EMPLOYMENT TRIBUNALS

Claimant: **Mr S Sunmaila**
Respondent: **Sussex Coast College Hastings**

Heard at: **Ashford** **On: 25-28 February 2019**
In Chambers: 13 March 2019

Before: **EMPLOYMENT JUDGE CORRIGAN**
Members: **Ms R Downer**
Mr S Huggins

Representation
Claimant: Mr D Ezuma, Lay Representative
Respondent: Ms G Crew, Counsel

RESERVED JUDGMENT

1. The Tribunal has not found a contravention of the Equality Act 2010 (direct race discrimination) and the race discrimination complaint is dismissed.

2. The Claimant's complaint of unlawful deduction of wages is well-founded in as far as he was not paid the minimum wage and the Respondent is ordered to pay £3,566.79 to the Claimant.

REASONS

1. By his claim dated 18 January 2017 the Claimant brings complaints of direct race discrimination and unlawful deduction of wages.

2. The issues were initially set out in the Case Management Order dated 15 March 2017. The matter was initially listed for a three day hearing on 5-7 February 2018 but that hearing did not go ahead for the reasons set out in the Case

Management Order dated 5 February 2018. That Order added the issue of employment status but during this hearing the Respondent conceded the Claimant was a worker. There are nevertheless references to staff including the Claimant being self-employed in the findings of fact below, which is a reference to the position for tax purposes and the label applied by the parties. It is not a finding in respect of employment status as it was conceded by the Respondent the Claimant nevertheless met the statutory definition of worker.

3. The issues between the parties had evolved since the Order of 15 March 2017 and were clarified at the outset with the parties and remained under review with the parties during the hearing. They were amended during the hearing with the agreement of both parties, save for the issue in respect of the minimum wage.

4. We had concerns ourselves, which increased during the hearing of the evidence, that the Respondent's payment system may not have been compliant with the minimum wage, given the Claimant received no pay at all for a significant number of months, and only received £6058.30 in total for the year despite on his case working significant hours. The Claimant did wish this to be considered. We kept under review with the parties whether the minimum wage issue was a matter that we could fairly determine, without an adjournment, given the issues were sufficiently widely drafted to encompass this (at 5.9 below in particular). The Respondent's Representative did not object on principle but objected to our doing so without a further adjournment, as there was further evidence the Respondent would have called, but she did nevertheless work hard to address the issue and we are grateful for her assistance in the matter. Despite her objections we have addressed this issue for the following reasons. The Respondent's Representative said she would have called further evidence on the origins of the 7 hours work per student on pages 82-83, but we accept the origins are the national framework agreement of the ILM awarding body. She also said she would have called evidence from other assessors about the average time taken to assess a unit, but we have accepted the evidence of Ms Robertson in this regard, so it is not necessary to hear from the individuals themselves. We do not consider any further evidence about either matter is likely to assist in determining the hours of work the Claimant himself was actually doing. We considered we had as much evidence as is likely to be available to assist with the number of hours performed by the Claimant, given neither side kept records of working hours. Moreover, there had already been more than a year since the last listed hearing which did not go ahead and it would be disproportionate to adjourn again.

5. The final issues for us to determine are:

Direct race discrimination

5.1 whether the Respondent treated the Claimant less favourably because of race than an actual or hypothetical comparator by:

5.1.1 withdrawing an offer of employment as an E-learning assessor on the ILM course on or about 15 March 2016 and/or 10 June 2016;

5.1.2 denying the Claimant access to standardisation training on 1 June 2016, 9 June 2016 and 2 September 2016; and/or

5.1.3 terminating the Claimant's contract on the ILM course on 26 August 2016.

5.2 if so, were one or more of the Claimant's claims presented outside the primary time limit?

5.3 was the conduct "conduct extending over a period"?

5.4 would it be just and equitable to extend time?

Unlawful deduction of wages

5.5 To what payment was the Claimant entitled in relation to the ILM course?

5.6 If the payment for the ILM course was calculable by reference to units completed, how many units were in fact completed by students?

5.7 If applicable, did the Claimant receive a payment of £70 in relation to each unit completed by the student?

5.8 If applicable, did the Claimant receive a payment of £250 in relation to each student who completed the ILM course, or relevant part payment?

5.9 whether there is any additional payment owing to the Claimant by the Respondent, and if so, how much?

Hearing

6. We heard evidence from the Claimant on his own behalf. On behalf of the Respondent we heard evidence from Mr David Fowler (Head of Higher Education), Miss Penelope Coppins (HR Advisor), and Ms Hayley Robertson (WBL Manager (Partners) and the Claimant's Line Manager on the ILM).

7. There was an agreed bundle of 629 pages. The parties made oral submissions on the above issues.

8. Based on the evidence we heard and the documents before us we find the following facts:

Facts

9. The Claimant is of African origin and speaks with an African accent. He commenced work for the Respondent in October 2014 as a self-employed business tutor/lecturer on the Respondent's HNC course. He had a written contract for this engagement. This provided that he would be paid £70 per student per completed unit. At the end of each month he was to submit an invoice detailing the date, students and units completed, following which the

Respondent would pay within 14 days. The contract specified that any additional days of employment over and above that agreed need to be agreed in advance by both parties and agreed in writing (pp74-77).

10. He then took on work as a visiting lecturer and internal verifier on the HNC/HND business course being paid £15 per verification and £23.05 per hour for lecturing. We have not seen any written contract in respect of the agreement for these roles though an email confirmed them in October 2015 (p115).

11. The Respondent created a new online ILM course (Institute of Leadership and Management) to begin August 2015. Mr Fowler gave evidence that the expectation was that some tutors on the HNC would also work on the ILM as they would have the relevant management experience. The role of assessor on the ILM was advertised internally on 3 July 2015. Both the advert and the job description said that remuneration would be £250 per successfully completed learner (pages 81-83). The role was as assessor not tutor. In error within the job description there was still reference to HNC/D business course though in the role description itself it specified correctly the ILM level 3 online course (numbered paragraph 1, page 82).

12. The job description said that the post holder would be responsible for the assessment of up to 50 students per intake involving 7 hours contact per student, ranging from responding to emails, marking work and providing feedback over the 4 month duration of the course (p82). There were other duties including but not limited to attending meetings including standardisation meetings, completing records and tracking progress, and liaising with colleagues as a team. The job description was more specific than the advert, that payment was to be £250 per student on the satisfactory completion and passing of each course delivered, subject to internal verification. It repeated the list of duties required in more detail (p83).

