EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4107490/2023

Final Hearing Held in Dundee on 15 – 17 July 2024

Employment Judge A Kemp
Tribunal Member P Fallow
Tribunal Member J McCullagh

Mr O E Nnamuchi	**Claimant** **In person**
University of Dundee	**Respondent** **Represented by:** **Ms L McArdle** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

(I) The respondent's termination of the contract of employment of the claimant summarily was in breach of contract and he is awarded the sum of FOUR THOUSAND SEVEN HUNDRED AND SIXTY SIX POUNDS FIFTY EIGHT PENCE (£4,766.58) as damages for that breach, payable by the respondent,

(II) the remaining claims do not succeed and are dismissed.

REASONS

Introduction

1. This was a Final Hearing into claims made by the claimant for

   (i) direct discrimination on grounds of age under section 13 of the Equality Act 2010,
   (ii) harassment in relation to age under section 26 of that Act,
   (iii) breach of contract, and
   (iv) unauthorised deductions from wages.

2. The claimant is now a party litigant having until relatively recently been represented by solicitors, and the respondent was represented by Ms McArdle.

3. A Preliminary Hearing had been held on 11 March 2024 after which case management orders were made. Those orders were varied by the parties' agreement on 16 April 2024. The claimant's then solicitors provided Further Particulars of his claims, and the respondent's amended their Response Form in reply. The claimant's solicitors provided a Schedule of Loss.

4. The claimant had earlier sought to postpone the Final Hearing, which the Tribunal had refused on the documents submitted to it at that stage, but in doing so stated that he could renew it at the commencement of the Final Hearing. Prior to that hearing the parties exchanged correspondence with the Tribunal in relation to various matters related to documents and a draft List of Issues that the respondent had prepared. The claimant submitted documents he wished to rely on by email dated 11 July 2024.

5. The claimant renewed his application for postponement at the commencement of the Final Hearing. The Tribunal had regard to the Presidential Guidance on Postponements issued in 2014, and to the terms of Rules 2, 29 and 41, and for the reasons given orally at the hearing refused it. The claimant also stated that he wished to proceed with a claim for automatic unfair dismissal, which the respondent opposed, and for the reasons given orally that application was also refused. The respondent objected to two documents that the claimant had produced on the basis

that they were without prejudice negotiations, and the Judge having alone considered the documents in question allowed that objection for one document, and did so for three particular paragraphs in one other, for reasons explained orally. Those documents were not considered as part of the evidence to that extent.

6. The parties each wished to add further documents, which the Tribunal accepted unopposed.

7. Prior to the commencement of the hearing the Judge explained to the claimant about how it would be conducted, referred to his using an aide memoire which the claimant subsequently did use, and referred to the giving of evidence in chief, cross examination and re-examination. He explained that documents were not evidence of themselves and would not be considered unless referred to in evidence by a witness. He explained about closing a case after the evidence was heard, and making submissions. He further explained that the Tribunal could assist the claimant as a party litigant under Rules 2 and 41, which included asking questions to elicit facts, but that it could not do so in a manner that meant that it entered the arena, meaning that it became an advocate for him or acted as if his solicitor.

The issues

8. The respondent had prepared a draft List of Issues which the claimant did not agree to. At the commencement of the Final Hearing the Judge proposed to the parties that the following were the issues in the case. They were not the same as those of the respondent in some respects. The claimant wished to add one as to automatic unfair dismissal, which was not allowed as referred to above. The issues were otherwise agreed. They are the following:

    1 Did the respondent directly discriminate against the claimant because of his race contrary to section 13 of the Equality Act 2010 ("the 2010 Act")?

    2 Did the respondent harass the claimant by subjecting him to unwanted conduct related to his race contrary to section 26 of the 2010 Act?

3 Was the respondent in breach of contract? [In this regard the respondent accepted that it was, and that two months' notice pay was due, but the amount of the same was in dispute.]

4 Did the respondent make any unauthorised deductions from wages under section 13 of the Employment Rights Act 1996? [The respondent disputed that this was before the Tribunal, and the evidence on it was heard under reservation as to whether or not it was]

5 Are any matters that occurred prior to 18 April 2023 outwith the jurisdiction of the Tribunal under section 123 of the 2010 Act?

6 If any claim is successful to what remedy is the claimant entitled, and in that regard:

(i) What award is appropriate for injury to feelings?
(ii) What losses has he or will he suffer from the dismissal?
(iii) Did he mitigate his loss?
(iv) What loss did he suffer in relation to the breach of contract?
(v) What were the wages not paid to him?

The evidence

9. The parties had provided two separate volumes of a Bundle of Documents extending to around 670 pages. Most but not all of the same was spoken to in evidence. Documents were as stated added during the course of the hearing without objection.

10. Evidence was given by the claimant, who did not call any other witnesses and by Mr Colin Stebbing, Mr Alpha Farrell and Mr Mark Skeldon for the respondent.

11. During the hearing the Tribunal sought to carry out its function under the terms of Rules 2 and 41 in both asking questions of witnesses including the claimant, raising with the respondent's witnesses some aspects of the claimant's case, and explaining legal principles to the claimant where appropriate. It gave the claimant considerable latitude in relation to the issues he wished to raise in evidence, and questions to witnesses, but

sought to retain that within reasonable bounds as to relevancy and proportionality where necessary.

12. During the claimant's evidence in chief the respondent raised the issue that it had not received fair notice of the claims of unauthorised deductions in relation to student loans or union dues, objecting to it, and the evidence on those matters was heard under reservation as to that point and relevancy generally.

13. On the final day and prior to the lunch break the Judge indicated that a time limit on the cross examination of the final witness Mr Skeldon would be imposed after the break, as provided for by Rule 45, of one further hour so as to ensure that the Final Hearing concluded within the allotted time, having regard to Tribunal questions, re-examination and submissions, but to his credit the claimant completed his cross examination in less time than that limit.

Facts

14. The Tribunal found the following facts, material to the issues before it, to have been established:

Parties

15. The claimant is Mr Ogbonna Emmanuel Nnamuchi. He is Nigerian by nationality and a Black African. He has a Nigerian passport. His date of birth is 18 January 1976.

