EMPLOYMENT TRIBUNALS

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Date: 27 July 2012

Case Number: 1100815/2011

Claimant		**Respondents**
Mr M McCammon	**V**	**R1:Gillingham Football Club**
		R2:Mr Paul Scally

EMPLOYMENT TRIBUNAL JUDGMENT

A copy of the Employment Tribunal's judgment is enclosed. There is important information in the booklet 'The Judgment' which you should read. The booklet can be found on our website at www.justice.gov.uk/tribunals/employment/claims/booklets

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

The Judgment booklet explains that you may request the employment tribunal to review a judgment or a decision. It also explains the appeal process to the Employment Appeal Tribunal including the strict 42 day time limit. These processes are quite different, and you will need to decide whether to follow either or both. **Both are subject to strict time limits**. An application to *review* must be made within 14 days of the date the decision was sent to you. An application to *appeal* must generally be made within 42 days of the date the decision was sent to you; but there are exceptions: see the booklet.

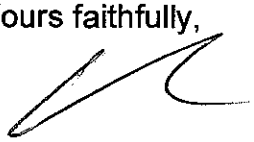
The booklet also explains about asking for written reasons for the judgment (if they are not included with the judgment). These will almost always be necessary if you wish to appeal. You must apply for reasons (if not included with the judgment) within 14 days of the date on which the judgment was sent. If you do so, the 42 day time limit for appeal runs from when these reasons were sent to you. Otherwise time runs from the date the judgment was sent to you or your representative.

For further information, it is important that you read the Judgment booklet. You may find further information about the EAT at –

www.justice.gov.uk/tribunals/employment-appeals

An appeal form can be obtained from the Employment Appeal Tribunal at: Employment Appeal Tribunal, Second Floor, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX or in Scotland at 52 Melville Street, Edinburgh EH3 7HS.

Yours faithfully,



ISABELLA JACKSON
For the Secretary of Employment Tribunal

Case Number: 1100815/2011

AMP

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr M McCammon	and	R1 - Gillingham Football Club R2 - Mr Paul Scally

Held at Ashford on	26, 27, 28, 29 June 2012 (hearing) 2 July 2012 (in chambers)	
Representation	**Claimant:**	Mr R Kohanzad, Counsel
	Respondents:	Mr M Duggan, Counsel
Employment Judge Mr S G Vowles	**Members:**	Mr S Sheath Mrs I Conner

RESERVED UNANIMOUS JUDGMENT

Evidence

1 The Tribunal heard evidence on oath and read documents in a bundle provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Unfair Dismissal – Section 98 Employment Rights Act 1996

2 The Claimant was dismissed from his employment as a footballer on 31 January 2011. The dismissal was unfair and the complaint of unfair dismissal succeeds against the 1st Respondent.

Race Victimisation – Dismissal - Section 27 Equality Act 2010

3 The Claimant was the subject of race victimisation by being dismissed. The complaint succeeds against the 1st and 2nd Respondent.

Race Victimisation - Detriment - Section 27 Equality Act 2010

4 The Claimant was not the subject of race victimisation by detriment. The complaint was made out of time. The complaint fails.

Unauthorised Deduction from Wages – Section 13 Employment Rights Act 1996 / Article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

5 The Respondent made a series of unauthorised deductions from the Claimant's wages. The complaint of unauthorised deduction from wages succeeds against the 1st Respondent.

Reasons

6 The judgment was reserved and written reasons are attached.

Remedy

7 The case is listed for a remedy hearing on **10 August 2012** before the same Tribunal with an allocation of one day.

8 No later than **3 August 2012** the Claimant is ordered to provide to the Respondent, with a copy to the Tribunal, an updated schedule of loss accompanied by all available supporting documents. Any calculations used in the schedule shall be shown and credit shall be given for any income after dismissal.

S G Vowles

Employment Judge
Mr S G Vowles

27 July 2012

Reserved Judgment sent to the parties on: 27 : 7 : 12 and entered in the Register.

..... for Secretary of the Tribunals.

REASONS

SUBMISSIONS

Claimant

1 On 29 April 2011 the Claimant presented complaints of unfair dismissal, race victimisation (detriment and dismissal) and unauthorised deduction from wages to the Tribunal.

2 The claims and the issues were clarified at a Case Management Discussion held on 28 July 2011.

Respondent

3 The Respondents resisted all claims. They asserted that the claims of victimisation (detriment) and deduction from wages had been brought out of time and that the Tribunal had no jurisdiction to consider them. They also asserted that there was no protected act for the purposes of the race victimisation claims.

EVIDENCE

4 The Tribunal heard evidence on oath from the following witnesses on behalf of the Respondent:

4.1 Mr Paul Scally, 2nd Respondent and Chairman of the 1st Respondent;

4.2 Mr Andy Hesenthaler, First Team Manager;

4.3 Mr Nicky Southall, First Team Assistant Manager;

4.4 Mr Bobby Barnes, Deputy Chief Executive of the Professional Footballers' Association (PFA);

4.5 Mr Steve Allen, Team Physiotherapist;

4.6 Mr Jamie Pitman, Former Manager of Hereford United;

4.7 Mr Steve Davies, Football Scout;

4.8 Mr Paul Mohamed, Player's Agent;

4.9 Ms Gwen Poynter, Club Secretary of 1st Respondent.

5 The Tribunal also read witness statements by Dr Jerry Hill, Club Doctor and Mr Luke Whittington, Youth Team Physiotherapist on behalf of the Respondent.

