**Case numbers: 3300015/2020** &
**3301726/2020**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr. R Tim**

**Respondent:** **Matthew Homes LTD**

**Heard at:** **Watford CVP** **On: 16h July 2021.**

**Before:** **Employment Judge R F Powell (sitting alone)**

**Representation:**
Claimant: In Person
Respondent: Ms Nicolaou, solicitor.

# JUDGMENT

**The judgment of the Employment Tribunal is:**

1. **The Respondents' application to strike out the claims is refused.**

2. **Upon withdrawal, and by consent, the following specific claims are dismissed;**

    a. **The claim of disability discrimination between April and November 2019.**
    b. **The claim of a verbal warning from Mr B Jordan.**
    c. **The claim of a further comment by Mr B Jordon.**

3. **Upon the formal concession by the Respondent Matthew Homes Limited, that it vaicariously liable for any proven unlawful conduct of the individual respondents and that Matthew Homes Limited would not assert a defence under section 109(4) of the Equality Act 2010 the individual respondents; Mr D Gallagher, Mr P English, Mr A Grantham and Mr J Wragg were removed from these proceedings in accordance with rule 34 of the Employment Tribunal Rules of Proceedure 2013.**

# REASONS

1. This is an open preliminary hearing, conducted by an employment judge sitting alone, to determine a number of issues set out in a case management order on the 1st of March 2021.

2. Those orders arise from the respondents' pleadings in this case which assert that the entirety of the claims should be struck out or be subject to a deposit order.

3. If the strike out applications were to fail the respondent also sought the removal of individual respondents who were, at all material times, employees of the corporate respondent; Matthew Homes Ltd.

4. Other issues have arisen in the course of the hearing which I have addressed in a separate directions order.

5. I first address the application to strike out the unfair and/or discriminatory dismissal as having no reasonable prospect of success and then turn to the application to strike out the balance of the discrimination claims.

6. The claimant's case is recorded in the two ET1 forms he submitted and the further and better particulars of claim which he provided, as ordered by the tribunal on the 1st of March 2021 and which are found at pages 46 F to G of the agreed bundle before me.

7. I should record that two of the respondent's potential witnesses for the final hearing; Mr Jordan and Mr Wragg have submitted witness statements for this preliminary hearing and did so in accordance with the direction of the tribunal. I have read those statements and also cautioned myself that my role today should focus on an examination of pleadings . My role is not to make findings of fact albeit I recognise that the statements of Mr Jordan and Mr Wragg appear to be consistent with the respondent's pleaded case.

8. The Statutory framework: Rule 37 (1)(a)

   Striking out

   37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
   (a) that it 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;
   (c) for non-compliance with any of these Rules or with an order of the Tribunal;
   (d) that it has not been actively pursued;
   (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

The respondent's argument

9. In this case the respondents pleaded that the claims were vexatious, and relied on the case of the Attorney General v Barker [2000] EWHC 453. The facts of that case, in which the Attorney General did not obtain an order, have little in common with the pleaded case before me and the short statement of law in that case is consistent with the authorities which are familiar to the Employment Tribunal.

10. Following the previous preliminary hearing, at which there was some discussion of "mutual termination", the respondent's case expanded to include an assertion that the claimant's acceptance of voluntary redundancy was an act of mutual termination. The respondent asserts that the claimant cannot hope to establish a dismissal which logically deprives him of any reasonable prospect of persuading the Employment tribunal that he was unfairly dismissed or subject to the pleaded less favourable treatment of dismissal.

The allegation of unfair / discriminatory dismissal.

11. On the parties' pleadings it is apparent that the respondent's case was, and is, that the particular kind of work in which Mr Tim was employed had ceased on the building site where he worked and that his role as a site manager was likely to come to an end.

12. It is common ground that Mr Tim was informed of the above and the option of voluntary redundancy was offered; an offer which Mr Tim accepted.

13. On Mr Tim's case, he was manipulated into believing that there was no other option but dismissal because available alterative employment was disguised by the temporary removal of a suitable alternative role, and, for that reason, he accepted voluntary redundancy; because he was led to believe that there was no alternative to dismissal.

