EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Dr R Masunga		Bishop Grosseteste University

AT A PRELIMINARY HEARING

Held at: Lincoln **On**: 15 January 2020,
and in chambers on 13 February 2020.

Before: Employment Judge R Clark

REPRESENTATION
For the Claimant: In Person
For the Respondent: Mr Fahy, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The claim of breach of contract was presented out of time and is **struck out**.

2. The claim of direct race discrimination, so far as it alleges the absence of a formal complaints procedure for ex-employees was an act of less favourable treatment because of the claimant's race has no reasonable prospects of success and is **struck out**.

REASONS

1. Introduction

1.1 This hearing was listed to consider whether any of the claimant's claims were presented out of time and, if so, whether time should be extended. It was also listed to consider whether it was appropriate to make any orders in respect of the prospects of

success of the claimant's claims. The claims themselves were not clearly particularised in the original ET1. An attempt to do so was made by EJ Broughton at the previous telephone preliminary hearing held on 1 November 2019. Following that hearing, she ordered the claimant to provide some further particularisation and set down this hearing.

1.2 Before I could consider the issues for this hearing it was necessary to spend some time ensuring the individual allegations were fully understood.

1.3 I have set out a short summary of the relevant chronology where it is agreed or non-contentious. Where there are disputes of substance, I identify them. The only area in which I make explicit findings of fact is in respect of the time limit issues. I then consider the elements of each of the allegations, the question of time limits and prospects of success.

2. Background Chronology

2.1 The claimant is a PhD level educationalist. He is black.

2.2 In March 2017, the claimant applied for employment with the respondent. There may be more detailed findings to be made as to whether there was an initial post for which he was not appointed and whether the visiting tutor ("VT") position was suggested as an alternative. Either way, it is common ground the claimant became eligible for VT work. He says he was appointed to a VT post. The respondent says he was merely included in a potential pool of VT's.

2.3 VT's are casual or hourly paid lecturers. They provide a flexible resource to allow the respondent to meet specific demands in each academic year to supplement its substantive lecturing workforce.

2.4 The respondent will say that VT's are given a contract for the specific lecturing tasks to be undertaken which may involve student contact or non-contact or both. A VT may have more than one such contract at any one time or in any one year. In order to claim and be paid for their hours, there must be a corresponding contract for VT hours.

2.5 Despite his appointment, the claimant was not given a specific allocation of work for the academic year 2017/18. A white VT tutor, John Ingoldsby, was given teaching hours. The claimant chased the respondent to find out if there was any work for him. There is an area of fact finding needed to understand why the claimant was added to the VT pool but not given any work for that year. The respondent will say his skills were not needed in that particular year on the undergraduate course, but his higher academic qualifications meant he was being considered for contributing to an MA course that did not run that year.

2.6 The claimant was invited to an induction course which was held on 22 November 2017. He was entitled to be paid for attending that and needed a contract against which payment could be authorised. A written contract was belatedly issued in mid-December, signed and returned to the respondent on 19 December 2017. The relevant terms of that contract are, at best, confusing. There are substantial findings to be made to determine the objective intentions of the terms of this contract. There is a real prospect that both parties are

wrong in their respective assertions about what it provides for. So far as commencement and termination is concerned, it provides: -

> ***Your employment commences on 22/11/2017 and will terminate on 31/07/2018.***

2.7 It is not contentious that the end date was the end of the academic year. So far as hours of work were concerned it says: -

> ***You are employed for a maximum of 6 hours. Details are determined by the Head of School and will be made available to you. Your total scheduled teaching responsibilities should not exceed 18 hours in any week or 550 in the teaching year.***

2.8 The claimant says this, together with verbal representations given at the induction course reflected a contractual entitlement for him to work 6 hours per week. The respondent says it is a maximum of 6 hours per week. The contract says neither and may in due course be found to be more likely to reflect the fact that the only paid "work" the claimant had was for 6 hours (in total, not per week) to attend the induction day on 22 November 2017.