6 The Tribunal also heard evidence on oath from the following witnesses on behalf of the Claimant:

6.1 Mr Alan Julian, former footballer with 1st Respondent;

6.2 Mr Mark McCammon, footballer and Claimant;

6.3 Mr Joshua Gowling, footballer.

7 The Tribunal also ready witness statements by Mr Andy Ford, Claimant's agent on behalf of the Claimant.

8 The Tribunal also read documents in a bundle provided by the parties. From the evidence heard and read the Tribunal made the following findings of fact.

FINDINGS OF FACT

9 The 1st Respondent is Gillingham Football Club (GFC) based in Gillingham, Kent. The 2nd Respondent has been the Chairman of GFC since 1995.

The Contract of Employment

10 In late June 2008 Mr Scally negotiated a contract with Mr Davies who was acting on behalf of the Claimant in order to recruit the Claimant as a footballer with GFC. A written contract of employment was signed by Mr Scally and the Claimant on 3 July 2008. The contract was a fixed term contract due to expire on 30 June 2011. The schedule to the contract set out the Claimant's remuneration as being £2500 per week with the addition of appearance bonuses. Prior to the recruitment of the Claimant, GFC had been relegated from League 1 to League 2.

11 The negotiation of the contract of employment and the written terms of the contract were matters of dispute between the parties.

12 Mr Scally's account Mr Scally said that he met with Mr Davies at Gatwick Airport on 29 June 2008 to discuss, and agree, the terms of the Claimant's contract of employment. He said they agreed that the Claimant should receive a weekly gross salary of £2500 for the first year in League 2 with a 15 percent reduction for any subsequent seasons in League 2, and a 30 percent reduction should the Club be relegated to the Conference League. This was balanced against a pay increase to £3000 gross per week should the Club reach the Championship League. The contract was to be for 2 years with an option to extend for a third year. Mr Scally made hand written notes of the meeting which were produced to the Tribunal. He faxed his notes to Ms Poynter and asked her to type up a formal agreement to pass to Mr Davies for the Claimant's approval.

13 On 3 July 2008 Mr Davies and the Claimant attended the GFC ground and received a typed contract from Ms Poynter. Mr Davies then called Mr Scally to say that the Claimant was happy in general terms but wanted the contract to be for 3 years rather than 2 years with an option to extend for a further year. Mr Scally agreed to extend the contract to 3 years and instructed Ms Poynter to retype the written contract altering it to a 3 year term.

14 Ms Poynter retyped the contract but by a mistake, which went unnoticed by all concerned, including Mr Scally, the Claimant, Mr Davies and Ms Poynter, the provision regarding the 15 percent reduction was not included in the final version of the contract which was signed by the parties.

15 In May 2010 GFC was relegated to League 2 (having previously been promoted to League 1). In June 2010 Mr Scally was informed by the Club's payroll manager that the Claimant was disputing the reduction of 15 percent to his wage. Mr Scally therefore contacted Mr Davies who recalled that the 15 percent salary reduction had been agreed by him and by the Claimant in July 2008. Mr Scally also spoke to Ms Poynter who said that she typed the 15 percent reduction clause in the initial version of the draft contract but that it must have been missed in error when she retyped the second version of the contract, when it was amended to change the length of the contract to 3 years.

16 Mr Davies, Ms Poynter and Mr Mohamed all supported Mr Scally's account during the course of their evidence to the Tribunal. The only supporting documentation was Mr Scally's handwritten note of the meeting with Mr Davies on 29 June 2008 which included the words *"year 1 only then 15 percent reduction thereafter if in league 2 during contract term".*

17 The Claimant's account The Claimant said that he did not agree to the 15 percent reduction clause and insisted that, since there was no specific provision for the reduction in the written contract, it was an unauthorised deduction in breach of contract. The Claimant appealed to the Football League about the deduction but did not progress with it and a costs order was made against him by the Football League.

18 The handwritten note of the meeting was disputed by the Claimant because it was a photocopy and the original has not been produced. It was alleged that the reference to the 15 percent reduction had been added later and the note was dated 2 July 2008 rather than 29 June 2008. The note was not signed by Mr Davies or by the Claimant.

19 Although the Claimant disputed the deduction of the 15 percent, the deduction continued from 7 May 2010 until the Claimant's dismissal on 31 January 2011. The Tribunal found that this was a series of deductions.

The Claimant's performance

20 In June 2010 Mr Hesenthaler was appointed as the GFC First Team Club Manager.

21 Mr Hesenthaler was aware that the Claimant was suffering with an injury and had not played for the most part of the 2009/2010 football season. He arranged for him to undergo private physiotherapy. Mr Scally informed Mr Hesenthaler that the Claimant was a player who did not have the best attitude and who had clashed with the previous manager. However, they agreed that as the Claimant was one of the highest paid players at the club at the time, it was important to get him to play more regularly for GFC as his playing record and goal ratio were poor.

22 By September 2010 Mr Hesenthaler had formed the view that the Claimant was not happy and was not giving 100 percent in training. His attitude seemed to deteriorate and he seemed to do the minimum that was required of him in training. He was also not setting a good example to the younger players. By the end of September 2010 he had concluded that the Claimant was not part of his plans for GFC because of his injury problems, training record, high salary, general attitude and overall record with the club. He told the chairman that it was time for the Claimant to move on.

23 Mr Scally said that in such circumstances, when a Club decides that a player's services are no longer required, it is common practice in the Football League to approach players or their advisers with the option of agreeing a termination package to be agreed as part of a compromise agreement. Accordingly, Mr Scally spoke to Mr Barnes (PFA) about the possibility of offering the Claimant a termination package. Mr Barnes suggested that he should speak with the Claimant to tell him that he would not play for the Club again and ask him whether he wanted to come to a settlement regarding the termination of his contract.

