a tussle. The Claimant admitted this at the time. When considering the statements of the other employees, we also accept that the Claimant struck Mr. Ivanov in the face.

150. When considering wrongful dismissal, issues of fairness and reasonableness are not relevant.

151. Given that we have found there was a serious and deliberate breach of contract by the Claimant, we now need to decide whether the Respondent accepted that breach and, if they did, whether the reason for that acceptance was the behaviour of the clamant.

152. We conclude that the Respondent has terminated the Claimant's contract of employment because of his behaviour towards Mr Ivanov. Consequently, because this was a serious and deliberate breach of contract amounting in our view to repudiatory conduct no notice pay was payable and no notice needed to be given to the Claimant.

153. There was no waiver or affirmation argued and there was no evidence of one. Consequently, his claim for notice pay fails and is dismissed.

Race discrimination

154. We now turn to the race discrimination complaint.

155. Applying **Igen,** the initial burden of proof is on the Claimant to prove facts from which the Tribunal could infer that discrimination because he was a black man has taken place. However, applying **Laing** it is fully open to a Tribunal to first see whether the Respondent has discharged its burden of proving that the decisions of the managers to first investigate the incident and second terminate the contract of engagement, were in no way whatsoever influenced by the fact he was black.

156. We must note that, at this point during cross examination, having been guided through all the documents in the bundle about the altercation involving Mr Ivanov, the Claimant was fairly asked whether he now considered that the Respondent made its decisions because of his behaviour rather than because he was black. The Claimant's answer to that question, was that he in our view fairly and knowingly answered that the response was because of his behaviour, not because of his race. This significantly undermined his case for a race discriminatory dismissal both in the circumstances surrounding it and also for the dismissal itself.

157. Nevertheless, regardless of that concession, there is insufficient evidence from which we can infer that any decisions or behaviours made by the Respondent were in any way because of the Claimant's race. No case for discrimination exists on the face of the evidence to shift the burden of proof to the Respondent.

158. Yes, there was less favourable treatment when compared to Mr. Ivanov who was white who appeared at first glance to be in the same circumstances of being involved in a fight and he was also doing the same job as the Claimant. However, his circumstances were materially different. The witnesses to the incident had identified the Claimant as the aggressor and only identified the Claimant as being violent by striking Mr. Ivanov across the face. Mr. Ivanov was described as being the victim. Consequently, the circumstances were materially different between the two.

159. It was also clear to us that if both parties had been involved in a mutual fight where both were identified as being aggressive, both parties to the fight would have been dismissed based on the statements of the Respondent's witnesses that they do not tolerate physical violence. We believe them. Therefore, in comparison to a hypothetical non-black employee, in circumstances not materially different to the Claimant's, the outcome for the non-black employee would have been the same.

160. The Claimant was therefore left simply with different treatment which, following **Schmidt,** is insufficient.

161. We are not therefore satisfied that the Claimant has discharged his initial burden of proof in proving facts from which we can infer that race discrimination was taking place. Nothing before us suggested that there was any racial motivation

on the part of the Respondents or any of the witnesses who made witness statements against the Claimant.

162. Secondly, we are satisfied that in any case, even if the burden had shifted to Respondent, the Respondent has proven to us applying **Khan** and **CFLIS,** that the real reason why its managers behaved as they did, after analysing their mental processes, was because of the behaviour the Claimant displayed towards Mr Ivanov during the incident on 1 October 2022 as proven in their minds by the information given in the independent statements gathered during the investigation process. In our judgment, their minds were in no way whatsoever either consciously or subconsciously influenced by the fact that the Claimant was black.

163. Consequently, the Claimant 's claim for direct race discrimination fails and is dismissed.

164. Having reviewed the case management preliminary hearing outcome of Judge Kenwood in the bundle, it is clear from that note that, although the word victimisation is used in the ET1 claim form, that claim was no longer pursued following that preliminary hearing and was therefore not listed is an issue to be determined by the Tribunal. Consequently, we did not consider it.

165. This therefore means that all the Claimant’s claims fail, they are dismissed and that concludes these proceedings.

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Employment Judge G Smart

Date: 02/02/2024

REASONS SENT TO THE PARTIES ON

.03/02/2024

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FOR THE TRIBUNAL OFFICE