14. I recognized from the submissions made by Ms Nicolaou that various forms of termination by agreement do not constitute a dismissal. She set out a number of examples, two of which I will repeat; an employee may resign and sign a settlement agreement or a termination may arise from the operation of a contractual term which has been agreed and which brings the contract to an end. As Mr Justice Arnold explained in Sheffield v Oxford Controls Co Ltd [1979] ICR 396:

"It is plain, we think, that there must exist a principle … that where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than to be dismissed (the alternative having been expressed to him by the employer in the terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than dismissal. The cases do not in terms go further than that. We find the principle to be one of causation. In cases such as that we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give, the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign'.'

15. In Jones v Mid Glamorgan County Council [1997] ICR 815, Waite LJ commented that it was for tribunals, applying their expertise, to distinguish between genuinely voluntary resignations and those made in response to a threat. The court rejected an argument that the threat must be the sole factor inducing the resignation.

16. A similar approach was adopted by the Court of Appeal in Birch and Humber v University of Liverpool [1985] IRLR 165, In that case the respondents were members of the University's technical staff who applied for retirement under the University's Retirement Compensation Scheme. In the context of a redundancy process. They had volunteered to be retired after the University had announced to all its staff that there had been a reduction in funds and that there would, accordingly, have to be a reduction in the number of staff employed. The tribunal held that in these circumstances there was a dismissal. They relied upon the case of Burton Allton and Johnson Ltd v Peck [1975] IRLR 87, a case which establishes that where an employer states that some workers will have to be made redundant, and volunteers come forward to accept redundancy, this is still treated as a termination by the employer and not a mutual agreement to terminate the contract.

17. However, in *Birch* the EAT upheld the appeal [1984] IRLR 54, and distinguished the *Burton* case as follows:

" … the fact than an employee has no objection to being dismissed, or even volunteers to be dismissed, does not prevent his dismissal, when it occurs, from being a dismissal within the meaning of the Act. We do not read the judgment as encroaching in any way upon the distinction which exists in law between a contract which is terminated unilaterally (albeit without objection, and perhaps even with encouragement from the other party) and a contract which is terminated by mutual agreement. The phrase “consensual dismissal” which the [employment] tribunal used seems to us, with respect, to blur this critical distinction. In every case it will be necessary to determine what it is that has had the effect, as a matter of law, of terminating the particular contract, and on the undisputed facts of the present case it seems to us clear for the reasons already given that the termination was affected by mutual agreement and not by dismissal'.'

18. The Court of Appeal upheld the decision of the EAT, and added that, in deciding whether or not the contract had been terminated by the employer :

    'the authorities … require one to look at the realities of the facts rather than the form of the relevant transactions'.

    Ultimately, the issue is essentially one of fact and degree:

"was there any pressure placed upon the employee to resign and if so was the degree of pressure such as to amount in reality to a dismissal?"

19. I have been taken to the case of Khan v HGS Global Images UKEAT 0176/15 where the respondent intended to move its premises and offered its employees three different options; moving to the new premises, being considered to stay on at the original site or potentially receive a redundancy package. In Mr Khan's case the Employment Tribunal concluded that he chose to leave, his departure was not caused by a threat and so was a termination by mutual agreement.

20. I finally considered the guidance of the Employment Appeal Tribunal in the case of Optar Group limited v TGWU 2007 IRLR 931:

" What is the cause of the termination of their employment; if it was that they volunteered to be made redundant what was it that the volunteers were volunteering for was it to be dismissed as part of redundancy exercise or was it, in some ways separate from that exercise, there agreeing to a consensual termination of employment which might have a knock on effect on the redundancy exercise?"

21. It is not my role here today to try and determine these issues; I am not hearing the evidence, my role is to assess whether the claimant's pleaded case is, as the respondent alleges, vexatious or otherwise without any reasonable prospect of success.

22. I have taken into account all that I have set out above and also the following matters:

    Dismissal, discussion and conclusions

23. There are two causes of action at play; for the unfair dismissal claim, contrary to section 94. 95 and 98(4) and Mr Tim's claim that his dismissal was because of his Black British origin; contrary to section 13 of the Equality Act 2010.

24. Paragraphs four to six of the initial grounds of response expressly plead that the claimant was dismissed.

25. At paragraph 6 the respondent pleaded its case thus :

"The first respondent explained to the claimant that he could ask for voluntary redundancy if he would rather not enter into a consultation process and the claimant immediately confirmed add that he would like to do that."

26. Where both parties have pleaded that the claimant was dismissed, I consider that the claimant has a reasonable prospect of establishing he was dismissed.