24 On 25 September 2010 the Respondent had a discussion with the Claimant in his office. He informed the Claimant that he would not be playing for the GFC again and that he did not feature in the manager's plans. He said that GFC would honour his contract until it expired but he was prepared to offer him a final package to leave the club. Negotiations then proceeded with Mr Barnes on behalf of the Claimant. On 27 October 2010 Mr Scally sent an email to Mr Barnes offering a settlement figure of £30-35,000 as payment to the Claimant to buy out his contract.

25 The Tribunal accepted the testimony of Mr Barnes that in such circumstances it was common practice in the football world for players to enter into discussions with their Club via their agent or the PFA to terminate the contract under the terms of a compromise agreement. This allows both parties a clean break and to move on. Compromise agreements are negotiated for a number of reasons but most commonly it is because a player has fallen out of favour with the club for whatever reason and no longer features in the manager's plans. This is what happened in this case. While Mr Barnes was negotiating with Mr Scally, another

PFA official, Mr Nick Cusack, was keeping the Claimant involved and informed about the negotiations on the terms of a compromise agreement. Ultimately, no compromise agreement was reached.

26 The Tribunal found that, at this stage, in October 2010, the Claimant was interested in the possibility of entering into a compromise agreement if a suitable financial package was offered and that he was a willing participant in the process.

The Claimant's medical problems

27 Although Mr Scally had said that the claimant would not play again for GFC, on 16 October 2010 he did play in a game against Port Vale Football Club. However, he was injured and did not thereafter play again for GFC. From thereon he continued to receive treatment for his right ankle injury under the guidance of the GFC medical team.

28 On 23 November 2010 Dr Hill wrote to the Claimant to inform him that the next stage in managing his ankle problem would be a further consultant referral and that he had requested an NHS appointment for him. He added that if he was able to access the private system, then a Mr Lloyd Williams would be a suitable person for him to see and that he would provide a referral letter for him with a summary of previous management.

The events of 30 November 2010

29 On 29 November 2010, heavy snow was forecast overnight. Non-injured footballers were told that they did not have to report in for training but injured players were told to report for treatment at the Club.

30 The Claimant lived in a house less than two miles from the GFC ground, with two other footballers who were also injured, Josh Gowling and Curtis Weston. On 30 November 2010 all three footballers contacted the GFC to say that they could not attend for treatment that day because of the snow. Mr Scally was informed and he insisted that they should attend for treatment as many other members of GFC staff had managed to make it to work in similar conditions. Mr Scally ordered that photographs be taken of the snow in and around the players' cars and house and that if they did not attend, they would be docked two week's wages. Eventually, the three injured players arrived at the GFC ground at about 1pm.

31 They went to the treatment room. The Claimant said to Mr Allen (physiotherapist): *"little white boy Jack Payne* [another injured player] *lives two minutes away from them* [Josh and Curtis] *and I bet no-one's been to take a photo of his car"*. Thereafter the Claimant entered the manager's office and an altercation took place involving the Claimant, Mr Hesenthaler and Mr Southall. What happened was a matter of dispute between the parties.

32 The Claimant's account The Claimant said that he was polite and asked Mr Hesenthaler about Jack Payne and asked why three black players (himself, Mr Gowling and Mr Weston) were being treated differently. He said that *"it feels like you're discriminating against me"*. He said that Mr Hesenthaler then picked up his desk and threw it at him. A computer and other equipment fell off the desk. He alleged the manager said *"don't ever come in here and fucking disrespect me.... I am going to fuck up your career, you're finished.... who the fuck do you think you are?"*. He said that Mr Hesenthaler told him to fuck off and that he was history, and then said that the Claimant would have to attend at the Club from there on from 9am to 6pm every day. He said that he told Mr Hesenthaler that if he wanted to hit him then to go on and do so and at that point Mr Southall stood up and held Mr Hesenthaler back. The Claimant then left and went back to the medical room. He said that shortly afterwards Mr Hesenthaler walked in and said aggressively *"See that clock:... 9 to 6"*, and then walked out.

33 The Claimant's account was supported, at least in part, by Mr Weston and Mr Gowling although they did not witness the events in the manager's office.

34 Mr Hesenthaler's account Mr Hesenthaler's account, which was supported by Mr Southall, and in part by Mr Allen and Mr Whittington, was that it was the Claimant who was the aggressor. He said that the Claimant pushed open his door with force and that his manner was aggressive. He shouted *"What do you think you're playing at. You two are racist and this is racist behaviour"*. He was waving his arms about. Mr Hesenthaler said that he told him that he was not a racist but the Claimant was out of control and very angry. The Claimant kept saying *"go on then, hit me"*. He believed that the Claimant was about to strike him but Mr Southall moved in front of him and pushed him away and he stormed out. After ten to fifteen minutes he went into the medical room to speak to the Claimant again. He told all the players that they would not leave the ground until he left because he had been forced to lose his day off to deal with them. He said that at this point the Claimant jumped off the medical treatment bed and came towards him again in an aggressive manner. Mr Southall again stood between them to prevent any contact from the Claimant.

35 After being informed of the incident, Mr Scally gave instructions later that day that the Claimant should be sent home.

The Investigation

36 On, or soon after, 30 November 2010, written statements of the events of that day were recorded by Mr Hesenthaler, Mr Southall, Mr Allen, Mr Whittington and the Claimant.

37 On 5 December 2010, the Claimant was informed that he had been fined 2 weeks' wages because he had failed to attend the Club on time on 30 November 2010 and because his statement that he was unable to attend due to being snowed in was deceitful and untruthful.

38 Also on 5 December 2010, the Claimant was suspended pending further enquiries regarding the incident in the manager's office on 30 November 2010.