2.9 The claimant alleges one of the attendees on the course, Lois or Louise Connolly, was appointed as a VT but unlike the claimant had not had to go through any form of interview of selection process to be used in that academic year.

2.10 Following the induction, the claimant sent various chasing emails through January, February and March about the possibility of work. Findings will be needed to understand exactly what was happening then and why there was a failure to respond to the claimant's queries then or, for that matter, to communicate to him earlier that he would not be needed that academic year. Further findings in respect of why he was invited to the induction course may shed light on what was happening at the time. His chasing correspondence will also likely inform findings about the claimant's own subjective belief about his contractual status at the time which may well not support a contention that he believed he had a contract for 6 hours per week from 22 November 2017.

2.11 In March 2018, the claimant commenced alternative salaried employment.

2.12 The only written contract in place ended on 31 July 2018.

2.13 In June 2018 the respondent advertised for more VT's. The claimant says this was for his "work". The respondent will say it was for different work. The claimant enquired about the advert and was informed that he would need to reapply. He did not apply.

2.14 I find between 4 August and 4 September 2018, the claimant was abroad on holiday, as advised by his GP in order to rest and recuperate.

2.15 I find as a fact that in September 2018, the claimant and/or his wife on his behalf visited CAB with a view to advancing his dispute with the respondent.

2.16 On 29 September 2018 the claimant, through his wife, lodged a written complaint with the respondent alleging race discrimination. He supplemented his complaint with further specific allegations on 5 October 2018. The respondent investigated the allegations and

responded in terms which rejected the complaint but also offered some conciliatory proposals. It explained how the claimant had not been used for the undergraduate course as other existing VT's had a better fit for that work. Equally, he was seen as a better fit for a planned MA course and there was still an option for him to work on that if he wished.

2.17 The respondent also accepted that its communication with the claimant had not been acceptable.

2.18 I find around late November / early December, the claimant's wife visited a lawyer on behalf of the claimant in respect of his complaint against the respondent. Around the same time, I find the claimant had been able to undertake his own research and "reading around" the subject of advancing an employment dispute with an employer and the role of ACAS. He had access to relevant support organisations, SET and EASS, who provide general advice on such complaints and when SET were asked about his complaint, they were quick to respond.

2.19 On 15 January 2019, the claimant "escalated" his complaint. There are facts to be found about what happened. The claimant says he was frustrated by the respondent's lack of a formal process appropriate to him and decided not to wait for an outcome. For its part, the respondent recognised he was no longer an employee and was not a student. Neither of its formal policies fitted the situation but it sought to engage to resolve the dispute. Before it could do so, the claim was initiated.

2.20 The claimant commenced early conciliation on 22 January 2019. His certificate was issued on 31 January 2019. His claim was presented on 4 February 2019.

3. The Breach of Contract Claim.

3.1 The claim of breach of contract relates to the allegation of non-payment of contractual wages throughout the duration of the contract. The claimant argues the written terms should be interpreted alongside what he says were oral representations made at the induction day. There are difficulties in law of such an approach to interpretation.

3.2 The claim is brought under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Articles 7(a), 7(c) and 8B define the time within which such a claim must be presented. Articles 7(a) and (c) provide: -

> ***7. An Employment Tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—***
>
> ***(a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or***
>
> ***(b).., or***
>
> ***(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable***

3.3 Article 8B modifies the time limit set by that provision by applying the standard statutory formula for not counting certain time spent in early conciliation.

3.4 I have considered the relevant authorities in this area of law. In particular, Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379, Walls Meat Company Ltd v Khan [1978] IRLR 499, Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 and Marks & Spencer plc v Williams-Ryan [2005] IRLR 562.

3.5 The principals they give rise to are to start with the words of the statute, and not any gloss applied to it by authorities which may be fact specific. The provision should be given a liberal construction in favour of the employee. In accordance with that approach it has consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit. In *Dedman* the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser, even if that adviser had failed to advise him correctly. Concluding internal procedures does not, in itself, render it not reasonably practicable to present a claim in time. The question of reasonable practicability is one of fact for the tribunal and falls to be decided by the particular circumstances of the case.