13. Neither advert nor job description clarify the number of units to be completed by a student to pass. There were 12 units on the ILM whereas there were just 7 units on the HNC.

14. The Claimant's evidence is that he had not understood the £250 upon completion to be the only remuneration, unlike the HNC where he is paid by completed unit. He says that he therefore believed the £250 to be a bonus in addition to his usual £70 per unit in accordance with his only contract for the HNC work. We address our findings in respect of this further below.

15. The Claimant applied and in reply on 23 July 2015 Mr Fowler, described then as Higher Education Manager, said he would be delighted if the Claimant would work on the ILM. He said that they would be looking to take on more staff and when he had details he would be in touch. He expected that the Respondent would want to start late August/September (p90).

16. No further contract was issued to confirm the terms. Six existing staff including the Claimant commenced working on the course in August/September 2015 (page 95). The Respondent's breakdown of units worked suggest the Claimant

began on 31 August 2015. The Claimant was the only black African out of the six. According to Mr Fowler at least one other was sessional like the Claimant. Some had other contracts with the Respondent. At that point there was no interview. An internal verifier was appointed and on 7 September 2015 she queried the level of experience of all the assessors. Mr Fowler confirmed that all, including the Claimant, had experience in management. The internal verifier noted that she should take into account any less experienced assessors when selecting portfolios for internal verification (page 95). The internal verifier is not named in these reasons as she did not give evidence before us and they will be placed online and be available to the public.

17. At the end of September the internal verifier sent through her first internal verification report. She picked up an issue that not all assessors were applying the same standards and she had returned 3 student answers that were too basic. These were all the Claimant's scripts. The internal verification (IV) process involved the assessor being given feedback on their feedback to students for each assessment. The Claimant's remaining 2 scripts were not an issue with positive feedback given to the Claimant. The internal verifier suggested a standardisation meeting as it was a pilot and referred the matter to Mr Fowler (pp 101-114).

18. On 1 October 2015 the Claimant, when dealing with invoicing generally, queried when and how to invoice the work he had done that month on the ILM and the completed units. We find this does support, and we accept, the Claimant's evidence at paragraph 14 above, in so far as he had not understood that he would not be paid upon completion of each unit, as he was on the HNC. The Respondent at that stage said that they would get back to him (pp115-116).

19. On 9 October 2015 there was a further internal verification report. This continued to highlight a lack of consistency between assessors. 6 out of 12 of the Claimant's scripts did not meet the criteria. 1 out of 2 of another assessor's scripts also did not meet the criteria. The internal verifier recommended standardisation as soon as possible and said that internal verification for the Claimant had been increased to 100% of assessments on the first health and safety unit (pp119-120).

20. On 13 October 2015 the Claimant met with Mr Fowler to discuss payment. The meeting is recorded on p144 in an email from the Claimant. The Claimant was effectively complaining that he had not yet had any remuneration despite all the effort he was putting in. He had raised that learners had dropped out and he asked for remuneration for that work. Mr Fowler cannot recall but it is likely from the wording of the email that he did not agree to anything different to what had been put in writing but may have agreed to look into it further. The email does not support the suggestion asserted by the Claimant that it was agreed to pay the Claimant £50 per completed unit, and we find this unlikely as it would have differed from what other assessors were being paid. That Mr Fowler would not have agreed to a different arrangement from other assessors, and may

have said as much, is supported by the wording of the Claimant's own later email at page 262.

21. Student complaints about the Claimant began mid October via the pastoral care system. The first student complaint was that she did not really understand the Claimant's feedback. She said she did not get along with him and "hardly could understand him". She said he was not specific about what was expected. The response from pastoral care and Mr Fowler was to move the student to another assessor. The Claimant agreed to this but reminded the Respondent that assessors were waiting for standardisation (p133).

22. The role of online assessor is to mark and give feedback on assessments. It is not the role of tutor. From pages 82-83 an assessor was supposed to be able to do all work relating to contacting students and assessing a unit in 35 minutes per unit. However all concerned referred to them as tutors (the Respondent's three witnesses, students, pastoral care, the Respondent's Administrator) and the complaints suggest that students saw them as tutors and expected more at times than simply assessment feedback. Some boundary setting with students by assessors was not inappropriate.

23. We also heard evidence from Ms Robertson, which we accept, that assessors were asked how long each assessment took and they said that assessment per unit took about 38-40 minutes on average (longer than the time allowed on pages 82-83). She accepted though that it would have taken more if they had to redo it following feedback from the internal verifier. Mr Fowler's evidence was that all tutors/assessors get complaints/ internal verifications raising issues at some stage, though not to the extent the Claimant did on the ILM.

24. On 27 October 2015 the Claimant provided a weekly report but filled it in with a complaint about remuneration (pages 161-162). Again his concern was that he had not yet been paid despite putting in "countless hours" and that students were dropping out (so would not complete). He also queried whether students would complete in the anticipated 4 months.

25. He did refer there to the £250 as a bonus and make a comparison with his original contractual rate on the HNC. We find that the wording used suggests a complaint that the remuneration on the ILM did not match the HNC rather than evidence that he believed he would be paid at a higher rate (of a rate per unit and £250 bonus). His comment reflects the fact he was realizing the ILM remuneration was a "bad deal" (given the number of students dropping out or taking too long) but not that anything higher than £250 per learner had been agreed. It was a complaint/request but is not evidence of any different agreement to the original job description as the Claimant now suggests.

26. There was another internal verification summary for 12th-28th October 2015 in very similar terms to the previous one and records that a standardisation was to occur 29 October 2015. The Claimant was the only assessor with issues (pp168-169).

27. There were a number of complaints and issues relating to the Claimant's work on the HNC in the bundle. However this claim relates only to the ILM and he continued in the HNC role after his ILM work was terminated with the support of the Course Leader so we did not give much weight to these. That they were relied on appears to be an attempt to make the Claimant look worse in these proceedings.

28. On 2 November 2015 there was another complaint from a student who had had a call from the Claimant and had difficulties understanding him (p232). Again the response from pastoral care and Mr Fowler was to move assessors.

29. The Claimant had not in the event attended the standardisation meeting and on 10 November in his weekly report (pages 221-223) recorded a request for minutes of the standardisation and a further comment about remuneration.