39 On 7 December 2010 the Claimant lodged a written grievance against GFC with the PFA. It alleged racial discrimination under the headings of breach of contract from club, media and journalism, date to see specialist, pay-off offer, discrimination and suspension. The grievance included the following: *"I now feel, based on the overwhelming evidence, that I am being racially bullied, victimised to get me out of the Club...myself and two other non-white players have all been fined 2 weeks' wages...clearly I now need to seek advice in order that the club treat me equally and that I am not discriminated against as all I would like is to be treated equally irrespective of the colour of my skin and the fact I expect my contract to be honoured."*

40 The grievance was not sent to GFC.

Medical Treatment

41 It was accepted by the Respondent's medical team that the Claimant required an operation on his right ankle to make him fit to play. However GFC was not prepared to have this operation done privately at their expense and had made arrangements for the Claimant to have the operation on the NHS. The Claimant was not prepared to wait for an NHS appointment and arranged treatment privately with Mr Lloyd Williams. The operation was conducted on 22 December 2010. On that same date, the Claimant was due to attend a meeting with Mr Scally to discuss the events of 30 November 2010.

42 On 21 December 2010, Mr Scally wrote to the Claimant and the letter included the following:

"I am told that you have instead visited an alternative consultant and arranged for an operation tomorrow (Wed) without the knowledge or consent of the Club or its medical team. As advised earlier we do not authorise this treatment. .....You have already been advised by me that you will not be required to play for the football club again, and the Club accepts it will be required to honour your contract until the termination date, subject to ongoing disciplinary procedures currently in place for an unrelated matter. .....On the matter of the serious allegations that have been made against you, I require you to attend the club premises to offer your account of the circumstances of the day in question tomorrow morning (Wed) at 10:00am to meet with me personally. This will be an informal meeting prior to a formal disciplinary hearing which will be held at the earliest possible opportunity thereafter."

43 In fact, because of the Claimant's operation, the meeting with Mr Scally did not take place until 28 December 2010. On that date, the Claimant gave his account of the events of 30 November 2010 which was consistent with the statement he made on that date.

44 On 30 December 2010 the Claimant was fined 2 weeks' wages for undergoing unauthorised medical treatment.

45 Also on 30 December 2010 Mr Scally made a final increased offer to Mr Barnes to settle the contract of the Claimant in the sum of £40,000. The offer was not accepted and no agreement was reached.

The Disciplinary Procedure

46 On 5 January 2011 the Claimant was invited to a disciplinary meeting in an email as follows:

"Hi Mark. I have been asked by the Chairman to request that you attend a formal internal hearing on Friday 28 January 2011 at 2.30pm regarding the serious allegations against you in regard to an incident on Tuesday 30 November 2010. If you wish to bring a representative to the hearing, would you please advise who will be attending. Regards, Gwen Poynter."

47 On 7 January 2011 Mr Nick Cusack (PFA representative) sent an email to Ms Poynter confirming that he would attend the meeting as the Claimant's representative and asking to be provided with all paperwork in relation to the matter and the copy of the Club's disciplinary code/procedures as soon as possible.

48 There was no response from the Respondent and so Mr Cusack sent a letter on 13 January 2011, again requesting all statements and documentation the Club wished to rely on in the forthcoming hearing on 28 January 2011. He also requested to be informed if any witnesses were to be called so that he would have the opportunity to ask questions of them. He also repeated the request for a copy of the Club's disciplinary code/procedures. He wrote *"I am mindful of the fact that the hearing is only a couple of weeks away and therefore would be grateful if you could send this documentation through to me as soon as possible so that the player has an opportunity and enough time to address the points raised and be properly prepared for the hearing."*

49 It was not until 27 January 2011 that Ms Poynter sent the relevant statements to Mr Cusack. The disciplinary hearing took place the following day.

50 At the disciplinary hearing on 28 January 2011, the disciplinary panel consisted of Mr Paul Scally (Chairman), Mr Michael Anderson (Vice Chairman) and Mr Mike Quarrangton (Director). They were advised by Mr Chris Waters (Solicitor) and Mr John McDonald (Solicitor). Ms Poynter (Club Secretary) was also present. The Claimant attended in person accompanied and represented by Mr Nick Cusack (PFA).

51 The hearing took place between 2.00pm and 3.25pm. The panel considered the written statements made by Mr Andy Hesenthaler, Mr Nicky Southall, Mr Steve Allen, Mr John Carter and Mr Luke Whittington. It also considered the

statements of the Claimant and Mr Curtis Weston and Mr Josh Gowling. The Respondent produced minutes of the meeting in summary form. The Tribunal was also shown a verbatim transcript of part of the meeting made from a covert recording made by the Claimant.

52 At the hearing, Mr Carter, Mr Hesenthaler, Mr Southall and Mr Allen attended to give evidence in person and they were questioned by the panel and Mr Cusack on behalf of the Claimant.

53 During the hearing Mr Cusack complained that witness statements had been served upon him only the day before.

54 The Claimant was given the opportunity to present his case but had not been told that he could bring his own witnesses to give evidence in person.

55 In a letter dated 31 January 2011, Mr Scally confirmed that the Claimant had been summarily dismissed by reason of gross misconduct. The letter read as follows:

"Dear Mr McCammon.

I write further to the formal disciplinary meeting which took place at Gillingham Football Club on Friday 28 January 2011.

I confirm that the allegations made against you were as follows:

1. That on 30 November 2010, at the club premises, you acted in a manner that was aggressive, violent and threatening towards the team manager.

2. That on 30 November 2010, at the club premises, you made very serious accusations of racism against both the team manager and the assistant manager.

