Neutral Citation Number: [2020] EWHC 3412 (QB)

Case No: QA-2020-000216

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2020

Before :

MRS JUSTICE EADY

- -

Between :

MR CETIN AVSAR	**Claimant/ Appellant**
- and –	
WILSON JAMES LTD	**Defendant/ Respondent**

- -
- -

Mr Changez Khan, counsel (instructed by **Whitechapel Advice Service Ltd**) for the **Claimant/Appellant**
Mr Gethin Thomas, counsel (instructed by **Trowers & Hamlins LLP**) for the **Defendant/Respondent**

Hearing date: 10 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am on Tuesday 15 December 2020.

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MRS JUSTICE EADY DBE

The Honourable Mrs Justice Eady:

Introduction

1. The Claimant is employed by the Defendant as a security guard. He is currently suspended due to what is said to be a concern that his views on outsourcing may give rise to a conflict of interest in his employment by the Defendant, which provides contracted out security services. The Claimant contends that the Defendant has acted in actual and anticipatory breach of contract and seeks an urgent interim injunction to stop any continuing breach.

2. The Claimant's application was heard at the Central London County Court, on 24 November 2020, when Her Honour Judge Baucher refused to grant the relief sought. The Claimant now applies for permission to appeal against Judge Baucher's decision.

3. The application for permission to appeal initially came before the Honourable Mrs Justice Foster on 25 November 2020, but was then adjourned to be listed before me on 10 December 2020, with the direction that the hearing of the appeal would follow if permission was granted. It was further directed that an internal hearing relating to the Claimant's employment would not take place until the determination of this application or further Order.

4. In pursuing his application, the Claimant asks that I set aside the decision of the lower Court and grant an interim injunction requiring that the Defendant lift his current suspension and be restrained from pursuing detrimental action against him, whether in the guise of a probation or disciplinary process, in relation to the matters set out in the Defendant's letter of 10 November 2020.

5. I have heard submissions on all points from both sides, and taken into account the skeleton arguments prepared by counsel in advance of the hearing; I am grateful to the legal teams for their assistance. I have also had regard to the documentation filed on behalf of the Claimant and the Defendant, which includes statements from the Claimant and Mr Elia, head organiser of the United Voices of the World trade union ("the UVW") and from Mr Channer, Chief of Staff for the Defendant.

6. Given the on-going need to reduce transmission of Covid-19, and with the agreement of the parties and it being an effective means of ensuring justice in this matter, this hearing has taken place remotely by Microsoft Teams. These have, however, remained public proceedings, and the hearing and details for access were published in the cause list, thus ensuring the principle of open justice.

The Factual Background

The Parties

7. The Claimant works as a security guard. In his statement, the Claimant explains that, since leaving education in 1988, he has been in continuous employment (save for a short period after he was made redundant in early 2018) and has never been dismissed for misconduct and has never claimed unemployment benefits. He says that he lives with his teenage son, who is financially dependent upon him, and that they would

suffer significantly if he were to lose his employment, not least as he fears he would find it difficult to obtain another job if now dismissed by the Defendant.

8. The Claimant is a member of the UVW. From the statement of Mr Elia, I understand that the UVW is an independent trade union with a number of members who are cleaners and security guards employed by contractors to work for various client institutions. In his previous employment, the Claimant took an active part in a campaign organised by the UVW relating to the outsourcing of security guards and he has joined with others in pursuing Employment Tribunal ("ET") proceedings against the client, complaining that the disparity of terms as between in-house and outsourced workers amounts to indirect race discrimination. I am told that those proceedings are on-going and there is a preliminary hearing listed for January 2021.

9. The Defendant is a company within the Wilson James Group ("the Group"), which specialises in the provision of security, aviation and construction logistics services. In his statement, Mr Channer explains that the Group employs some 5,400 employees, based primarily in the UK. The Francis Crick Institute is a client of the Defendant and Mr Channer states that there are particular sensitivities associated with that client as the activities carried out on-site are of a sensitive and confidential nature. Although the UVW is not recognised by the Defendant, I am told that it has recognition agreements with other trade unions and Mr Channer says that the Defendant is fully supportive of its employees being members of trade unions and taking part in lawful trade union activities.

The Defendant's Offer of Employment to the Claimant

10. In August 2020, the Claimant applied for a position with the Defendant as a security officer. After an interview, on 19 August 2020, the Defendant emailed the Claimant with an initial offer of employment at the Francis Crick Institute, which was stated to be subject to satisfactory completion of standard employment checks and security vetting. Mr Channer explains that this security vetting complied with BS7858 (as set by the British Standards Institute for those involved in the security sector), which requires employment and credit checks going back five years.

