**RESERVED**

**Case Numbers: 2600786/2019**
**2600838/2019**
**2601018/2019**
**2601034/2019**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr. AZ Mohamed**

**Respondent:** **The University of Nottingham**

**Heard at:** **Nottingham**

**On:** **28th November 2019**
**14th January 2020 (In Chambers)**

**Before:** **Employment Judge Heap (Sitting Alone)**

**Representatives**

**Claimant:** **In Person**
**Respondent:** **Mr. A Sugarman - Counsel**

# RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. The entirety of the first Claim Form presented on 12th March 2019 is struck out under the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) on the basis that it has no reasonable prospect of success because the Tribunal has no jurisdiction to entertain it.

2. The entirety of the second Claim Form presented on 19th March 2019 is struck out under the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) on the basis that it has no reasonable prospect of success because the Tribunal has no jurisdiction to entertain it.

3. The entirety of the third Claim Form presented on 3rd April 2019 is struck out under the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) on the basis that it has no reasonable prospect of success and/or because the Tribunal has no jurisdiction to entertain it.

4. The complaint of a breach of the Human Rights Act 1998 within the fourth Claim Form presented on 3rd April 2019 is struck out under the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) on

the basis that it has no reasonable prospect of success because the Tribunal has no jurisdiction to entertain it.

5. The complaint of discrimination relying on the protected characteristic of race as set out in the fourth Claim Form presented on 3rd April 2019 was presented outside the time limit provided for by Section 123 Equality Act 2010 but it is just and equitable to extend time for that complaint to be substantively determined. However, that complaint has little reasonable prospects of success and a Deposit Order is made in the terms given in the attached Order.

6. A Preliminary hearing will be listed by telephone for the purposes of case management after the date for payment of the Deposit has passed, and assuming that the Deposit is paid, so as to make appropriate Orders for the remaining part of the claim to proceed and to list it for a hearing. Notice of hearing will follow.

# REASONS

## BACKGROUND & THE ISSUES

1. This Preliminary hearing was listed by my colleague, Employment Judge Britton, following receipt of four separate Claim Forms from the Claimant. Those Claim Forms were presented on 12th March 2019, 19th March 2019 and two separate Claim Forms which were both presented on 3rd April 2019.

2. The issues to be determined at the Preliminary hearing were as follows:

   (i) Whether the Claimant's complaint of unfair dismissal should be struck out on the basis that he lacked the two years continuous employment required by Section 108 Employment Rights Act 1996 to bring it;
   (ii) To consider if any complaint had been presented outside the relevant statutory time limit(s) and if so, whether time should be extended to consider such complaint(s);
   (iii) To consider whether all or any of the claim should be struck out under Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 if the Tribunal were to find that it has no reasonable prospect of success;
   (iv) To consider whether a Deposit Order should be made under Rule 39 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 were the Tribunal to find that the claim or part of it has little reasonable prospect of success; and
   (v) If the claim or any part of it does proceed, to make appreciate Orders including any further information which may be required from the Claimant.

3. Orders were made for preparation for the Preliminary hearing and it was directed by Employment Judge Britton that the matter would proceed on the face of the papers and on submissions only – that is to say without any witness evidence

being heard. However, with the agreement of the parties I did in fact hear evidence from the Claimant so as to enable me to make appropriate findings of fact in respect of the question of whether the Claimant's race discrimination complaint had been presented outside the time limit provided for by Section 123 Equality Act 2010 and, if so, whether it was just and equitable to extend time.

4. The Orders made by Employment Judge Britton had envisaged a single bundle of documents being created for the hearing today by the Respondent. As it transpired, the Claimant had decided to take charge of that and handed to the clerk shortly before the commencement of the hearing three large lever arch files running to some 995 pages. He then handed up a further file of papers during the course of the hearing. I discussed with the parties that if I were to read all the documents with those files there would be precious little time to do anything else within the time allocated for the hearing. I therefore asked both parties for confirmation of the key documents that they wanted me to read prior to dealing with the issues. After taking note of those documents, I adjourned the hearing for a sufficient period so as to read into them.

5. During that same adjournment I asked the Claimant to ensure that he had read the Skeleton Argument and Chronology produced by Mr. Sugarman on the basis that that would assist him in having prior warning as to the submissions which were to be made on behalf of the Respondent. Unfortunately, despite a reasonably lengthy adjournment, the Claimant did not take the opportunity to fully read the documents before we resumed the hearing. I am satisfied, however, that he was afforded ample time to do so had he wished.

6. I began the hearing by seeking to identify with the Claimant each of the complaints advanced under each of the Claim Forms and I record below the position in respect of each of them. I then deal further below with the representations of both parties, my relevant findings of fact where appropriate and my conclusions.

<u>First Claim Form – presented 12th March 2019 (page 5 to 16 of the hearing bundle)</u>

7. The Claimant originally set out at the hearing today that this Claim Form was a complaint of fraud. When it was indicated that the Tribunal has no jurisdiction to consider such complaints, the Claimant said that the complaint was then one of breach of contract. That then later changed to a complaint of both fraud and breach of contract and therefore I have taken that as the definitive position.

8. He also contended that it also constituted a complaint about unpaid wages and discrimination but, as I shall come to, those complaints are in fact not within the first Claim Form but in further claims that were issued at later dates.

9. The Claimant contended that the first Claim Form did contain a discrimination claim because he had ticked a box which features at page 12 of the hearing bundle which relates to what is sought if the claim is successful and says *"If claiming discrimination, a recommendation"*. I do not accept that that is sufficient to advance a discrimination claim in this Claim Form. Firstly, the Claimant did not complete any of the boxes at section 8 of the Claim Form (see page 10 of the hearing bundle) to suggest that he was claiming discrimination or, indeed, anything more than "another type of claim that the Tribunal can deal with". Secondly,

nothing within the narrative in the first Claim Form even hints at a discrimination claim and therefore I am satisfied that there is no discrimination complaint advanced in the first Claim Form. I have limited the Claimant to the complaints which he has actually advanced in each of the Claim Forms in question. I therefore record that the complaints that the Claimant seeks to advance in respect of the first Claim Form are of breach of contract and fraud.

The Second Claim Form – presented on 19th March 2019 (pages 17 to 28 of the hearing bundle)

10. I discussed the second Claim Form with the Claimant which he confirmed contained only complaints of breach of contract and a breach of the General Data Protection Regulation ("GDPR").

Third Claim Form – presented 3rd April 2019 (page 30 to 41 of the hearing bundle)

11. I have also discussed this Claim Form with Claimant at some length. The basis of this claim is one of unfair dismissal and also for unauthorised deductions from wages contrary to Section 13 Employment Rights Act 1996 in respect of the fact that his wages were stopped in January 2019. There is no dispute that that is what happened but I shall come to the reasons why later. The Claimant also complains within this Claim Form of fraud, largely as I understand it on the same grounds as within the first Claim Form.