At the hearing on 28 January 2011 the club presented its case, witnesses of fact were called and questioned by both the club and your adviser and you were given the opportunity to voice your recollection of the version of events on 30 November 2010.

On 29 January 2011, the Board of Directors convened a meeting to consider the allegations that had been made against you and the witness evidence presented at the formal hearing.

Having taken into account the witness statements, oral evidence and the representations made both by you and on your behalf by Mr Cusack, the Directors upheld the allegations.

In light of the serious nature of your behaviour the Board has resolved to make a finding of gross misconduct and have no option but to terminate your professional playing contract with Gillingham Football Club with immediate effect.

In accordance with the rules prescribed by the Football League, you have a right to appeal the Board's decision. We would advise you to obtain independent advice should you wish to appeal.

It is with considerable concern that the Board were notified on Friday 28 January 2011 that you had made contact with one of the Club's witnesses, having received his witness statement. The witness alleged that you attempted to pressurise him into altering his statement to your benefit. Despite being questioned on this point, you tried to deceive the directors. It is the Club's intention to obtain a further witness statement to this effect and reserve the right to utilise the same, should it be necessary at a later date.

Finally, we reiterate the undertaking given by you at the meeting on Friday, in which you have undertaken not to make contact either directly or indirectly, now or in the future, with any of the Club's witnesses.

A copy of this letter has been sent to Nick Cusack as your representative and the Football League.

In the meantime, please arrange to return to the Club, all and any property you have belonging to the Club.

Yours sincerely, Paul Scally, Chairman"

The Appeal

56 On 1 February 2011 the Claimant wrote to Mr Scally to appeal the dismissal decision. The appeal was forwarded on his behalf by the PFA to The Football League but ultimately it was not pursued.

57 The Claimant presented his complaint to the Employment Tribunal on 29 April 2011.

58 The Respondents' response was presented on 22 June 2011.

TRIBUNAL DECISION

Race Victimisation – Dismissal

59 Equality Act 2010

Section 27 - Victimisation

(1) a person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act or

(b) B believes that B has done, or may do, a protected act.

(2) each of the following is a protected act:

...

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Section 39 – Employees and Applicants

(4) An employer (A) must not victimise an employee of A's (B) -

...

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Section 123 – Time Limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of -

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

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

Section 136 – Burden of Proof

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

(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the Court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision.

60 Commission for Racial Equality: Code of Practice on Racial Equality in Employment

Para 1.6 – Courts and Tribunals must take account of any part of the code that might be relevant to a question arising during those proceedings.

Para 3.8 – A systematic approach to developing and maintaining good practice is the best way of showing that an organisation is taking its legal responsibilities

seriously. To help employers and others meet their legal obligations, it is recommended that they:-

(a) draw up an equal opportunities policy in employment; and

(b) put the equal opportunities policy in employment into practice.

Para 4.65 – Employers must not discriminate on racial grounds in the way they respond to grievances or invoke disciplinary measures. Disciplinary action is an extreme measure and should be taken fairly and consistently, regardless of the worker's racial group. Equally, allegations of racial discrimination or harassment must always be taken seriously and investigated promptly, not dismissed as "over sensitivity" on a worker's part.

(The above code of practice was replaced by the Equality and Human Rights Commission: Code of Practice on Employment (2011) which came into force on 6 April 2011)

61 Igen Ltd v Wong [2005 IRLR 258 CA] The Court held that a Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account, in determining such facts, pursuant to the relevant statutory burden of proof. This means that inferences may also be drawn from any failure to comply with any relevant code of practice. Where the Claimant has proved facts from which conclusions can be drawn, that the Respondent has treated the Respondent less favourably on a prohibited ground, then the burden of proof moves to the Respondent. It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.

62 To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on a prohibited ground since "no discrimination whatsoever" is compatible with the burden of proof directive. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

63 Although Mr Scally said in his evidence that the 1st Respondent had an equality and diversity policy and that staff were trained in that policy, no such policy was included in the bundle or produced to the Tribunal. Nor was any evidence of training given. The Tribunal would normally expect such a policy, if it existed, to be produced, at least the relevant part, in the bundle of documents. The Tribunal found that there was no reliable evidence of the existence of such a policy.

64 The protected act alleged by the Claimant was his verbal allegation to Mr Hesenthaler and Mr Southall on 30 November 2010 that they were racist and that the Claimant had been the subject of racial discrimination.

65 The Respondent asserted that both the manner of the complaint, being aggressive and violently stated, and the fact that he did not genuinely believe that the managers were racist or that he had suffered racial discrimination, meant that his complaint was not made in good faith and could not therefore amount to a protected disclosure.

66 The Tribunal found that the evidence of the events of 30 November 2010 were so unreliable that it could not find that the Claimant had made his complaints in a violent and aggressive manner. In particular, the Tribunal found that it could not rely upon the evidence of the Respondent's witnesses because their statements were clearly copied one from the other. They could not be considered to be credible witnesses when considering their accounts of the incident because, despite it being manifestly obvious on the face of the statements that they had been copied, they denied any such copying and insisted the statements had been completed separately by each witness. This was particularly so when the main similarities were at crucial parts of the evidence and were clearly designed to strengthen the adverse nature of their narrative against the Claimant and to put the Claimant in a bad light. All that the Tribunal could reliably conclude from the evidence was that the Claimant was involved in a heated argument with Mr Hesenthaler in his office with both swearing and shouting taking place on both sides. There was insufficient evidence for the Tribunal to conclude that the Claimant made his accusations of racial discrimination in a manner which amounted to bad faith.