Discussion

3.6 For these purposes, the effective date of termination is agreed as being 31 July 2018. The time limit for presenting a claim of breach of contract under article 7(a) therefore expired on 30 October 2018. Early conciliation was not commenced during this period and there is therefore no period “not to be counted” which may modify that time limit. The claim was presented on 4 February 2019, a little over 3 months after the time limit expired. The claimant must therefore satisfy me that the facts engage the test in article 7(c).

3.7 In support of an extension, the claimant asserts he was unwell and, in any event, ignorant of his rights to claim race discrimination in the employment tribunal.

3.8 I do not accept he was unwell to the extent that he could not address his mind to the claim. I have seen no supporting evidence of incapacity beyond that he was stressed by the situation and his doctor advised him to take a holiday. He did and was out of the country for one month from August to September 2018. He had been working in other employment since March 2018 and that employment continues to this day. I do not regard the evidence of ill health, such as it is, to be sufficient to amount to render the presentation of the claim before October 2018 not reasonably practicable.

3.9 As to his knowledge of a right to bring a claim, I am also not satisfied that there was the necessary level of ignorance of his rights to render a timeous claim not reasonably practicable. The claimant was aware of his position throughout the relevant chronology yet there was no challenge to his alleged contractual rights either within the time of the contract or the 3 months’ time limit following the effective date of termination. He was aware of a basis of complaint from September 2018 as he and his wife began making enquiries of advice agencies and an initial complaint was made alleging race discrimination. The claimant holds high academic qualifications and accepted in evidence he was well able to research and read around a subject such as the role of ACAS in employment disputes. There was nothing I

heard which suggested there was the necessary ignorance of rights. In any event it is not a question of the actual knowledge the claimant had, but what he ought reasonably to have had in the circumstances. This is a claimant who has sufficient intellect to understand the broad basis of a grievance and to take his research further.

3.10 I also have regard to the fact that the claimant had other points of advice and support available to him. Firstly, he had available to him the quasi professional support of two industry bodies, SET and EASS. Their support was readily available throughout the time limit and when SET were asked about his complaint, they were quick to respond. Secondly, at all times his wife was available to support him and actively progress his complaints. She had enough awareness of his rights and grounds for employment disputes to draft his initial complaint alleging race discrimination, she had sufficient insight to know to visit CAB. She had sufficient insight to seek legal advice from solicitors. It seems highly doubtful that an intelligent claimant would be aware of legal rights without being in a position to very quickly establish the necessary steps to enforce them. As he said himself, he was able to read around the subject.

3.11 That leads me to the conclusion that even if I accept that the visit to CAB in September 2018 was limited to the issue of the internal complaint, and the unlikely absence of any further discussion about enforcing the rights that complaint asserted, I still cannot conclude that any remaining ignorance that there was in fact was itself a reasonable state of affairs. That is reinforced by the visit to solicitors. Even if that went no further because of the cost, the very fact that the claimant and his wife were of the view that they may need the assistance of lawyers is itself indicative of the true state of knowledge.

3.12 Those matters lead me to the conclusion that the claimant has not satisfied me of the necessary ignorance of his rights. I accept there are many aspects of employment tribunal practice and procedure that he may not have been aware of. However, I am satisfied that there was a sufficient level of understanding of the existence of rights, some form of enforcement and, if nothing else, where to go to find out more. He has not established the first limb of the test. It was reasonably practicable to present a claim within time. If I am wrong in that conclusion, I am not satisfied that the further 3 months taken to present a claim was itself a reasonable further period. The three separate points of advice sought in October, November and December 2018 all mean a reasonable further period would expire around November or December 2018 and it is not a reasonable further period to extend time under the second limb to 4 February 2019.