16. The respondent is the University of Dundee.

17. The respondent worked as a Senior Lecturer at a University in Nigeria. The claimant thereafter undertook a postgraduate Masters degree with the respondent in the period September 2019 to September 2020.

Right to work

18. The claimant was issued with a Residence Permit by the Home Office providing for leave to remain in the UK which was valid until 11 January 2021, and was a Tier 4 General Student Leave to Enter. He was permitted under its terms to work a maximum of 20 hours per week during term time.

19. For the claimant term time was generally the period between September one year and June the following year, save for a period for the Christmas and New Year holiday.

20. The claimant was registered on a PhD course at the University of Exeter with effect from September 2021.

21. The claimant applied for extensions to the Residence Permit [which were not before the Tribunal]. An "exceptional assurance" was granted to him in a letter from the Home Office for the period to 17 February 2022. It stated that it was on the same terms and conditions as the previous grant of leave, and added "please note that this is not an extension of your leave".

22. He sent an application for an extension of leave by post, which was picked up by a courier contracted to the Home Office on 18 February 2022 having been posted on 16 February 2022 by "special delivery guaranteed". The Home Office lost that application.

23. In or around May 2022 he was informed by the Home Office that he required to cease undertaking the PhD course because of a visa issue, which he challenged and which remains unresolved [the documents in relation to that issue were not before the Tribunal].

24. He has continued to undertake research for the PhD.

25. In around September 2022 an issue arose in relation to the claimant's then employment and his right to work in the UK.

26. The respondent's general practice is to carry out right to work checks for all prospective employees. For those with a British or Irish passport an online process called Trust ID is used. For all others the respondent normally seeks a share code from the applicant or employee, obtained by them from the Home Office and given to the respondent to allow it to verify the person's right to work status. If that is not possible, an Employer Checking Service (ECS) check can be made by requesting that from the Home Office. That will either confirm the right to work and any restrictions, or that there is no such right.

27. The respondent is a category A sponsor, which allows it to recruit and employ persons from outwith the United Kingdom. It has a significant number of employees employed on such a basis.

Contractual terms

28. The claimant was employed by the respondent from 5 October 2022, initially to work as a Temporary Assistant after applying to an internal organisation of the respondent called Dundee University Temporary Employment (DUTE). He was paid on the basis of an hourly rate, and with arrangements for overtime. The terms of his employment were set out in a contract of employment with the respondent which was emailed to him. It stated that the contract was dependent on the respondent being able to employ him without breaching UK immigration or other legislation.

29. The claimant provided documentation to the respondent at or around the time of the commencement of his employment with them, believing that to be sufficient evidence of his right to work in the UK, in the form of the said Permit and a letter from the University of Exeter confirming that he was "currently registered as a Full-Time student….studying PhD Renewable Energy – C." It stated that he had been registered since 20 September 2021 and was expected to complete his studies on 19 September 2025.

30. The documents provided to the respondent were not sufficient evidence of his right to work in the UK. The respondent ought to have carried out a right to work check for the claimant, and as he did not have a British or Irish passport that was either by means of a share code or seeking an ECS certificate. Neither was done by the respondent, in error. The respondent did not carry out a full and adequate check at that time as to the claimant's right to work in the UK.

31. In or around early November 2022 the claimant contacted his Member of Parliament with regard to the application he had posted on 16 February 2022, who received a letter from Royal Mail dated 9 November 2022 confirming the posting of the claimant's letter and the date of collection by the Home Office courier. That was passed to the claimant.

32. Initially the claimant worked on reception duties with the respondent. It was work inside a building. He was later also working on parking warden

duties after being offered those duties by Mr Spedding, and his accepting that offer. He was at that stage provided with a fluorescent jacket, and offered boots by Mr Spedding which he declined. Generally Mr Spedding would email the claimant each week with proposals for work in the following week, which he either accepted or sought to vary if he wished to. The work he did was a mixture of reception duties inside buildings, including a security element, and parking warden duties outside. His hours varied, and were not arranged in regular shifts. He was paid overtime if the total hours in a week exceeded 36.25, at one and a half times the normal hourly rate, or if he worked after midnight in the period up to a normal start time in which event he was paid double the normal hourly rate.

33. The claimant's role, remuneration and hours of work including shift arrangements were not the same as those who were Campus Security Officers. Campus Security Officers worked an average of 42 hours per week on three 12 hour shifts either on day shift or night shift in blocks of three, followed each time by three days of leave. They were paid a 20% shift premium. They had training relevant to that role which was different to that the claimant had.

Administrative Review

34. The claimant made an application to the Home Office for administrative review on 16 March 2023. The application stated that it was in relation to a decision as to "an application for leave to remain or indefinite leave to remain from inside the UK" made on 2 March 2023, which the application for administrative review stated had been refused.

Offer of new contract

35. The role as Temporary Assistant was intended to be for a limited period of time, initially three months, which was exceeded. The DUTE policy is for employment of up to six months. That was also exceeded. In May 2023 emails were exchanged internally in the respondent as to moving the claimant from a DUTE contract to one of a permanent kind but still with zero hours.

36. There were emails exchanged as to the job title to be used, and a form completed by Mr Spedding his line manager internally referring to the role of Campus Security Assistant. Mr Spedding completed the form as far as he was able to. Mr Spedding later emailed the HR Department of the respondent stating that the job title should be the same as three others he named who had similarly been moved from DUTE contracts and were already working. Those staff were contracted as Student Ambassadors.

37. On 2 June 2023 Ms Vicky Chapman of the HR department of the respondent wrote to the claimant with an offer of an appointment as a Student Ambassador commencing on 1 June 2023, for a term to 31 May 2024. It provided for notice of termination of two months by the respondent, and was similarly dependent on the respondent being able to employ the claimant without breaching UK immigration or other legislation. The hours of work were to be agreed with Mr Spedding. It provided for an annual salary of £21,761. Its terms did not refer to any overtime rate or rates specifically, although the respondent had intended that the claimant's remuneration would in practice continue as it had been under the former contract.