67 The dismissal letter dated 31 January 2011, set out in full above, clearly states that one of the reasons for dismissal was that the Claimant had made accusations of racism against the team manager and the assistant manager. Although Mr Duggan for the Respondent stated during the hearing that the letter was drafted without legal advice, he later confirmed in a letter dated 2 July 2012 (copied to the Claimant's representative) that the letter of dismissal was seen by Mr Waters, solicitor, who advised the Respondent on 28 January 2011, although it was stated that he was not an employment lawyer.

68 The Tribunal found it notable that the paragraph simply referred to *"very serious accusations of racism."* That phrase was not qualified. It did not for example refer to *"false" accusations"* or *"accusations which you did not believe to be true"* or *"accusations made in bad faith"*, as it might have done if that was the Respondents' case. The Claimant's alleged aggressive, violent and threatening manner was dealt with in the previous paragraph. The second paragraph therefore stood alone.

69 The Tribunal also noted that, before this letter, there was no evidence of any allegation made by the Respondents that the Claimant had made the accusations knowing them to be false or not believing them to be true.

70 The Tribunal found that the Respondent was in no position to assert that the accusations were either false, or that the Claimant did not believe them to be true, because there was no investigation whatsoever into the accusations. Mr

Scally had discounted them from the start as being without merit and not worthy of investigation.

71 The Tribunal found that the accusation made by the Claimant on 30 November 2010 to Mr Hesenthaler and Mr Southall that they were racist and that the Claimant had been the subject of racial discrimination was a protected act within section 27 of the Act.

72 The Tribunal rejected the Respondent's assertion that even if there was a protected act on 30 November 2010, the reason why the Claimant was dismissed was nothing to do with any protected Act but was because of the behaviour and manner of the Claimant, relying upon Martin –v- Devonshires Solicitors [2011] ICR 352.

73 The Respondent had clearly stated that making accusations of racism was a principal reason for dismissal. The Respondents had failed to comply with the CRE Code of Practice, paragraphs 3.8 and 4.65 above. From these facts the Tribunal inferred that the Respondents regarded the Claimant's accusations of race discrimination as a permissible reason for dismissal.

74 The Tribunal found that the Claimant had proved facts from which it could conclude that the dismissal was because of the protected act. The Respondent had failed to show that it was in no sense whatsoever on the grounds of a protected act.

75 It is rare that a letter of dismissal overtly states that a protected act is the reason for dismissal, especially when the Respondent has had the benefit of legal advice. However, it was done in this case. There was no reasonable conclusion other than that in the circumstances it was an act of victimisation by dismissal.

76 The complaint of victimisation by dismissal succeeds.

Race Victimisation – Detriment

77 The Claimant alleged in paragraph 18 of the ET1 Claim Form that the following acts of detriment alleged to amount to race victimisation aside from dismissal.

78 **Mr Hesenthaler's response on 30 November 2010 when the Claimant made the allegation.** The Tribunal, as stated above, found that the evidence regarding what happened in Mr Hesenthaler's office on 30 November 2010 to be so unclear and unreliable that it could not make findings of fact other than to say that the argument was heated on both sides. The Claimant's account was also unreliable because he clearly exaggerated his account of his own conduct by suggesting he was calm and giving an implausible account of Mr Hesenthaler picking up and throwing a desk at him. The Tribunal did not have sufficient evidence to be able to conclude that Mr Hesenthaler's conduct towards the Claimant immediately after the accusation of racism was made, amounted to a detriment.

79 **Mr Scally initiated an unprovoked offer to terminate the Claimant's employment.** The Tribunal found that the offer to terminate the Claimant's employment was not unprovoked and that the Claimant took an active and willing part in these negotiations together with his PFA representative. Additionally, the initiation of the negotiations took place in October 2010, well before the protected act on 30 November 2010.

80 **The threat of having his wages docked for failing to turn up to training on time on 30 November 2010** The Tribunal found that the threat of having wages docked was made before the protected act on 30 November 2010 and therefore could not qualify as a detriment. Additionally, the threat of having wages docked was made to the other two occupants of the house, Mr Weston and Mr Gowling.

81 **The threat of having his wages docked for having undergone medical treatment independently of the Respondent.** The reason for the dispute between the parties regarding private and NHS treatment and who would pay for the treatment was well documented and unconnected with the events of 30 November 2010 and their aftermath. Although on its face it was an unreasonable detriment, because there was no proper basis in the contract of employment for the insistence that medical treatment must be authorised by the Respondent, the Tribunal found that it was unconnected to the protected act.

82 The Tribunal found that the Claimant had not proved facts upon which it could determine that the Respondent was guilty of victimisation by way of the above alleged detriments.

83 Additionally, the Tribunal found that these complaints were presented out of time and there were no grounds to extend the time limit.

84 The complaint of victimisation by detriment fails.

Unfair Dismissal

85 Under section 94(1) of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.

86 The relevant law is set out in Section 98 of the Act and in the well-known case law relating to this Section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827 and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.

87 Firstly, whether there was a potentially fair reason for the dismissal under Section 98(2) of the Act and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

88 Secondly, whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under Section 98(4) of the Act. In particular, did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

89 Thirdly, did the investigation and the dismissal fall within the range of reasonable responses. The Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses.

90 Additionally, under Section 207 Trade Union and Labour Relations (Consolidation) Act 1992, the ACAS Code of Practice on Disciplinary and Grievance Procedures (2009) is admissible in evidence before an Employment Tribunal and any provision of the code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

91 In view of the finding above that a significant reason for the dismissal was unlawful victimisation under Section 27 Equality Act 2010, the Tribunal found that the dismissal was unfair because this was not a potentially fair reason under Section 98 (2) Employment Rights Act 1996.