30. The internal verifier began sending some emails about standardisation in November and another Business Lecturer provided face to face mentoring and support to the Claimant on 18 November 2015.

31. On 28 November 2015 the Respondent advertised for e-learning business tutors/assessors on the ILM. This was to be an employed role but otherwise was the same role as the Claimant already performed. The Claimant applied. His understanding about the remuneration being £250 per course is shown in the way he completed the existing salary box on page 247 on his application form.

32. In the meantime the Claimant accepted a further cohort of 20 ILM students in his current role. The payment terms for the further 20 students were confirmed to be "the same as the current arrangement of payment once the student has completed all units" (p261). The Claimant was asked to confirm his agreement to this arrangement.

33. The Claimant responded (at page 262): "….I presently have to bear with the current arrangement with payment since that is what is applicable to possibly my other colleagues. Moreover as discussed with you I have applied for the same position on a permanent basis….The current arrangement shall therefore be endured by me to see what happens as time goes on. I sense this to be the best option as of moment….I shall however need….the considerations for assessor when a Learner drops out of the system." He was therefore still looking for payment when a student drops out.

34. On 21 December 2015 the Claimant was invited to an "informal discussion" on 7 January 2016 (p273). Discussions had already commenced with other assessors and there had already been appointments to the new roles. We find that these discussions were not interviews and it was intended that internal candidates were to be appointed to the roles. These were interrupted as Mr Fowler went on a period of absence. The 7 January interview with the Claimant therefore did not take place (p274).

35. In early January, during Mr Fowler's absence, another student was removed to "a new tutor" after asking about opting out. That student contact was referred to at the time as an "enquiry", and we do not see this as a complaint about a particular aspect of the Claimant's work. The student included reference to the Claimant's response to her own message which was about struggling with understanding the course and fitting it around working commitments. He asked her to be more specific about problems with study but to raise the issues about her time commitments with the career champion. The response was quick to move the student and is based on previous complaints about the Claimant, and the observation on page 268 that some of the Claimant's students who have struggled have progressed with the other tutor. This was agreed by the Vice Principal in Mr Fowler's absence and it was agreed not to give the Claimant full feedback (pp271-268).

36. On 20 January 2016 the Claimant was told that Mr Fowler was due back imminently and they were now wishing to allocate a number of students to each successful assessor/tutor (p276). The email asked the Claimant to confirm his availability for this purpose: "It may be difficult to quantify but could you confirm what availability you now have so that the allocation offered is realistic".

37. The Claimant replied and said he would take 20 students, subject to his informal discussion in which he wanted to discuss expectations in relation to his existing students (p277).

38. On 21 January 2016 the Vice Principal wrote to the team of assessors and informed them of Mr Fowler's expected return, Ms Hayley Robertson's appointment as Business Manager for e-learning and confirmed the situation with their contracts. The letter said

    "I know that you were supposed to have discussions with [Mr Fowler] regarding your fractional posts before Christmas and I am sorry these were delayed. Once [Mr Fowler] is back next week he and [Ms Robertson] will rearrange these appointment [sic] and ensure that we move to more secure terms and conditions for you to recognise the work that you are doing and agree suitable caseloads as numbers increase in the months ahead. We will also be going back out to advert in the next few days but this won't affect these discussions".

39. Again the implication was that the Claimant would be given a permanent post. We find it likely that had Mr Fowler not been absent the Claimant would have been appointed by this time, irrespective of the student complaints/issues on internal verification.

40. On 8 February 2016 the Claimant chased payment of outstanding invoices from the HNC (p285). That email said that most of his time "has now been dedicated to the e-Learning ILM programme…for which no final financial consideration has been agreed or paid so far since 31/08/2015". He said he was "begging" for other outstanding invoices to be paid immediately as his welfare was "suffering".

41. On 15 February 2016 Ms Hayley Robertson commenced working in the position of Business Manager for e-Learning. This was an internal appointment and Ms Robertson had already been working for the Respondent since 2003. On the same date there was a standardisation meeting which the Claimant attended.

42. Ms Robertson's priority was quality and she reviewed the internal verifications when she started in post. From the email chain at page 311 (18 February 2016) we find she immediately had concerns about the Claimant's performance and by 18 February 2016 had discussed this with the internal verifier and Mr Fowler. Mr Fowler had sought to reassure her that the Claimant's performance had improved, but the internal verifier had raised her concerns about the Claimant including the internal verification feedback sent to the Claimant on 18 February 2016 (pp308-310). We note though that the assessment concerned had been done before the standardisation meeting, at which Ms James had discussed the unit and level of evidence required, as she herself stated in her feedback to the Claimant (p309). Ms Robertson's response to the email from the internal verifer forwarding the internal verification feedback was to inform HR and meet with Mr Fowler, and to reply to the internal verifier about the Claimant saying "[if] he has to be removed from programme [sic] then that is the route we will take!!" (page 311).

43. Ms Robertson said in evidence that the decision not to offer the Claimant a permanent role after all was made before she began in post and she cannot say by whom. We do not accept this. We find the position when she commenced in post was that the Claimant had been told on 21 January 2016 that he would be getting a permanent position and Mr Fowler did not share Ms Robertson's concerns. Nothing different had been communicated to the Claimant.

44. Attempts were then made to have a meeting between the Claimant, Ms Robertson and Mr Fowler, as had been promised in the Vice Principal's letter of 21 January 2016 (pp278-279).

45. Meanwhile the 8 March 2016 internal verification gave the Claimant very positive feedback (pp 329-330). On the same date the Claimant provided progress on his learners to the Respondent and on 9 March 2016 Ms Robertson emailed him saying she was concerned that there were a large number that the Claimant believed were "unlikely to achieve in a timely manner" and a discussion followed about whether they would achieve within the permissible 90 day extension (pages 331-333).

46. The meeting between Ms Robertson, Mr Fowler and the Claimant finally took place on 14 March 2016. The agenda is on page 336 and also there is a record in the Claimant's email on page 348, sent the next evening. The agenda records the employment contract would be discussed: item number 4 was "confirming contract against performance". Other matters relating to performance were listed.

47. The Claimant's email (page 348) demonstrates that in the event at that meeting he was told he would not be given a permanent position, despite all his work. He was told the reason for this was that he also had a self-employed contract on the HNC and he could not have both. Others had by now been given permanent contracts.