11. On 11 September 2020, an email was sent to the Claimant by Agenda Screening Services, pre-employment screening partner of the Francis Crick Institute, informing the Claimant that his pre-employment screening had been completed, saying that "*The Crick will make direct contact should anything further be required*". On 28 September 2020, the security operations manager of the Francis Crick Institute emailed the Claimant to confirm he had cleared the Defendant's security screening and his offer of employment was now formalised; he was invited to resign his previous employment so he could start his new post. On 30 September 2020, the Claimant gave two weeks' notice of resignation from his previous employment and, on 19 October 2020, he started with the Defendant, working as a security officer at the Francis Crick Institute.

The Contractual Position

12. As is common ground, the Claimant's employment was subject (relevantly) to the following express terms and conditions (as set out in the Defendant's offer letter of 19 August 2020):

"3. Place of Work

3.1 Your place of work will be … The Francis Crick Institute ….

3.2 The Company reserves the right to change your location of work if the need should arise (including where a client has asked for your removal). All reasonable efforts will be made by the Company to place you at locations or Site Assignments within reasonable travelling distance of your home or place of residence and your current place of work.

3.3 Your employment at any site location always remains subject to client approval. Should the client request your removal from site for any reason, the Company will take whatever action is appropriate in the circumstances. Although we will take all possible measures to try to avoid it, including looking for redeployment to another site, if we cannot find a suitable alternative role for you this may lead to your dismissal.
…

11. Probation period

11.1 Your appointment is subject to a probation period of up to 3 months, during which time you will be required to demonstrate to the Company's satisfaction, your suitability for the position in which you are employed.

11.2 The organisation reserves the right to extend this period as appropriate.

11.3 You will be notified in writing once you have successfully passed your probation period.

12. Notice to terminate

12.1 This employment may be terminated by you or the Company giving notice to the other party as follows: [one week's notice after four weeks of employment]

…

12.3 The organisation reserves the right to pay you a payment equal to the remuneration due for the relevant period of notice rather than requiring you to work your notice period.

12.4 The organisation reserves the right to require you not to attend the workplace during the notice period. The contract of employment will remain in force during this period and you are not permitted to take up employment elsewhere during this period.

> 12.5 Nothing in this agreement prevents the Company from terminating your employment either summarily or otherwise in the event of any serious breach by you of the terms of your employment or in the event of any act or acts of gross misconduct by you.
>
> …
>
> 14. Policies and Procedures
>
> 14.1 All employee policies and procedures applicable to your employment can be found on the Wilson James Intranet. They are for guidance only and do not form part of your contract of employment. …"

13. As stated by clause 11 of those terms and conditions, the Claimant's employment was subject to a probationary period. The Defendant's probation policy provides (relevantly) as follows:

> "1.0 Introduction
>
> …
>
> It is the organisation's policy to operate probationary periods for all new employees.
>
> This policy is intended to allow both the employee and the employee's Line Manager to assess objectively whether the employee is suitable for the role. The organisation believes that the use of probationary periods increases the likelihood that new employees will perform effectively in their employment.
>
> The Line Manager is responsible under this policy for ensuring that all new employees are properly supported and monitored during their probationary period. If any problems arise, the Line Manager should address these promptly.
>
> …
>
> 3.0 Procedure
>
> Extending probationary periods
>
> The organisation reserves the right to extend an employee's period of probation at its discretion.
>
> …
>
> Terms of employment during the probationary period

During the probationary period, employees will be subject to all the terms and conditions of their contracts of employment.

During probation, either party may terminate the employee's contract of employment by giving one week's notice. In the event that the organisation decides to terminate the employee's employment, their employment will come to an end immediately and the employee will receive pay in lieu of their one week's notice together with any outstanding accrued holiday pay.

…

Line managers' responsibilities

Under this policy, the Line Manager has responsibility for monitoring a new employee's performance and progress during their probationary period. The Line Manager must ensure that the employee is properly informed at the start of their employment about what is expected of them and the required job outputs or standards of performance.

Reviews during probation

The Line Manager should review and assess the employee's performance, capability and suitability for the role on at least a monthly basis during the employee's probation, and again at the end of the probationary period. …

During an employee's probation, the Line Manager should provide regular feedback to the employee about their performance and progress, should any issues arise these should be discussed with the employee as soon as possible with a view to resolving them. The Line Manager is also responsible for providing guidance and support and for identifying and arranging any necessary training or coaching.

Irregularities discovered during the probationary period

If, during an employee's probation, it is suspected or established that the employee does not have the qualifications, experience or knowledge that they claimed to have at the time of recruitment, the matter will be discussed with the employee to establish the facts. If the evidence suggests that the employee misrepresented their abilities in any way, the organisation may terminate the employment giving one week's pay in lieu of notice.