3.13 The claim of breach of contract is therefore struck out, as it was presented out of time in circumstances where it was reasonably practicable for it to be presented in time. It is not necessary to consider the merits of the claim.

4. The Race Discrimination Claims

4.1 It is necessary to start by summarising the 4 claims of direct race discrimination under s.13 of the Equality Act 2010 advanced by the claimant.

4.2 **The first allegation** – not being given any work.

a) The treatment amounting to a detriment is not being deployed to teach or given any VT work to do.

b) The comparator relied on is an actual comparator called John Ingoldsby, a white VT tutor who was given hours of teaching during that academic year.

c) The claimant seeks to shift the burden to show the difference in treatment was influenced by race relying on inferences being drawn from the conduct of his subsequent complaint; the evidence found in the internal investigation and the acknowledgment of poor communication; and the circumstances of the 2018 advert to appoint additional VT staff.

4.3 **The second allegation** – "deliberate Silence" / not responding to the claimant's concerns.

a) The treatment amounting to a detriment is the failure of the respondent to reply to his messages and telephone calls and to address his concerns about getting VT work.

b) The comparator relied on is a hypothetical comparator.

c) The claimant seeks to shift the burden to show the difference in treatment was influenced by race relying on inferences being drawn from the conduct of his subsequent complaints and the evidence in the later emails about not offering him any hours.

4.4 **The third allegation** – Having to go through a selection process / be interviewed .

a) The treatment amounting to a detriment is the claimant having to go through an interview / selection process to be considered for VT work.

b) The comparator relied on is an actual comparator called Lois (or Louise) Connolly who was appointed to the VT pool for that year without having to undergo an interview of selection process.

c) The claimant seeks to shift the burden to show the difference in treatment was influenced by race relying on inferences being drawn from the handling of his subsequent complaints and the fact that he was later required to re-apply to re-join the VT pool for a second year.

4.5 **The fourth allegation** – Failure to formally investigate his complaints and/or treat them seriously and genuinely.

a) The treatment amounting to a detriment is the respondent not having a formal complaints policy relevant to his complaints as an ex-employee and its failure to investigate his complaints both in September 2018 and January 2019 at all or seriously / genuinely.

b) The comparator relied on is a hypothetical comparator.

c) The claimant seeks to shift the burden to show the difference in treatment was influenced by race relying on inferences being drawn from the handling of his complaints as set out in his schedule.

5. Time limits

5.1 Section 123 of the Equality Act 2010 provides, so far as is relevant: -

> ***(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—***
>
> ***(a)the period of 3 months starting with the date of the act to which the complaint relates, or***
>
> ***(b)such other period as the employment tribunal thinks just and equitable.***
>
> ***(2) . . .***
>
> ***(3) For the purposes of this section—***
>
> ***(a)conduct extending over a period is to be treated as done at the end of the period;***
>
> ***(b)… failure to do something is to be treated as occurring when the person in question decided on it.***
>
> ***(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—***
>
> ***(a)when P does an act inconsistent with doing it, or***
>
> ***(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it***

5.2 By those provisions, the time limit for presenting a claim of race discrimination is calculated first by identifying the act or omission that is alleged to form the act of discrimination. Where it continues over a period of time, time starts to run from the end of that period. In considering the meaning of conduct extending over a period of time I have had regard to Hendricks v Metropolitan Police Commission [2002] EWCA Civ 1686 and Pugh v National Assembly for Wales UKEAT/0251/106 as submitted by the respondent.