48. This reason for not giving a permanent contract came from a query from payroll to HR and a call by Ms Coppins to HMRC. The Respondent's rationale was set out in the letter from Ms Robertson to the Claimant on pages 349 -350, dated 17 March 2016. Namely, that it was believed they were restricted from employing someone on a permanent contract who the Respondent was also paying for services on a self-employed basis in a similar role. The letter suggests the Claimant was the only person to whom this applied. Ms Coppins' evidence was she had sought advice from both HMRC and a legal adviser and the view was that a person cannot be self-employed and employed doing exactly same role at same time. Although the letter to the Claimant suggests he was the only person to whom this applied Ms Coppins said that another self-employed worker may have had to give up working on the HNC so he could work on the ILM for this reason.

49. In the letter at pages 349-350 Ms Robertson also addressed the Claimant's concerns about delay in pay and nonpayment for those who did not complete the course by revising the pay terms. He was to get four different payments across the course, totaling £270.55, dependent on the progress of the student.

50. The Claimant replied on 21 March 2016 (pages 351-352) saying he would prefer to give up the "skeletal" self employed role and requested that he be given the permanent role. He again said he had worked on the ILM for 7 months without any pay and the implication was that one reason he had done so was that he was holding out for the permanent position. He said if he was not given the permanent position then he may take the matter to a third party to decide whether there had been discrimination on "age, race, religion etc".

51. The others who had by now been appointed in the permanent posts were white, younger than the Claimant, and were described by the Claimant as "well spoken" with similar accents to Ms Robertson. Ms Robertson's evidence, which we accept, was that the Claimant was not the only candidate not to be appointed. Some other candidates were not appointed on merit including another internal candidate. She has appointed white staff, including those of Russian, Danish and German origin but also one other person of black African origin, described as having an African accent, who was based in Manchester.

52. Ms Robertson did not reply until 12 April 2016 (p361). The Claimant was invited to produce any evidence that there was an agreement to anything other than £250 per completed student. She explained there that other staff supporting the course had already been directly employed by the Respondent before the project began and therefore had different terms and conditions. She did say that they would offer back dated pay based on the new payment structure (at paragraph 54 above). She did not address the Claimant's offer to

give up his self-employed position in order to undertake the permanent post and she did say "it is my responsibility as manager of the E-learning project to make decisions based on the information and data presented to me since my time in post. I must ensure that we are offering a quality product by qualified staff who's [sic] performance and commitment are consistent." She ended by saying "we do wish to work with you … and to resolve any issues…"

53. The Claimant replied on 12 April 2016 (page 365). He observed the question of the permanent position had not been addressed. He said he had already put in an invoice under the new payment terms as he "just [had] to live on something or [he] would have to go and sign on". From page 629 he had submitted that invoice on 4 April 2016. He did not provide additional evidence that there was an agreement that he would be paid anything other than £250 per completed student. He said on 12 April 2016 "no further contractual obligation was given to me beyond the £70 per module for the HNC".

54. Ms Robertson then spoke with the Claimant on 14 April 2016 and confirmed in a subsequent email (page 366) that she would offer a part-time contract (50 learners) at £22,311 (Pro-rata). He was required to be part of the standard probationary reviews. He was required to hand in his notice on the HNC. There was to be a one off payment to reflect existing students that had progressed sufficiently.

55. The Claimant responded on 14 April 2016 (page 374) saying he was looking forward to the contract and requesting a fair settlement to reflect that he had worked for seven months without any payment.

56. Prior to his receiving a contract, the internal verifier contacted the Claimant with questions about his CV and his management experience. He attempted to reply but she had to engage in a detailed exchange with him on the matter, that was copied to Ms Robertson. On 2 May 2016 (page 384) the Claimant in an email to the internal verifier said "unless there is any underlying issue apart from my competence which you are not willing to disclose to me, I do not think the quality of my submitted CV should be that difficult to collect enough evidence as an online business tutor/assessor [sic]". She replied explaining why she needed the further information and the Claimant then provided it on 9 May 2016. The internal verifier replied saying "that all sounds great" and requested the Claimant add it to his CV and the Claimant did this by 10 May 2016 (pages 390-391). There was also a discussion about the Claimant providing his certificates around the same time. On 16 May 2016 an email between the internal verifier and the Respondent's personnel department shows that the Claimant was willing to show his certificates to the personnel department but not the internal verifier. She further said that if he could not show the relevant certificates to support his delivery of the ILM then she would have to ask that he was removed as an Asessor (page 421).

57. Meanwhile on 14 May 2016 there was a further complaint from a student about the Claimant and in particular that she felt he had been rude (p398).

58. There were also a number of internal verifications on 17 May 2016 for the Claimant, most of which were unsatisfactory (pp403-404, 407-417).

59. The Claimant wrote a further email on 17 May 2016 (page 418) chasing up his contract and continuing to pursue the issue of payment, this time for learners that drop out. He described these as grievances and threatened to take them to a third party.

60. There were two further internal verifications dated 21 May 2016 that were satisfactory (pages 425-428) however there was a further one on 24 May 2016 that was less positive (pages 431-432).

61. On 26 May 2016 (page 433) Ms Robertson listed her concerns about the Claimant to Human Resources. The concerns included the internal verification reports "showing poor quality which appears to be due to a lack of basic understanding of Managerial requirements which an assessor/tutor with the correct qualifications should have", a range of student complaints, the outstanding certificates and the pace of progress of his students. She also mentioned an issue with names which she accepts "could be deemed as cultural in some aspect".

62. She also sought the view of the staff member responsible for the Claimant's work on the HNC. He said in reply (page 434) that there had been historic complaints from students about the Claimant's linguistic skills but they all completed well. He said the Claimant also internally verifies three units for which the standard and feedback has improved with further training. They were satisfactorily externally verified. He said that he hoped this additional information would help Ms Robertson decide whether she would retain the Claimant's services but that until he could find a replacement he would still need the Claimant. On 26 May 2016 Ms Robertson commented to HR that it was not "particularly helpful" that he wanted to keep the Claimant on for a period.

63. On 31 May there is a record of a call from an E-Learning Compliance Administrator at the Respondent to check up on one of the Claimant's student's progress. In that call the student said that much earlier she had had a call with the Claimant and had found his comment disheartening (pages 439-440). This was fed back to Hayley Robertson who requested that the student put it in writing (p439), though we were not shown any complaint in writing. We find that the Respondent was evidently gathering whatever evidence it could at this stage against the Claimant.

64. Two internal verifications dated 31 May 2016 (447-449 and 451-452) suggested improvement though the feedback now was that his feedback required his learners to provide more detail than was necessary, whereas what they had done was already adequate.

65. There was a trial of having standardisation meetings by Skype as the Claimant and two others were not local and it would save travel. One meeting was scheduled on 1 June 2016, 9.30 to 4.30, but the Claimant was only invited to attend via Skype from 1-3.15pm, the unit standardisation part of the meeting.

However, there were issues with the technology and a signal problem. The motive and technical difficulties are recorded in the email from Ms Robertson to the Claimant on page 464. That suggests all those Skyping into the meeting were affected. There was a further attempt to have a Skype meeting with the Claimant on 9 June 2016 (pages 474-478). On this occasion the Claimant had technical problems and could not Skype. He was asked to email information instead. The Skype trial was eventually abandoned.

66. Ms Coppins then wrote to the Claimant on 10 June 2016. In respect of the ILM she said: "We have received some concerns from learners …Also, in conjunction, the external verifier has rejected some of the recent modules submitted". We have not seen evidence that the external verifier rejected modules. The letter said that based on the above they would not be able to offer a position within the ILM and Ms Robertson would be in contact to discuss withdrawal of students. We find that although Ms Coppins wrote this letter it reflected Ms Robertson's decision about which she corresponded with HR on 26 May 2016. This is also suggested in the cover email sent to the Claimant by Ms Coppins on page 497.

67. On 20 June 2016 a further internal verification continued to raise issues.

68. The Claimant and Ms Roberston had a telephone conversation on 21 June 2016, recorded in Ms Robertson's email to the Claimant at page 505.

69. She accepted the "quality" of learner was such that more than expected dropped out during the first few months of the programme. It was agreed the Claimant would keep his current cohort on the understanding certain issues were rectified. Monitoring was also to increase. Despite indications the Claimant's CV was acceptably updated in May, there continued to be a request that it be updated. 50% of units were to be internally verified over two months. It was also expected there would be a significant reduction in complaints. He was to continue to be paid according to the self employed assessor model and any breaches of the requirements could result in termination of the contract for services agreement.

70. There was an issue with the Claimant following guidance in respect of noting his contact with students on the relevant electronic platform (page 517).

71. The Claimant was invited to standardisation on 2 September 2016 but confirmed on 10 August 2016 he would not be able to attend (page 543).

72. On 13 August 2016 there was a further internal verification raising significant issues of plagiarism. The Claimant was asked to check that student's entire qualification for further plagiarism (page 545).

73. There was a further student complaint on 18 August. It related in part to the Claimant taking too long to mark and then not giving the student enough time (pages 552-553). There was reference to the fact there had been two past units referred back by the internal verifier at an earlier date. Ms Robertson said that was the last straw.

74. On 25 August 2016 Ms Robertson wrote to the Claimant terminating his contract on that date with immediate effect. The letter acknowledges a reduction in complaints and some improvement in feedback to learners but said that there are other significant areas that have shown little improvement. It said: "..you have been unable to clarify your background knowledge and competence of experience within the field of Leadership and Management, which has shown to be consistently weak through the implementation of the 50% moderating exercise we have carried out via our ILM standardization and moderating process…Because you are not meeting the stringent ILM standards required for all of our tutors and assessors we regret that we are unable to take you forward into the 16/17 contract year or continue with the remaining thirteen learners". The learners were to be transferred from him on that date.

75. The Claimant had by then provided the updated CV and certificates. We find this letter was badly worded. It reads as though the issue was the Claimant's experience whereas in fact the emphasis should have been on the internal verification issues.

76. The Claimant continued to work on the HNC.

77. The Claimant wrote to Ms Robertson on 12 October 2016 (p566). In that letter he said that in total he had supported 203 learners during the 12 months period and that his workload would have been more than that of a full time employee in the same period and that his work should be valued at £25,375. Accounting for the £6058.30 he had been paid he claimed the balance of £19,316.70. He referred to unnecessary discrimination. He appeared to hold the internal verifier responsible.

78. The Claimant's hours of work were not recorded. His invoices are by reference to students completing units. The Claimant received no remuneration for his work on the ILM until April 2016. We were not told the exact date he began to be paid but his first invoice was dated 4 April 2016 and his complaints about not being paid at all ceased around mid April 2016. A summary of what he received for work on the ILM and HNC is at page 629. He did receive £6058.30 from 4 April 2016 to 26 August 2016. By comparison he earned only £3414.50 on the HNC, mostly before 4 April 2016.

79. The Job Description for Online Assessor on the ILM gives an expectation of a caseload of up to 50 students per intake and 7 hours contact per student over a 4 month period. We accept Ms Robertson's evidence that the 7 hours per student comes from the ILM National Framework provided by the awarding body. We also accept her evidence that on average assessors take 40 minutes to assess a unit for a student. Some were more straightforward and some required more thought. This amounts to about 8 hours on average per student over 12 units. This did not take account of the Claimant's need to re-do a higher number than average units following the Internal Verifier's feedback, some of which we find was substantial (for example three

pages of feedback). It does not account for the occasion he was asked to check back over all of a student's qualification for plagiarism, and the wider duties of the role such as attending meetings and mentoring, liaising with managers about his employment, pay and performance. We find it likely, given the feedback about the Claimant, including from the students, that he took longer than average.

80. The Claimant's evidence was that he was working "countless hours" which he estimated to be about 60-80 hours per week, with 60 on the ILM, the remainder on the HNC.

81. The full time employee role (37 hours) was expected to carry a caseload of 100 learners at any one time. A half time post of 18.5 hours a week approximately would carry a case load of 50 learners at one time.

82. On page 262 the Claimant makes reference to "building his caseload to 100" when he agreed to take a further 20 students for the December 2015 cohort. On 21 January 2016 he wrote that he had 35 learners on target and 19 "risky ones". He said he could take another 20 students then. On the other hand by 13 June 2016 the Claimant appeared to have approximately 28 active students (pp480-495) and by the date of termination just 13 students (556).