27. Further, in a case where the offer of voluntary redundancy was made as an alternative to formal redundancy consultation about the only role which was "at risk" (the claimant's role), I consider the claimant has a reasonable prospect of persuading an Employment Tribunal that accepting the offer of voluntary redundancy was an acceptance of his impending dismissal not a mutual agreement to terminate his employment.

A reasonable response / less favourable treatment

28. The claimant's case for the purpose of section 98(4) and section 13[1] is that there was another site manager role, occupied by an agency worker, to which the claimant could have been appointed. The agency worker is of White British origin.

29. The claimant asserts that the respondent disguised this potential alternative employment by temporarily removing the agency worker from that role to give the impression that the role no longer existed and then re-instating the same person back into that role after Mr Tim's termination.

30. I note that the above argument is strongly contested and the respondent has two witnesses to contradict the claimant's assertion.

31. The Claimant's case pleads that a white agency worker, engaged in a materially similar role, was enabled to continue working for the respondent after the claimant, an employee had been dismissed by reason of redundancy. The claimant relies on (as he would put it) the intentional manipulation of the presence of the agency worker as the "something else" to establish a causal connection between his protected characteristic and the pleaded less favourable treatment.

32. The same alleged course of conduct is said to be an unreasonable response by the respondent for the purposes of section 98(4) of the Employment Rights Act 1996.

33. In my judgment, taking the claimant's pleaded case at its highest, these claims assert the necessary elements of the relevant statutes and the merits of the case will depend very largely on an Employment Tribunal's assessment of the relative reliability of the witnesses and the conscious, or unconscious motivation of the respondent's decision makers.

34. For the above reasons I have concluded that both claims have a reasonable prospect of success. I refuse the application to strike out either claim.

[1] See paragraph 66 (d) & (e) of these reasons.

The further claims of direct race discrimination

35. Apart from the above complaints of dismissal Mr Tim has set out a series of complaints of direct discrimination. Some of which have a degree of relevance to the dismissal claims I have addressed above.

36. The details of these claims are found in the content of both ET1s, the Responses and most importantly the Further and Better Particulars of Claim ordered by the Employment Tribunal on 1st of March 2021.

37. These further particulars are not numbered but they are found at pages 46F to 46G of the bundle prepared for this preliminary hearing. I will refer to each as precisely as I can so that readers of this judgment can cross reference these reasons to that document.

38. The first allegation is titled; **"Disability April 2019 - November 2019".** The essence of the allegation is that Mr Tim had not been allowed compassionate leave for time off associated with his daughter's disability; an act of direct discrimination.

39. in the course of Ms. Nicolaou's submissions she took me to pages 51 and 52 of the bundle. On those pages are a series of emails which, taken at face value, indicate that, in the relevant period, the respondent had allowed the claimant 5 days of compassionate leave.

40. In Mr Tim's oral submissions, he accepted that the emails in the bundle had a sound provenance and he did not dispute their content. On reflection he accepted that those emails were an accurate account of events . Consequently, after further consideration, he decided to withdraw this particular head of claim and consented to its dismissal.

41. I therefore dismiss this head of claim upon withdrawal.

42. I now turn to the 3rd allegation on the same page which is titled: **"August/ September 2019"** which pleads comments allegedly made by Mr Barry Jordon. There is also reference, on the very last line of page 46 F and the first sentence of page 47G to another comment by Mr Barry Jordan.

43. The respondent has quite reasonably understood those to be allegations of direct discrimination.

44. Mr Tim made clear in his submissions that these particulars were never intended to stand as allegations of discrimination by Mr Jordon. He was not alleging that Mr Jordan had acted in a discriminatory fashion. These pleaded comments were context for an allegation of discrimination relating to Mr Tim's complaints about his dismissal (and addressed below).

45. With Mr Tim's consent, I dismiss each of the above as claims of discrimination, but it is still open to Mr Tim to rely upon the alleged factual statements as part of his evidence pertinent to the issue of dismissal.

46. **Allegation: 7 -23 October 2019** "No formal HR contact or information was given; I was not given the benefit of any formal guidance or advice."

47. **Allegation: 23rd of October- 19th November** "No communication from HR. Comparator, Alex Bruce. Ricky Bland – at a later date had HR meetings with external HR Company as offered by the business to discuss redundancy procedures and support. Throughout the whole time I was given no formal support or guidance regarding redundancy and my rights."