12. The Claimant accepts that he lacks the qualifying service required by Section 108 Employment Rights Act 1996 to bring a claim of "ordinary" unfair dismissal and Mr. Sugarman helpfully brought up a copy of that particular statutory provision in order to assist the Claimant. The Claimant's position is that his dismissal was automatically unfair and he advances a complaint under Section 103A Employment Rights Act 1996 to say that the reason or principle reason for his dismissal was that he had made a protected disclosure (often referred to as "whistleblowing").

13. It was discussed that the Claimant would need to identify a protected disclosure that he relied on for the purposes of such an automatically unfair dismissal complaint. It is perhaps fair to observe that there was some difficulty in doing so. The Claimant told me that he relied on the narrative at page 35 of the hearing bundle as being the protected disclosure relied upon and we were able to ascertain that this was the final sentence of that page relating to the grievance that the Claimant had raised with Human Resources. The relevant section of the Claim Form said this:

*"In addition, this action from the previous employer (The University of Nottingham) may because I was raised grievance to the directors of human resources which contains clearly 54 breach to (The University".*

14. That particular paragraph tails off after the word "University" and does not appear to continue on subsequent pages of this Claim Form.

15. The Claimant originally said that this grievance was at page 372 of the hearing bundle but that transpired to be a copy of the Respondent's Grievance Procedure. He then identified this as being the document at page 289 of the hearing bundle which appeared to be the stage 3 appeal against the grievance outcome rather than the grievance itself. The Claimant indicated that the protected disclosure relied upon is the entirety of the appeal document running from page 290 to 370 of the hearing bundle. There was insufficient time to read that document in its entirety and unfortunately it was not one of the items that the Claimant had identified as being a key document to read at the outset when I had explored that issue with the parties.

16. I discussed with the parties that the burden of proving the 'whistleblowing' reason for dismissal under Section 103A ERA 1996 lies on the employee who has insufficient continuous service to bring a claim of ordinary unfair dismissal (see **Ross v Eddie Stobart UKEAT/0068/13/RN**) and therefore I needed to know from the Claimant why he contended that the reason or principle reason for his dismissal was because of his stage 3 grievance appeal and not, as the Respondent says, because he was absent from work without permission and accepting payment from another source during that time. The Claimant told me the following in relation to that enquiry:

    *"That they [the Respondent] will breach the procedure again and again and if they do not follow it once they will do it again and again if no-one acts on it".*

17. I discussed and agreed with the Claimant that that meant that he was saying that the reason or principle reason that he says that his dismissal was because of his stage 3 grievance was because it had not been investigated, as he saw it, by the Respondent.

18. I should observe that the Claimant also contended that the third Claim Form contained a complaint about discrimination. The Claimant contended that to be the case on the basis that the narrative to the Claim Form said this at page 36 of the hearing bundle:

    *"In addition, this letter was one of my official letters about approval of my previous employer (The University of Nottingham) for granting my legal visa for entering Germany as delivered to the German Embassy in London through diplomatic channels where they checked about it in this time, and they authorised for me a (Guest Scientist) visa to my trip. Furthermore, as I am a migrant inside UK, I have to inform the UK's Home Office about my travel abroad to any trip more than 90 days where I informed legally".*

19. I do not accept that that constituted a discrimination claim. It did not refer to any form of discrimination nor is there anything within that passage from which such a claim could be inferred. It is clearly part of the narrative to the unfair dismissal and unauthorised deductions from wages claim. Unlike the position with the fourth Claim Form, to which I shall come shortly, the Claimant did not complete any of the boxes at section 8 of the Claim Form (see page 35 of the hearing bundle) to suggest that he was claiming discrimination and set out clearly that he was only complaining of being unfairly dismissed, for "other payments" that he was owed and "another type of claim that the Tribunal can deal with". The Claimant had

again ticked the box which features at page 37 of the hearing bundle which relates to what is sought if the claim is successful and which says *"If claiming discrimination, a recommendation"* but I do not accept that that is sufficient to advance a discrimination claim in this Claim Form any more than I did with regard to the first Claim Form.

The Fourth Claim Form – 3rd April 2019 (pages 42 to 53 of the hearing bundle)

20. This Claim Form comprises complaints of discrimination relying on the protected characteristic of race and what is said to be a breach of Section 10 Human Rights Act 1998. He refers to reference in the ET3 Response to a complaint of discrimination relying on the protected characteristic of religion or belief but confirmed clearly on more than one occasion that he is **not** advancing any such claim.

21. The elements of both parts of the claim relate to the fact that the Claimant was asked by the Respondent to send a draft of a speech that he intended to give for their approval before it was given and, further, that the video of that speech was not permitted to be longer than 2 minutes. The Claimant contends that his video, which exceeded 2 minutes was deleted from Facebook but one of his fellow employees was nevertheless permitted to have a recording of 2 minutes and 14 seconds and that was not removed. That colleague is Italian and the Claimant relies upon this individual as an actual comparator for the purposes of the discrimination element of the claim. The Claimant relies upon his nationality (Egyptian) for the purposes of the discrimination claim and therefore compares his treatment with that of his Italian counterpart.

22. The Claimant had initially stated that he complained of two acts of discrimination which were the requirement to have his draft speech reviewed and the deletion of his video from Facebook but the Claimant later confirmed that the basis of the discrimination complaint relates only to the video issue. The deletion of that video took place on or around 16th July 2018. I should observe that the complaint of a breach of the Human Rights Act comprises both the request/requirement to provide a draft of his speech and the deletion from Facebook of the Claimant's video.

23. I asked the Claimant why he says that it is his race that caused the video to be deleted given that a difference in nationality and a difference in treatment will not be sufficient to make out a claim of race discrimination. The Claimant told me that this was on the basis that he was the only Arabic member of staff within the relevant team whilst there were five Italian members of staff. I understand the make up of the team as a whole to be 15 with the remaining members being of various different nationalities.

**THE LAW**

24. Before turning to my findings of fact, it is necessary for me to set out a brief statement of the law which I shall in turn apply to those facts as I have found them to be.

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

25. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

26. Rule 37 provides as follows:

> *"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:*
>
> *(a) That it is scandalous or vexatious or has no reasonable prospect of success.*
> *(b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
> *(b) For non-compliance with any of these Rules or with an order of the Tribunal;*
> *(c) That it has not been actively pursued;*
> *(d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"*

27. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success. A claim can have no reasonable prospect of success if there is no jurisdiction for a Tribunal to entertain it.

28. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

> *"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"*

29. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested.

30. Particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as enjoying no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

31. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

> *"(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."*

32. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

Direct Discrimination

33. It is also necessary to consider the law in respect of the discrimination claim that the Claimant advances.

34. Section 13 Equality Act 2010 provides that:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

35. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

36. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

37. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

38. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246**:

> *"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.*
>
> *The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

39. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**.)

Time limits in discrimination cases

40. Section 123 Equality Act 2010 deals with the time limits in which Claimants must present discrimination complaints to the Employment Tribunal and provides as follows:

*(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.*

Therefore, Section 123 provides that proceedings must be brought *"within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".*

41. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is "just and equitable" to allow time to be extended and the complaint to proceed out of time.

42. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and should have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**).

43. In considering whether to exercise their discretion, a Tribunal must consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

44. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. However, the burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 Equality Act 2010.

Complaints of breach of contract

45. An Employment Tribunal is seized of jurisdiction to consider complaints of breach of contract by virtue of the provisions of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Article 3 of that Order provides as follows:

*"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-*

*(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*

*(b) the claim is not one to which article 5 applies; and*

*(c) the claim arises or is outstanding on the termination of the employee's employment."*

**THE POSITION OF THE PARTIES ON EACH OF THE CLAIM FORMS**

46. I deal now with the respective positions of the parties on each of the Claim Forms. In each case I shall take the submissions of the Respondent first on the basis that essentially the matters for consideration today are their application and I have therefore heard submissions from Mr. Sugarman before hearing the Claimant's reply in response.

First Claim Form – presented 12th March 2019 (page 5 – 16 of the hearing bundle)

47. The position of the Respondent is that the Employment Tribunals have no jurisdiction to hear claims relating to fraud. Insofar as the breach of contract claim is concerned, the position of the Respondent is that as the Claimant was still an employee when his first Claim Form was presented then the Tribunal have no jurisdiction to entertain that complaint either as such claims can only be brought where the breach arises or is outstanding on the termination of the Claimant's employment (see Article 3(c) Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994). That cannot be the case here where the Claimant was, at the point that the first Claim Form was presented, still in employment.

48. It has been very difficult to understand the Claimant's position as to the Tribunal having jurisdiction to hear claims of fraud and for breach of contract whilst a person is still employed. Mr. Sugarman has done his best to assist by lending the Claimant use of his own materials to access the relevant parts of the

Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. However, the Claimant's focus was more on what he felt to be the merits of the complaints rather than addressing the question of how the Tribunal had the power to deal with them. However, it appeared after lengthy discussion that the Claimant's position is that the Employment Tribunal does have jurisdiction to deal with the matters of which he complains because they arise out of an employment relationship and so that must be the appropriate forum for them to be determined, particularly where the Respondent has not addressed matters to his satisfaction in internal processes.

The Second Claim Form – presented on 19th March 2019 (pages 17 to 28 of the hearing bundle)

49. The position of the Respondent is that again there is no jurisdiction to entertain these complaints. The Tribunal does not have jurisdiction to deal with complaints about a breach of the GDPR and, as the Claimant was still employed as at 19th March 2019 when this second Claim Form was presented, the Tribunal has no jurisdiction for the same reasons as advanced in respect of the first Claim Form. The Claimant's position, as I understand it, mirrors his position on the first Claim Form.

Third Claim Form – presented 3rd April 2019 (page 30 – 41 of the hearing bundle)

50. The position of the Respondent is again that the Tribunal have no jurisdiction to entertain complaints of fraud.

51. Insofar as the unfair dismissal claim is concerned, it is the Respondent's position that the Claimant lacks qualifying service to bring an ordinary unfair dismissal claim and there is nothing that can be read into the third Claim Form to suggest that he was bringing a complaint under Section 103A Employment Rights Act 1996. In all events, Mr. Sugarman contends that such a claim would have no reasonable prospect of success as the Claimant has not established that his stage 3 grievance has any public interest element to it as it is a complaint about personal treatment of him and furthermore it is clear that the reason that the Claimant was dismissed was because he was absent without leave having taken a paid research trip to Germany without consent from the Respondent and therefore on causation the complaint is, as Mr. Sugarman described it, "utterly hopeless". The Claimant had signed a Fellowship Agreement (see pages 83 to 86 of the hearing bundle) that he would devote his time and activities to work for the Respondent and his Contract of Employment (see pages 105 and 106 of the hearing bundle) saw him being required to obtain permission from the Respondent if he was to undertake other work. The Respondent's position is that there was no permission obtained and therefore he was absent without leave and that was the reason for dismissal.

52. Insofar as the unauthorised deductions from wages claim is concerned, the Respondent accepts that they ceased to pay the Claimant from January 2019 until the termination of his employment because he was not present at work – being in Germany as indicated above. It is said (and I accept that the documents evidence that) that the Respondent had written to the Claimant asking him to attend work and had warned him that salary payments may be

stopped if he did not and that he was consistently told that he did not have permission to be in Germany. It is said that as the Claimant did not attend work, there was no obligation to pay him and therefore there is no sum that was "properly payable". The Respondent relies in that regard in the decision in **Miles v Wakefield District Council [1987] IRLR 193** (see paragraph 46 of Mr. Sugarman's Skeleton Argument).

53. The Claimant's position in respect of the Tribunal's jurisdiction to deal with fraud complaints is as per his submissions for the first Claim Form.

54. With regard to the unfair dismissal claim, as I have observed he accepts that he lacks the qualifying service required by Section 108 Employment Rights Act 1996 to bring a claim of "ordinary" unfair dismissal. He contends instead that he was dismissed because of his stage 3 grievance and that the link between that and his dismissal was that the Respondent failed to investigate it.

55. He also contends in respect of both the unfair dismissal claim and the complaint of unauthorised deductions from wages that he did have clear authority from the Respondent to attend the research trip and therefore that cannot have been the real reason to dismiss him. He contends that it is not true that he did not have authority from the Respondent to travel to Germany to undertake research and accept his Green Talent Award and I have spent some time discussing this with the Claimant and seeking to understand his position and it is fair perhaps to say that it has not been entirely straightforward to do so. However, as I understand it, the Claimant's position is that there are a number of documents which all provided him with authority from the Respondent to travel to Germany and undertake the research trip. I have dealt with each of those identified by the Claimant within my conclusions below.

Fourth Claim Form – presented 3rd April 2019 (page 42 – 53 of the hearing bundle)

56. I remind myself there that the Claimant tells me that he intends this Claim Form to consist of complaints of race discrimination and a breach of Article 10 Human Rights Act 1998[1].