92 The Tribunal also found that the dismissal was procedurally unfair. The Claimant made specific allegations of procedural unfairness in paragraph 16 of the ET1 Claim Form as follows.

93 **The Claimant was not sent a letter inviting him to the disciplinary meeting setting out the nature of the allegations that he was to face.** The Tribunal found this proved. It was a breach of paragraphs 9 and 11 of the ACAS Code of Practice. Additionally, although Mr Cusack requested copies of the statements of evidence and paperwork on two occasions (7 January 2011 and 13 January 2011) the material was only provided to him the day before the disciplinary meeting which took place on 28 January 2011. That was unfair.

94 **Mr Scally had pre-judged the Claimant and decided that the Claimant was never going to play for the Respondent again.** The Tribunal found this proved. It was clear that with effect from October 2010 Mr Scally was attempting to negotiate a settlement with the Claimant and his PFA representative that would result in the termination of his contract with GFC. Additionally, Mr Scally had ordered the Claimant to attend work on 30 November 2010, ordered an investigation of his non-attendance to take place, ordered his suspension and ordered a fine of two weeks' pay for his late attendance at work on that date. He also conducted the investigative meeting with the Claimant on 28 December 2010. In these circumstances, it was clear, and should have been apparent to

Mr Scally at the time, that he was not a fit person to chair the disciplinary meeting because of obvious conflicts of interest and apparent bias. It was clear from the record of the meeting that Mr Scally did not adopt an impartial or detached approach to the evidence but acted more like a prosecutor. In view of the earlier negotiations he had a clear interest in the Claimant's termination of contract at the least possible cost. The Respondent employs 300 personnel and has a Board of Directors. It would have been a simple task to arrange for an impartial person to chair the disciplinary meeting.

95 **There appears to have been interaction between the witnesses in the drafting of their statements in relation to the 30 November 2010 matters.** The Tribunal found this proved. Even a cursory examination of the initial statements of Mr Hesenthaler, Mr Southall, Mr Allen and Mr Whittington revealed striking similarities in both wording and content, and the order of events described. This could not be explained simply because the witnesses were describing the same event.

96 The following are examples.

Mr Hesenthaler *"At about 1.00pm I was in my office with Nicky Southall when Mark McCammon came crashing through my office door, pushing it open with real force. His manner was aggressive and he shouted at me "what do you think you're playing at. You two are racist and this is racist behaviour". He was waving his arms about."*

Mr Southall *"Suddenly the office door was pushed open forcefully and Mark McCammon came storming in. He looked aggressively at the manager and shouted at him "what are you playing at? You two are racists and this is racist behaviour". He was waving his arms about at this time."*

97 Following the incident in the manager's office there was a further incident in the treatment room which was described by the witnesses as follows.

Mr Hesenthaler *"At this point Mark jumped off the medical treatment bed and came towards me again in an aggressive manner... Nicky was closest to me and again stood between us avoiding any contact from Mark."*

Mr Southall *"Mark McCammon jumped off the treatment bed and went towards the manager aggressively. I stood in between Mark and the manager to prevent any contact between them and the manager left the room".*

Mr Allen *"At that point Mark jumped up off the treatment couch and was verbally abusive to the manager again, moving towards him in an aggressive manner. Nicky Southall was near to the manager and he stood in front of Mark."*

Mr Whittington *"Mark got off the couch and walked towards the manager in an aggressive manner, Nicky Southall got between the manager and Mark to stop anything from happening."*

98 The Tribunal found that not only were parts of the statements nearly identical but it appeared that there had been an inept attempt to vary the wording slightly. It had failed to disguise the fact that the statements had been copied one from another or that the statements had been completed by the witnesses together.

99 The disciplinary panel should have questioned the similarity between the statements because it was so obvious. That was particularly so because Mr Scally had himself criticised the statements of the Claimant's witnesses Mr Weston and Mr Gowling because they were *"very similar"*.

100 The Tribunal also noted that the witness statements produced by Mr Hesenthaler and Mr Southall before the Tribunal were strikingly similar. For example:

Mr Hesenthaler – paragraph 52. *"I had given thought to why the Claimant acted as he did on 30 November 2010 and accused both me and Nicky of being racists. I don't believe that he could have genuinely believed us to be racists. I think that as he and the other two players had been caught out for failing to turn up for treatment, blaming the snow conditions, he felt embarrassed. Fearing that he may face a fine for his actions, along with the other two players, I believe he tried to deflect his own wrong-doing by calling us racists in the hope that no action would be taken against them."*

Mr Southall – paragraph 53. *"I have given thought to why the Claimant may have accused both me and Andy of being racists on 30 November 2010. Having played with me and having been managed by Andy for a good few months and the fact that both of those had worked very hard to get fit, giving him lots of support, I do not feel that he could have genuinely believed us to be racists. I believe that because he and the other two players had been caught out for failing to turn up for treatment, blaming the snow conditions, he felt embarrassed and fearing that he may face a fine for his actions along with the other two players, I believe that he tried to deflect his own wrong-doing by calling us racists in the hope that no action would be taken against him."*

101 None of the above witnesses accepted, when questioned, that they had colluded or copied any parts of their statements and all insisted that the statements had been completed separately. The Tribunal found that to be implausible given the nature and extent of the similarities.

102 The Tribunal found that the similarities in the statements, and the witnesses' refusal to accept any collusion or copying, reflected adversely upon their credibility before the Tribunal.

103 **Dismissing the Claimant for having made a complaint of race discrimination.** The Tribunal found this proved. As referred to above, the letter

of dismissal clearly stated that a principal reason for the Claimant's dismissal was because he had made accusations of racism.