38. The claimant raised those terms with Mr Spedding, as he thought that they indicated a salary of £21,761 should be paid. Emails were exchanged with regard to that matter, and the claimant met Mark Skeldon of the respondent, their Senior People Partner, who explained that the intention was to remain on the same hourly rate, and how that was calculated from the salary figure by dividing that by 52 then by 36.25 (that figure being the standard hours per week). He explained as to overtime. He gave the claimant a draft job description for Response Assistant to show an example of other working arrangements. That role had not at that stage been approved for use. The claimant raised the issue of his job title. Mr Skeldon was prepared to discuss these issues further.

Remuneration

39. In April 2023 the claimant had net income from the respondent of £1,636.16.

40. In May 2023 the claimant had net income from the respondent of £1,579.72.

41. In June 2023 the claimant had net income from the respondent of £1,534.46.

42. In July 2023 the claimant had net income from the respondent of £1,999.77, including earnings from on or around 16 June 2023 and accrued holiday pay.

43. Sums were deducted from the claimant's pay for sums due to the union of which he was a member. He signed a form authorising that on 29 May 2023.

44. There were deductions from the claimant's pay for what were said to be student loans in January 2023 of £19, in February 2023 of £4, in March 2023 of £31, in April 2023 of £7, May 2023 of £31. There was no such deduction in June 2023, and in July 2023 it was £64. The total is £156. Student loans had been referred to on the P45 issued by his former employer, as a result of which the respondent had been obliged to make those deductions. It is a matter referred to within His Majesty's Revenue and Customs Guidance.

45. There were also deductions for employee pension contributions as follows:

April 2023 £146.67
May 2023 £175.19
June 2023 £106.02
July 2023 £570

46. There were payments made as employer pension contributions as follows:

April 2023 £416.53
May 2023 £497.54
June 2023 £301.11
July 2023 £570

UK Visa and Immigration check

47. In relation to the offer of a new contract the respondent sought from the claimant evidence of his right to work in the UK. The parties exchanged emails on that in June and July 2023. The claimant provided his passport, and was informed by Ms Chapman that that was not sufficient. The respondent asked the claimant to provide a share code which allowed confirmation of the right to work to be obtained directly from the Home Office by email dated 13 July 2023. The claimant did not provide that. He was asked for other evidence of the right to work, and responded answering a series of questions to do so.

48. On or around 14 July 2023 the respondent applied for an Employer Check under the Employer Checking Service (ESC) in relation to the claimant with the UK Visas and Immigration operational command of the Home Office using the information from the claimant. The claimant was informed not to come to work by email on 17 July 2023, pending that being obtained.

49. On 18 July 2023 the respondent received a Negative Verification Notice in response to that application, stating that the claimant did not have the right to work in the UK. The Notice stated that it was "issued in respect of your duty to prevent illegal working set out in sections 15 to 25 of the Immigration, Asylum and Nationality Act 2006".

50. The reason for the negative response was given as "An application for leave in the UK has been submitted but that was done so after the expiry of the person's previous leave." In respect of "what this means" it was stated "You should not employ this person, or continue to employ them, if they are an existing employee as they do not have the right to work in the UK." In respect of compliance it was stated "If you are found employing this person illegally you could be prosecuted for knowingly employing an illegal worker which means you may face an unlimited fine and or imprisonment."

Termination of employment

51. The Notice was received by Ms Chapman, People Partner of the respondent, who consulted Ms Julie Strachan the Deputy Director of People of the respondent, and Ms Lisa Amber, People Partner of the

respondent who had particular experience and expertise in matters related to visas and right to work. Mr Skeldon was at that point on annual leave. A decision was taken to terminate the claimant's employment immediately as a result of that Notice. The respondent had a concern over its terms were it to continue to employ the claimant when he did not have the right to work, the reference to the potential consequences of doing so in the Notice, and the potential impact on their ability to act as a sponsor.

52. Ms Chapman spoke by telephone to Mr Stebbing. She explained that the claimant could not continue to be employed because of the terms of the Notice. Mr Stebbing offered to inform the claimant of that.

53. On the same date 18 July 2023 the claimant was called to a meeting with Mr Stebbing at around 11.50am in Mr Stebbing's office. Mr Stebbing closed the door to his office when the claimant arrived to ensure confidentiality. He showed the claimant the Notice and informed him that the respondent required to terminate the claimant's employment immediately in light of it. Mr Stebbing asked him for his identity card. That is a step taken for any employee of the respondent when their employment is terminated summarily. The claimant gave it to him. After their meeting as the claimant was leaving they shook hands.

54. After leaving Mr Stebbing the claimant went to speak to Ms Amber. They had a discussion for about an hour. Ms Amber did not consider from that conversation that the claimant had a right to work in the UK, although he believed that he did.

55. Mr Stebbing wrote to Ms Chapman and others that day with regard to their meeting recording what had happened about 45 minutes after it had taken place. He also separately wrote to his team to inform them of the claimant's termination of employment stressing that that was because of the right to work issue not otherwise.

56. The dismissal of the claimant was confirmed by letter from Ms Chapman stating that his employment had ceased with immediate effect on that date (18 July 2023) because of the said notice, a copy of which was attached to the letter. It confirmed a right of appeal. It also stated that if he had any questions about his application for leave he should contact the Home

Office, and provided a link to seek to assist him to do so. The claimant did not follow up that link.

Appeal

57. The claimant appealed the decision to dismiss him by letter dated 18 July 2023.

58. The respondent corresponded with the Home Office after the termination of the claimant's employment by email from Ms Julie Strachan to the Business Helpdesk of the Home Office on 28 July 2023 and 3 August 2023, and asked for details as to the claimant's right to work. The Home Office stated in reply on 8 August 2023 that it could not provide such details given GDPR (the General Data Protection Regulation), but recommended that a fresh ESC be applied for by the respondent. It did not do so. Ms Strachan decided that it would be addressed at the appeal hearing, but did not inform those at the appeal of that.