57. The position of the Respondent is that the Tribunal does not have jurisdiction to consider complaints about a breach of the Human Rights Act as a freestanding cause of action.

58. Insofar as the complaint of race discrimination is concerned, it is said that that claim has been presented outside of the statutory time limit set out in Section 123 Equality Act 2010 and that it is not just and equitable to now extend time. There is therefore said to be no jurisdiction to hear the complaint. If time was extended, it is said that the discrimination claim lacks merit and that a Deposit Order ought to be made. Mr. Sugarman confirmed that in view of the authorities on strike out of discrimination claims, only a Deposit Order is sought and he does not advance an application to strike it out other than on jurisdictional grounds.

[1] Given that the Claimant is referring to Freedom of Expression I believe this to be in fact a reference to Article 10 European Convention on Human Rights. Section 6 Human Rights Act 1998 makes it unlawful for a public authority to act in contravention of a Convention right.

59. Whilst the Claimant accepts that the act of deleting the video took place on 16th July 2018, he says that he could not present a claim previously against the Respondent because they had not completed their investigations into his complaint under the Dignity at Work policy and that he did not receive an outcome until 3rd January 2019 and therefore it was that date and not the former from which time ran to present the claim because the complaint was against the Respondent University and not the individual who deleted the video. I discussed with the Claimant that as the act that he is complaining about is the deletion of the video (rather than the decision made by the Respondent on his complaint about that) the communication of 3rd January 2019 does not change the date of deletion. The Claimant's position was that he had to await the outcome of the complaint before he was able to present a claim because he needed the report from the Respondent as evidence to support the same. I heard evidence from the Claimant in relation to this issue and give my findings of fact below.

60. Insofar as the question of jurisdiction to consider complaints of a breach of the Human Rights Act is concerned, the Claimant contended that the Tribunal would have jurisdiction because the incidents of which he complains occurred whilst he was employed by the Respondent and that dignity is part of the employment relationship and therefore the Tribunal is the appropriate forum.

## FINDINGS OF FACT - JURISDICTION

61. I turn now to my findings of fact based on the evidence that I have seen and heard during the course of this hearing. Those findings relate only to the question of jurisdiction in respect of whether the Claimant's discrimination complaints have been presented in time and, if not, whether it is just and equitable to extend time for them to be heard.

62. The Claimant's evidence was that he believed in July 2018 that he had been subjected to race discrimination but that he also believed that he was unable to issue proceedings against the Respondent until he had received the outcome of his complaint under the Dignity at Work policy and that when he received that on 3rd January 2019, he immediately commenced early conciliation via ACAS.

63. The Claimant accepted that he had researched how to bring an Employment Tribunal claim and his evidence was that he had done so in December 2018 when the Respondent had written to him to say that the investigation was nearing a conclusion. His evidence was that he also had an interest in the law and it is clear that the Claimant is an intelligent man with considerable abilities in using Information Technology and an ability to undertake research. He has a degree in electrical engineering and is educated to Masters level.

64. He did not obtain any legal advice as he found the costs to be prohibitive and he was also told that there would be a delay because he would need to find a lawyer who could speak Arabic. He did make attempts to speak to a lawyer in that regard in either July or August 2018. He did not seek any advice from any organisations who would assist him without charge as he believed that there would be some form of breach of his obligations to the Respondent if he did so.

## CONCLUSIONS

65. I now deal with my conclusions in relation to each of the complaints within each of the Claim Forms.

First Claim Form – presented 12th March 2019 (page 5 – 16 of the hearing bundle)

66. I accept the submissions of the Respondent that the Employment Tribunals have no jurisdiction to hear claims relating to fraud. I have asked the Claimant to set out some authority for his proposition that they do. The Claimant has been unable to take me to anything to that effect other than the fact that he believes that the Tribunal have jurisdiction to deal with any claim which arises out of an employment relationship. I do not accept that contention. The Tribunal only has the power to deal with claims where there is some statutory basis conferring jurisdiction upon it. There is no such statutory provision which allows a Tribunal to deal with cases of fraud. The position can be considered to be akin, as raised with the Claimant at the Preliminary hearing, to claims for pure personal injury which arise only from an accident at work such as where an employee has fallen from a ladder and broken his or her leg. Those claims belong in the County or High Courts and an Employment Tribunal could not consider them. It follows that as the Tribunal has no jurisdiction to entertain fraud claims, that complaint within the first Claim Form must be struck out under the provisions of Rule 37 of the Regulations.

67. Insofar as the breach of contract claim is concerned, the jurisdiction of the Employment Tribunal to deal with such complaints is embodied in Article 3 Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Article 3(c) provides that there is jurisdiction where the claim arises or is outstanding on termination of employment. It follows that where employment has not terminated, the Tribunal is not seized of jurisdiction to entertain a breach of contract claim. There is no dispute that the Claimant's employment had not been terminated when he presented the first Claim Form. The termination date is recorded as 25th March 2019, although having regard to the decision in **Gisda Cyf v Barratt [2010] IRLR 1073** it is in fact more likely to be 2nd April 2019 but, either way, the termination of employment was after the presentation of the first Claim Form. Therefore, there is no jurisdiction to hear the breach of contract claim complaint contained within the first Claim Form and it must be struck out under the provisions of Rule 37 of the Regulations.

68. Therefore, for those reasons the entirety of the first Claim Form is struck out for want of jurisdiction.

The Second Claim Form – presented on 19th March 2019 (pages 17 to 28 of the hearing bundle)

69. I accept the submissions of the Respondent that the Employment Tribunal has no jurisdiction to deal with complaints about a breach of the GDPR. Any complaint about a breach of the GDPR falls within the remit of the Information Commissioner (to whom I understand the Claimant has already made a complaint) or the civil courts but there is no statutory basis upon which an

Employment Tribunal has jurisdiction to determine such claims any more than complaints of fraud. It follows that as the Tribunal has no jurisdiction to entertain complaints of a breach of the GDPR, that complaint within the first Claim Form must be struck out under the provisions of Rule 37 of the Regulations.

70. Insofar as the breach of contract claim is concerned, again at the date of presentation of the second Claim Form the Claimant's employment had not been terminated. Any breach of contract complaint could therefore not arise or be outstanding on termination of employment as required by Article 3(c) Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 and accordingly the Tribunal has no jurisdiction to hear it. I should observe here that insofar as the Claimant's complaint regarding an asserted breach of the GDPR could be categorised as a complaint of breach of contract, the Tribunal would also have no jurisdiction to entertain it for the same reasons.