48. I asked Mr Tim about these two allegations because I had not quite understood the distinction between them. The second appeared, in some respects, to be further particulars of the first. He confirmed that was so and for this reason I have considered these two allegations as one alleged course of conduct which the claimant asserts occurred across the period from the 7th October to the 19th November 2019.

49. The claimant asserts that the respondent's decision not to provide him with access to HR advice or support was part of the respondent's alleged deceit; to "trick" the claimant into accepting voluntary redundancy without questioning why he had been selected or why he was not offered another role which was occupied by a contractor . He alleges that the absence of contact with an HR advisor or meetings with the respondent's HR external company (to provide information about redundancy procedures and support) contributed to the claimant's naïve acceptance that all of the respondent's representations were true.

50. His comparators are white British people who were subsequently at risk of redundancy.

51. The respondent argues that these comparators were not in materially similar circumstances as because they were a group of employees who were "at risk" of redundancy and they had not accepted any offer of voluntary redundancy. Moreover, their redundancy process was not contemporaneous with the claimant's termination and was consequent to the March 2020 Lockdown. Such circumstances, unlike the claimant's case, required the respondent to follow a consultation and selection process for which the respondent needed external HR expertise.

52. The claimant does dispute the majority of the features which distinguish the material circumstances of the comparators from his own case.

53. Further, the respondent argues that, as the claimant accepted the opportunity to take voluntary redundancy, no HR advice would have been appropriate; because none of the procedural steps and consultation were envisaged in his case. Had the claimant not volunteered, it is more than likely that HR support would have been sought for formal consultation.

54. In my judgment, this allegation is not robust; the claimant faces serious difficulties in establishing that his comparators were appropriate ones for the purposes of section of the Equality Act 2010. Nor is it apparent why a hypothetical comparator, who

volunteered for redundancy, with a small firm which had no in-house HR Advisor, would have been treated more favourably in that respect.

55. However, this allegation is an element of the allegation of unfair/ discriminatory dismissal; that the claimant had been misled into accepting voluntary redundancy and that the alleged failure to provide access to HR advice was allegedly a deliberate omission to lessen the chance that the claimant would become aware that he could challenge the respondent's decision to select him for redundancy or challenge whether he should have been offered the role occupied by a contract worker.

56. Whilst these arguments are more nuanced, in the wider context and bearing in mind that these are discrimination claims, I allow this claim to proceed because it is not a case which has no reasonable prospect of success.

A formal warning; 20th June 2018

57. The last allegation is whether or not the claimant was subject to a formal warning. This is set out towards the top of page 46 F and states:

" 20th November 2019 - on site. Comparators Chris Graham, Tom Griffin and Ricky Bland. All acted in the same manner as me, I was the only one given a written warning by Andrew Grantham. None of the above people were given the same written warning for the same act when also found in the same position on a previous occasion with no repercussions or warnings".

58. The claimant, is his submissions, put the matter more clearly than he had set out in writing. It is his case that on the same day the same director of the company visited two sites and that on that day the claimant and his comparator were not present as they were required to be on their respective sites. Only the claimant was subject to a written warning.

59. The claimant asserts that the respondent has not, and cannot ,explain the less favourable treatment and that is sufficient to establish the " something" which connects the alleged less favourable treatment to the claimant's black British origin.

60. The Respondent makes the point that the pleaded date 20th of November 2019 cannot be right because that is after the claimant's effective date of termination. A point which the claimant accepts and identified the correct date as the 20th June 2018.

61. The Respondent then correctly identified that there was a potential jurisdictional issue given the incident was more than a year prior to the effective date of termination and the claimant had not pleaded facts which could sustain an assertion of a continuing course of conduct.

62. In my judgment, the pleading as revised (and which I have recorded and shared with the parties; see below ) is clearly a tenable case. The claimant has identified a white employee of the respondent as a comparator who, on the claimant's case, was in

materially the same circumstances on the same day, and who received more favourable treatment from the same manager who required a warning to be issued against the claimant but not against his white colleague.

63. The respondent makes a forceful submission on the basis of a time point; an issue which is not before me today. I do not consider it to be in the interests of justice to address that argument about which the claimant, a litigant in person, is not on notice and thereby not ready to address. That, in my judgment, is a discrete issue properly taken by the respondent, but deserving a separate consideration.

64. On the pleaded case, absent the time point, the claim has a reasonable prospect of success.

Clarity and finality of the particulars of the claimant's case.

65. The respondent argues that the description given by the claimant goes beyond the particulars he has provided and that is not in the interests of justice to allow the claimant a third opportunity to state his claim.

66. I have reminded myself of the guidance of His Honour Judge Tayler in the case of Cox v Adecco & others UKEAT 0339/202I.

67. I have referred to the case of Chapman v Simon and in particular the propositions of which HHJ Taylor set out, and which I of course accept;

a. No one gains by a truly hopeless case being pursued to a Hearing.
b. Strike out is not prohibited in discrimination or whistle-blower cases but a special care must be taken in such cases .
c. Where the reasonable prospect of success turns on factual issues that are disputed it's highly unlikely that strike out will be appropriate .
d. The claimant 's case must ordinarily be taken at its highest.
e. It is necessary to consider in reasonable detail what the claimant's issues are; put bluntly you can't decide whether a claim has a reasonable prospect of success if you don't know what it is.
f. When dealing with a litigant in person, the particulars of a claim should not be ascertained only by requiring the claimant to explain whilst under the stresses of hearing; the judge must take care to read the pleadings and all additional information from which a reasonable understanding of the claim can be understood.

68. I firstly find that the comments that the claimant has made today by way of explanation of his claims were clarifications. His comments did not introduce new claims nor expand the compass of those claims beyond that set out in his ET1s and further and better particulars.

69. However, the respondent, is rightly concerned that there must be a point at which the particulars of these claims become fixed. I therefore record the wording of the particulars of the claims of direct race discrimination:

    a. On the 20th June 2018 Mr Andrew Grantham issued a written warning to the claimant for leaving his site during working time. A white British colleague, Mr Chris Graham, had also been found to be away from his site on the same day as the claimant. Mr Graham was not issued with a written warning. The issuing of the warning was an act of less favourable treatment.

    b. On or about the 7th to 23rd of October 2019 the claimant was not offered any contact, support or advice from the respondent's HR advisors. This was less favourable treatment than the respondent's provision of HR advice and support to his comparators: Mr Ricky Band and Mr Alex Bruce.

    c. On or about the 7th to 23rd October 2019, Mr English instructed that an agency worker, undertaking the role of site manager or assistant site manager, was to be removed from that role or from the site. The post which the agency worker was undertaking was one which the claimant could have taken up, rather than be made redundant. The role was not made available to the claimant and the claimant was informed that the role was not available. However, after the claimant's dismissal, the role was re-instated and the agency worker returned to the post. The comparator is the said agency worker or a hypothetical comparator.

    d. On or about the 7th to 23rd October 2019 Mr Andrew Grantham, despite informing the claimant that he would be informed of any available alternative roles, did not do so. The claimant says he was less favourably treated than his comparator Mr Alex Bruce who was provided with a Customer Service role.

    e. On or about the 7th to 23rd October 2019, Mr Wragg as Managing Director, had found alterative work for Mr Ricky Bland and Mr Alex Bruce (the claimant's comparators) but he treated the claimant less favourably by failing to find work for the claimant.

70. Having some confidence that I now properly understand the claimant's pleaded allegations, I considered each and I have concluded each claim of race discrimination has some reasonable prospect of success.

71. Accordingly, I refuse the application to strike out any of the claims.

<u>A point on case management.</u>

72. The last four allegations also form part of the foundation of the claimant's case that his dismissal was unfair and, of itself, less favourable treatment because of his ethnic origin.

73. I note, and have set out in a separate order that the respondent has fourteen days from the date of the promulgation of this judgement to further amend its response.

74. I also note that I agreed the respondent's request for a further preliminary Hearing, listed for two hours, for two matters to be considered:

    a. Whether the 20th June written warning was within the employment tribunal's jurisdiction given that the claim was presented more than 18 months after the alleged act of discrimination and, if so, is it just and equitable to extend the time for service:

    b. General case management orders which could not be undertaken today.