104 The Tribunal found that the Respondent had not conducted a reasonable investigation. It was seriously flawed in the above respects and there were no sufficient grounds for the Respondent to conclude that the Claimant was guilty of gross misconduct.

105 No reasonable employer would have reached that conclusion in view of the obviously unsatisfactory nature of the evidence before the disciplinary panel and the procedural unfairness and irregularities described above. The decision to dismiss was outside the range of reasonable responses.

106 The dismissal was unfair and the complaint of unfair dismissal succeeds.

Unauthorised Deductions from Wages – Section 13 Employment Rights Act 1996/Article 3 Employment Tribunals Extension of Jurisdiction [E&W] Order 1994

107 There was nothing in the Claimant's written contract of employment signed on 3 July 2008 which provided for a reduction of 15 percent in the Claimant's wages after the first year.

108 The parties' conflicting accounts of the negotiations and creation of the contract are set out above at paragraphs 10-18.

109 The Respondent asserted that the Tribunal should rectify the contract by giving effect to the intention of the parties at the time the contract was signed.

110 Chitty on Contract 28th Edition

Paragraph 5-065 Common Mistake

Rectification naturally only applies to contracts which have been reduced to writing. It has long been an established rule of equity that where a contract has by reason of a mistake common to the contracting parties been drawn up so as to militate against the intentions of both as revealed in their previous oral understanding, the Court will rectify the contract so as to carry out such intentions so long as there is an issue between the parties as to their legal rights inter se. If there is no such issue or if no substantive relief is sought and no practical purpose will be achieved, rectification may be refused. It will also be refused if a written agreement fails to mention a matter because the parties simply overlooked it, having no intention on the point at all. In such a case, the written agreement must be construed as it stands.

Paragraph 5-069 Proof of Mistake

The burden of proof is on the party seeking rectification. He must produce convincing proof not only that the document to be rectified was not in accordance with the parties' true intentions at the time of its execution, but also that the

document in its proposed form does accord with their intentions. It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract. The denial of one of the parties that the deed as it stands is contrary to his intention ought to have considerable weight, and unless the other party can convince the Court that the document does not represent both parties' intentions at the time of execution, rectification will only exceptionally be ordered.

Indeed, it has been said that it is not sufficient that the written contract does not represent the true intention of the parties; it must be shown that the written contract was actually contrary to the intention of the parties. Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document.

111 The Respondent's position was based upon Mr Scally's evidence before the Tribunal and his handwritten notes which he said were made at the meeting on 29 June 2008. It also relied upon the evidence of Mr Davies, Mr Mohamed and Ms Poynter. It also pointed to a hanging comma at the end of the last paragraph where, said the Respondent, the 15 percent reduction clause must have been accidentally deleted.

112 The Tribunal discounted Mr Davies' evidence. He admitted in his evidence under oath that he had lied to Mr Scally during the meeting by inflating the Claimant's current earnings in an effort to achieve a higher wage and he was successful in doing so. He said that although he was prepared to lie when negotiating contracts for players, when an agreement was reached he would always tell the truth. The Tribunal decided that it could not rely upon his evidence. When a witness admits under oath that he is prepared to lie on certain occasions it is not possible to identify when he is telling the truth. Additionally, it was evidence challenged by the Claimant.

113 The Tribunal also discounted Mr Mohamed's evidence. His involvement as an agent for the Claimant came to light only a few days before the Tribunal hearing. He claimed to recall the 15 percent reduction clause some four years after the event and despite not having been significantly involved in negotiating the Claimant's contract. The Tribunal found his evidence unreliable, and it was challenged by the Claimant.

114 So far as Mr Scally and Ms Poynter were concerned, they relied heavily upon Mr Scally's handwritten notes. However, no original of the notes was produced and it was not possible to ascertain from the photocopy whether some parts were in a different pen or had been added later. The notes are not signed by anyone, except that discrete part of the notes where Mr Scally asked Ms Poynter to type up the notes. The notes were not signed by the Claimant or his representative. The date is incorrect. That part of the notes which refers to the 15 percent reduction appears to have been added later because it is alongside the main body of text. The appearance of the hanging comma shows only that something

may be missing. Crucially, if something was missing, it does not indicate what it was. The Tribunal noted that in the two paragraphs above the last paragraph there is no full stop at the end of each sentence, indicating no particular attention was paid to grammar.

115 There was evidence before the Tribunal that each one of the player's contracts was negotiated individually and each was a bespoke production. Some players had relegation reduction clauses, others (including Mr Julian who gave evidence before the Tribunal) did not.

116 The Tribunal also noted that there were two versions of the final page resulting from the Football League insisting that a correction in the middle of the page be initialled by both parties. The signature blocks are immediately below the last paragraph with the hanging comma. It is clear that all three signatories signed this page on two separate occasions between 14 July 2008 and 8 August 2008 (according to the Football League stamps), although all signatures are dated 3 July 2008.

117 The Tribunal found it implausible that Mr Scally and Ms Poynter would, on two separate occasions, put their signatures immediately below a paragraph which was incomplete and which had omitted a crucial part of the agreement between the parties.

118 The Claimant insisted that he had not agreed a 15 percent reduction clause or intended that such a clause should be included in the contract. When the deduction from his pay was made in June 2010, he complained promptly and formally in writing.

119 In these circumstances, the Tribunal found that there were insufficient grounds for rectification and concluded that it must give effect to the signed contract as it stands.

120 The Tribunal found that the deduction of 15 percent from the Claimant's wages was a series of deductions which continued up to the date of dismissal on 31 January 2011. It was not authorised by the contract of employment. The claim was not made out of time.

121 The complaint of unauthorised deduction from wages succeeds both as a deduction from wages and as a breach of contract.