Neutral Citation Number: [2020] EWHC 1661(QB)

Case No: QB 2020-000909

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2020

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

THOMAS CURR	**Claimant**
- and -	
LONDON & COUNTRY MORTGAGES	**Defendant**

- -
- -

The Claimant appeared in person
Stuart Brittenden (instructed by **Royds Withy King**) for the **Defendant**

Hearing dates: 15 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties or their representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10am on Thursday 25 April 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's clerk Karen.Welford@Justice.gov.uk

Mrs Justice Andrews:

INTRODUCTION

1. This is an application by the Defendant, ("L&C"), for summary judgment under CPR 24.2, or alternatively for the claim to be struck out as an abuse of process, and for an Extended Civil Restraint Order ("ECRO") against the Claimant ("Mr Curr").

2. L&C carries on business as a mortgage broker and adviser. In 2017, it employed Mr Curr as a Protection Adviser at its Bath Sales Office. Clause 2 of his contract of employment contained the following relevant provisions:

   2.1 The first eight months of the employment shall be a probationary period. The Company may, at its discretion, extend the probationary period by up to a further 2 months.

   2.2 The Employee's period of continuous employment commenced on 18 September 2017. The Employee's employment under this contract shall commence on 18 September 2017 and shall continue until terminated:

   (1) during the probationary period, on one week's notice from either party…

3. Clause 11.1 of the contract permitted L&C to:

   "in its sole and absolute discretion, terminate the employment at any time and with immediate effect by notifying the Employee that the Company is exercising its right under this clause 11 and that it will make a payment in lieu of notice to the Employee…

   Clause 1.1 defined "termination" as meaning:

   "*… the termination of the Employee's employment with the Company howsoever caused*."

4. L&C's probation policy was set out in more detail in its Bath sales office manual, the terms of which were incorporated into the contract of employment. The manual explained that the amount of notice that an employee must give to L&C if they wished to resign and the length of notice that L&C must give to the employee for dismissal are different during probation:

   "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 with the exception of those terms noted below ….*
   >
   > *During probation either party may terminate the employee's contract of employment by giving one week's notice. In the event that London and Country*

decides to terminate the employee's employment his/her employment will come to an end immediately and the employee will receive pay in lieu of the one week's notice together with any outstanding holiday pay. Once the probationary period has been completed, the notice periods will be as defined in the employee's contract of employment."

5. The manual also stated:

"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.

Although L & C aim to allow employees to complete the designated period of probation rather than terminating employment before the probation has come to an end, there may be instances where it is decided that the employee is unsuitable for the role. If there is clear evidence to suggest that the employee is unsuitable the line manager should consult the Head of Department and HR with a view to terminating the employee's contract early.

Where a decision is taken to terminate the employee's employment, the employee must be invited to a probation hearing and be informed of the reason for the termination. They will have the right to be accompanied. If following the meeting the decision is taken that the employment will come to an end immediately, the employee will be paid in lieu of notice and holiday pay. London and Country will write to the employee confirming the termination and the reason for it and will offer a right to appeal."

6. On 8 December 2017 (less than 3 months into his probation period) Mr Curr attended a probation review meeting. The meeting was reconvened on 11 December, and on that occasion, Mr Curr was informed that his employment would terminate with immediate effect. He was paid one week's salary in lieu of notice. On 18 December 2017, as envisaged by the manual, L&C wrote to Mr Curr providing detailed reasons for the termination of his employment. Mr Curr appealed. Following a hearing, the appeal was rejected on 9 January 2018.

7. In the letter that was sent to Mr Curr on the same day explaining why his appeal been rejected, a number of reasons for terminating his employment were given, including that the number of errors he had made and continued to make after being given support from his team manager following his initial period of induction was excessive. Another reason given was that when L&C compared his sales performance to that of his peers he was significantly behind, and it would take a disproportionate amount of time and effort for him to be able to reach the probation targets looking back on this previous performance.

8. Mr Curr strongly disagrees with that evaluation. He takes the view that L&C treated him unfairly, and that the termination of his employment in these circumstances was a repudiatory breach of contract. The manual sets out certain probation targets which a protection adviser must meet before they can be signed off probation. The manual

states that during the 8-month probation period, probationers should be given one month's induction, then a one-month untargeted "lead in," followed by 6 months' targeted advising. The probation targets were to be measured over those 6 months. Mr Curr complains that his performance was measured from 1 November 2017, which was within the contractual period of untargeted lead-in, instead of from 19 November, when the 6-month period would have started. He says that it could be projected from the targets he had achieved at the date of termination of his contract that he *would* have met the required targets if he had been given the opportunity to have them measured over the full 6 months, as the manual envisaged. Even if that were wrong, Mr Curr contends that his targets would not have fallen below the level at which the manual envisaged that his employer would extend the period of probation by 2 months to enable him to achieve them. Therefore, he says, there was no justification for terminating his contract.