**The Application for Deposit Orders**

75. The relevant rules of the Employment Tribunal states as follows:

**Deposit orders**

(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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order:

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

76. I remind myself that each of those claims I have allowed to proceed has an element of discrimination under the Equality Act as well as, in one case, being a claim of unfair dismissal. I therefore have reminded myself that, in my evaluation of the discrimination claims, I must follow the dicta in Scharmer v New College Nottingham UKEAT 0287/11 in which the EAT held that an employment tribunal had erred in concluding that the claimant's race discrimination claims had little prospect of success when that decision was reached solely on the basis of the contemporaneous documentation which was inconsistent with the claimant's account when there may well have been underlying factual disputes and there were assertions of verbal harassment. That dicta essentially applied the House of Lords decision in Anyaya & Another v South Bank Student Union 2001 ICR 391, wherein Lord Hope said that discrimination issues should, as a general rule, be decided only after hearing the evidence and held it would be illogical to require the Employment Judge to have a different approach when considering applications under what are now rules 37 and 39.

    .

    The dismissal

77. Firstly, on the case of the unfair dismissal claim; this claim is fraught with factual disputes a potential redundancy being and notified of the possibility of voluntary redundancy and accepting it all of the material facts from which the claim it relies to assert that there was a covert motivation are disputed I do not consider that as such a case that I could possibly say that the prospect success or little at it is simply not something even taking into account Mr Wragg's witness statement which gives a clear denial for something which I could set up on so I do not make a or consider rather I don't consider it appropriate to consider that allegation has little prospect of success.

    The 2018 Warning

78. For the reasons set out above and by reason of the parties' agreement to a further hearing as to whether this claim is " in time". But for that issue I would have no doubt that this claim should be allowed to proceed without a deposit order.

The absence of HR provision

79. The respondent's case asserts that the claimant's site manager role came to an end when the site he managed had reached its end. The claimant did not dispute those facts; his case centres on the lack of an offer of suitable alternative employment.

80. The claimant wasn't able to articulate why, in the apparently very different circumstances, the difference in treatment between his comparators and himself would support an inference of discrimination. However, in the wider context of his case I concluded that the "HR" allegation had some prospect of success.

81. However, I do find that there is little reasonable prospect of the claimant establishing that his race was a material factor in the respondent's decision not to provide a HR support when the explanation by the respondent is consistent with undisputed facts of

the process and secondly there are so many material facts in the comparators 'case that are not shared with Mr Tim's case that I think it will be difficult for him to establish the comparators, meet statutory test and, because he relies upon the comparator to establish a prima facie case, that must impact on his prospects of success.

82. For this reason, with regard to the allegations of direct discrimination by the failure to provide HR services and support , I do find that that allegation has little prospect of success.

83. The second point I have to consider is whether I consider it to be just an equitable to consider making an order for a deposit. I do in this case for on one point is that my order and judgment on this itself could have a potential impact if Mr Tim were to proceed and not succeed because he will be at risk of accosts application being made simply on the on what I have said the second is it doesn't assist the claimant too take forward point which doesn't have great clarity as Mr Tim said he will seek add legal support and advice and this may be some encouragement to do that properly I bear in mind that the degree to which any financial order is made must be my judgment proportionate to send a "a shot across the bows " but not one which would bar Mr Tim from being able to have access to justice.

84. I must then determine the amount which is proportionate, and in the interest of justice in this case.

85. Having taken into account the detail of Mr Tim's financial circumstances and the respondent's challenges on Mr Tim's account, I was asked by the respondent to fix the deposit at £600.00. Mr Tim asked that the deposit should be £200.00.

86. The respondent argues that £200.00 is insufficient to impress upon Mr Tim the need to exercise a degree of reasonably objective judgment about this aspect of his case. I have taken that argument into account. In my judgment the real force of rule 39 is the consequence of proceeding with a claim which is subject to a deposit order:

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party

87. Mr Tim's account of his means lead me to conclude he has very little available income, no savings and considerable debt.

88. The respondent's reasonable costs on this element of Mr Tim's claim will likely exceed the £600.00. for which the respondent argues today, and if Mr Tim continues with this claim, and fail to succeed then he will be at a high risk of a cost order and the loss of his deposit. He might also be at risk of the paying the respondent's legal fees associated with a costs application made against him.

89. This should It is this risk that every party subject to a deposit order must consider carefully. The sum of £200.00 is sufficient to make Mr Tim fully aware of the risk and to caution him to give careful consideration of the strength of this claim before paying the deposit.

90. For the above reasons, I order Mr Tim to pay to the Employment Tribunal a deposit in the sum of £200.00 as a pre-condition for continuing the claim subject to this order.

Employment Judge R F Powell
Dated: 6th August 2021

JUDGMENT SENT TO THE PARTIES ON
8th September 2021.

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
THY