59. Mr Skeldon returned to work on 31 July 2023. Ms Chapman spoke to him and explained about the termination of the claimant's employment and the reason for that. Ms Strachan also spoke to him similarly and explained the reason for that termination. Ms Amber also spoke to him on the same issues, and explained about the discussion she had had with the claimant on 18 July 2023.

60. The appeal hearing was heard on 24 August 2023. A minute of that hearing is a reasonably accurate record of it. The claimant tendered further documents at the appeal hearing. Ms Chapman had prepared the management case document for it, but as she had by then left the respondent Mr Skeldon attended with Ms Amber to give the management case at the appeal hearing.

61. The appeal was refused, with the reasons for that set out in a letter to the claimant dated 28 August 2023. It stated that the Panel did not "find clear evidence to support the claimant's claim of discrimination….the Panel was nevertheless faced with a clear requirement from the Home Office, through the Employer Checking Service (ECS) that the University should not employ you, or continue to employ you as you do not have the right to work in the UK…….The Panel did however unanimously express the view

that, in the event your immigration status changes and you acquire the right to work, the University would be happy to consider an application from you for any suitable vacancies in the future….."

Position after termination

62. The respondent issued a form P45 for tax purposes. It referred to a student loan applying.

63. The claimant was shocked and upset by the termination of his employment. He has a wife and five children. He believed that he had the right to work in the UK and that the respondent should re-employ him.

Home Office Review

64. By letter dated 17 November 2023 the Home Office confirmed that the claimant had submitted an application for Tier 4 Limited Leave to Remain on 16 February 2022, the day before the existing leave was due to expire. It accepted that that application had been lost. It confirmed that he still had valid leave to remain in the UK "and the conditions attached to this are still in place pending the outcome of the open application." It stated that if he had been financially impacted by the negative ECS that he could apply for financial restitution. He has not yet done so.

65. The claimant provided a copy of that letter to the respondent in December 2023. He hoped to be re-employed, but has not been as the respondent did not have the same vacancy for the role he had earlier performed. The claimant has not applied for any vacancy with the respondent since the dismissal.

66. The claimant made about 15 applications for alternative employment after the termination of his employment with the respondent, commencing in December 2023. He has not been successful. He has not received any State Benefits.

67. The claimant's outstanding applications for extension of leave have not yet been decided by the Home Office, and it is not known when they will be. He received an email from the Home Office on 24 June 2024 stating

that the “application is delayed due to awaiting a response from another Government department.“

Submissions

68. The following is a brief summary of the submissions made by each party. The claimant spoke eloquently about the effect of the termination of the contract on him and his family, and the difficulties he had in seeking to resolve matters. He was a mathematician who had researched the areas considered in this hearing including the immigration aspect and saw that something was wrong. He explained his view that the termination in the circumstances narrated was direct discrimination because if he had been white British he would have been treated differently. He had asked questions and most had not been answered. The only reason for the treatment he had received was his race. The appeal panel had said that he had the right to work. He had suffered many detriments. He had not known how to address matters with the Home Office but then received their letter (being the one on 17 November 2023) which he had given to the respondent. He referred to the new contract and the internal form for recruitment which he did not know about at the time. He asked the Tribunal to put things right for him.

69. Ms McArdle spoke to a skeleton submission she had prepared. She asked the Tribunal to accept the respondent’s evidence and to dismiss the discrimination claims. She argued that none of the matters raised had been direct race discrimination. The sole reason for the termination of employment was the ECS Notice. The first matter relied on was outwith the Tribunal’s jurisdiction. The other matters had not occurred, and were not because of, or where pled as harassment related to, race. The comparators proposed were not appropriate ones. She submitted that so far as the breach of contract claim was concerned, liability for which was admitted, there should be no award as there had been a failure to mitigate. Had the claimant raised the issue with the Home Office and sought restitution it is likely that that would have been awarded. She argued mitigation more widely with regard to attempts to obtain other employment, and as to the award if discrimination were to be found.

The law

(i) Discrimination claims

70. The Equality Act 2010 ("the Act") provides in section 4 that race is a protected characteristic. Race is further addressed in section 9.

71. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> 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."

72. Section 23 of the Act provides

> "**Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

73. Section 26 of the Act provides

> **"26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> ……
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
> (5) The relevant protected characteristics are

….race…..”

74. Section 39 of the Act provides:

“**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…….”

75. Section 123 of the Act provides

“**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…….

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.”

76. Section 136 of the Act provides:

“**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.”

77. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

78. The provisions of the Act are construed against the terms of European Union Directive 2000/43 implementing the principle of equal treatment of persons irrespective of racial or ethnic origin. The Directive is retained law under the European Union Withdrawal Act 2018.

Direct discrimination

79. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagarajan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagarajan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is

irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.*** The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

80. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

81. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority it was held that an unjustified sense of grievance could not amount to a detriment. In ***R (ex part Birmingham) v EOC [1980] AC 1155*** it was held that it was not enough for the claimant to believe that there had been less favourable treatment. The test is an objective on – ***HM Land Registry v Grant [2011] ICR 1390***.

Comparator

82. In ***Shamoon*** Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

83. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***.

84. The EHRC Code of Practice on Employment states at paragraph 3.23 that the circumstances of the claimant and comparator need not be identical but nearly the same, and it provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

85. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

86. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

87. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal.

Harassment

88. Guidance was given by the then Mr Justice Underhill in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not *per se* a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

89. Para 7.9 of the Equality and Human Rights Commission Code of Practice states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording. The test for “related to” is different to that for whether conduct is “because of” a characteristic. It is a broader and more easily satisfied test – ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.***

90. There can be harassment under this provision arising from an isolated incident; for an example, see ***Lindsay v London School of Economics [2014] IRLR 218.*** It is not necessary for the claimant to have expressed discomfort or air views publicly ***Reed and Bull Information Systems Ltd v Steadman [199] IRLR 299.***

Burden of proof

91. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the relevant protected characteristic, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities.

92. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***

93. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> "s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the

> old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

94. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

95. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "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 grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

96. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***.