…

Termination of employment

> If an employee's performance while on probation has been unsatisfactory, despite support from the Line Manager, and it is thought unlikely that further training or support would lead to a satisfactory level of improvement, the employment will be terminated at the end of the period of probation.
>
> It is the organisation's policy to allow the employee to complete the designated period of probation rather than terminating employment before the probation has come to an end. This is to give the employee a full opportunity to come up to the required standards. If, however, there is clear evidence prior to the end of the period of probation that suggests the employee is wholly unsuitable for the role, The Line Manager should consult Employee Relations with a view to terminating the employee's contract early.
>
> Where a decision is taken to terminate employment, the employee must be interviewed and informed of the reason for the termination. The Company will write to the employee confirming the termination and the reason for it. The employee will be given an opportunity to appeal the decision."

14. It is also relevant at this stage to refer to the Defendant's disciplinary policy where, in the context of a disciplinary investigation, it is provided as follows:

> "3.2 Suspension
>
> There may be instances where suspension is necessary while investigations are carried out, this will normally be with full pay. Wilson James has the right to suspend when:
>
> - there is reasonable grounds for concern that evidence may be tampered with or destroyed
> - witnesses may be pressurised
> - there is a potential risk to the business or other employees or third parties in allowing the employee to remain at work
> - gross misconduct is suspected
>
> It should be made clear to the employee that suspension is not a form of disciplinary action or a pre-judgement of guilt. The period of suspension should not normally be for longer than 10 days and should be kept under review. …"

15. Where there is to be an investigatory meeting with the employee, the Defendant's disciplinary policy provides as follows:

> "3.1 Investigation
>
> Prior to a disciplinary hearing taking place there will usually be an investigation into the circumstances of the alleged

> misconduct. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. Should this be the case the employee should be informed at the outset and in writing, that the meeting is an investigation. …"

16. In addition to the express terms and conditions governing the Claimant's employment, the parties' relationship was also subject to the implied obligation on the part of the Defendant to not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, see *Malik v BCCI* [1998] AC 20, HL.

The Invitation to a Hearing and the Claimant's Suspension

17. On 10 November 2020, the Defendant wrote to the Claimant stating that his conduct during the probationary period of his employment "*has not reached the required standards*" and he was invited to attend a hearing on 12 November 2020 "*to discuss your probation period and your future employment*"; the letter went on to state that the following would be discussed:

> "In your most recent employment with Noonans where you were employed as a Security Officer for about 2.5yrs at St. George's University, you were leading a campaign to be taken in-house and given the same terms as all in house employees. The union you have joined and who have supported you in your campaign are United Voices of the World (UVW), who in their words '*believe that outsourcing is antiquated and discriminatory*'. You planned a 13 day strike action earlier in the year to protest on the above. Wilson James are also a contractor, which fundamentally means that there is a conflict of interest between your opinion and work with the union which lead to your protesting, and your employment with Wilson James."

18. Evidence said to support this allegation was included in the form of hyperlinks to various articles and other forms of media relating to the Claimant's involvement in the UVW's anti-outsourcing campaign at his former employer.

19. The letter further warned the Claimant:

> "You should be aware that the outcome of this hearing may be your dismissal from the Company's employment for failing your probation."

20. On 11 November 2020, the Claimant was informed that he should not present for work the following day, save to attend the meeting to which he had been invited. It was, however, confirmed that he would still be paid for the day.

21. By email of 12 November 2020, the UVW wrote to the Defendant on the Claimant's behalf, objecting to the meeting that had been called for that day. It was contended that the meeting was in fact a disciplinary hearing and the Claimant therefore had the

right to be accompanied by his chosen trade union representative. As his UVW representative was not available to attend the hearing that day, it was requested that this be postponed to 29 November 2020. The Defendant was also asked to clarify whether the Claimant had been suspended. As for the Claimant's conduct, as referenced in the Defendant's letter of 10 November 2020, the UVW said this related to activities undertaken by the Claimant "*in his previous employment in exercise of his statutory employment law rights in the UK and his human rights more broadly*", referring in particular to Articles 9 (freedom of thought, belief and religion) and 11 (freedom of assembly and association), and asserting that his conduct was protected by the Trade Union and Labour Relations (Consolidation Act 1992 ("TULRCA") and the Equality Act 2010 ("the EqA")).

22. The same day, the Defendant responded to the UVW's email, confirming that the meeting would not proceed as previously arranged as the Claimant's trade union representative was not available. Subsequently, by letter of 13 November 2020, the Defendant wrote to the Claimant to confirm that he was suspended from duties on full pay pending a re-scheduled meeting regarding his probationary period. It was further clarified that this suspension was "*a neutral act*", and was "*in no way a form of disciplinary sanction against you*". In a covering email, the Defendant also proposed a new date for what it referred to as his "*probation hearing*", of 20 November 2020.

23. By email of 13 November 2020 (copied into the Defendant), the UVW sought to contact various persons at the Francis Crick Institute seeking their intervention in the Claimant's case; it being said that this might prevent the Defendant "*from trampling over [the Claimant's] human rights …*" and "*help avert a national scandal that will inevitably bring the reputation of [the Francis Crick Institute] into disrepute …*".