71. Therefore, for those reasons the entirety of the second Claim Form is struck out for want of jurisdiction.

Third Claim Form – presented 3rd April 2019 (page 30 – 41 of the hearing bundle)

72. I remind myself that this Claim Form comprises complaints of unfair dismissal contrary to Section 103A Employment Rights Act 1996; unauthorised deductions from wages contrary to Section 13 Employment Rights Act 1996 and of fraud.

73. For the same reasons that I have in respect of the first Claim Form, the Employment Tribunal has no jurisdiction to entertain fraud claims and so that complaint within the first Claim Form must be struck out under the provisions of Rule 37 of the Regulations.

74. I turn then to the complaint of automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996. Mr. Sugarman contends that the Claimant's Claim Form contains no such complaint. However, I consider that the Claimant has set out sufficient information from within the Claim Form where such a complaint could be discerned. There is clear reference to the grievance and some link (although I return to that later) to his dismissal. I consider that sufficient to identify the existence of a claim under Section 103A Employment Rights Act 1996 such that an amendment to the Claim Form is not needed. I take into account in that regard the fact that the Claimant is a litigant in person; that he presented the Claim Form without the benefit of any legal advice or assistance and that English is not his first language.

75. The burden of proving the 'whistleblowing' reason for dismissal under Section 103A ERA 1996 lies on the employee who has insufficient continuous service to bring a claim of ordinary unfair dismissal (see **Ross v Eddie Stobart UKEAT/0068/13/RN**) and so that will rest in these circumstances squarely with the Claimant. The Claimant must first establish that he has made a protected disclosure. For the reasons that I have already given, I have not had the time to read the entirety of the grievance document that he relies upon in order to determine this issue. For the purposes of this aspect of the claim I therefore

take the Claimant's claim at its highest and assume that he will be able to make out that that stage 3 grievance contains a protected disclosure.

76. That grievance was lodged with the Respondent on 31st October 2018 (see page 370 of the hearing bundle). The sole basis upon which the Claimant says that that grievance was the reason or principle reason for his dismissal was on the basis that he says that the Respondent failed to investigate it. It is clear from the Respondent's Grievance Procedure that stage 3 of the process relates to an appeal against an earlier conclusion reached on an earlier grievance and from this it must be assumed that the position is that it is said that the Respondent failed to deal with the appeal at stage 3. Other than that, the Claimant does not suggest that the Respondent subjected him to any ill treatment as a result of that stage 3 grievance appeal or made any adverse comment to him that he had submitted it or about the content.

77. The fact that the Respondent did not, it seems, conclude the stage 3 appeal process does not have any apparent link to the Claimant's dismissal. Indeed, other than the fact that it is said that there was a failure to investigate and that might happen to others in the future, the Claimant was not able to provide anything at all to even begin to suggest any form of evidential link between the stage 3 grievance appeal and his dismissal some months later. Indeed, even the Claimant appears somewhat unsure of his own case on this given that the ET1 Claim Form sets out at page 35 that the grievance "may" be something to do with his dismissal. That is as high as the Claimant puts it and is a far cry from him being able to advance any positive case that would show a link between the stage 3 grievance appeal and the subsequent dismissal. An assertion that there "may" be a link is woefully insufficient and the Claimant has not been able to take me to anything within the voluminous bundle to make out any positive case. In those circumstances, I cannot see any possibility that the Claimant would be in any better position to do so at trial.

78. In addition to all that, it is abundantly clear from the documentation that the Claimant was dismissed for unauthorised absence. The Claimant would have to show that that was all a complete sham to hide the real reason for dismissal which, he says, was because he had raised a stage 3 grievance appeal and the content of the same. There is simply no evidence at all of that that the Claimant is able to point to and I bear in mind in that regard that I have a substantial number of documents before me. The Claimant maintains that he had authorisation from the Respondent to attend the research trip and therefore it is false (or fraud) for them to have suggested otherwise. The Claimant has set out each of the documents that he relies upon in that regard in the hearing before me and I have considered each of them below. As I shall come to, none of them either singularly or cumulatively come close to providing the Claimant with the necessary authorisation to leave the Respondent University – by whom he was still being remunerated – and take up a fully funded research trip in Germany.

79. The first document relied upon by the Claimant is page 114 of the hearing bundle. This is a letter from Louise Wright, Business Operations Administrator dated 10th December 2018 which set out that the Claimant would be covered by the Respondent's travel insurance policy in respect of the trip to Germany. It is

clear that that arose from a request made by the Claimant to Ms. Wright on 7th December 2018 asking for written confirmation for the German Embassy that he was covered by the Respondent's travel policy. It set out details of the trip to Germany and in terms what the Claimant wanted the letter to say. It was not, it is very clear from that document, a request for permission to attend the trip in Germany and in all events Ms. Wright could not have given that permission. The letter is was simply Ms. Wright replicating the information that the Claimant had asked her to provide to the German Embassy. The Claimant likened this to page 79 of the hearing bundle which was a letter from a Tribunal Clerk setting out details of this Preliminary hearing as Ordered by Employment Judge Britton and that as such Louise Wright must have been acting on instructions from someone with authority to approve the Germany trip. I do not accept that and as I have observed, it is clear that the letter was written at the request of the Claimant from his email of 7th December 2018. As I shall come to below, the Claimant knew full well from the document that appears at page 131 of the hearing bundle that it was his supervisors who he needed to obtain permission from, not an administrator.

80. The second document relied upon is at page 117 of the hearing bundle. This is a blank page with commentary from the Claimant to say the following *"The Respondent' letters which approve the travel to other research activities (Countries) as the same procedures for approving the travel to Germany for receiving Green Talents Award"*. Within that section are pages 118, 119 and 120 on which the Claimant also relies. Page 118 is again a letter from Louise Wright to the Italian Embassy setting out that the Claimant was covered by the Respondent's travel policy for an earlier trip to Italy in September 2018. It does not give permission for the Italian trip itself let alone the trip to Germany the following year. Page 119 is a letter from a Sue Wren, Employment Support Services Assistant, written on a "To Whom it May Concern" basis. I presume that this was also written at the behest of the Claimant but in all events it relates to attendance at a summer school in Palermo in September 2018. It does not provide any authority for a trip to Germany in late December 2018. Page 120 is blank save as for the letter "D" and that does not take matters any further.

81. The third is page 131 – this is part of the Claimant's Personal Career Development Review and the extract relied upon by the Claimant says this:

*"I have been selected to Green Talent Grant 2018 from German Federal Ministry of Education and Research (BMBF). Green Talents Award is one of the Research Awards in Sustainability field to the young researchers from the German Federal Ministry of Education and Research (BMBF) at Germany. In addition, The Ministry acted "Green Talent Forum 201" which is fully funded from the ministry and I attended it during the first month.*

*The grant is fully funded to three months research stay, where the starting day must be during the year 2018. The specific research stay time, German institution, research topic from my selection in 2018. In addition, This grant depend on my host institution, supervisor, and PhD supervisors' approval."*

There was thereafter a link to the Green Talent Award website.