5.3 The cause of action behind the four allegations therefore crystallise on the following dates and gives rise to the following time limits.

a) The alleged failure to provide work continued throughout the existence of the apparent contract until it ended on 31 July 2018. The time limit for presenting the first allegation expired on 30 October 2018. The time spent in early conciliation started after this date does not modify this date. It is prima facie out of time.

b) The alleged failure to respond to the claimant's messages continues through the period his messages were not being responded to. That is said to start some time shortly after the induction day on 22 November 2017 and continue until a reasonable period after the last such message within which it may be reasonable to expect a response. The respondent suggests up to 4 weeks is a period after which it may be

clear there is no such response coming. It may well be much sooner than that. In any event, that takes the period to 5 April 2018 based on the last such message being sent on 8 March 2018. The time limit for presenting the second allegation expired on 4 July 2018. The time spent in early conciliation started after this date does not modify this date. It is prima facie out of time.

c) The allegation of having to go through a selection process gives rise to a detriment both in the process that was undertaken in March 2017 and the one that the claimant did not proceed with in 2018. There is no exact date of the first detriment but in view of its age, the principals to be applied are unlikely to lead to a different conclusion whether it was, say, the 10th or 31st of the month. The detriment occurs again on 29 June 2018 when the claimant sees the further advert for VT's and he is told to reapply. The time limit for presenting the third allegation expires on 28 September 2018. The time spent in early conciliation started after this date does not modify this date. It is prima facie out of time.

d) The allegations of failure to formally investigate the complaints arise after a reasonable period of time following the presentation of the complaint. This is an artificial analysis as it seems there was an investigation and a response. The time limit for presenting the fourth allegation expired after a reasonable period within which the complaint could have been investigated and responded to. The exact dates when that occurred are not determinative as the date of the second complaint on 15 January 2019 is itself in time in respect of a claim presented on 4 February 2019 and there is a potential issue of conduct extending over a period insofar as the claim alleges the respondent's failed to investigate and respond to the complaints which, in isolation, would be an issue that I would leave for the final hearing if that allegation proceeds.

5.4 The claimant offers no explicit pleading on the question of conduct extending over a period that may provide a basis for a state of affairs which overarches the four discrete allegations and so as to bring ostensibly out of time matters, within time. It is therefore necessary to consider the three allegations which are out of time against the just and equitable test for extending time in der s.123(1)(b) set out above. The respondent reminds me of London Borough of Southward v Afolabi [2003] IRLR 220 which provides guidance on the approach to a just and equitable extension and Bexley Community Centre v Robertson [2003] EWCA Civ 576 that the burden rests with the claimant to establish a just and equitable extension.

5.5 There clearly has been delay in the claimant advancing his rights. This was firstly within the contractual period although much of this was time the claimant was faced with silence and understandably focused on obtaining other paid employment. There is some evidence of him suffering some mental ill health which, although not of a sufficient duration or magnitude to explain delay in itself, is one small factor in the chronology. He embarked on an internal resolution at the end of September which has had the advantage of securing the contemporaneous documentation and the respondent's reasons for acting have been crystallised in its responses. He sought to resurrect the internal complaint in January 2019 but took the view that he needed to formalise that in these proceedings at the end of January.

5.6 The delay on the part of the claimant which is in part answered by the respondent's initial silence. There is delay of around 3 months from the time limit based on the termination of the contract on 31 July 2018. Of course, before that time limit expired, the claimant did launch his first internal complaint and although a claim did not promptly follow the outcome of that, the parties were engaged with the issues. I am satisfied the delay is explained in the claimant's evidence albeit not excused so as to render an extension just and equitable in itself. The fact of the delay therefore falls to be considered in the round, as an exercise in the balance of justice between the parties. The single biggest feature of that exercise is the extent to which the respondent is disadvantaged if the claim proceeds, beyond, that is, the limitation defence. In this case there is next to no adverse effect on the available contemporary documentation.

5.7 The argument of the respondent which found the greatest traction appeared to be the fact that two of its witnesses were no longer in its employment. In the case of Mr Graham Meeson, who I accept played a key role in this matter, he has not in fact left the respondent's employment as initially argued but is in fact still in employment albeit on a sabbatical break which ends soon. Another individual was also identified as having left, that is Sabah Holmes. There is nothing before me to say she will not give evidence or that a witness attendance order would not be appropriate if sought. In any event, her involvement is well documented in the contemporaneous documentation. I am not satisfied that there is any, or certainly any significant, disadvantage to the respondent by her change of employment or Mr Meeson's sabbatical.

5.8 Consequently, I am satisfied that the balance within the just and equitable test is in the claimant's favour. There would be injustice to the claimant if the claims were denied by the delay alone and it is just and equitable to extend time for the presentation of the claims identified as allegations 1, 2 and 3 to 4 February 2019.

6. Reasonable Prospects of Success

6.1 Rule 37 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides, so far as is relevant: -

> ***(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—***
>
> ***(a)that it …… has no reasonable prospect of success***

6.2 Rule 39 provides a power to impose a deposit as a condition of a claimant continuing with an allegation or argument where the tribunal has determined that it has little reasonable prospect of success.

6.3 Both tests engage a power, not a duty. Meeting the relevant test is therefore only the first of two stages to engaging the relevant consequence. In both cases there is an additional stage after the initial test is made out which is for the tribunal to decide whether to exercise the power then engaged. That must be done judicially.

6.4 I remind myself that this is a preliminary hearing and caution should be exercised in making orders which may, either directly or indirectly, restrict a party's case being brought to justice.

6.5 When considering the prospects on a strike out application under rule 37, the claimant's case is to be considered at its highest. It is not my purpose to resolve disputes of fact at all, but especially where oral evidence is required to be heard to resolve it, nor is it appropriate to seek to assess the likely outcome. It is a draconian order and where cases are fact sensitive, as in discrimination cases, it should only be used in the plainest and most obvious cases. (Anyanwu v South Bank Students' Union [2001] IRLR 305).

6.6 In applying the tests of no, or little, reasonable prospect of success, it is of course essential to have regard to the legal tests to be applied in the substantive claim. In the case of a claim of direct discrimination under s.13 of the Equality Act 2010, the claimant must broadly establish two things. They are:-

a) That he has been subject to some detriment capable of amounting to less favourable treatment.

b) That he can point to some evidence sufficient to show a prima facie case that the reason for that detrimental treatment is, in part at least, because of his race. Except where the protected characteristic, or a proxy for it, arises clearly in the treatment itself, that test arises in two parts. First, that an actual comparator was, or a hypothetical comparator would be, treated more favourable than the claimant was in materially similar circumstances. That difference in treatment and difference in characteristic in itself is not enough. The second, crucial, part is that the claimant must be able to point to some evidence which establishes "something more" from which the tribunal could decide the reason for the treatment was race.

6.7 The reference to "could decide" is drawn from s.136 of the 2010 Act which provides:-

> ***(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 provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision***

6.8 It is therefore sufficient for the claimant to establish evidence that could point to race as the reason.

Discussion

6.9 The respondent made detailed submissions on each of the allegations as are now understood in the claimant's claim of direct discrimination. Mr Fahy, on its behalf, has provided a fair summary of the law in full, largely for the claimant's benefit. There are elements of those submissions which seek to demonstrate a non-discriminatory reason for the alleged treatment from the contemporary documentation. From that, I am invited to

conclude this is a case which, plainly and obviously, has no reasonable prospects of success and to strike it out or at least impose a deposit.

6.10 There are aspects of those submissions which I accept invite a conclusion that none of the claimant's allegations is a particularly strong one and I am inclined towards a conclusion that each may well fail. However, that is not the test.

6.11 As to allegations 1, 2 and 3, they each advance something which is properly capable of amounting to a detriment. Of those, the main issue in this case is allegation 1 and why the claimant did not get work as a VT following his appointment (at least, to the pool of available VT's). The other allegations whilst arguably proper detriments are secondary to this allegation but, nevertheless, stand as part of the surrounding evidential landscape relevant to allegation 1. I therefore take a step back when viewing allegations 1, 2 and 3. I am satisfied that there is either an actual comparator which, on the face of it, is a proper comparison, at least to warrant testing by a full tribunal, or a basis for advancing a hypothetical comparator which is at least not a fanciful contention. Secondly, the claimant does identify points in the evidence from which he can properly advance a case to establish the necessary something more from which a tribunal may draw inferences that could be sufficient to shift the burden. Whether it does or not is a matter for it. As to the rest of allegation 3, were it not for the clear requirement to re-apply, I might have taken a more determinative approach to that part of the allegation. Overall, I have concluded these allegations are not in the category of having no reasonable prospect of success.