24. On 16 November 2020, the Claimant emailed the Defendant asking for clarification as to why he had been suspended, saying he believed he was being victimised for "*my legitimate and lawful trade union membership and activities as well as being victimised for my protected beliefs and protected disclosures*". The Claimant stated this would make his suspension unlawful and in breach of the implied term of trust and confident in his contract of employment with the Defendant, and he would be seeking legal remedy "*in the employment tribunal and/or County Court and/or High Court*".

25. The Defendant responded to the Claimant the same day, stating that it did not consider it possible to lift his suspension, explaining:

> "Given the nature of the concerns about your suitability for employment with Wilson James, it is appropriate for you to be temporarily suspended on full pay while we consider those concerns. These issues will be discussed at the rearranged probation hearing on Friday 20 November 2020. This is in accordance with our probation policy and your contract of employment. Therefore we do not agree that there has been any breach of your contract of employment, or that these are matters for a separate grievance. The probation hearing is the appropriate forum to discuss these issues and pending that hearing you remain an employee of Wilson James and subject to your contract of employment."

Pre-Action Correspondence

26. By email of 17 November 2020, the Whitechapel Advice Service wrote to the Defendant explaining that they were now acting for the Claimant and enclosing a letter before action. The Defendant responded by its Solicitors, Trowers & Hamlins LLP, declining to give any undertakings and confirming that a re-arranged probation hearing would take place on 25 November 2020.

27. Further correspondence passed between the parties' representatives and an application for an urgent interim injunction was filed with the Central London County Court on 18 November 2020. It was heard by Judge Baucher on 24 November 2020.

The County Court Decision

28. As Judge Baucher observed, the approach she was bound to follow in considering the Claimant's application for interim relies was that laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396: (1) was there a serious question to be tried? If so, (2) would damages provide an adequate remedy? And, to the extent that the answer to (2) might be doubtful, (3) where does the balance of convenience lie?

29. Referring to the case of *Jahangiri v St George University Hospital Trust* [2018] EWHC 2278, on the question whether there was a serious issue to be tried, Judge Baucher observed that the parties were agreed: suspension without reasonable grounds might amount to a breach of the implied term of trust and confidence. She then continued:

> "15. … When the effect of the injunction is to require reinstatement, the court should have regard to the need to resolve factual disputes and the decision was for the employer to make. The decision to suspend must be irrational – so the court should give more regard to the merits than in a traditional serious issue to be tried case. Suspensions which are unlawful may not be able to be healed by an award of damages."

30. Having regard to the statement of Mr Channer, Judge Baucher concluded that, given the need for sensitivity because of the particular client in question, a rational basis for the Defendant's decision had been provided. Judge Baucher also referred to the Defendant's letter of 10 November 2020; she concluded that the Defendant had not threatened to dismiss the Claimant (which it could have done on one week's notice) but had invited him to a probation hearing, which was not in breach of contract or the Defendant's procedures. In the circumstances, she was satisfied that there was no serious issue to be tried; there was no real prospect that the Claimant would obtain a final injunction.

31. Even if that was not correct, Judge Baucher was satisfied that damages would provide the Claimant with an adequate remedy: he had suffered no loss as a result of the suspension and any loss that might subsequently arise, following the outcome of the probation hearing, could be compensated in damages. Moreover, a contract of employment was of personal service and an injunction (which could give rise to criminal sanctions if breached) would cut across the freely agreed contract; to refuse

the injunction would permit the contractual proceedings to take their natural course and thus preserve the status quo.

The Grounds of Appeal and the Parties' Submissions

32. By Ground 1, the Claimant complains that Judge Baucher erred in concluding that there was no serious issue to be tried when breaches of the implied term of trust and confidence arose from (i) his suspension and (ii) the summons to a probation hearing under threat of termination. Both acts were without reasonable and proper cause because they were predicated on unlawful grounds and Judge Baucher further erred in treating the Claimant's opinion on outsourcing as being separable from his union activities when the two were inextricably linked (see *Morris v Metrolink* [2018] EWCA Civ 1358). In this regard, the Claimant relies on the reasoning provided in the letter of 10 November 2020, which referred to his "*opinion and work with the union, which led to your protesting*". The Claimant points out that his "*protesting*" had included his complaint that outsourcing at his previous workplace amounted to race discrimination; to take action against him on that basis amounted to unlawful victimisation (contrary to section 27 EqA). The evidence relied on by the Defendant also referred to his trade union activities, which gave rise to an unlawful detriment (contrary to section 146 TULRCA). Such unlawful grounds could not, the Claimant contends, qualify as a "reasonable and proper cause", applying the *Malik* test (and see *Nottinghamshire CC v Meikle* [2005] ICR 1; *Greenhof v Barnsley MBC* [2006] ILR 98; and *Shaw v CCL Ltd* [2008] IRLR 284).