82. It plainly cannot be the case that this gave the Claimant authority to attend the trip to Germany. It was written by the Claimant himself not the Respondent and made it absolutely clear from the narrative that approval was required by both his supervisor and PhD supervisor.

83. The fourth document relied upon is page 89 of the hearing bundle – this is the signature sheet from the Claimant's Contract of Employment. The Claimant relies on clause 6.1 of the Contract of Employment which sets out that there will be an agreement as to the Claimant's Personal Career Development Plan. That relates back to the extract at page 131 above but again neither that document nor the Claimant's Contract of Employment authorise him to attend the Germany trip and again it is abundantly clear from the Claimant's own comments at page 131 that he was fully aware that he needed express permission from his Supervisor and PhD supervisor.

84. The fifth document upon which the Claimant places reliance is page 704 of the hearing bundle – this is also a part of the Claimant's Personal Career Development Plan and is effectively a list of expectations and expected achievement dates. It is dated 6th November 2017. It makes no reference whatsoever to the Germany trip let alone provides any authorisation from the Respondent for the Claimant to attend the same.

85. The sixth document relied upon is page 703 of the hearing bundle – this is an extract from the Claimant's Personal Career Development Plan relating to Grants and Awards. It sets out that the Claimant has achieved his goal of obtaining a Green Talent Award for 2017 and the dates for a trip to Germany to receive it. However, this document does not provide either express or implied authority for the Claimant to attend a further trip relating to a separate Green Talent Award over a year later. Whilst the Claimant appears to suggest that he may not have sought authority in 2017 and was not challenged by the Respondent and so the position should have been the same in 2018, I cannot accept that that provided him with implicit authority to attend the following year. As I have already observed, the Claimant himself at page 131 was well aware that he had to obtain authority to attend for the December 2018 research trip.

86. The seventh document relied upon is at page 122 of the hearing bundle. This is a letter from the Respondent dated August 2018 which referred to the Claimant having achieved a rating of 2 as to his performance over the previous year and confirming the amount of his salary. I asked the Claimant how that letter provided him with authority to go to Germany given the content. The Claimant's position was that this approved his Personal Career Development Plan. However, for the reasons that I have already given that same Personal Career Development Plan expressly set out that the Claimant needed permission to attend. There is nothing within this letter, the Personal Career Development Plan or the Contract of Employment which refers to it which provided the Claimant with any express or implied authority to attend the Green Talent Award trip to Germany in late 2018 and early 2019.

87. The eighth document relied upon is a Global Business Travel receipt dated 10th December 2018. This is a separate document within the additional file that the Claimant provided during the course of the hearing. The Claimant's case in this

regard appears to be that as his flights were paid by the Respondent from France (where he had been attending another event) to Germany where he attended the Green Talent Award research trip in late 2018, that that demonstrated that he had authorisation to attend. I do not accept that position. The Claimant claimed the costs of the travel through the Respondent's online American Express Global Business Travel system. That is not the same as receiving authorisation from his supervisors that he was permitted to attend the event and, as I have already observed, that was the permission that he was fully aware that he needed to obtain.

88. The ninth document relied upon is the Claimant's passport. Although I indicated that I did not need to see this document which the Claimant offered to produce during the hearing, I understand the point to be that the Claimant had to apply for a visa to travel to Germany and that he says that the visa application was paid for by the Respondent. Although I have not seen any documentation confirming that payment, the point remains that although the Claimant may have received a payment of some expenses in respect of that trip, which he would have claimed himself, there is still nothing to demonstrate that he had the authorisation of his relevant supervisors to attend the Green Talent Award event in December 2018.

89. The tenth document relied upon is at page 907 and 908 of the hearing bundle. This is an extract from the Claimant's European Training Network Personal Development Review. It refers to a three month fully funded research stay in Germany between 31st December 2018 and 31st March 2019. Nowhere within this document is there any express or implied consent from the Respondent for the Claimant to attend and, as I have already observed above, the Claimant was well aware that he needed permission from his two supervisors to attend.

90. The next document upon which reliance was placed is an extract from the Respondent's website dated 9th November 2017 that the Claimant had been awarded the Green Talent Award. Given the date, that clearly related to the 2017 Green Talent Award and not the one in December 2018. It was of course that latter trip with which the Respondent took issue and in respect of which the Claimant was dismissed as a result of his absence being unauthorised. It comes nowhere close to express or implied consent for the December 2018 research trip in question.

91. The next document relied upon is a Migrant Change of Circumstances Form (contained within the Claimant's smaller unpaginated bundle) completed by the Claimant. This relates to an application to the Home Office for a change of circumstances in respect of the Claimant's visa and references that he will be out of the country from 1st January 2019 in respect of the Green Talent Award research trip. I understand that he says that this was sent to the Respondent prior to travel but that they did not supply it to him as part of a Subject Access Request and that he involved the police as a result. That Form is one that was completed by the Claimant and again comes nowhere close to providing express or implied authority from the Respondent for him to attend a three month funded research trip in Germany in December 2018.

92. The next documents relied upon are pages 156, 160, 163 and 166 of the hearing bundle. Two of these pages are letters from the Claimant's Supervisor informing him that his absence was unauthorised. The first letter asks the Claimant to make contact and warns him that his pay may be stopped if he does not attend work. The second letter, in reply to the Claimant's representations (which appeared to suggest that he did have authority to attend the research trip and are based largely on similar arguments to those advanced today) set out that he did not have permission from his two supervisors or the European Commission and that his absence was therefore unauthorised. Page 166 of the hearing bundle is a certificate signed by the Claimant's supervisor (and author of the unauthorised absence letters) in respect of a week long training course in France. That course took place during the time that the Claimant was also on the research trip in Germany. The Claimant appears to contend that his absence could not therefore have been authorised but it is clear that that certificate covered a week long course, not the three month funded research trip that, by that stage, the Claimant had already been absent from work for some three weeks to attend and intended to return to complete until the end of March 2019. That certificate does not authorise the Claimant's absence in Germany nor provide him with either express or implied authority to have attended.

93. The Claimant also relies on the fact that the Respondent did not participate in early conciliation to resolve the claim. That cannot be a matter that is relevant to whether or not the Claimant had permission to attend the research trip in Germany given that it occurred after the period when he had already elected to attend.