97. The Equality and Human Rights Commission has issued a Code of Practice on Employment, which the Tribunal took into account in its determination. The Tribunal also had regard to the Code of Practice on Avoiding Unlawful Discrimination Whilst Preventing Illegal Working, issued by the Home Office.

(ii) Other claims

98. The Tribunal has jurisdiction in relation to a claim as to breach of contract by an employee under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. Under article 4 it must arise at or be outstanding on termination of employment, and not be a matter falling within article 5.

99. The standard in contract for termination of employment without giving notice, which in law is where the other party has committed a material breach of contract.

100. There is a right not to suffer unauthorised deductions from wages under section 13 of the Employment Rights Act 1996. There are further provisions in relation to that in section 14. Wages are defined in section 27. Complaint may be made to an Employment Tribunal under section 27.

Remedy

101. For damages for breach of contract in failing to give notice when due the remedy is the amount of the loss caused by the breach. There is a duty of mitigation which is to take reasonable steps to reduce the loss to a reasonable minimum. That is determined having regard to all the circumstances.

Observations on the evidence

102. The claimant gave what we considered was honest evidence. He is clearly an intelligent man, and had found dealing with the issues to do with right to work and the issues caused by the ECS being issued difficult. It had a profound impact on him. He is both a party litigant, and seeking to resolve matters with the Home Office. He wished to raise some matters that we were not in a position to address. For example he raised inconsistencies between the record of the earnings he had with the respondent in the tax year commencing 6 April 2023 and the P45. He queried the deductions for student loan, but accepted that the respondent had to do so given the terms of the P45 from his previous employer. These are issues beyond our jurisdiction. Also beyond our jurisdiction is the issue of his leave to remain in the UK, and the extent of his right to work, although that is part

of the background that led to the dismissal. We have addressed them to the extent that we can, and as relevant to the issues before us.

103. There were some areas where we had concerns over the reliability of his evidence. Firstly the evidence as to his right to work in the UK and any restrictions on that was at best unclear. It ought normally to be straightforward to establish the right to work, as that is conferred in documents. It can be checked by actual or prospective employers using a share code. The claimant did not provide that code when asked to do so by the respondent, nor did he provide clear documents to them when asked. He provided his passport and a letter from the University of Exeter, but when told that that was insufficient did not it appears to us co-operate as fully as might normally be expected.

104. He produced on the second day of the hearing further documents. We did not have before us clear evidence to establish precisely what the right to work position was. The Residence Permit he provided had a limited validity to 11 January 2021 and there was not a full document trail for the period from then until 9 December 2021.The letter of that date stated that it was not an extension of leave but an exceptional assurance.

105. Assuming as the claimant stated that it amounted to an extension of leave, and that the conditions remained the same as in the original Permit, there was a restriction on his ability to work of 20 hours as a maximum during term time. He appears to have exceeded that with the respondent on various occasions, on the documents we saw. He said that he thought that the maximum did not apply, but there was no basis in that as we could see it from the documents or in the evidence as a whole. It appeared to us that it might have been more in the nature of wishful thinking given his obvious strong desire to remain in the UK, but without full documentation and detail we could not reach a concluded view on that matter. We were however concerned that the desire to remain in the UK and work the hours he wished to may have influenced the reliability of the evidence he gave on the issue of the right to work, proof of that, and the extent of conditions which applied to it, as well as over what he claimed was a comment at the appeal hearing as we shall come to.

106. Secondly he made allegations against Mr Stebbing in particular, which he (Mr Stebbing) denied. We considered that Mr Stebbing gave clear and convincing evidence. He obviously sought to help the claimant, both before the termination and at the point of it, and we accepted his evidence that not only had he not acted in an aggressive manner towards the claimant as alleged but that to the contrary he had encouraged the claimant to raise the issue of the right to work with the Home Office and done so out of genuine desire to help. The tone of Mr Stebbing's message to report the meeting that day was not that of someone who had been aggressive in our view, for example it referred to the claimant's conduct in a manner that in effect complimented him. The same message of the possibility of the claimant contacting the Home Office about the position was given in the letter of dismissal, with a link to follow. It was, or ought to have been, clear that that is what the claimant could have done. As we shall come to, the respondent could not resolve this problem for him. They did however seek to assist him to the extent that they thought that they could. The claimant's argument that they should have done more is understandable from his perspective, but it appears to us that in reality the respondent could not ignore the ECS Notice given its terms and the circumstances.

107. Thirdly, the claimant's allegations changed from the Claim Form to his oral evidence which was that he had handed Mr Stebbing his badge, not that Mr Stebbing had taken it from him. That is a significant change in our view.

108. Fourthly there was some inconsistency in his evidence. As one example, he said initially that the minute of the appeal hearing was reasonably accurate, but latterly claimed that a part of it which recorded that he had accepted that there had not been evidence of discrimination was wrong and that he had in fact made comments about matters (not the same as those he had pled). Mr Skeldon did not accept that, and stated that had the issue been raised by the claimant as he had suggested one of the Panel members would have addressed it directly. He did not recall that happening, and we accepted that evidence. The claimant also alleged that the Panel chairman had said that the claimant did have the right to work at the appeal hearing. That was not in the minute, Mr Skeldon did not recall any such remark and he also noted that that was contrary to the position

set out in the letter of outcome of that appeal. We considered it likely that Mr Skeldon was right in relation to this, and that the claimant's evidence as to what had been said was not reliable.

109. The claimant's evidence in relation to the application for review in March 2023 did not, in our view, accord with the terms of the document itself, which he had authored. There was an inconsistency between the written record and his oral evidence which we did not consider he explained. The claimant's documents also included an application for strike pay from his union in September 2023, in which he gave a daily rate for pay, but at a time when he was not working.

110. These comments must however be set in context. Firstly the respondent required to have checked the right to work when initially employing him. It accepts now that it did not do so adequately. That was its failure. That the claimant then considered that the respondent accepted he had the right to work is understandable, even if that is at best an incomplete view of the matter. The respondent's view of right to work is not determinative. It is the view of the Home Office that is, subject to any later litigation.