33. The Claimant contends that Judge Baucher erred in her approach to this question: (1) by failing to engage correctly with the legal issue relating to the breach of the implied term; (2) by holding that the Claimant's suspension had to be "*irrational*", when the question was whether it was without reasonable or proper cause; (3) by adopting a subjective, rather than an objective, approach to the question of breach, and accepting the subjective intention of the Defendant (as expressed by Mr Channer) as determinative; and (4) by separating out the Claimant's opinion from his trade union activity, when the evidence relied on by the Defendant related entirely to trade union activities.

34. The Defendant submits that Judge Baucher was correct to apply the test of irrationality, per *Jahangiri* para 57. This was a case involving the exercise of the employer's contractual discretion as to whether to discipline and/or suspend an employee; that involved an exercise of judgement and, to succeed in a claim of breach of contract, the Claimant would have to demonstrate that the decision was unreasonable or irrational. The Defendant was exercising a contractual power afforded under its disciplinary and probation policies and the Judge had rightly stated that the Claimant had a high hurdle to satisfy to show that power was being exercised irrationally. To the extent that the Judge had not specifically identified the source of the Defendant's contractual entitlement, that had been because it had not been put in issue by the Claimant.

35. It was also wrong to say that Judge Baucher had applied a subjective test: she had expressly stated that she was "*looking at matters objectively*"; that approach was not undermined by the fact that the Judge had accepted the Defendant's evidence as to the issue of sensitivity given the Claimant's views on outsourcing. In coming to that conclusion, Judge Baucher had taken account of the Claimant's arguments but accepted that the purpose of the meeting related to the potential conflict of interest identified, not the Claimant's trade activities. That was a permissible view: as was allowed in *Morris v Metrolink* (see para 19), there can be cases where "*it can fairly be said that it is not the trade union activities themselves which are the (principal) reason for the dismissal but some feature of them which is genuinely separable*."

36. By Ground 2, the Claimant submits that Judge Baucher erred in law in concluding that damages would provide him with an adequate remedy, thereby failing to pay any regard to the non-financial aspects of being excluded from work. By focussing narrowly on the question of financial loss, Judge Baucher failed to properly consider whether damages were an adequate remedy in *this* case. Suspension can cause stress and loss of self-esteem and identity; as acknowledged in the case-law, damages may not provide an adequate remedy where an employee is suspended in breach of contract (*Jahangiri* at para 57(iii)). In this case, damages would not address the wider issue raised: that the Defendant's actions would have the effect of stifling the exercise by the Claimant of his right to engage in trade union activities; he was being forced to choose between his employment and the continuation of his campaigning. Moreover, any contractual damages for wrongful termination of contract would be limited to a week's notice pay, which was inadequate given the Claimant's financial precarity.

37. For the Defendant, it is said that Judge Baucher had due regard to the Claimant's arguments, and did not err in rejecting them. Specifically, the Judge had been addressed on the issue of delays in ET claims, and the Claimant's particular financial difficulties, but was entitled to conclude that the primary remedy for a breach of contract, leading to termination of employment, was compensation and that any losses suffered by the Claimant - if he was dismissed and subsequently successful in his claim - could be readily quantified by the Court, which was familiar with the task of quantifying damage (e.g.) to reputation or for loss of amenity (if such claims were established). As for the suggestion that the Claimant was being put to an election between his trade union activities or his employment, this was not a point taken below. In any event, there was no dichotomy of choice: he had been invited to the meeting simply to understand whether or not his views did give rise to difficulties; by seeking to stop that conversation between employer and employee, the application for an injunction was premature.

38. Finally, by Ground 3, the Claimant contends that Judge Baucher erred in her approach to the balance of convenience, wrongly concluding that granting an injunction would "*cut across the contract*" when it would not: the Defendant would not be prevented from following a *bona fide* probation process, only from using that process as a means by which to victimise the Claimant.

39. The Defendant submits that Judge Baucher had not erred by first considering what the contract entitled the Defendant to do and to conclude that an injunction would cut across its ability to exercise its legitimate contractual rights, effectively ring-fencing the Claimant. Although the draft terms suggested the injunction would apply to the matters raised by the letter of 10 November 2020, there was sufficient uncertainty to

mean that the Defendant would be constrained in how it could treat the Claimant during his probation period; that could not be right given this was a contract of personal service.

Discussion and Conclusions

Permission to Appeal: My Approach

40. In considering whether to grant permission, the question for me is whether the appeal would have a real prospect of success, or there is some other compelling reason for it to be heard (CPR 52.6). Decisions as to whether or not to grant interim relief are discretionary and inevitably highly case sensitive; it would not be sufficient for me to grant permission to appeal merely because I took a different view of the case to Judge Baucher; the question is whether she erred in law or reached a decision that was not reasonably open to her.