6.12 Turning to whether they are, nonetheless, in the category of little reasonable prospect of success, I have concluded they are not. The fact that my sense is that they may each fail in the final analysis is not sufficient grounds for imposing a deposit. That they may not be strong cases is not the same as having little reasonable prospect of success. I am satisfied that there are questions within the allegations that demand an answer which must be properly understood through testing evidence. Why wasn't he offered work? Why didn't he get a response to the messages he left? Why was he viewed the way he was when he chased for an answer? Why did he have to reapply to be in the VT pool when his understanding is that others were given VT work without having to apply? I sense that those questions may well end up being answered by the respondent in terms which show race was in no way whatsoever the reason for the treatment, but if the claims are in time, that must happen at a final hearing.

6.13 The fourth allegation faces more significant problems, and particularly so insofar as there is an allegation that the absence of a formal procedure for dealing with an ex-employee's complaints amounts to a detriment because of the claimant's race. There is no basis on which the claimant will show less favourable treatment at all, still less any sense whatsoever that state of affairs was in anyway influenced by the claimant's race. There is no reasonable prospect of that specific part of the allegation succeeding and so much of it will be struck out. The remaining detriments in allegation 4 allege that the respondent failed to investigate his complaints and (this must be in the alternative) did not take them seriously. The first part of that allegation, that the respondent did not investigate the complaints, does not stand up to scrutiny where it is common ground that the respondent did investigate the

first complaint and respond to the claimant with its findings and made recommendations for a way forward. Further findings are necessary to understand what took place in January 2019. If the allegation was in respect of the September 2018 complaints, I would have been inclined to strike out that part of it also. However, the allegation that the complaint was not taken seriously or genuinely is potentially a proper detriment, particularly to the extent it concluded that there was no race discrimination. However, in practice it seems to me he will have difficulty establishing that the alleged detriment arose in fact, particularly as the respondent's investigation concluded that there were deficiencies in the communication with the claimant and was conciliatory in its proposals for going forward. I can see similar difficulties in the other elements of this allegation. In particular, I have doubts over whether the claimant will establish the basis for a hypothetical comparator being treated more favourably. If he does, he then faces another difficult hurdle. He has set out various aspects of the investigation process from which he will invite the tribunal to draw an adverse inference that his treatment was because of his race and the possibility of such inferences being available to the tribunal is why this element is not in the category of no reasonable prospects of success. However, the examples shown, if accepted as facts, are in parts indicative of a positive response to the claimant. Overall, therefore, I have concluded that this allegation falls into the category of little reasonable prospect of success which engages the power to impose a deposit as a condition of the claimant being permitted to continue with this allegation. If this were the only allegation, or if taking it out of the analysis would have a significant effect on narrowing the issues or reducing the time and costs of the final hearing I would make such an order. However, in this case I decline to make any further orders. My reasons are, firstly, that the allegations stand as part of the relevant factual landscape that the parties and tribunal will be required to consider in any event. That is so even if the discrete allegation is not maintained. The second, and related, reason is that if the final consequence of a costs order were to be considered, it is difficult to conceive how the respondent's costs of that allegation in isolation could be meaningfully separated from the costs it otherwise incurred and even an assessment on the basis of a proportion would be artificial. I do not place a great deal of weight on this second reason but it is relevant to have regard to the utility of any order, especially one which may serve to prevent a claim being heard.

6.14 Separate case management orders follow.

EMPLOYMENT JUDGE R Clark

DATE 14 February 2020

JUDGMENT SENT TO THE PARTIES ON

……...……

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AND ENTERED IN THE REGISTER

……...……

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FOR SECRETARY OF THE TRIBUNALS