111. Related to that however is that although the ECS was in the terms set out, the Home Office in its letter of 17 November 2023 appears to accept that it was not accurate, and that the claimant did in July 2023 have the right to work in the UK. There is not a complete documentation trail with regard to that issue, or the extent of the right as to any limits such as hours of work, which we comment on further below. The basic point however is that on the face of it the claimant had been correct when stating on the date of termination and later that he did have the right to work contrary to the terms of the Notice. That does not mean that his claim of direct discrimination succeeds, as we address further below, but the change of position of the Home Office is a matter to take account of in the consideration of what is before us.

112. Secondly, the contractual terms proposed latterly were not easy to follow, and it is not surprising that the claimant asked questions about them. The offer of contract sent to him on 2 June 2023 had a provision for remuneration which was not what was intended, as it had nothing as to the hourly rate or the overtime rates, although the existing arrangements

were intended to continue unchanged. There were discussions on the precise details including job title that were not resolved by the time of the termination. It was also surprising to us that the second contract did not recognise continuous employment from the first, but that was not an issue before us specifically.

113. Thirdly the evidence as to who it was who decided to dismiss the claimant was not completely clear. It might have been Ms Chapman, who wrote the dismissal letter, but she did not give evidence before us. She has left the respondent. Others who were referred to as being involved in the discussion being Ms Strachan and Ms Amber and who do remain employed by the respondent did not do so either. Not always did Mr Skeldon know the answers to questions, and he accepted that he did not know who had made the decision to dismiss exactly, but we accepted his evidence as to what Ms Chapman, Ms Strachan and Ms Amber had told him with regard to the dismissal on his return to work on 31 July 2023, which although hearsay is admissible as a matter of the civil law of evidence, and Rule 41 itself, and in the circumstances we accepted as being accurate. We noted that he had presented the first respondent's case at the appeal hearing as she had left the first respondent's employment by then.

114. Overall we considered that the respondent's witnesses who did appear gave clear and straightforward evidence. We considered that they were credible and reliable witnesses. Mr Stebbing we considered was clear and convincing in his evidence as already stated. Mr Farrell explained that he identifies as a black British person, that he did not use the term "stranger" as alleged, and would not do so. He explained his own experience as the recipient of racist language, and we accepted his evidence. Mr Skeldon gave clear answers where he could, and was candid where he could not. He was not certain whether Ms Chapman or Ms Strachan, or them jointly with Ms Amber, had taken the decision to terminate the contract. What we did consider clear however was that the reason for it as spoken to in the oral evidence of Mr Stebbing and Mr Skeldon and from the letter of termination written by Ms Chapman, as well as the position from the appeal hearing, confirmed in the letter of decision, was that it was only the ECS being negative that resulted in dismissal, and that had that been

remedied, with the Home Office confirming the right to work, either the dismissal would not have taken place or his appeal would have been allowed.

115. It is also now conceded by the respondent that they were in breach of contract in terminating the contract without notice, or a payment in lieu. That is a factor to consider with all the other evidence.

Discussion

116. The Tribunal reached an unanimous decision. It dealt with each of the issues identified above as follows:

Did the respondent directly discriminate against the claimant because of his race contrary to section 13 of the Equality Act 2010?

117. The first question is whether or not the claimant has established a *prima facie* case such as leads to the burden of proof shifting to the first respondent. That focussed initially on the dismissal, but having regard to the other aspects relied upon. We did not consider that the claimant had established a *prima facie* case. As the authorities make clear, more is needed than simply something regarded as unreasonable and the fact of a protected characteristic.

118. The first allegation was as to not having PPE, but we accepted Mr Stebbing's evidence firstly that when the claimant required a fluorescent jacket it was provided, and secondly that the claimant had been offered boots but said that he had his own. There was in any event nothing beyond the fact of the claimant's race that could mean that the conduct was because of race. It was also a matter outwith the period of timebar, and there was no basis we could find for a just and equitable extension.

119. The second allegation was in relation to a comment allegedly made by Mr Farrell. We preferred his evidence to that of the claimant in that regard, not only from that evidence but also the evidence more widely. Mr Farrell is black. He said that the word "stranger" was not one he would or did use. The claimant's evidence about alarm codes was contradicted by Mr Stebbing who explained convincingly that they were given after training

to those in different job categories than the claimant, and taking account of the comments above as to reliability we concluded that the claimant had not proved that the comment had been made. It did not appear to us from the evidence that we heard that any complaint about it had been made at the time.

120. The third allegation was that the claimant was given disproportionately more outside work. We accepted Mr Stebbing's evidence that he had offered the extra parking warden duties to the claimant, who could have accepted or not, but accepted it stating that he wished the further hours it involved. That is in general terms supported by emails sent on a weekly basis by Mr Stebbing with proposals for hours in the forthcoming week, which the claimant could accept or propose changes to. On some occasions the claimant asked for changes, which were agreed. That did not seem to us to be indicative of someone being required to do work that they did not think was appropriately given or distributed. Nothing was said to challenge it at the time from the evidence before us. We did not consider that this allegation had been proved, and in any event there was no evidence as to the reason for the work outside, if required rather than offered, being because of the claimant's race. It was not therefore necessary to address comparators, but we noted that none of those proposed by the claimant met the statutory definition.

121. The fourth allegation was of lower pay than two others, Mr Farrell and Ms Gaynor Wemyss, but they were Campus Security Officers, in a different role and with different remuneration arrangements with very different shift patterns as well as higher levels of hours of work. They were not comparators in our view because of those material differences, which meant that they did not meet the statutory definition. In any event, there was no evidence that the claimant's pay was different to theirs because of his race.

122. The fifth allegation is the dismissal itself. The claimant's argument was that the respondent knew that he challenged the Home Office position, and should in effect have accepted that, as well as following up on the email suggestion of asking for a new ECS. He also argued that the appeal

panel accepted that he had the right to work and the implication was that he considered that they should have allowed his appeal.

123. We considered that it was clear from all the evidence, including that from Mr Stebbing as well as from Mr Skeldon, that the sole reason for the decision was the terms of the ECS. It simply stated that the claimant could not be employed, or continue to be so. The respondent thought that it could not act otherwise than on that basis, and could not act contrary to its terms. That was also the view of the appeal panel. The dispute was not with the respondent in reality, but with the Home Office. It was the Home Office which decided the question of the right to work in the UK, not the respondent. It was the Home Office which issued the ECS Notice.

124. What the claimant did not do was to challenge it with the Home Office there and then, as had been suggested, on the belief that it was for the respondent to do. Whilst that was his genuine belief, we consider it simply wrong. The issue of the right to work was one for him. It was his right to work that was involved, with any relevant conditions attached. It was for him to address where there was a dispute about it with the Home Office. The respondent could not resolve that issue, only the Home Office could do so, and for that he required to engage directly with them (as he later did successfully). That the Home Office therefore later changed its position does not assist us in determining why the decision to dismiss was taken at the time it was.

125. It was we considered also relevant that the claimant had not provided the respondent with all the documents that he could have done, or any share code as he had been asked to do. Ms Amber told Mr Skeldon that although she discussed matters with him for about an hour on 18 July 2023 she was not persuaded that he did have the right to work in the UK. Whilst therefore the claimant believed that he did have the right to do so, and later was established to be correct in that, at the time not only the Home Office considered that he did not, but Ms Amber as well, rightly or wrongly.

126. We were concerned that Ms Strachan appears to have decided not to act on the recommendation of a second ECS made by the Home Office, albeit for reasons related to a statutory penalty, on the basis that it would be addressed at the appeal, but then not told anyone involved in the appeal.

She did not give evidence before us. We required to consider that aspect accordingly.

127. Even if a second ECS had been applied for shortly after the dismissal, or after the email with the Home Office when it was raised, however, it appears to us inevitable that the same outcome of a finding that there was no right to work in the UK would at each of those stages have resulted. At that point the Home Office did not appear to know that they had lost the document collected on 16 February 2022, because the claimant it appears to us from the evidence we heard had not raised that with them until 1 November 2023. It is possible that he had done so earlier, and we noted that the letter to his MP about the lost document was dated about a year earlier, but we did not have the full documentation as noted above, or clear evidence on this aspect.

128. We do appreciate that issues to do with visas, rights to work, and restrictions to that, may be complex and difficult to negotiate in practice. It is at the least highly regrettable that the ECS now appears to have been issued wrongly. It is not exactly clear that the circumstances which are set out include a right to work in the UK but that appears likely, and it also appears possible that that is subject to a restriction of 20 hours per week during term time, and not the unrestricted hours that the claimant argued for. The claimant appears to have been working to an extent at least more hours than that with the claimant and the respondent had not acted on that limit as it had not carried out proper right to work checks. We did not have the evidence before us on the issue of such a restriction on the right to work, if any existed (addressed further below), and we made no specific finding as to that.

129. The claimant has the opportunity to seek restitution for the ECS certificate, which he has yet to do, through the Home Office. That is not a matter for us, as we deal solely with the claims made before us, save in relation to mitigation which we refer to below.

130. Even if there had been a *prima facie* case we consider that the respondent has proved that the sole reason for the dismissal was the ECS. Race did not affect it in any way whatsoever. We were satisfied from the evidence given by Mr Skeldon that had the claimant been someone in the same

circumstances but of a different race they would have taken the same action. Simply by way of example, we were satisfied from his evidence that had the person in that situation been a white South African, in respect of whom there had been a negative ECS in equivalent terms to that issued in respect of the claimant, and in the same circumstances as the claimant, that person would have been dismissed summarily as well. In submission the respondents gave a different example of a white American person, and the same principle applies in our view. On that basis the fifth allegation is not upheld

131. The last allegation was that Mr Stebbing had taken his identity card or "badge" from him, later amended to acting in an aggressive way when asking for it. For the reasons given above we did not accept that that is what had happened. We preferred Mr Stebbing's evidence having regard to all that was before us. We did not consider that Mr Stebbing had acted aggressively, and in any event did not consider that any action was because of the claimant's race in any way at all. Mr Stebbing had been seeking to assist the claimant throughout, including on the day of the dismissal by suggesting that he raise matters with the Home Office, which was good advice.

132. We have therefore answered the first issue in the negative.

Did the respondent harass the claimant by subjecting him to unwanted conduct related to his race contrary to section 26 of the Equality Act 2010?

133. For the reasons stated above we answer this in the negative as well. The first allegation was of the comment said to have been made by Mr Farrell as to the claimant being a stranger. We did not find that that had taken place. We preferred Mr Farrell's evidence to that of the claimant. The second was in relation to the meeting with Mr Stebbing on 18 July 2023 and his allegedly being aggressive when asking for the badge back. We did not find that that had taken place in the sense that there had been any aggression. We preferred Mr Stebbing's evidence for the reasons given above including the change of position as to how the event had taken place from the pled case to the claimant's oral evidence. In any event, if the claimant had such a perception of aggression it was not reasonable to do so given all the circumstances in our view, such as not to fall within

section 26 given all the evidence we heard. Finally the actions of Mr Stebbing were not related to the claimant's race in any way, but simply were a consequence of the decision taken to terminate the employment summarily because of the ESC. This claim therefore fails.

Did the respondent terminate their contract with the claimant in breach of contract?

134. This issue is now accepted by the respondent, at least in relation to notice, and is answered in the affirmative. There were arguments made in relation to overtime, union dues and student loans which could be breach of contract and are addressed below. In so far as they might be breach of contract our finding is that they are not, on the basis of the evidence before us, for the same reasons as given below.

Did the respondent make any unauthorised deduction from the wages due to the claimant under section 13 of the Employment Rights Act 1996.

135. The claimant alleged initially that he had not been paid overtime, but in evidence accepted that he had and that his argument was part of the claim for future losses. It did not appear to us that any question of unpaid overtime therefore arose. He also alleged that union dues had been deducted improperly, but firstly there was a form he signed to authorise that before us such that we did not consider that argument could succeed, and secondly his argument in evidence appeared to be that too little on occasion had been deducted. We did not consider that this was a matter that was established, even if it had been pled.

136. The other matter was the student loan amounts. In his evidence his position latterly appeared to be that as the former P45 from his last employer referred to that the respondent did have to deduct these amounts. Even if therefore this had been pled, and there had been fair notice, as to which we had reserved the position, we considered that it was not established on the facts that the deductions were in breach of sections 13 and 14. If the claimant never had a student loan to repay, then as that is a matter administered by His Majesty's Revenue and Customs, as to which there was a Guidance document in the papers before us, the

claimant is able to take that up with them, but we do not consider it to be within our jurisdiction to address.

Are any matters that occurred prior to 18 April 2023 outwith the jurisdiction of the Tribunal under section 123 of the 2010 Act?

137. No issue now arises in this regard save that of the PPE, which is addressed above.

If any claim is successful to what remedy is the claimant entitled, and in that regard:

(i) What award is appropriate for injury to feelings?

(ii) What losses has he or will he suffer?

(iii) Did he mitigate his loss?

(iv) What loss did he suffer in relation to the breach of contract?

(v) What were the wages not paid to him?

138. The only claim that remains is that for breach of contract, such that only items (iii) and (iv) are relevant. The respondent did not argue either that the claimant had been in material breach of contract entitling their rescission of the contract or that the contract had been frustrated by the Notice being issued. It appeared to us that in such circumstances we required to consider the losses that occurred during the period of notice on the basis that the respondent accepts that it had a contractual duty to have given that notice, or to have paid the sums that would have been paid during the notice period alternatively.

139. The respondent sought to argue mitigation, but we did not consider that that had been established by them, given all the circumstances. There are two aspects. The first is the restitution possibility, as referenced in the letter of 17 November 2023. That came however months after the end of the notice period, and we did not consider that the claimant required to have found out about that, raised the issue, and made that claim. We do not know what the result of any claim might be. The documents indicate that an application for restitution can be made, but whether or not it would succeed and in what amount if so is we consider not clear. The respondent argued that he ought to have raised the issue of the ECS with the Home Office direct. It is something that he might well have done, in our view, and

it was not obvious to us why he had not when the respondent had told him specifically both orally by Mr Spedding and in writing by Ms Chapman, both on 18 July 2023, that he should or could. We did not however consider it likely that even if he had very quickly raised that issue with the Home Office the error would have been identified, and remedied, within the two month period of the notice. We also accept that he felt substantially upset by the dismissal, which had come without prior warning, and genuinely believed that he had the right to work, such that the issue would be remedied by his appeal. That appeal was intimated on the day of the termination of contract. Although his view of what the first respondent should or could do was not exactly right as already addressed, his standpoint was not entirely unreasonable as the first respondent had, he thought, earlier accepted that he had the right to work when first employing him. As the first respondent had the onus of proof on this and it was not discharged we did not accept that argument.

140. The second aspect was in relation to seeking alternative employment. The fact was that the ECS stated that the claimant did not have the right to work, that would have been the position of the Home Office had any prospective employer made a similar enquiry and no employer would have employed the claimant given that position. It was not realistic we considered to expect the claimant to seek employment at that stage, which is during the notice period, in such a situation. We considered that on the basis of the evidence before us the respondent had not discharged the onus on it of establishing a failure to mitigate loss.

141. We therefore required to consider the loss for a period of two months. We did so by considering the net pay prior to the dismissal. We took a broad approach as the claimant was in a new position, that of Student Ambassador but with discussions ongoing about that title, with hours that were to be agreed and therefore variable. The first respondent argued that the period 1 – 18 July 2023 should be taken for that purpose, but we did not consider that to be appropriate. The first respondent stated that the remuneration provisions were intended to be unchanged in the new contract. The first respondent also argued that section 89 of the Employment Rights Act 1996 applied for the calculation. That is however a provision that follows section 86 on the minimum period of notice, and is

how that I to be calculated. The contract provided for two months' notice, and it is that period of loss that is considered, in what is a claim of breach of contract independent of these statutory provisions as to a minimum period. The basic principle is that the loss is that which the employee would have earned to the point when the contract could have lawfully been terminated: ***Cameron v Fletcher 1872 10 M 301.*** There is no single measure, and it can be considered by checking different measures against each other: ***Prudential Assurance Co Ltd v James Grant & Co (West) Limited 1982 SLT 423.***

142. The first respondent's calculations were on the basis of timesheets, converting hours to gross pay, estimating from that what net pay would have been, but not including any element of pension loss. We did not consider that that method produced the correct amount. It appeared to us that it was appropriate to use the payslips for the period April to July 2023, a period of about four months, take an average of those to reach a monthly figure, and then apply that to the two months period of loss.

143. We did consider whether we required to, or ought more generally to, limit the loss to the equivalent of 20 hours work per week, as this may be the extent of the right to work. We have concluded, not without difficulty, that we should not. As stated above we did not have full documentation on that point, and were not able to reach a concluded view. The first respondent had not carried out the appropriate right to work check when employing the claimant, and had not limited the work carried out to 20 hours per week. It appears to us very likely that if it had decided to pay in lieu of notice it would not have sought to limit the amount to that extent. We are not in a position to determine this issue fully as we have incomplete documentation. We therefore do not limit the award in this manner. If there was a limit of 20 hours per week that is for others to address.

144. Taking the average net pay for the said period and adding in the pension contributions both employee and employer from the figures set out above for that period produced a monthly average for net pay and including both employee and employer pension contributions totalling £2,383.29. For two months the figure is £4,766.58. That is the amount that we award.

Conclusion

145. All the claims are dismissed save for that as to breach of contract, in respect of which we award the sum just stated.

146. Whilst the cases on damages for breach of contract were not raised in submission, the Tribunal considered that it was appropriate under the overriding objective to issue this Judgment without requiring further submissions on the point before doing so. If however the respondent considers that it has suffered prejudice thereby it may seek a reconsideration of the Judgment under Rule 71 making its submissions on that point and referring to any further authority it wishes to.

Employment Judge: **A Kemp**
Date of Judgment: **23 July 2024**
Entered in register: **23 July 2024**
and copied to parties