41. Judge Baucher was required to apply the three-stage test laid down in *American Cyanamid*: (1) is there a serious issue to be tried? If yes, (2) would damages be an adequate remedy? If that was open to question, (3) does the balance of convenience favour granting an injunction? As the grounds of appeal seek to challenge the Judge's decision on each of these questions, I will address each in turn.

Serious Issue to be Tried

42. It is important to bear in mind that, when applying this test, the Court must not lose sight of the specific rights which the interim application seeks to protect: it must focus on the actual issue which is said to be serious enough to be tried. Here, the claim brought is for breach of contract, the breach being said to be of the implied term of mutual trust and confidence. It is common ground that such a term is to be implied in any employment contract; it is the irreducible and necessary bedrock of an employment relationship.

43. Judge Baucher identified the breach of contract in this case as "*the suspension and consideration of matters at the probation hearing*"; she took the view that:

> "… the Claimant would have to persuade me that the suspension was irrational, as per *Jahangiri*. The Court must have proper regard to the decision requiring the balancing of several different factors, and it was for the employer to make."

44. The Claimant contends Judge Baucher thereby adopted the wrong approach: this was not a case where the complaint related to an irrational exercise of a contractual discretion, the Claimant was saying that the Defendant had acted without reasonable and proper cause and had thereby breached the term of mutual trust and confidence (applying the test laid down in *Malik*).

45. The distinction set out in the case-law, between the different approaches to be taken, was helpfully summarised by Linden J in *Smo v Hywel DDA University Health Board* [2020] EWHC 727 (QB), at para 205, as follows:

> "In *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4, [2018] ICR 1681 the Court of Appeal drew a distinction between cases where the employer is exercising an express or implied discretionary power, and cases where the concern is simply with the conduct of the employer. In the former category of case, the discretion is required to be exercised in accordance with the duty of mutual trust and confidence but the test is as to the rationality of the employer's exercise of its contractual discretion, as was held in *Braganza v BP Shipping Ltd* [2015] 4 All ER 639, [2015] ICR 449 UKSC. In cases in the latter category the test is that formulated by Browne Wilkinson J (as he then was) in *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, [1981] ICR 666 EAT as further explained by the House of Lords in *Malik v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20. Browne Wilkinson J said this:
>
> > 'there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'"

46. Judge Baucher's Judgment does not identify the basis of any express or implied contractual discretionary power exercised by the Defendant in this case. In inviting the Claimant to a hearing to discuss the matters set out in the 10 November 2020 letter, the Defendant relies on its probation policy: it is referred as a probation hearing or review. The suspension of the Claimant is, however, said to be an exercise of the power provided by clause 3.2 of the Defendant's disciplinary policy, although the Defendant has never said that the Claimant is subject to any disciplinary investigation.

47. In oral submissions before me, the Defendant says that this was not an issue articulated before Judge Baucher and her reasoning reflects the way the case was argued below. I note, however, that the Claimant's case was put squarely on the basis that the Defendant's conduct (in the 10 November 2020 invitation to a probation hearing and in his suspension) amounted to a breach of the implied term as it was without reasonable and proper cause. As has been recognised in the case-law, the act of suspending an employee is likely to be sufficiently serious to amount to a potential breach of the implied duty of trust and confidence unless the employer has reasonable and proper cause for the suspension, see *Harrison v Barking, Havering and Redbridge University Hospitals NHS Trust* [2019] EWHC 3507 (QB) at para 40 (a proposition set out in *Gogay v Hertfordshire County Council* [2000] EWCA Civ 228, per Hale LJ at paras 55-58, and *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] EWCA Civ 138 per Elias LJ at para 71).

48. The error in Judge Baucher's reasoning thus arose from a failure to focus on the complaint made. That meant that the Judge asked herself the wrong question, looking to see whether the Claimant had established a serious issue to be tried arising from the Defendant's exercise of a discretionary contractual power (without actually identifying the basis of such a power), rather than the impact of its conduct on the implied term of trust and confidence.

49. Turning then to the issue raised by the complaint made in this case, the Defendant has described the Claimant's suspension as a neutral act, removing a potential risk to its business (said to arise from the Claimant's apparent disagreement with the outsourcing of services) pending a hearing to review the Claimant's probationary employment. As was observed by Sedley LJ in *Mezey v South West London and St George's Mental Health NHS Trust* [2007] EWCA Civ 106, however, suspension is not a purely neutral act: "*it changes the status quo from work to no work, and it inevitably casts a shadow over the employee's competence*". The difficulty with characterising the Claimant's suspension as a purely neutral act is further underlined in this case by the fact that he has been suspended from work by reference to a power contained within the disciplinary policy notwithstanding the fact that the Defendant has never said it is pursuing any disciplinary process against him.