9. However, even if Mr Curr was able to prove all these matters at trial, and even if he were able to overcome the fact that his sales performance was not the sole reason given for the termination, he faces an insuperable legal difficulty, namely, that during the probationary period L&C had the express contractual right to terminate his contract on payment of one week's salary, whether or not they had any good reason for doing so. As Lord Hoffmann pointed out in *Johnson v Unisys Ltd* [2003] 1 AC 503, if the employer has a contractual right to dismiss an employee on notice without giving any reason, the court cannot imply a term that the dismissal should not take place save for good cause and after giving him a reasonable opportunity to demonstrate that no such cause existed.

10. Moreover, even if Mr Curr had been able to prove that there was a repudiatory breach of the contract of employment, and that he was wrongfully dismissed, as a matter of law his damages would be limited to the payment in lieu of notice that he has already received. That is why any claim for breach of contract brought at common law seeking damages based on the amount of future salary he would have or might have earned is bound to fail, however that claim is formulated.

THE EARLIER PROCEEDINGS

11. On 7 February 2018, Mr Curr issued proceedings against L&C in the High Court (HQ 18X00498) ("the First Claim") in respect of the termination of his contract with them, claiming damages for breach of the implied term of mutual trust and confidence. The quantum of damages claimed was £1,125,000, based on an estimate of the salary he would have earned over 45 years. L&C applied to strike out the proceedings, or for summary judgment in the alternative, on the basis that (i) it was entitled to terminate his contract in reliance on the express notice provisions in Clause 2 and the manual and (ii) in any event, the High Court could not entertain a claim for post-termination losses arising in consequence of an alleged breach of the implied term of trust and confidence in connection with any dismissal process. It relied upon the principles in *Johnson v Unisys* (above), most recently confirmed by the Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22.

12. This line of authorities at the highest level, which I will consider in more detail later in this judgment, establishes that an employee has no right at common law to recover damages for loss arising from the fairness of, or the manner of, his dismissal. Parliament intended that any claim for post-termination losses arising from an alleged

failure by an employer to follow a fair procedure before dismissing an employee, in breach of the implied term of trust and confidence, should be brought exclusively before the employment tribunal ("ET").

13. On 10 May 2018, Master Cook heard L&C's application. He made an order granting it summary judgment, but he also struck out the statement of case (i.e. the particulars of claim) under CPR 3.4(2(a) as disclosing no reasonable grounds for bringing the claim. Mr Curr did not appeal. A contemporaneous attendance note was made by L&C's solicitor. Although Mr Curr disputes the accuracy of that note, I have no reason to suppose that it contains any material inaccuracies. I am satisfied that it provides a sufficiently accurate record of the arguments advanced by the parties, and of the Master's judgment, for me to understand what was in issue, and what his reasons were.

14. Before the Master, Mr Curr contended that the contract did not entitle his employer to terminate without reason, and that he had a contractual right not to be prevented from finishing his probationary period. He argued that the reason for his dismissal was incorrect, the fact-finding leading up to the dismissal was flawed, and the methods and processes leading up to the dismissal were wrong. The termination resulted from the misapplication of the policies and the probation period process in the manual.

15. The Master referred to the correct legal tests for summary judgment and strike out, reminding himself that the latter course was only appropriate in clear and obvious cases. He held that as a matter of construction, the employment contract did provide a right to dismiss Mr Curr without reason, and that he had received payment in lieu of notice. Even if Mr Curr could establish that the *manner* in which he was dismissed was unfair, any claim which sought damages at common law for the breach of mutual trust and confidence in the dismissal process was bound to fail by reason of the *Johnson v Unisys* line of authorities. Any complaint of unfair dismissal had to be brought in the ET. The Master expressly rejected Mr Curr's argument that the facts in this case were distinguishable from those authorities. Finally, he commented that even if the hurdle of the authorities could have been overcome, the damages recoverable were vastly overstated, and he would have transferred the claim to the County Court.

16. CPR 3.4(6) expressly provides that if the court strikes out the claimant's statement of case and it considers that the claim is totally without merit ("TWM") the court's order must record that fact. The court must at the same time consider whether it is appropriate to make a civil restraint order. The court has similar powers under different provisions of the CPR when dismissing an application, such as an application for permission to appeal or for permission to apply for judicial review, see e.g. CPR 23.12 and 52.20.

17. As the Court of Appeal explained in *R(Grace) v Secretary of State for the Home Department* [2014] 1 WLR 3432, the expression "totally without merit" encompasses, but is not confined to, claims and applications that are an abuse of the process or vexatious. It means that the claim or application is bound to fail.

18. Certain consequences flow from a TWM marking - for example, it will usually preclude a litigant from renewing to an oral hearing an application dismissed on the papers. It also serves the useful purpose of making it known to other judges and courts

who may be concerned with the same litigant that he or she has made a claim or application that was so wholly devoid of merit that it was bound to fail.

19. If a pattern of such applications by the same litigant emerges, the court may consider the time has come to make a civil restraint order. Such an order provides a judicial permission filter for future applications or claims by that litigant, which ensures that only those which are truly arguable proceed, thereby saving costs, time, and valuable court resources.

20. For whatever reason, Master Cook did not mark the claim as TWM when he struck out the particulars of claim. However, the absence of such a marking will not preclude the court, when considering whether a case is suitable for making a civil restraint order, from examining whether a claim or an application fits that description.