83. The Respondent provided a coloured spreadsheet of all the students that were allocated to the Claimant between 31 August 2015 and 26 August 2015 as a separate document (not the spreadsheets in the bundle). This showed 173 students were allocated in total, and 379 units were completed. 18 students fully completed, for which the Claimant received the full £270.55. 96 students withdrew during induction period without completing any units. 9 students part completed and the Claimant received part payment. There were 50 students that completed insufficient units for the Claimant to be paid (amounting to 77 units in total).

84. In the absence of actual records from either side, and considering the above, we do not consider it is possible to calculate the hours worked from the number of units and average time taken by an assessor. The role was wider than this, the Claimant took longer than an average assessor given the issues involved with his work and we find given his evidence of the hours he regularly worked that this figure would be too low. That said, we do not accept that he was consistently working 60 hours a week, given the number of students and completed units. We find the number of weekly hours was in between that stated by the Claimant and Respondent and that it is better to take a broad brush approach based on the evidence to establish a weekly average. We find that on average the Claimant had a caseload similar to a part time employee of 50 students (but sometimes more, sometimes less). Part time work was 18.5 hours a week to include wider tasks such as meetings. However the Claimant was taking longer than average to do the work, in part due to the amount of feedback and the number of units he had to re-do. However we find he was not doing the hours of a full time employee. We therefore find that he worked, on average, 25 hours a week.

Relevant law

Race Discrimination

85. Section 13 Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic (including race), A treats B less favourably than A treats or would treat others. Section 9 provides that "race" includes "colour;…ethnic or national origins".

86. Section 23 Equality Act 2010 provides that on a comparison for the purpose of section 13 there must be no material difference between the circumstances of the Claimant's case and any comparator's case.

87. The burden of proof is set out at section 136 Equality Act. This states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that s 13 has been contravened by A then it must hold the contravention occurred unless A shows that it did not contravene the provision.

Minimum Wage

88. The National Minimum Wage Act 1998 provides that a qualifying worker shall be remunerated in respect of work in any pay reference period at a rate which is not less than the minimum wage (section 1). Under section 17 if a worker is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage the worker shall, at the time of determination, be taken to be entitled under his contract to be paid either the balance that he would have been paid if he had been paid the minimum wage or a sum by reference to the formula at section 17 (4) Minimum Wage Act, if that is higher. This means that the Claimant is entitled to a payment which reflects an increase in the Minimum Wage at the time of determination, but that any payments made by the employer after the reference period can reduce the amount owed to the Claimant. The date of determination is not further defined but the BEIS guidance on the minimum wage refers to "current rate" at the date of calculation and also states that a worker is entitled to any further increase in the rate if it goes up before arrears are paid.

89. The minimum wage rate at the time of the Claimant's employment was £6.50 up to 31 March 2016, then £7.20. The rate at the time of our decision in Chambers was £7.83 and at the time of this Reserved Judgment is £8.21.

90. A pay reference period is a month, unless the worker is paid by reference to a shorter period (regulation 6 National Minimum Wage Regulations 2015). Regulation 18 states that if a worker is only entitled to payment for hours of work when a record of the hours has been given to the employer, then the hours of work in the pay reference period do not include hours of work in respect of which that record has not been submitted. The employer bears the obligation

of keeping records to establish that it is paying the minimum wage (regulation 59).

91. To determine the hourly rate the remuneration for the pay reference period is divided by the "hours of work" (regulation 7). What count as "hours of work" depend on the type of work. In this case it is the hours actually worked by the Claimant in the pay reference period which are relevant for the reasons set out in the following paragraph.

92. The regulations make reference to different types of work dependant on how the work is paid. Salaried work and time work are not relevant here. Although the Claimant was paid by reference to output, the circumstances in this case do not meet the requirements in regulation 42 and so output work is not relevant. The relevant type of work for this case is unmeasured work (regulations 44-50). Unless there is a daily average hours agreement in place, the hours of unmeasured work in a pay reference period are the total number of hours worked (regulation 45).

93. Remuneration for a pay reference period includes payments in that pay reference period, and payments in the next pay reference period "as respects" the pay reference period in question (regulation 10). Therefore only payments in the same or following month count in calculating whether a worker has been paid the minimum wage in a particular pay reference period. There is leeway to pay later if a worker is required to complete a record of amount of work done and has not done so. Then payment should be made within two reference periods of it being done (regulation 9). The Respondent made reference to BEIS guidance on the minimum wage, which does clarify that this relates to workers who complete timesheets.

Conclusions

Direct race discrimination

Whether the Respondent treated the Claimant less favourably because of race than an actual or hypothetical comparator by:

Withdrawing an offer of employment as an E-learning assessor on the ILM course on or about 15 March 2016 and/or 10 June 2016

Terminating the Claimant's contract on the ILM course on 26 August 2016

94. We find that the Claimant was treated less favourably than the other white staff who were not of African origin when he was told he would not be offered the employed assessor post in a meeting with Ms Robertson and Mr Fowler on 15 March 2016, and again when the offer made on 14 April 2016 was not followed up with a contract before it was withdrawn on 10 June 2016. Prior to 15 March

2016 there had been a clear indication by the Respondent's actions the Claimant was to be given an employed post on the ILM. He had, like the other colleagues, been invited to an "informal discussion", which we have found was not an interview. We have found the intention was that those internal candidates were to be appointed, including the Claimant. The Claimant's discussion was due on 7 January 2016 but did not go ahead because of Mr Fowler's absence. Nevertheless allocations of students on that basis were discussed and we have found that if Mr Fowler had not been absent it is likely the Claimant would have been appointed by then (20 January 2016), as some of his colleagues already had been. The Vice President on 21 January 2016 wrote to the Claimant and others apologizing for the delay regarding discussions in relation to the fractional posts and confirmed the plan to move them to secure terms and conditions imminently.

95. The proposed discussion did not in the end take place until 14 March 2016, by which time the other white staff had been given permanent employment contracts. Both Ms Robertson and Mr Fowler were present and he was told he would not be given a permanent position after all. He was told the reason for this was that he also had a self-employed contract on HNC and he could not have both, to which he unsurprisingly responded on 21 March 2016 that he would prefer the employment contract and would give up working on HNC if required. The letter informed him that he was the only person affected, though we were told by Ms Coppins there was another member of staff who gave up work on the HNC to work on the ILM due to the HMRC advice. Ms Robertson was slow to respond to this, and only did so after a further prompt from the Claimant. On 14 April 2016 she did then offer a part time employment contract on condition that he withdrew from the HNC. Despite this, and despite the fact this offer was so late in comparison to others who had been given permanent contracts, no contract was provided and the Claimant chased it on 17 May 2016.

96. At this stage there was no material difference between the Claimant and his colleagues. He had been promised secure terms in the Vice Principal's letter. The advice from HMRC does not explain why the contract was not offered conditional on giving up the HNC.

97. By 26 May 2016 Ms Robertson was gathering evidence about poor performance against the Claimant with a view to withdrawing the offer of a contract, which was communicated to him on 10 June 2016. The withdrawal of students completely (ie termination of his existing appointment) was initially part of the decision on 10 June 2016 not to offer a position on the ILM (page 479). There was then agreement on 21 June 2016 that the Claimant could keep his current cohort of students provided there were improvements as set out in the email of 27 June 2016 (page 505) over a two month period.

98. On 13 August 2016 there was a further internal verification raising significant issues of plagiarism. There was a further student complaint on 18 August. It related to the Claimant taking too long to mark and then not giving the student

enough time (pages 552-553), when there had been two past units referred back by the internal verifier at an earlier date. This led to the decision on 25 August 2016 to terminate the contract and remove the remaining learners with immediate effect. At this stage there was a material difference between the Claimant and his actual colleagues as there were performance concerns, though he also relies on a hypothetical comparator. The appropriate comparator would have the same performance concerns as the Claimant.

99. In submissions the Respondent's representative focused on the reason why the Claimant was treated as he was, as opposed to whether there was less favourable treatment.

100. In our view there are a number of factors in this case which are sufficient to raise a prima facie case that the Claimant was less favourably treated on grounds of race and shift the burden of proof to the Respondent.

101. The Claimant was understandably very aggrieved at the way the permanent contract was handled. Although we have accepted the pay arrangement was as the Respondent described, it was at least at the outset an exploitative arrangement, in breach of the minimum wage rules. At the outset it applied to all the staff but it was only the Claimant who was not given permanent employment and left doing a significant amount of work for no pay until April 2016 (over six months). The Claimant did not hide the difficult financial position he was in as a result. Despite this the Respondent was slow to address both the concerns the Claimant was raising about the suitability of the pay arrangements and the Claimant's contract of employment in comparison to his white non African colleagues, both between January and April 2016 and then after the contract was offered conditional on the Claimant giving up the HNC. None of the Respondent's witnesses took responsibility for the first decision not to offer a contract, despite the documentation pointing to Ms Robertson and Mr Fowler. We have taken into account that these events are now some time ago, but this does not fully account for this. The Respondent accepts now that the reason given for the initial refusal to offer a contract (that he could not be both employed and self-employed) may not be factually correct. In any event this does not explain the delays or why the position was not offered from the outset on the basis that the Claimant would not be able to do both roles and would have to choose (as appears to have been the case for his white colleague who gave up the HNC). The letter to the Claimant of 25 August 2016 is badly worded and suggests on the face of it that his experience is being questioned, rather than the performance issues raised via the internal verification.

102. The Respondent also accepts that some student complaints could be construed as raising linguistic issues that may be a reference to the Claimant's accent. We have also found if the complaint involved the Claimant the Respondent was quick to move the student to another assessor. We also find there was a difference in the opinions of managers. Despite Mr Fowler's involvement in the March 2016 meeting we find that had the Claimant continued to be managed

by Mr Fowler alone he would have been offered the contract. Mr Fowler's approach is inclusive. We find he is likely to have adopted a position similar to the Course Leader for the HNC who continued to use the Claimant despite student complaints. We agree with the Claimant that the significant change was the arrival of Ms Robertson. She very rapidly (after 3 days) formed the view that the Claimant might need to be removed and when she attempted to gather evidence from the HNC against the Claimant, considered it unhelpful that that course leader wished to retain him.

103. A number of complaints in the bundle actually relate to the HNC and as the HNC Course Leader has nevertheless retained the Claimant on that course we find they are not relevant and there has been an attempt to make the Claimant look worse in these proceedings by including these.

104. We agree with the Respondent's Representative therefore that the focus is whether the Respondent can show that these decisions had nothing to do with the Claimant's race. We are satisfied on balance that the reason for the Claimant's treatment was performance and not race.

105. We agree that performance issues had been raised about the Claimant consistently from the outset, and prior to Ms Robertson's appointment. This was why she was discussing this by email with the internal verifier three days after starting in post. We do find Ms Robertson's style differs from that of Mr Fowler. She has a greater emphasis on quality than inclusion and was prepared to grapple with the issues being raised about the Claimant and contemplate removing him as an assessor from the outset.

106. We accept that the Respondent did genuinely have a conversation with HMRC and form the understanding (correct or otherwise) the Claimant could not do both ILM on an employed basis and his existing HNC work. We find that Ms Robertson had her reservations about the Claimant from the outset because of the internal verifications, whereas conversely the Claimant was wanted and needed on the HNC. Applying the HMRC advice as a reason not to offer the contract was a convenient way of avoiding giving the Claimant an employment contract and leaving the status quo, with his working self-employed for both the ILM and HNC. Both when the offer of a contract was made and then when the extension was given to him to enable him to retain his existing students performance matters were mentioned (paragraphs 54 and the mention of a probation period and paragraph 69 and the conditions attached to the extension).

107. There were issues being raised on internal verifications and there are far more for the Claimant than others. We do not accept the Claimant's suggestion that there was a conspiracy between the internal verifier and Ms Robertson. The internal verifier was making genuine assessments of the Claimant's work. There are some of his scripts that received positive feedback. At least one colleague also received negative feedback but not to the degree of the Claimant. We accept that genuine issues were being raised regularly with the

Claimant. The focus of the internal verifications is written work not linguistic issues.

108. There are also student complaints about the Claimant. Whilst some identify linguistic issues, the complaints are also about issues like delay. There were also concerns about the number of his learners not completing on time, which was supported by the figures.

109. We have taken account that Ms Robertson did take the decision not to appoint another white applicant whereas she did appoint another black African member of staff who she says also had an African accent.

110. Although Ms Robertson did not initially offer the Claimant a contract she did address his financial concerns and introduced a fairer payment method, which was applied retrospectively. When the Claimant took issue with the decision not to initially offer a contract because of HMRC advice and said he would prefer to be employed on the ILM in preference to his HNC work, there was then an agreement to give a contract (though no urgency to progress it). Whereas initially the decision was to remove his learners from June, he was then given a further extension until August, at which point some improvement was acknowledged. Not all decisions were adverse to the Claimant therefore.

111. The 25 August 2016 letter is not well worded but we accept the main concern was the internal verifications, as had been the case throughout. The Claimant was retained on the HNC.

112. Overall we accept on the balance of probability that the reason the Respondent did not follow through and give the Claimant a permanent contract like his colleagues was performance and not his race or accent.

Denying the Claimant access to standardisation training on 1 June 2016, 9 June 2016 and 2 September 2016

113. The June standardisation meetings are addressed at paragraph 65 above. We accept there was a trial of having standardisation meetings by Skype. The aim was to save travel as the Claimant and others were not local and it would save travel. It is right that the Claimant was only invited to part of the meeting scheduled on 1 June 2016. The entire meeting was scheduled 9.30 to 4.30, but the Claimant was only invited to attend via Skype from 1-3.15pm, to focus on unit standardisation. There is no evidence that the Claimant was treated differently than the other non-local assessors in this regard.

114. We do not find the Claimant was denied access. He was invited to attend part of the meeting. He was paid £10 meeting allowance. This then did not go ahead because of technical issues, which affected all those attending remotely by Skype. We do not find this less favourable treatment. In any event the reason the Claimant was only invited to part of the meeting and that it was unable to

go ahead was because there had been a decision to trial meetings by Skype with the aim of saving those working off campus including the Claimant having to attend.

115. On 9 June the Respondent again tried to meet with the Claimant and this time he had technical issues and was unable to participate.

116. We accept neither of these incidents had anything to do with the Claimant's race, it was an attempt to be more efficient and save travel costs, which was unsuccessful. It was applied to others who had to travel lengthy distances to the meeting.

117. The Claimant was invited to the standardisation meeting on 2 September 2016 along with colleagues on 10 August 2016 (page 541). The Claimant responded on the same date to say he could not attend. In any event his contract was terminated on 25 August 2016. We do not find any less favourable treatment on grounds of race.

If so, were one or more of the Claimant's claims presented outside the primary time limit? Was the conduct "conduct extending over a period"? Would it be just and equitable to extend time?

118. As we have not found the claims of race discrimination successful it is not necessary to consider time limits.

Unlawful deduction of wages

To what payment was the Claimant entitled in relation to the ILM course?

119. We accept that initially the agreed rate was £250 when a student satisfactorily completed, as set out in the Job Description on page 83. This was then reviewed and the staged assessor payment model was brought in and applied retrospectively (pages 349-350). This was to address the Claimant's concerns about delay in pay and nonpayment for those students who did not complete the course. He was to get four different payments across the course, totaling £270.55, dependent on the progress of the student. This is set out at page 350. He was to get 30% payment after 5 units; 35% payment after ten units, 35% on full completion and a final £25 per successful candidate. The total was £270.55, a slight increase.

If the payment for the ILM course was calculable by reference to units completed, how many units were in fact completed by students?

120. Payment was as set out above, and not on completion of each unit. We do not accept the Claimant's evidence that any unit rate was agreed with him or that the £70 rate per unit on the HNC applied to the ILM.

If applicable, did the Claimant receive a payment of £70 in relation to each unit completed by the student? If applicable, did the Claimant receive a payment of £250 in relation to each student who completed the ILM course, or relevant part payment?

121. The Claimant received payment for the work in accordance with the revised model set out above, applied retrospectively. He did therefore receive £270.55 for each student who successfully completed. He did receive the appropriate part payments under the model above. In total he was paid £6058.30. There is no suggestion that the Claimant has not been correctly paid in accordance with that model. He has not been paid for every unit as he has not been paid at all for the work with 50 students who did not complete sufficient units to qualify for payment (77 units).

Whether there is any additional payment owing to the Claimant by the Respondent, and if so, how much?

122. Under the payment model in place there is no additional sum due for the Claimant in respect of the 77 units or any other work for which he has not been paid. There is however an issue in respect of whether the Claimant was paid in compliance with the minimum wage, and whether there are any outstanding sums due to him as a result.

123. The two appointments are separate and this case only relates to the ILM assessor role, therefore payment for the work on the HNC does not count. He was not paid at all for work done on the ILM from 31 August 2015 through to shortly after his first invoice dated 4 April 2016, when he first received payment for the work on the ILM. As he should have been paid the minimum wage from at least two months into his appointment (the second pay reference period), there is prima facie non compliance. The Respondent bears the responsibility of keeping records to show he was paid the minimum wage. There were no such records, and clearly at the outset he was not so paid. The Claimant did not complete timesheets and we do not consider that regulation 9 (2) applies.

124. In the absence of records showing how many hours the Claimant worked we have found he worked on average 25 hours a week. He was entitled to be paid

at the rate of £6.70 when the ILM started, rising to £7.20 from 1 April 2016. This amounts to approximately £726 per month initially rising to £780 per month. We have worked with approximate figures given that in the absence of records this is a broad brush exercise. Once he did begin to be paid he was paid more than this per month (from the breakdown of payments on page 629), and the sums would appear to be sufficient to cover pay due from the March pay reference period onwards. From 1 March 2016- 26 August 2016 (approximately 26 weeks) he was due to be paid £4506. He was paid £6058.30. There is therefore about £1,552 which the Respondent has paid at a later date and can be off set against the amount due for the earlier months, by virtue of section 17 Minimum Wage Act.

125. The amounts due from 31 August 2015- 29 February 2016 at the time were £167.50 (25 x £6.70) x 26 weeks (approximately), amounting to £4,355. Applying the calculation at section 17 (4) Minimum wage Act 1998 this would have risen to £4,680 ((£4,355 divided by £6.70) x £7.20) by the time the Respondent commenced making payments. Giving credit for the £1,552 in the paragraph above leaves £3,128. We find that the calculation at section 17(4) Minimum Wage Act must be applied again, using the rate at the date of determination, which we find to be the date of this Judgment, when the rate is £8.21. This gives a final figure due of £3,566.79 (£3128 divided by £7.20 x £8.21).

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Employment Judge Corrigan
23 July 2019