94. Finally, the Claimant also relies on the fact that he could not attend disciplinary hearings because he was still in Germany and was not allowed to travel until the Home Office approved his application for a change of visa (see pages 148 and 154 of the hearing bundle). This cannot possibly be relevant to the question of whether the Claimant had authorisation to attend the research trip. It may well impact on whether a dismissal was procedurally unfair but that will not be a question for the Tribunal in respect of the Claimant's unfair dismissal claim. The sole question will be whether the reason or principle reason for dismissal was that the Claimant had made a protected disclosure.

95. The Claimant also makes the point that the Green Talent Award was a prestigious accomplishment, akin he tells me to a Nobel Prize, and that the Respondent had no evidence that he was working rather than merely collecting that award. I am unsure if the Claimant is contending that he was therefore not being paid for what is described as a "fully funded" research trip as that position is far from clear, but it overlooks the fact that he was nevertheless, as he was well aware, required to obtain permission from the Respondent to attend and nothing that he has taken me to has come anywhere close to showing that he obtained that. It also overlooks the fact that the Claimant was due to be away in Germany for some three months on what the Claimant himself described in his Personal Development Plan as a fully funded research trip and collecting the award appeared to be rather more involved, therefore, than attending a single awards ceremony which I understand from page 914 of the bundle to have been on 22nd October 2018.

96. The Claimant, it seems, attended that ceremony and appears to contend that the fact that the Respondent did not challenge him on it at the time gave him implicit authority to undertake the three month research trip. I do not accept that that was the case. The Claimant needed to obtain express consent from the Respondent and these pages take him no further forward in establishing that he sought and was granted authorisation.

97. What the Claimant has not been able to take me to, however, is anything at all from his supervisor and PhD supervisor to show that he had **their** authorisation to attend the event. Nothing that the Claimant has shown me has even come close to that for the reasons that I have already said and it is clear from page 131 of the hearing bundle that the Claimant was aware that it was their authorisation that he needed.

98. It is abundantly clear that the Respondent considered the Claimant to be on unauthorised absence and he was clearly told so by the Respondent in the documentation to which I have already referred above before the commencement of the disciplinary proceedings which led to his dismissal. Nothing in the Claimant's representations in reply evidenced any authorisation having been given to him to attend the research trip and the Claimant was of course well aware as I have already observed that he required authorisation from his supervisors. On the basis of the evidence before me, it is abundantly clear that the Respondent was able to form the view that the Claimant was on unauthorised absence and there is absolutely nothing to begin to suggest that that was not the real reason for dismissal. The Claimant clearly did not have permission to attend and can in no way evidence that there was a falsehood (or sham) about the Respondent dismissing him for unauthorised absence.

99. Even discounting the issue of the burden of proof which rests on the Claimant, all of the documentation and all of the evidence points squarely to the reason for dismissal being conduct on the basis that the Claimant had taken a period of absence to attend the funded research trip which was not authorised. The Claimant provided no more evidence to the Respondent that he had authorisation than he has today and all of the evidence that the Respondent had by way of their investigation from interviews with the relevant people who were required to provide authorisation, was that none had been given.

100. The Claimant has not been able to provide any reasoned and positive case about why he now contends that his stage 3 grievance appeal submitted over five months prior to his dismissal was the reason or principle reason for the termination of his employment. If he cannot do so now with the bulk, if not all, of the relevant documents in his possession and which feature in the extensive bundle before me, it is inconceivable that he would be able to do so at trial.

101. The automatically unfair dismissal claim is one which, even taking the Claimant's case at its absolute highest, had no reasonable prospect of success and therefore I am satisfied that it should be struck out under the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

102. I turn then to the complaint of an unauthorised deduction from wages. Section 13(3) Employment Rights Act 1996 requires a Tribunal to look at what sum is "properly payable" to a worker when considering the question of whether there has been a deduction and whether that deduction is authorised or not.

103. As I have already set out above, other than his assertion to that effect there is no evidence whatsoever that the Claimant was given authorisation to leave his work at the Respondent University and take up the 3 month fully funded research post in Germany. I accept the submissions of Mr. Sugarman that for there to be an obligation to pay the Claimant, he must have been ready and willing to work (as per Lord Templeman in **Miles v Wakefield District Council [1987] IRLR 193)**. Here, that was not the case. For the reasons that I have already given in connection with the unfair dismissal claim, the Claimant had absented himself from work for a period of 3 months without authorisation. He was told to return to work or face his salary being stopped but the Claimant failed to return. He cannot have been ready and willing to work for the Respondent because he was absent without leave in another country. It cannot be said on that basis that there was any salary "properly payable" to the Claimant and thus a complaint of unauthorised deductions from wages is doomed to failure. Again, and for those reasons, this aspect of the claim has no reasonable prospect of success and it is struck out under the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

Fourth Claim Form – presented 3rd April 2019 (page 42 – 53 of the hearing bundle)

104. This Claim Form comprises complaints of discrimination relying on the protected characteristic of race and what is said to be a breach of Section 10 Human Rights Act 1998.

105. I take the latter complaint first. As I have already observed, as the Claimant is referring to a complaint about his freedom of expression it would appear to be the case that he is referencing Article 10 European Convention on Human Rights ("ECHR"). Section 6 Human Rights Act 1998 makes it unlawful for a public authority to act in contravention of a Convention right. Section 3 Human Rights Act 1998 places a statutory duty on Courts and Tribunals, including the Employment Tribunal, to interpret and give effect to legislation in a way which is compatible with Convention rights.

106. However, that does not give the Tribunal jurisdiction to consider claims where a Claimant wants – as in this case – to enforce their Convention rights against their employers. It only requires a Tribunal, where Convention rights are engaged in a claim where the Tribunal does have jurisdiction, to interpret and give effect to the relevant legislation in a way which is compatible with those

Convention rights. I therefore accept the submissions of Mr. Sugarman that the Tribunal has no jurisdiction to consider a freestanding complaint that the Respondent breached the Claimant's Article 10 ECHR right to freedom of expression (or any part of the Human Rights Act 1998). It follows that as the Tribunal has no jurisdiction to entertain that aspect of the claim then it has no reasonable prospect of success and it is struck out under the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

107. I turn then to the complaint of discrimination relying on the protected characteristic of race. I do not accept the Claimant's arguments that the communication of the outcome of the Dignity at Work complaint somehow altered the date of the act complained of. The decision itself is not complained of as an act of race discrimination but the sole act in this regard is the deletion of the Claimant's video from Facebook. The deletion of that video took place on or around 16th July 2018 and the Claim Form should therefore have been presented by no later than 15th October 2018 given that the Claimant would not benefit from an extension of time for early conciliation via ACAS because he did not commence that process before that point. The Claimant presented the Claim Form on 12th April 2019 and it is therefore almost three months out of time.