50. As for the complaint relating to the threat of dismissal made in the 10 November 2020 letter, it is right to observe (as Judge Baucher did) that the Defendant has a contractual entitlement to dismiss the Claimant on giving one week's notice. The Defendant also has the right to pursue disciplinary proceedings, which may well allow that dismissal would be a potential outcome (and, in most instances, there could be no question that an employer has reasonable and proper cause to warn an employee that, when called to a hearing to discuss unsatisfactory conduct, one possible result will be the termination of their employment), but this is not how it has chosen to characterise the process it is following. As for the Defendant's probation policy, although there is a general commitment to allowing the employee to complete the designated period of probation, the policy also provides for the possibility of an early termination of the employment where "*there is clear evidence … that suggests the employee is wholly unsuitable for the role*".

51. The complaint made by the Claimant is that there can be no reasonable and proper cause to pursue the course adopted by the Defendant where the grounds relied on would amount to unlawful acts of victimisation (relating to his complaints that outsourcing at his previous employer was indirectly discriminatory because of race) or detriment (relating to his trade union activities arising from his previous employment). Applying a test of irrationality, Judge Baucher disagreed; she was satisfied that the Defendant (through the witness statement of Mr Channer) had set out a rational basis for the Defendant's decision.

52. The evidence that weighed with Judge Baucher was set out in Mr Channer's statement as follows:

> "14. The preliminary vetting process carried out by Wilson James and the Client in respect of the Claimant was satisfactory. However, during the course of the full five year vetting, we became aware that the Claimant appears to hold the view that outsourcing is antiquated and discriminatory. As a company providing a range of outsourced services, this is naturally a concern and, if true, would mean that the Claimant may not be suitable to be employed by Wilson James since he would appear to fundamentally disagree with the nature of our business, operations and services. This was a serious concern, especially because the Claimant is employed in a position of particular trust and sensitivity at the Client's site. In fact the

> Client is particularly security-conscious at the particular site where the Claimant works; the activities carried out onsite are of a sensitive and confidential nature. Consequently, we considered it appropriate to consider the apparent conflict of interest between the Claimant and Wilson James as part of the Claimant's probation.
>
> 15. For the avoidance of doubt, as a business we are fully supportive of employees being members of trade unions and undertaking trade union related activity. We have strong and constructive partnerships with a number of recognised trade unions across our business, in particular in Aviation. They are essential to the success of our business and operation. We recognise that everyone has a right to their views and opinions, and that employees and trade unions have a right to organise, campaign and carry out lawful industrial action. Wilson James supports the Claimant's right to be a member of any trade union and to be involved in their lawful activities.
>
> 16. Wilson James' concerns arise because of the potential conflict of interest that exists between it and the Claimant, not because the Claimant has taken part in trade union activities."

53. As Judge Baucher acknowledged, Mr Channer's evidence has not been tested. In asking whether the Claimant has identified a serious issue to be tried, it would be relevant to note that this was not a case where it was suggested that the Claimant made any misrepresentations in applying for this employment with the Defendant and that, notwithstanding that the evidence apparently relied on by the Defendant (as attached to the 10 November 2020 letter) appears to be readily available on the internet, before his offer of employment was confirmed, the Claimant was told that he had cleared pre-employment screening, carried out by both the Francis Crick Institute and the Defendant. I accept, however, that Judge Baucher had a discretion as to the weight to be given to these matters and I would not find that she erred in her assessment merely because she made no reference to these features of the case.

54. The more significant issue identified before Judge Baucher related to the reason given for the Defendant's expression of concern; in particular, whether the "*conflict of interest*" identified was inextricably linked to the Claimant's previous complaints of race discrimination and/or his trade union activities, such as to mean this could not amount to a reasonable and proper cause for the Defendant's conduct. This required consideration of the content of the letter of 10 November 2020, which refers to the Claimant's involvement in the campaign (including strike action) relating to outsourcing in his previous employment and then states:

> "The union you have joined and who have supported you in your campaign are … UVW, who in their words 'believe that outsourcing is antiquated and discriminatory'.
>
> You planned a 13 day strike action earlier in the year to protest on the above. Wilson James are also a contractor, which fundamentally means that there is a conflict of interest between

> your opinion and work with the union which lead to your protesting, and your employment with Wilson James."

55. Putting to one side any contrast in the language used in the letter and in Mr Channer's statement, as to whether the Defendant had reached a concluded view as to the existence of a conflict of interest, the concerns identified in the letter of 10 November 2020 are expressly stated to relate to the Claimant's trade union activities. The Defendant thus speaks of the Claimant's "*work with the union which lead to your protesting*" and the opinion which is said to give rise to the conflict of interest is clearly stated to be that of the trade union of which the Claimant is a member. There may be cases where it can fairly be said that some aspect of the employee's conduct can be separated out from what would otherwise be a trade union activity (see *Morris v Metrolink*), but there is nothing in Judge Baucher's reasoning that explains how the "*work of the union*" and the views expressed by that union can be separated from the "*conflict of interest*" which the Defendant had itself characterised as arising from precisely those matters.

56. Applying the correct test, it is clear to me that the Claimant has established that there is a serious issue to be tried as to whether the Defendant has acted in breach, or anticipatory breach, of the implied term of trust and confidence in, without reasonable and proper cause, suspending him and in inviting him to a hearing to discuss the matters set out in the letter of 10 November 2020.

Adequacy of Damages

57. As is acknowledged in the case-law, damages may not provide an adequate remedy where an employee is suspended in breach of contract (see *Jahangiri* at para 57(iii)). Judge Baucher was, however, required to consider this question on the material before her, which did not include any evidence of particular detriment to the Claimant's continued ability to work as a security officer because he had been suspended for a short period. Further, although referring to his anxiety concerning his future employment, the Claimant's witness statement did not state that he was suffering stress, loss of self-esteem or loss of identity. As the Judge observed, the Claimant has suffered no financial losses as yet and, should he suffer loss in the future, the quantification of damages would be something that could be undertaken by the Court. Moreover, to the extent that the County Court would be unable to award damages for any non-pecuniary losses that the Claimant might be found to have suffered, it would be open to him to pursue claims in the ET, where remedies could include an award of compensation for injury to feelings.

58. In oral submissions, the Claimant complained that damages could not address the wider issue raised: that the Defendant's actions meant that he was being forced to choose between his employment and the continuation of his campaigning as a manifestation of his beliefs and his trade union activity. This was, however, not a point identified below and I cannot see that Judge Baucher can be said to have erred in determining the case on the basis presented before her. It is, moreover, a point that could only go to the Defendant's conduct in inviting the Claimant to a probation hearing in the terms in the letter of 10 November 2020; it does not identify any basis for concluding that the Judge erred in her approach to the question of suspension.

59. Even if it were open to the Claimant to raise this point in relation to the invitation to the probation hearing, I am not persuaded that this is a choice that has yet been required of the Claimant. The issue raised by the letter of 10 November 2020 relates to the Claimant's past campaigning activities and to what has been characterised as the opinion he shares with the union of which he is a member. It is notable that the Defendant has not suggested that the Claimant has led any such campaign, or stated any such opinion, in relation to his current employment. Whilst it is unclear what might be discussed at the probation hearing, should that give rise to the choice suggested by the Claimant, that would seem to provide him with a potential cause of action in the ET. On his claim before the County Court, I cannot see that Judge Baucher can be said to have erred in her conclusion on this point.

Balance of Convenience

60. Should I be wrong on the question of adequacy of damages so far as the invitation to the probation hearing is concerned, I have gone on to consider the application for permission relating to the Judge's conclusion on balance of convenience (Ground 3).

61. As Judge Baucher rightly observed, a contract of employment is one of personal service. That does not mean, however, that the Court will not grant injunctive relief to restrain a breach of contract in circumstances where trust and confidence remains intact. In the present case, the Defendant does not say that it no longer has trust and confidence in the Claimant; indeed, in oral submissions before me, it was stressed that no concluded view had been taken regarding the Claimant's probation period and the Defendant would approach the review hearing with an entirely open mind.

62. In determining that the balance of convenience fell against the grant of an injunction, Judge Baucher concluded that to grant such relief "*would be to cut across the Contract freely agreed*", whereas to refuse it would be "*to allow the contractual proceedings to take their natural course*". That reasoning assumes, however, that the Defendant's conduct would not amount to a breach of contract; if it did, then permitting that conduct to continue could not be said to allow the "*natural course*" of any "*contractual proceedings*".

63. As I have said, I am satisfied that Judge Baucher erred in her approach and her conclusion on the first question under *American Cyanamid*. In my judgment, the Claimant has raised a serious issue in his contention that the invitation to the probation hearing, on the basis of the letter of 10 November 2020, gives rise to a breach of the implied term of trust and confidence. That is because it is clearly arguable that the matters identified in that letter are inextricably linked with the Claimant's trade union activities and his past claim that outsourcing within his previous employment amounted to unlawful race discrimination. Granting injunctive relief to stop the Defendant proceeding with a hearing on that basis would not prevent it holding a probation review hearing on lawful grounds; rather than cutting across the contract, it would merely require the Defendant to act in accordance with the implied term of trust and confidence at the heart of that contract.

64. Thus, had I taken the view that damages could not provide the Claimant with an adequate remedy, I would have granted permission to appeal on Ground 3, and found

that the balance of convenience would favour the grant of an injunction in so far as the claim was concerned with the basis of the invitation to the probation hearing, as set out in the letter of 10 November 2020.

Conclusion and Disposal

65. For the reasons I have provided, I grant the Claimant permission to appeal on Grounds 1 and 3 and would have upheld the Claimant's appeal on both those grounds. The application for permission to appeal on Ground 2 is, however, refused, which means that the appeal must be dismissed.