21. The Master ordered Mr Curr to pay L&C's costs, summarily assessed at £15,000. He failed to pay any of that sum, and L&C petitioned for his bankruptcy. A Bankruptcy Order was made against him on 24 September 2018. The effect of this was that any rights of action which existed as at the date of his bankruptcy passed by operation of law to his trustee, the Official Receiver. Even upon his discharge from bankruptcy, the right of action would not revert to him without being assigned by the trustee. This meant that Mr Curr could not bring proceedings in respect of those claims without the consent of the trustee.

22. On 13 November 2018, without obtaining the necessary consent, Mr Curr issued proceedings for breach of contract against L&C in the Bristol ET, alleging breach of the implied term of trust and confidence due to the manner of his dismissal. Again, he claimed damages of £1.125 million, or in the alternative the maximum statutory award of £25,000.

23. L & C applied to strike out this claim. At a preliminary hearing convened for the purpose of hearing that application on 10 May 2019, Mr Curr asserted that he had additionally brought a claim for "loss of chance" as set out in a calculation of damages document dated 19 December 2018, by reference to the well-known case of *Chaplin v Hicks* [1911] 2 KB 786.

24. Employment Judge O'Rourke struck out the claim on four grounds, each of which independently sufficed to put an end to the proceedings before the ET. The chief reason that he gave was that the claim was substantially out of time and that there were no grounds for extending time. The ET therefore had no jurisdiction to hear it. Secondly, he found that the claim before the tribunal was to all intents and purposes identical to that which had already been brought before the High Court. There were no reasonable prospects of success, because any claim for breach of the implied term of trust and confidence was doomed to fail, as Master Cook had already found: L&C was entitled to terminate the contract on one week's notice.

25. The judge rejected an argument by Mr Curr that "loss of chance" is an actionable claim in its own right, pointing out that it is a type of damages potentially recoverable (or perhaps more accurately, a basis upon which damages may be measured) in a claim for breach of contract. He said that even if such a claim had been brought within his claim form (which it had not) or permission were given to amend the claim

form to include it, there is no such claim that could be brought before the ET, which is a creature of statute.

26. Thirdly, the Employment Judge held that the claim was an abuse of process because Master Cook had already considered an identical claim and held there were no reasonable grounds for bringing it (for precisely the same reasons as Employment Judge O'Rourke had independently determined). He said:

"*were this Tribunal to go on, as the Master did, to consider the contractual position, it is quite obvious also that the contract provided a right to dismiss the claimant (in this case because he was still in his probationary period), on one week's notice. There is no contractual requirement for 'good cause' (or indeed any justification for the decision) to be shown, and the employer was entitled under the pay in lieu of notice clause to dismiss with immediate effect with payment of notice in lieu, which they did."*

He concluded that the breach of contract claim now brought in the ET was res judicata, and it was "clearly an abuse of process/vexatious" under rule 37(1)) (a) of the ET's rules of procedure (see the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

27. Finally, he held that Mr Curr had no status to bring the claim, because the right of action had vested in his trustee in bankruptcy. He could not take proceedings unless the Official Receiver was willing to be substituted as a party or otherwise consented. It was no answer to this objection that the Official Receiver was unlikely to give his consent because L&C, as the major creditor, was unlikely to support action being taken against itself. The judge rightly rejected an argument by Mr Curr that the removal of his independent ability to take these proceedings was a breach of Article 6 ECHR, pithily observing that "*Article 6 does not confer the right to have yet more 'bites of the cherry' by pursuing circular litigation*."

28. Mr Curr sought to appeal that decision to the EAT, to which an appeal only lies on a point of law. Lord Summers considered the matter on the papers and concluded that the notice of appeal disclosed no reasonable grounds for bringing an appeal. He said that he was unable to identify any point in the particulars of appeal which could be described as having legal merit. Since no point of law capable of being argued had been identified, he did not consider that the appeal should go any further. However, he did not mark the appeal as TWM, which he could have done under the EAT Rules.

29. Mr Curr therefore exercised his right under Rule 3(10) of the EAT Rules to have the matter heard before a judge, who would make a direction as to whether any further action should be taken on the notice of appeal. The oral hearing took place before HH Judge Stacey on 19 February 2020. Mr Curr attended the hearing and made representations. The judge refused the Rule 3(10) application and directed that no further action be taken on the appeal, and the appeal should thereby be dismissed. She gave her reasons in an ex tempore judgment delivered in the presence of Mr Curr.

30. Those reasons, recorded in her order, are clear and simple: there were no grounds in the appeal that were or might be arguable, so as to allow the case to proceed to a full hearing. There was no error of law in the ET's approach to time limits or in its decision that it was reasonably practicable for Mr Curr to have brought his complaint

in time, and that since it was lodged 9 months after the primary time limit, the ET had no jurisdiction. For that reason alone, the appeal *was bound to fail*. She added, "nor do or might the other 3 reasons why the tribunal rejected the claim disclose any arguable error of law". Judge Stacey refused permission to appeal against her decision.

31. On 21 February 2020, Judge Stacey refused to extend time for Mr Curr to appeal against her decision to the Court of Appeal, to enable him to receive a transcript of her oral judgment before lodging the appellant's notice. When exercising her discretion, she pointed out that Mr Curr had heard her judgment and therefore had sufficient knowledge of the reasons for her decision to be able to challenge them on appeal.

32. I understand that Mr Curr has made an application to the Court of Appeal for permission to appeal which has not yet been determined.

33. On 3 March 2020, Mr Curr issued judicial review proceedings in the High Court seeking to challenge the EAT's refusal of an extension of time for appealing to the Court of Appeal. He sought an interim order staying the sealing of Judge Stacey's order. The matter came before Eady J (a judge with considerable experience of the EAT) who, on 9 March, dismissed the application for urgent interim relief and permission on the papers and marked it TWM, thereby precluding Mr Curr from renewing the application to an oral hearing.

34. Eady J pointed out that Rule 24.1 of the EAT Practice Direction 2018 states that any application for an extension of time for appealing should normally be made to the Court of Appeal (under CPR 52.15). However, she said that more substantively, and for the detailed reasons that she gave, there was no proper basis for characterising Judge Stacey's decision to refuse the extension of time as "perverse". She said: "although it is not common to state that a claim is made totally without merit, I am satisfied that this is the case in this instance."

35. Mr Curr disputes Eady J's marking of the claim for judicial review as TWM. He relies on a communication from the Court of Appeal office which drew his attention to CPR PD 52C paragraph 4(1)(b) which provides that if filed out of time, an application for an extension of time must be made within the appellant's notice. He says he was told that unless the lower court has extended time, the appeal notice must be filed according to the time limit in CPR 52.12(2), i.e. 21 days. That is true, but it does not affect the validity of Eady J's reasoning. The initial point she made was that if HH Judge Stacey refused to extend time for appealing under Rule 24.1, that rule envisaged that the applicant should seek such an extension from the Court of Appeal. This could be done either by filing in time and asking the Court of Appeal for further time to lodge the transcript and perfect the grounds of appeal, or by waiting, filing the appellant's notice out of time and seeking a retrospective extension of time (see CPR 52.15). Therefore, Mr Curr had a viable alternative remedy. The fact that he had to choose between filing his appellant's notice in time and seeking an extension of time for amending his grounds; or filing out of time and seeking a retrospective extension, is irrelevant; her analysis was impeccable.

36. In any event, the main reason why Eady J decided the application was bound to fail was not the availability of another remedy. It was because there was no arguable basis

for challenging HH Judge Stacey's exercise of discretion as "perverse". It plainly was nothing of the kind. Judge Stacey was entitled to take the view that as she had given a clear explanation of her reasons to Mr Curr (who from his written and oral submissions is plainly an intelligent and articulate young man) he was perfectly capable of formulating his grounds of appeal without needing to wait for a transcript. For that reason alone, Eady J was fully justified in marking the application TWM.

THE PRESENT CLAIM

37. It is against that background that I turn to the current proceedings. The claim form was issued on 20 February 2020, the day after the hearing of the rule 3(10) application before HH Judge Stacey in the EAT. By that time, Mr Curr had been discharged from his bankruptcy, but the bankruptcy order was not annulled pursuant to section 282 (1) of the Insolvency Act 1986. As explained earlier, any cause of action against L&C in existence at the time when Mr Curr was declared bankrupt remained vested in the Official Receiver. I can understand why Mr Curr might have assumed that his right to bring a claim would revert to him on discharge from bankruptcy, which is what he told me: but that assumption was mistaken.

38. If the claim otherwise had merit, it seems to me that the question of status to bring it is one which might be capable of resolution. Despite the fact that Mr Curr had taken no steps to find out from the Official Receiver whether he would be willing to assign him the cause of action, the proper course in those circumstances might well be to give him a final chance to do so: see *Pathania v Adedeji and another (Bank of Scotland Plc intervening)* [2014] EWCA Civ 681 per Floyd LJ at [15]-[16]. On the other hand, if this claim is hopeless and/or an abuse of process, Mr Curr's lack of status to bring it really takes matters no further.

39. The Particulars of Claim are dated 26 January 2020. The complaint set out in that statement of case is essentially that which I have summarised in paragraphs 8 and 9 above. Mr Curr contends that there was a "*contractually invalid deprivation of a chance to earn 45 years' guaranteed salary and also to benefit from the contractual bonus clause*". He states that loss of a chance is not a measure of damages but a substantive type of breach of contract, in reliance on *Chaplin v Hicks*. He claims that he was contractually entitled to attempt to show compliance with a complicated system of targets, and the contract stated that if those targets were met then (subject to none of the specific grounds for termination in clause 10 being triggered) he *would be confirmed in employment*. He refers to being deprived of "legally enforceable" chances, and puts the matter thus:

> *"The chance in this case was not arbitrary but rather was systematic. The defendant violated the contract by purporting to measure the claimant against targets 18 days before they actually existed, according to the contract."*

40. Although he accepts that under the terms in the manual his employer would be entitled to bring the contract to an end within the probation period if there was clear evidence that he was unsuitable, Mr Curr disputes that there was such clear evidence.

41. The claim was issued in the Chancery Division but was transferred to the Queen's Bench Division by a Chancery Master. Mr Curr applied for a stay of the proceedings until the EAT had determined whether the ET had jurisdiction to hear a claim for loss

of chance. On 4 March 2020, by which time Judge Stacey had already made her rulings (though he was probably unaware of this), Master Cook made an order noting that the claim was issued to protect the claimant's position pending his appeal to the EAT, and staying the claim *pending the appeal to the EAT.*

42. Mr Brittenden, on behalf of L&C, submitted that the appeal to the EAT is now concluded and that the stay has automatically been lifted, but lest there be any doubt about that, the court should lift the stay in order to determine his client's application. Mr Curr submitted that the proceedings should remain stayed because the Court of Appeal has not yet determined his application for permission to appeal against Judge Stacey's ruling.

43. I am of the view that there is no longer an extant appeal to the EAT, notwithstanding the remote possibility that the Court of Appeal might entertain an appeal from Judge Stacey's ruling; but that even if that were not the case, there is no purpose to be served in continuing this stay until after the Court of Appeal decides the question of permission. It is only fair that L&C should have the opportunity to persuade the court that these proceedings should be struck out or that summary judgment should be entered in their favour, irrespective of whether the appeal to the EAT is or might be resurrected. Matters have moved on since the Master made his order. Mr Curr will suffer no prejudice from that application being determined now. A stay could always be re-imposed if the claim survived the application.

THE APPLICATION TO STRIKE OUT OR FOR SUMMARY JUDGMENT

44. Mr Brittenden submitted that this claim was a classic example of an abuse of the process of the court, for 3 reasons:

    i) the claimant is acting vexatiously in pursuing a 3rd set of proceedings for breach of contract, seeking the same quantum of damages arising from the manner in which his employment was terminated;

    ii) the abuse is compounded by the fact that Master Cook entered summary judgment in favour of L&C in respect of the first claim, and the ET struck out the proceedings before it as an abuse;

    iii) even if that analysis is wrong, and the claim for loss of a chance is somehow outside the *Johnson v Unisys* principle, it could and should have been brought in the first claim, and is caught by the rule in *Henderson v Henderson* (1843) 3 Hare 100. It is an important principle of public policy that there should be finality in litigation and a defendant should not be harassed by 3 separate sets of proceedings asserting breach of contract in relation to the same dismissal.

45. Mr Curr submitted that there was nothing abusive about these proceedings. He frankly accepted, in answer to a question from me, that at the time when he brought the first claim he was aware that he might have been able to bring a claim based on the loss of a chance. However, he said he thought that loss of chance was or might be an equitable phenomenon and therefore it should be brought in the Chancery Division, or in the ET if that was the right venue for his claim. He said that afforded him a reasonable excuse for not including it in the First Claim, and it was only after the ET ruled that it had no jurisdiction to entertain it that he had brought the current

proceedings. He relied upon Lord Bingham's observation in the leading modern authority on the *Henderson* v *Henderson* principle, *Johnson v Gore Wood* &Co [2002] 2 AC 1 at p.31 that "to hold that because a matter could have been raised in earlier proceedings it should have been… is to adopt too dogmatic an approach."

46. In the same passage, Lord Bingham went on to say that the court should exercise a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. That is the approach that I shall apply when considering the *Henderson v Henderson* principle in due course.

DISCUSSION

47. Contrary to Mr Curr's submission that Master Cook's decision was purely based on a lack of jurisdiction to entertain a claim for damages for unlawful dismissal, his decision to grant summary judgment to L&C in the First Claim and to strike out the claim was undoubtedly a decision on the merits of a claim for damages for repudiatory breach of the contract of employment, arising from the circumstances in which it was terminated. It involved determination of the key issue, namely, whether L&C could terminate the contract without reason. His findings on that issue are res judicata.

48. The Master recognised the distinction between a claim for wrongful dismissal (which may be brought in the High Court or County Court), which is essentially a complaint that the fact of termination of the contract of employment was a repudiatory breach, and a claim for unfair dismissal, which is essentially a complaint about the fairness or otherwise of the process leading up to termination, irrespective of whether the termination itself was otherwise legally justified. As he pointed out, any complaint about the fairness of the process falls exclusively within the jurisdiction of the ET. That does not mean that he decided the application purely on the basis that the High Court lacked jurisdiction.

49. Whilst it was founded on the implied term of trust and confidence, Mr Curr's claim for wrongful dismissal could not even get off the ground unless he was able to show that, as a matter of construction, the contract did not entitle L&C to terminate his contract at any time without reason, and that he was entitled to finish his probation period. The Master determined the issue of construction against him (as did Employment Judge O'Rourke in the subsequent ET proceedings). He was right to do so. Clause 2 is clear and unambiguous. The employment may be terminated at any time during the probationary period on one week's notice. Clause 2 is reinforced by Clause 11 which allows the employer to terminate *at any time* and "notwithstanding Clause 2" with immediate effect, on payment in lieu of notice. Neither clause contains any obligation on L&C to give, or indeed have, reasons for termination, let alone good reasons.

50. Mr Curr pointed out that he was not served a notice of termination which referred to Clause 11. That is correct, but misses the point, which is that the existence of Clause 11 negates any interpretation of the contract which qualifies Clause 2 as being conditional upon L&C following the procedures or affording the opportunities set out

in the manual. So does the definition of "termination" in Clause 1.1. Whilst Mr Curr is right that "termination" is a noun, describing the consequences of a decision to terminate, its definition as "termination of the employee's employment with the Company *howsoever caused*" presupposes that the employment may be terminated in circumstances other than those specified in express terms of the contract. The heading in the manual, "termination of employment" must be interpreted in line with that definition.

51. The manual does not supersede or qualify Clause 2. On the contrary it strengthens it by making it clear that during the probationary period, if L&C decides to terminate the employment of an employee, his/her contract will come to an end immediately, with payment in lieu of notice. The provisions in the manual relating to termination of employment do not mandate the completion of the probationary period. On the contrary, whilst they indicate that it is L&C's "aim" to allow the probationer to finish, they make it plain that L&C has a *discretion* to terminate within the probation period if it decides that the employee is unsuitable for the role That further reinforces the unfettered power of termination under Clause 2.

52. A failure by L&C to follow the process set out in the manual for termination within the probation period (i.e. the performance review, the statement of reasons for termination and the right of internal appeal) might arguably give rise to a claim for unfair dismissal, but that claim would fall exclusively within the jurisdiction of the ET. However, that did not prevent Mr Curr from bringing a claim at common law for wrongful dismissal or the Master from considering the merits of that claim; and the Master rightly held that claim was doomed to failure because L&C had a contractual right to terminate his contract when they did, which they exercised. In other words, his dismissal was not even arguably a repudiatory breach.

53. Mr Curr contends in the present proceedings that L&C deprived him of the chance to meet the targets in the manual and thereby of the chance to continue in their employment for 45 years and to earn salary and bonuses over that period. He contended that in *Chaplin v Hicks* the court introduced liability in circumstances in which it would not otherwise have arisen. In that case, the defendant had submitted that the breach of contract gave rise to no recoverable loss, because all that was lost was a chance of obtaining a prize in a beauty competition, and therefore the aggrieved young lady was entitled only to nominal damages. However, *Chaplin v Hicks* did not create some new cause of action. It merely established that in a case where it is impossible to accurately establish the quantum of the claimant's loss arising from a breach of contract, because any financial loss depends on a contingency (the chance of something happening) but it is nevertheless clear that a real loss has been suffered, damages will still be recoverable. The court will do its best on the evidence available to estimate the loss.

54. In the present case, just as it was in the First Claim, Mr Curr's substantive grievance is that the contract was terminated unlawfully and unfairly. Indeed, he confirmed in his oral submissions to me that he was contending that L&C was in repudiatory breach. I can see how, if that was established, subject to the *Johnson v Unisys* principle, one might theoretically analyse matters on the basis that damages flowing from the termination of the contract of employment should properly be measured as the loss of a chance to earn salary and bonuses in future, instead of the loss of 100% of the salary and bonuses, because it could not be predicted with certainty how long

the employee would have remained in L&C's employment or how well or badly he would have performed. But damages flowing from the fact of dismissal, rather than the manner of dismissal, are not to be calculated in that way.

55. If the employer has the right to dismiss on notice, as L&C did, then at common law the damages are confined to the payment in lieu of notice that the employee would receive if the employer terminated the contract in accordance with the relevant contractual provisions. Because Mr Curr had already received that payment, there was no loss recoverable at law, and the Court would not allow the claim to proceed to trial just to enable recovery of nominal damages.

56. I can also see how it might be suggested that a breach of the terms of the manual regarding the period over which targets were to be measured deprived Mr Curr of a contractual opportunity to meet the targets, and in turn of the chance to be taken on permanently at the end of his probation period. However, even if characterised in that way, the nub of the complaint remains the same, namely, that Mr Curr should not have been dismissed (on the basis of the wrongly measured performance) and that his dismissal was a repudiatory breach. The argument runs up against the same problem in terms of quantifying recoverable damages. The loss of the chance to meet the targets in and of itself gave rise to no separately quantifiable loss and damage. Any loss flows from the dismissal.

57. Whether one characterises the claim as a breach of the express terms of the contract, or as a breach of the implied term of trust and confidence, or as a breach consisting of the deprivation of a contractual opportunity, the merits turn on the answer to the same question, namely, was L&C contractually entitled to terminate the contract without reason? If it was, that is the end of the claim. Unfortunately for Mr Curr, the Master held that L&C was entitled to terminate the contract without reason, and so did Employment Judge O'Rourke. Those findings by the Master were and are binding on the parties and cannot be re-visited in subsequent litigation. They give rise to the clearest issue estoppel.

58. Even if Master Cook had not made those findings, then in common with the Employment Judge, I agree with that construction. For the reasons I have already explained, even if Mr Curr had met all the targets at the end of the six months, or would have been in line to do so if his targets had been measured properly, L&C still had the right under the contract to decide not to take him on. That was their prerogative. The manual does not guarantee a permanent job. They also had the right to decide he was unsuitable before the six months ended, and to let him go early, irrespective of whether their reasons were good, bad, or non-existent.

59. Under this contract it was open to L&C, in theory, to decide that it simply did not like someone, however good their work, and terminate their employment immediately at any time during the probationary period on payment of a week's salary in lieu of notice. I am not suggesting that is what happened in the present case, but rather, using the example to illustrate that this contract did not oblige L&C to give Mr Curr any chance to meet the targets, let alone to earn 45 years' worth of salary and bonuses. Even if they measured the targets wrongly before they dismissed him, it would make no difference.

60. So, even if there had been no issue estoppel, if the claim went to trial and Mr Curr succeeded in establishing that all his complaints were justified and that L&C should not have begun to measure his targets until 18 days later, and that he would have met them if they had been measured properly, his claim would still be bound to fail. Those alleged breaches would result in no recoverable loss, or the lost chance would be valued at zero, because L&C had an absolute, inalienable contractual entitlement to dismiss him without justification. If the complaint is about the manner in which Mr Curr was dismissed, only the ET could determine it. If it is about the fact of dismissal, this court has already determined that it is hopeless, so has the ET, and I agree with that analysis.

61. Even if that were not enough to put paid to this claim, (which it is) the re-characterisation of the claim as one for loss of a (contractual) chance does not get round the problem of the *Johnson v Unisys* limitation on damages. As Lord Dyson explained in *Edwards v Chesterfield* at [40], the unfair dismissal legislation precludes a claim for damages for breach of contract in relation to the manner of the dismissal, whether the claim is formulated as a claim for breach of an implied term or as a claim for breach of an express term which regulates disciplinary procedures leading to a dismissal. So it is no answer to the objection for Mr Curr to say: "I am no longer claiming for breach of the implied term of trust and confidence but for breach of express terms in the manual regarding how my performance was to be assessed."

62. A dismissal may be unfair because it is substantively unfair to dismiss the employee in the circumstances of the case (which is the heart of Mr Curr's complaint) and/or because the manner in which the dismissal was effected was unfair. Any such complaint was intended by Parliament to be adjudicated upon by the specialist employment tribunal.

63. The Supreme Court considered the question of where the boundaries of the *Johnson v Unisys* principle are to be drawn in *Eastwood v Magnox Electric plc* [2005] 1 AC 503. In a passage quoted with approval by Lord Dyson in *Edwards v Chesterfield*, Lord Nicholls said at [27]:

"*identifying the boundary of the 'Johnson exclusion area,' as it is been called is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.*"

64. In *Edwards* Lord Dyson held at [51] that it was a fact-specific question in each case whether the loss founding the cause of action flowed directly from the employer's failure to act fairly when taking steps leading to dismissal, or whether it preceded and was independent of the dismissal process. At [150], Lord Kerr, with whom Lord Wilson agreed, distilled the following three principles from Lord Nicholls' speech in *Eastwood*:

(i) if the cause of action exists before dismissal it is not extinguished by subsequent dismissal;

(ii) if financial loss occurs from the dismissal itself, such loss is not recoverable other than by a claim for unfair dismissal;

(iii) where financial loss flows directly from an employer's failure to act fairly or to abide by the terms of the contract of employment, even though that failure relates to steps taken which lead to dismissal, it is recoverable at the suit of the employee other than by an unfair dismissal claim.

65. In the present case, the financial loss which is claimed by Mr Curr (the loss of 45 years' salary and/or bonuses, or the loss of the chance to earn that salary and bonuses) occurred as the direct result of the dismissal itself, and not in consequence of any earlier breach of the terms of the contract. Once again, in applying the principle in *Johnson v Unisys* to the facts of this case, both the Master and the Employment Judge have so held. Once again, they were right to do so. Once again, the Master's finding gives rise to an issue estoppel (as the Employment Judge recognized, though he would have made the same finding). Mr Curr cannot get round that problem by re-casting his complaint as being one of a breach of contract pre-dating the dismissal, because without the dismissal there would be no loss, even if characterised as loss of a chance to earn money.

66. Thirdly, even if all the above analysis were wrong, the claim as currently formulated is one which could and should have been brought in the First Claim and falls foul of the rule in *Henderson v Henderson.* Applying Lord Bingham's test in *Johnson v Gore Wood & Co.* this is a classic example of a case in which the essence of the complaint in the earlier litigation is the same; the subject-matter is the same, exactly the same facts are relied upon, and the claimant is simply seeking to re-cast the legal arguments. Both claims concern damages flowing from both the fact of his dismissal, which is said to be a repudiatory breach of contract, and the manner of his dismissal, which is alleged to have been unfair.

67. At the time of the First Claim, Mr Curr knew he could have put the claim on the basis of an alleged loss of a chance, and deliberately chose not to do so. Even if he thought such a claim should be brought in the Chancery Division, there was no good reason why he could not have started his proceedings for wrongful dismissal there and brought all his claims in those proceedings.

68. It is an important principle of public policy that there should be finality in litigation. L&C is entitled not to have to face a third set of proceedings asserting, for essentially exactly the same reasons as in the previous two, that it is liable to Mr Curr for repudiatory breach of the contract of employment, however his claim is put, and irrespective of whether the latest version would bring the claim outside the ambit of *Johnson v Unisys*. The claim could also be characterised as a collateral attack on the Master's decision, which was not appealed and which is binding on Mr Curr as well as on L&C.

CONCLUSION ON THE APPLICATION

69. This claim is the clearest possible abuse of the process of the court, as it seeks to re-open issues that have been finally and conclusively determined against Mr Curr; but even if that were not the case, it is clearly and obviously bound to fail. There is no prospect of success at trial even if Mr Curr were to establish all the facts on which he seeks to rely. I have considered whether to strike out the statement of case under CPR 3.4 (2)(a) and (b) or to grant summary judgment. Whilst this is a clear and obvious case for a strike out, and I would unhesitatingly strike out the Particulars of Claim under both those limbs of the rule if I thought there was any point in doing so, a strike out would not necessarily produce finality. The overriding objective requires there to be finality in these proceedings and the best way of achieving that is a decision on the merits. I will therefore grant summary judgment in favour of L&C, which was the primary relief it sought. I also find that, for the reasons I have set out in this judgment, the claim is totally without merit.

THE CLAIM FOR AN EXTENDED CIVIL RESTRAINT ORDER

70. Having formed the view that this claim is TWM, I would have been obliged to consider making a civil restraint order irrespective of whether L&C had applied for one. Although only one previous application in the history of these various proceedings has been marked TWM, the reasoning of Master Cook's judgment indicates that in substance, the First Claim was bound to fail, because L&C had the right to terminate the contract without reason. Employment Judge O'Rourke found that even if the proceedings in the ET had not been brought out of time, and he had had jurisdiction to determine them, he would have taken the same view of the merits as the Master, and that Mr Curr could not re-argue the matter before the ET, as that would be an abuse of process. In substance, therefore, he too found the claim was bound to fail, for essentially the same reasons. Lord Summers could find no legal basis for challenging that decision, and HH Judge Stacey decided in terms that any appeal was bound to fail. All those findings that the claims or appeals were bound to fail predated Eady J's marking of the judicial review application as TWM, and the issue of the current claim which satisfies that test.

71. I am satisfied that Mr Curr is a litigant who has persistently made claims or issued applications arising from the same set of facts, and airing the same grievances, which are totally without merit. Therefore, the jurisdiction to make an ECRO is engaged. The question for me is whether this is the right time to make one. That is not so easy to answer as might at first appear. The key question that I need to decide is whether Mr Curr will continue with his campaign against L&C, forcing them to rack up irrecoverable costs by making hopeless claims and applications whilst benefiting from the fact that he is exempt from paying court fees, or whether he will finally accept that this is the end of the road?

72. I have seen correspondence from Mr Curr whose tone and content leaves a great deal to be desired, and which suggests that he does not care whether his claims or applications have merit or not. To give but one example, in an email sent in February 2019 he told L&C's solicitor that it would be gross professional misconduct on her part not to "remind them of my unfettered power to appeal this case to the nth degree – incurring colossal legal costs for them (which they have no hope of recovering) and

meanwhile accruing devastating publicity for them (which I will take delicious pleasure in creating)".

73. Mr Curr submitted that, in negotiations to settle, it is appropriate to point out to the opposing party that continuing to litigate will be very expensive for them. That is true, as far as it goes, but the message he was conveying and the tone of his correspondence went far beyond that. In the course of the correspondence he was also, at times, gratuitously offensive to the professionals representing L&C. I am not persuaded by Mr Curr's attempts to pass this off as humour. L&C should not have to face multiple proceedings arising out of the same underlying facts, at the hands of an impecunious litigant who has nothing to lose and who appears to derive considerable personal satisfaction from goading them.

74. On the other hand, that correspondence pre-dates the present claim, which Mr Curr appeared to genuinely believe was not shut out by the earlier High Court proceedings, although his belief is mistaken. Now that I have granted summary judgment, although I remain seriously concerned about his apparent inability to accept defeat, it is difficult to envisage what fresh proceedings he might commence in respect of the same underlying grievance, against which an ECRO would be designed to protect L&C. As Mr Brittenden very properly accepted, an ECRO could not preclude Mr Curr from seeking to appeal against my order. Nor could it interfere with the consideration by the Court of Appeal of the question whether to grant permission to appeal from Judge Stacey's order, which is currently before it. Suppose the Court of Appeal gave permission and allowed the appeal from the EAT? Mr Curr would then be entitled to pursue the substantive appeal to the EAT. There would be no justification for requiring him to get permission from a judge as well as from the Court of Appeal.

75. Although the jurisdiction to make an ECRO is engaged and many judges might have decided differently, I am just about persuaded that the time has not yet arrived for making one. However, Mr Curr should be under no illusion that this is because I expect that he will appreciate that if he were foolish enough to start yet further proceedings against L&C arising from the same underlying grievance, another judge is unlikely to take so benevolent a view. I am hoping that what I have said will provide sufficient deterrent.

76. Of course, there is nothing to stop the Court of Appeal from exercising its own discretion to make an ECRO, if it decides any application that Mr Curr chooses to pursue before it is TWM.

CONCLUSION

77. I shall grant summary judgment in favour of L&C and declare that this claim is totally without merit. However I refuse the application for an ECRO.