108. I therefore need to consider if it is just and equitable to extend time and as set out above, I pay regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**) insofar as those factors are relevant to the circumstances before me. If they are not relevant, I need not mention them here although the parties can be assured that I have considered each of the factors and whether they have relevance to the circumstances of this matter

109. I take firstly the length of and reasons for the delay. The length of the delay is almost three months. That is not a particularly lengthy delay but it is not a trivial one either given that it is double the time limit contained within Section 123 Equality Act 2010. However, for much of that period the Claimant was labouring under a misapprehension that his claim was not out of time and just shy of two weeks of that period he was also engaged in early conciliation via ACAS.

110. The reason for the delay in early conciliation being commenced was that the Claimant erroneously believed that he could not present a claim against the Respondent (as distinct from the perpetrator of the alleged discrimination) without the Respondent having responded to his complaint under the internal Dignity at Work policy. Whilst that was clearly incorrect and had the Claimant researched the position in more detail at an early stage he would likely have realised that, I take into account the fact that the Claimant is a litigant in person. English is not his first language and it is clear that he struggles in some aspects of written communication in English in particular. He had tried to seek advice but could not do so expediently because, perhaps understandably given what I have just said, he was told that he would need an Arabic speaking lawyer. He was under the misapprehension that he could not seek pro bono advice or assistance as it would in some way breach his obligations to the Respondent

and as soon as he received the Dignity at Work outcome, he immediately acted the very same day to commence the early conciliation process.

111. Whilst I have paid reference to paragraph 16 of the decision of the Court of Appeal in **Apelogun-Gabriels v London Borough of Lambeth and another [2002] IRLR 116 CA** as relied upon by Mr. Sugarman and accept that there is not of itself any general principle that it will be just and equitable to extend time for bringing a Tribunal claim where a Claimant is using the employer's internal grievance procedure, I distinguish that decision from the case before me. I say that on the basis that here the Claimant made no conscious decision not to present a claim but to utlise the grievance (or Dignity at Work) procedure instead. The Claimant here was under the misunderstanding that he could not present any claim against the Respondent unless he had done so. Whilst he was clearly wrong about that and, as Mr. Sugarman suggests, should perhaps have done more to check whether his understanding was correct or not, again I note that the Claimant has had no legal advice and English is not his first language. In those circumstances, I consider that the Claimant has demonstrated here a genuine and legitimate reason for the delay by way of his misunderstanding that he had to first exhaust the Respondent's internal processes.

112. I turn then to consider the extent to which the cogency of the evidence is likely to be affected by the delay. Mr. Sugarman does not suggest that the Respondent will be unable to deploy witness evidence in respect of this aspect of the claim and of course there is a relatively contemporaneous record of matters both in respect of the Dignity at Work complaint and the outcome which was communicated to the Claimant on 3rd January 2019, shortly before he commenced this fourth claim to the Tribunal.

113. Again, once that outcome was to hand the Claimant acted promptly in commencing ACAS early conciliation and from that point the Respondent would have been alive to the possibility of a further claim being presented.

114. I turn then to consider the prejudice to the parties. Other than having to defend the complaint, which they would have had to do if the claim had been issued in time, I cannot discern any particular prejudice to the Respondent. Conversely, there is some prejudice to the Claimant as he will not be able to have his discrimination claim ventilated on the merits and determined by the Tribunal. I would observe, however, that that is tempered by the fact that, as I shall come to, I do consider the Claimant's discrimination claim to have little reasonable prospect of success and so he is not in the same position as a Claimant whose out of time complaint has some obvious merit. Nevertheless, I accept that there will be some prejudice to him in this regard and more so than to the Respondent.

115. Finally, I consider whether a fair hearing is still possible. Having regard to all that I have said above and particularly in respect of the cogency of the evidence, I am satisfied that there is.

116. With all that in mind and balancing all of those factors against each other, I am satisfied that it is just and equitable to extend time to allow the discrimination complaint to proceed.

Deposit Order

117. However, I turn then to consider the Respondent's application for a Deposit Order in respect of this remaining element of the claim.

118. The Claimant has identified a comparator of a different nationality who, on the face of it, received different treatment to the Claimant in that his video was not deleted even though it lasted longer than two minutes whereas the Claimant's video was. However, a difference in treatment and a difference in protected characteristic is not enough. Something more is needed and the Claimant will need to show facts from which the Tribunal could conclude, in the absence of any reasonable non-discriminatory explanation from the Respondent, that the Claimant's nationality was the reason that his video was deleted. Aside from the fact that he was the only Arabic member of staff in his team and there were perhaps more Italian members that other individual nationalities, the Claimant has not been able to point to anything to suggest that his nationality had anything to do with deletion of his video. He is not able to say why he considers that the Respondent would, consciously or unconsciously, treat Arabic members of staff less favourably or, conversely, why they would treat Italian members of staff more favourably.

119. The complaint is in that regard somewhat fanciful and as matters stand at present, it is a complaint which has little reasonable prospect of success given the legal test that the Tribunal will apply in a direct discrimination complaint. I consider in this regard that the Claimant has little reasonable prospect of successfully establishing that race was the reason for the treatment he complains of. There are presently no facts to suggest that and no obvious link. It is therefore appropriate to Order a deposit to be paid as a condition of permitting the Claimant to continue with it.

120. I turn then to the amount of the deposit. The Claimant is currently working on a freelance basis and living in London where the cost of living is high. He earns between £1,000.00 and £1,200.00 per month. He tells me that he has savings of £3,700.00 and that he has a monthly disposable income of between £300.00 and £400.00 per month. I consider a Deposit of £150.00 to be sufficient to reflect the thought that the Claimant should give to proceedings with this matter and to provide some surety for costs if a costs Order was to be made in favour of the Respondent but which nevertheless will enable the Claimant to face no real barriers in terms of payment given his finances as I have set them out above.

121. On a final point, given the existence of a Deposit Order and what I have said as to the merits of the complaint of race discrimination, I urge the Claimant to seek legal advice before this matter proceeds much further. The Claimant should consider the availability of any pro bono advisers who may be able to assist him and the Law Society or Bar Pro Bono Unit may be able to signpost him to some individuals who provide such services.

122. In addition to the merits of the discrimination complaint, I also urge the parties to consider the likely value of a one off act of discrimination of this type if the claim were to succeed. It appears to me to be an act which is likely to attract a rather modest award for injury to feelings if it was to succeed and it is clear that the Claimant was not occasioned financial loss by the deletion of the video. If the Deposit is paid and the claim proceeds, the parties may wish to consider the realistic value of the claim in the event that it did succeed so as to see if they are able to resolve the dispute with the ongoing assistance of ACAS.

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Employment Judge Heap

Date: 23rd January 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE