EMPLOYMENT TRIBUNALS

Claimant: **Mr Mathios Berhane**

Respondents: **(1) Mr Adebowale Olujimi**
(2) Mrs Olugbesoye Olujimi

RECORD OF A PRELIMINARY HEARING

Heard at: London Central Employment Tribunal in person

On: 11th December 2023

Before: Employment Judge Gidney

Appearances

For the Claimant: Mathios Berhane

For the Respondent: David Tinkler (Counsel)

PRELIMINARY HEARING JUDGMENT WITH FULL WRITTEN REASONS

It is the Judgment of the Tribunal is that:

1. **The Claimant's automatic unfair dismissal claim is struck out.**
2. **The Claimant's notice pay claim is struck out.**
3. **The Claimant's unlawful deduction from wages claim is struck out.**
4. **The Claimant's 4 breach of contract claims are struck out.**
5. **The Claimant's direct race discrimination claim shall proceed to trial.**
6. **The Claimant's direct sex discrimination claim shall proceed to trial.**
7. **The Claimant's claim of discrimination on the grounds of religion or belief shall proceed to trial.**

REASONS

Background

1. This case has had a convoluted procedural history, which I have summarised as follows: The Claimant entered the UK on 29th April 2020, during the Coronavirus pandemic. He commenced work for the Respondents on 1st October 2020 in the role of Driver and Personal Assistant, pursuant to the terms of a fixed term contract ('the 1st Contract') **[191]**[1]. Upon its expiry on 30th September 2021, a 2nd fixed term contract dated 24th September 2021 was entered into on 1st October 2021 ('the 2nd Contract') **[210]**, on less favourable (but nonetheless agreed) terms for the Claimant. At about that time of the 2nd Contract the Claimant commenced a visa application for his wife to reside with him in the UK. The 2nd Contract ran until 30th April 2022, following notice to terminate given one week earlier. The Respondents assert that any employment relationship with the Claimant ended on that date.

2. Upon the expiry of the 2nd Contract the parties entered into a third working arrangement, on 1st May 2022, on a zero hours contract basis. Under this arrangement the Claimant would be paid £150.00 per day for each day that he worked. Upon the commencement of the 3rd Contract the Claimant wrote to the Respondent to confirm that '*by definition a zero hours contract means you are not obliged to provide me with a job and I am not obliged to wait by idly for your job offers*' **[253]**. The Respondents assert that the Claimant stopped accepting work offers from them, leading them to terminate the 3rd Contract on or around 28th June 2022. The Respondents assert that for the period of the 3rd Contract the Claimant had become a self-employed contractor. On 19th July 2022 the Respondents sent to the Claimant a P45.

3. The Claimant notified ACAS of a dispute with the Respondents on 31st August 2022 and obtained his Early Conciliation certificate on 12th October 2022. On 23rd October 2022 the Claimant presented his Claim Form, which included a large number of claims against the Respondents. At the first Case Management Conference on 15th March 2023 Employment Judge Khan listed a hearing on 26th July 2023 to determine whether some of the Claimant's claims should be struck out. The Judge noted that it

[1] Numbers refer to pages within the Preliminary Hearing Bundle

had been necessary to spend some time with the Claimant to understand the ambit if the Claims that he had presented. On 29th June 2023 Employment Judge Khan converted the hearing from a strike out / deposit order hearing to a 2nd Case Management Hearing because he considered that all of the claims and factual and legal issues needed to be identified before determining any strike out and/or deposit order applications.

4. The hearing on 26th July 2023 proceeded before me. At the commencement of the hearing the Claimant explained that he had had a problem with his computer so he was accessing the Cloud Video Platform Hearing via his mobile telephone. He said he could hear everybody but not see them. However, he said he was happy to proceed with the hearing. During the hearing the Claimant withdrew his claims of:

   4.1. ordinary unfair dismissal pursuant to s98(4) **Employment Rights Act 1996** ('**ERA**');
   4.2. victimisation pursuant to s27 **Equality Act 2010** ('**EqA**');
   4.3. direct discrimination on the grounds of marriage or civil partnership pursuant to s8 **EqA**;
   4.4. indirect race and sex discrimination, pursuant to s19 **EqA**.

5. I dismissed those claims upon withdrawal by way of a separate Judgment. I granted the Respondent's application to amend its Grounds of Resistance to assert that the Claimant's effective date of termination was 30th April 2022 and not 19th July 2022 (as recorded in the Judgment sent out separately).

6. Unfortunately throughout the day the Claimant's mobile phone proved an increasingly unreliable means of accessing the hearing. There were blocks of time during which sound froze, only for the Claimant to be further on in his conversation when it restarted, such that it was necessary to ask him to backtrack over what he had just said. Towards the end of the hearing I summarised the Claimant's remaining claims as he had clarified them, only for the Claimant to correct me on important details. It was too late in the day to reopen all of the claims that had been explained. I determined that the most appropriate course would be for me to:

   6.1. write to the parties setting out the Claims as I understood them;

6.2. ask the parties to write to the Tribunal and each other by 6th September 2023 stating whether they agree with the statement of the remaining claims, and if not, explaining why not;

6.3. require the Respondent to update and re-serve any application to strike out the Claimant's claims or seek a deposit order by 18th September 2023; and,

6.4. relist a 2nd Case Management Conference on 29th October 2023 to finalise the issues and claims in the case and list the Respondent's application for a strike out / deposit order of the Claimant's claims, now that they were understood.

7. The Claimant applied for a reconsideration of the Judgment dated 26th July 2023 which was sent to the parties on 25th August 2023. The application was made orally at the hearing on 29th October 2023 and dismissed by me orally on the grounds that it stood no reasonable prospect of success.

8. We then moved on to consider the List of Issues and the proper identification of the remaining Claims presented by the Claimant. This undertaking took up all of the remaining time available to us on the day. The Respondent adopted a sensible approach to this process, by allowing the identification and recording of the Claimant's claims without objection, on the understanding that it would then consider all of the identified claims and include any submissions on (i) whether any claim required an amendment, or (ii) whether any claim was out of time, in its updated application to strike out the Claimant's claims on the grounds that they had no reasonable prospect of success and/or for a deposit order on the grounds that they had little reasonable prospect of success. By the end of that hearing the Claimant had had the following opportunities to state and clarify his claims:

8.1. in his original Claim Form;

8.2. to Employment Judge Khan on 15th March 2023;

8.3. In the List of Issues contained within his Case Management Agenda prepared for that hearing;

8.4. Before me at the Case Management Hearing on 26th July 2023;

8.5. In the documentation contained within an Agreed Preliminary Hearing bundle prepared for today;

8.6. In three witness statements and written submissions prepared by the Claimant for today;

8.7. Orally, at the hearing on 23rd October 2023.

9. I was satisfied that the Claimant was fully able to engage in the 'in person' hearing on 23rd October 2023. There were no communication issues. I explained to the Claimant that the list produced that day would be the final list, and at the conclusion of the hearing the Claimant agreed that every claim had been captured. Accordingly the List of Claims set out below is the definitive statement of the Claimant's Claims, prior to the Respondent's application for a strike out and/or for a deposit order. The Claims are:

9.1. **Automatic Unfair Dismissal** on 30th April 2022 for asserting a statutory right to paid holiday on 22nd April 2022, pursuant to s104(1)(a) **Employment Rights Act 1996** ('**ERA**'). The Claimant claims that he requested paid holiday on 22nd April 2022 (thereby asserting a statutory right) and that he was then dismissed on one week's notice for asserting that right, in circumstances that made that dismissal automatically unfair. The notice expired on 30th April 2022. Thereafter the Claimant asserts that he was then reengaged on a zero hours contract until that contracted was brought to an end on 19th July 2022.

9.2. **Notice Pay**. The Claimant asserts that when his zero hours contract was brought to an end on 19th July 2022 he was not given any notice of the termination of that zero hours contact or paid notice in lieu. The Respondent denies that any notice was due to the Claimant to terminate a zero hours contract, as he was a worker at the time and not an employee.

9.3. **Unlawful deductions from wages**. The Claimant asserts that following an agreement in October 2021 to reduce his hours from full time to 12 days a month, the sums properly payable to him pursuant to s13(3) **ERA** was £1,550.00 per calendar month. However the Claimant asserts that the Respondent, between October 2021 and April 2022, only paid him £1,200.00 per month, amounting to an unlawful deduction of £350.00 per month from October 2021 until April 2022.

9.4. **Breach of Contract**. The Claimant now relies on 4 separate breach of contract claims, as follows:

9.4.1. Breach of the express term contained in clause 9 of his 1st Contract to pay £2,000.00 net per calendar month. The Claimant asserts that the breach of contract occurred for the period between January and

April 2021 when the Respondent only paid £1,200.00 net per calendar month, before reverting, from May 2021, to £2,000.00 per calendar month. Thus the Claimant claims a monthly loss for £800 for a four month period.

9.4.2. Breach of an express term reached in an oral contract with the 1st Respondent made on 23rd June 2021 and evidenced by a WhatsApp message sent from the Claimant to the 1st Respondent on 24th June 2021 to the effect that the 1st Contract would be renewed by one year on identical terms on its expiry date of 30th September 2021 until 30th September 2022. The Claimant asserts the breach occurred when the Respondent refused to renew the 1st Contract on the same terms.

9.4.3. Breach of an implied term reached in an oral contract with the 1st Respondent made on 23rd June 2021 and evidenced by a WhatsApp message sent from the Claimant to the 1st Respondent on 24th June 2021. The term that the Claimant asserts was or should have been implied into that oral contract is as follows: '*The Respondent will consult with the Claimant before making any major amendments to the terms of the oral contract that affect the Claimant*'. The Claimant asserts that implied term was breached when the Respondent elected not to renew the 1st Contract but replace it with different, less favourable, contract.

9.4.4. Breach of an implied term in grievance clause the Claimant's 2nd Contract. The grievance clause in the 2nd Contract refers to a grievance policy. To that clause the Claimant asserts that the following clause was or should have been implied, as follows: '*In the event of a grievance being raised by the Claimant, a set procedure will be followed to determine that grievance*'. The Claimant asserts that the above mentioned implied term was breached by the Respondent when it failed to follow a set procedure for grievances that the Claimant raised on 17th March, 27th June and 28th June 2022.

9.5. **Direct Sex and Race discrimination**. The Claimant is male and Ethiopian British. He brings a claim of direct discrimination on the grounds of his sex and his race/nationality. For both claims the Claimant relies on the same acts

of less favourable treatment. For both claims the Claimant relies on the same actual comparator. He compares his treatment to that of the Respondent's Housekeeper, Lisa Lister. She is female and Filipino British. In clarifying the particulars of less favourable treatment at this Case Management Hearing the Claimant confirmed that he was no longer relying on the incidents set out at paragraph 8.5.1(i) and 8.5.1(iii) of the Case Management Order dated 26th July 2023 namely *'(i) between January and April 2021 the Claimant was paid 60% of her salary whilst Ms Lister was paid 80% of hers'* and *'(iii) the Claimant was downgraded to a zero hours contract whilst Ms Lister's contract was not downgraded'*. Those two incidents having been withdrawn were dismissed by way of separate Judgment. The remaining incidents of less favourable treatment relied on by the Claimant both for his direct race and direct sex discrimination claims as particularised in his Particulars of Claim are:

9.5.1. The Claimant was not provided with payslips whilst Ms Lister was. The Respondent asserts that the explanation for any difference in treatment was that the Claimant had a different employment status to Ms Lister;

9.5.2. Deducting Ms Lister's tax at source for the period October 2020 until July 2022 and not deducting the Claimant's tax at source. The Respondent asserts that the explanation for any difference in treatment was that the Claimant had a different employment status to Ms Lister.

9.6. The Claimant added additional allegations of discrimination at the Case Management Hearing before me on 23rd October 2023. They were:

9.6.1. Letting Ms Lister use the toilet in the Respondents' home, but not letting the Claimant use it. The Respondent asserts that the explanation for any difference in treatment was that Ms Lister worked as a housekeeper inside the main residence and the Claimant did not;

9.6.2. Providing an employment reference for Ms Lister but not the Claimant. The Respondent asserts that, in terms of providing a

reference the circumstances of the Claimant and Ms Lister were materially different;

9.6.3. Agreeing by November 2021 to take Lisa Lister back into the Respondents' employment after she had left on 30th September 2021, but not agreeing to take the Claimant back into their employment after he left in May 2022, after he asked if he could return by email on 27th June 2022. The Respondent asserts that, in terms of returning to work, the circumstances of the Claimant and Ms Lister were materially different;

9.6.4. Allowing Ms Lister paid holiday without issues, but treating the Claimant less favourably whenever he asked for paid holiday, as follows: (i) when the Claimant asked for paid holiday in August 2021, the Respondent agreed, but then told him that the terms of his 2nd Contract would be changed to his detriment; (ii) on 22nd April 2022 when, in the course of contract renewal negotiations, the Claimant asked for holiday pay to be included he was dismissed;

9.6.5. On 27th April 2022 when the Claimant asked for accrued holiday from 1st October 2021 the Respondents denied any such payment and only paid it after the Claimant had been required to prove that it was due to him;

9.7. **Discrimination on the grounds of religion or belief**. The Claimant asserts that he was asked to drive at weekends in his 2nd fixed term contract starting on 1st October 2021, which were considered by him to be days of religious observance, which he agreed to do under duress. The Respondent accepts that the Claimant was asked some of the time at weekends but could refuse to drive if he wished.

10. Upon confirmation of the Claimant's claims, the Respondent submitted an updated application to strike out the claims and/or seek a deposit order in respect of them. That hearing was listed before me in person on 11th December 2023.

The evidence

11. I was provided with an agreed preliminary hearing bundle running to 412 pages. The Claimant provided a consolidated witness statement prepared for the hearing on 11th December 2023 running to 36 pages. The Claimant gave evidence from a witness statement and was subject to cross examination. The Respondent provided a skeleton argument in support of its application running to 9 pages. The Claimant made oral submissions in opposition to it. At the end of his submissions the Claimant asked if he could forward his manuscript oral submission notes (running to 19 pages) to the Tribunal after the hearing had ended. I allowed the Claimant to do so, sending a copy to the Tribunal and the Respondent by 12th December 2023. I gave the Respondent the opportunity to respond to those manuscript notes by 19th December 2023, which it did, confirming that it had nothing further to say.

Findings of Fact

12. Much of this case will turn on the application of the applicable legal principles, although some evidence is necessary. I have not recited every fact in this case, or sought to resolve every dispute between the parties. I have limited my analysis to the facts that were relevant to the amendment / strike out / deposit order applications that I have been tasked to resolve. I made the following findings of fact on the basis of the material before me, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. I resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witness and the consistency of his evidence with the surrounding facts.

13. On the issue of 'time' in his witness statement the Claimant told me that in September 2021 he had asked for his payslips to support his wife's visa application **[MB20]**[2]. The Claimant explained why he did not apply to the Tribunal at an earlier point in time at **[MB24-34]**:

> '***[MB24]*** *I was in no position to complain openly to a Tribunal during COVID pandemic times unless I intended to lose my job … and not because of right demonstrating the very vulnerable position I found myself in due to covid (easy to fire, difficult to find*

[2] Refers to the paragraph number within the Claimant's witness statement.

alternative employment) and the general disregard or arrogance regarding the law based on their privileged power and attitude that came with their opulence. …
***[MB25]** I could not have done anything until the Home Office decided on our visa application for a settlement, private and family life.*
***[MB30]** To stress again, I was not in a position to complain even after the COVID restrictions were lifted.*
***[MB31]** At the very least, I was not in a position to complain to a tribunal about any of my grievances until the visa application had been decided.*
***[MB34]**. In February 2022, we were informed that the decision. Will have to be postponed by another three months to June 2022. Due to the Russian invasion of Ukraine or the Ukraine war and the associated back box again, I could not have therefore complained in any of the months before June 2022 before we got the visa for settlement and private and family life.* '

14. The Claimant was provided with payslips on 19th July 2022 **[MB39]**. The Claimant said that this was the first time that he could apply to the Tribunal. He left the UK on 26th July 2022 and submitted his Claim Form on-line on 29th July 2022. The Claimant (who had by then left the country) asked his lodger to open his post from the Tribunal. He discovered that his claim had been rejected due to failing to follow the Early Conciliation process. The Claimant the notified ACAS of a dispute with the Respondents on 31st August 2022 and obtained his Early Conciliation certificate on 12th October 2022. It is not clear why, now that time was a known issue, the Claimant allowed the early conciliation process to last the full 6 weeks. He could have made the notification and sought a certificate on the same day. On 23rd October 2022 (10 days after the ACAS certificate) the Claimant presented his Claim Form. His wife's visa application was approved in August 2023.

15. In cross examination the Claimant accepted:

    15.1. That he could not complain to a Tribunal until his wife's visa application had been decided;
    15.2. That he nonetheless applied in July 2023 (albeit without having conciliated via ACAS) prior to the determination of his wife's visa application;
    15.3. That Mr Wale (an agent of the Respondents) had threatened him verbally not to go to the Employment Tribunal. The Claimant asserted that the fact of the threat can be evidenced by a WhatsApp message sent by the Claimant to Mr Wale **[Claimant's bundle 106]**, in which the Claimant recites what he had been told by Mr Wale, '*you have said many things about writing to the Secretary of State to say don't deal with this case as he has an Employment Tribunal matter or about your tactics of how you would say I'm blackmailing*

your Nigerian clients and how you think my requests are racist. Or how you would write to the HMRC and ask them to investigate me for the past 20 years and how your clients are powerful and how and what they will do in the tribunal'.

15.4. The Claimant said that he knew about ACAS as he'd been in the UK for 30 years;

15.5. That not proceeding to the Tribunal was a choice he made as he thought it would be detrimental to his wife's visa position, in light of Mr Wale's threat.

15.6. That he went along with the zero hours contract and maintained it until the Home Office decision had been made, as he wanted to keep the Respondents on board.

15.7. That he did seek advice from a solicitor, but not on Tribunal time limits. He asked about Home Office visa time limits.

16. On the issue of the Claimant's contractual terms and pay, the 1st Contract, dated 1st October 2020 **[191]**, contained the following renumeration clause at clause 9:

> *'Renumeration paid to the employee for services rendered by the employee as required by this agreement will include a salary of £2000.00 per month'*

17. The Claimant relied on an oral agreement that he asserts was reached with Mr Olujimi on 23rd June 2021 that his 2nd Contract would be renewed on the same terms as his 1st Contract. The Claimant sent a message to Mr Olumjimi the next day, 24th June 2021 **[205]** in the following terms:

> *'Dear Mr Olujimi, further to our discussion yesterday I confirmed that I would like the contract to be renewed for another year, until the 30th of September 2021. It might even be more helpful for all to describe the job as a permanent position, with the notice period remaining the same or longer at three months - just a thought. Thanks for everything. Yours sincerely, Mathias Berhane'*.

18. The 2nd Contract, dated 24th September 2021 (to take effect on 1st October 2021) **[210]**, was on less favourable terms than the 1st Contract. It confirmed in clause 16 that the Claimant was to work Monday to Friday *some* hours per week between 7.30am and 5.30pm (ie a maximum of 10 hours a day). It contained the following renumeration clause, also at clause 9:

> *'Renumeration paid to the employee for services rendered by the employee as required by this agreement will include a salary of £1,550.00 per month'*

19. On the same date the parties entered into a Memorandum of Understanding which was said to be an Addendum of the Employment Contract **[224]**. It contained the following terms:

> *'is agreed and understood by both parties that (a) the above referenced employment contract references a salary of £1,500.00 per month as renumeration for the employee. (b) the above mentioned salary is for document purposes and to enable the employee to meet certain requirements as minimum earning and this will be paid monthly for the period of six months starting October 2021. (c) £1,200.00 per month is the employee's actual salary.'*

20. On 15th January 2021 the Respondents wrote to the Claimant informing him that there would need to be a reduction in his pay during the coronavirus pandemic lockdown in force at the time to £1,200.00 per month. The Claimant responded on 16th January 2021 **[203]** stating:

> *'I acknowledge receipt of your e-mail. I can confirm that I completely understand, appreciate and accept the amended terms which I have already expressed to Mr. Olujimi verbally. Stay safe and all the best. Yours sincerely, Mathias Berhane'*.

21. On the issue of the switch from the 2nd Contract to the 3rd Contract the Claimant wrote to the Respondents on 25th April 2022 **[253]** to clarify his understanding of the new working arrangement. He said:

> '*I can confirm that in the month of May I will be able to provide you with a service as I have not arranged another work in the moment and the related processes are likely to take a month or so. Please let me know which days in advance. After that we will see as it goes. By definition, a zero hour contract means you are not obliged to provide me with a job and I am not obliged to wait idly for your possible job offers. In effect, you can, if and when you wish, provide me with work which I may or may not take based on commitments with other employers or other situations. Hope this explains your sincerely, Mathias Berhane*'

22. On the issue of his earnings, in his witness statement **[MB47-50]** the Claimant told me that he had been '*unable to gain gainful employment as a result of the ordeal during and after employment*' and that as a result he and his wife's combined debt stood at £45,000.00. He told me had two lodgers who between them contributed £1,120.00 per month. He told me his rent and council tax amounted to £719.00 per month and that his other bills left him with no money at the end of the month. The Claimant told me that his wife now earned £384.00 a month (working 8 hours) and

that he earned the same amount (£384.00 pm) but that he would be unlikely to stay employed due to his back pain. He said he had no capital, savings or deposits.

23. In cross examination he admitted earning 16 hours work, not 8 hours, and as such he had undervalued his income by half in his witness statement. He had said he was on £384.00 a month, but accepted in cross examination that the actual figure was £768.00 a month. Taking all of his income together (his, his wife's, his lodgers) he received £2,272.00 per month against outgoings amounting to £1,196.00 a month, leaving a disposable income of about £1,000.00 a month, which was a significantly larger figure than the nil figure his witness statement had suggested. The Claimant explained his discrepancy in re-examination, stating that if he had to pay the Respondent's costs he wanted to say that he had a new job, but give basic information, expecting to be cross-examined on it. This explanation was tantamount to admitting that the financial information that he had included in his witness statement had been known by him to be wrong, in order to minimise his income and thereby reduce the amount of any deposit order that may be made.

24. My general view of the Claimant was that he was essentially a reliable witness, on issues of uncontroversial fact. He deeply believes in the merits of his claim and it is clear that his claim is *very* important to him. However, he had chosen to attempt to mislead the Tribunal as to his level of earnings in his witness statement. This illustrated a willingness to be partial with the truth, if he believed it would assist him in his claim. It is not really acceptable to argue that he thought the truth would come out in cross examination. He had signed a statement of truth to declare his income, which he knew in relation to his salary misrepresented the figure by 100%. His willingness to do this did cause me to doubt his reliability on contentious issues, in particular his account of the being threatened by Mr Wale, particularly as the only evidence for it was a self-serving WhatsApp that he (the Claimant) wrote. There is a considerable possibility that it was written by him so as to create evidence of a threat. Context is important in this regard and I concluded that I cannot rely on the Claimant's WhatsApp as a reliable source of evidence of what was actually said by Mr Wale and what Mr Wale intended to convey.

25. It is now necessary to turn to the applicable law. I do so as follows:

The Law

26. **Time limits for ERA claims**. The statutory time limit for public interest disclosure detriment, public interest disclosure dismissal and ordinary unfair dismissal is a period of three months beginning with the date of the act or failure to act to which the claim relates, or where that act or failure is part of a series of similar failures, the last of them, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

27. It is a high bar test to extend time under this rule. In **Palmer v Southend-on-Sea Borough Council** [1984] ICR 372, CA, May LJ stated that the overall test is whether it was '*reasonably feasible*' to present the complaint to the employment tribunal within the relevant three months.

28. An Employment Tribunal investigate what was the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. Factors to consider are:

    28.1. When did the employee knew that he had the right to complain that he had been unfairly dismissed?
    28.2. Had there has been any misrepresentation about any relevant matter by the employer to the employee?
    28.3. Was the employee being advised at any material time and, if so, by whom; of the extent of the adviser's knowledge of the facts and of the nature of any advice which they may have given to him?
    28.4. Has there been any substantial fault on the part of the employee or his adviser which has led to the failure to comply with the statutory time limit?

29. **Time limits for EqA claims**. The statutory time limit in discrimination cases is whether it would be just and equitable to extend the time limit to allow the claims to proceed. The onus lies on the Claimant to seek the exercise of the Tribunal's discretion to extend the time limit. The ET should consider all relevant factors including the balance of convenience and the chance of success: **Rathakrishnan v Pizza Express (Restaurants)** Ltd [2016] ICR 283, EAT.

30. The list of factors set out in s33 **Limitation Act 1980** may be of some use, as long as it is not used formulaically as a check list: **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 27. Those factors are:

30.1. the length of, and the reasons for, the delay on the part of the plaintiff;
30.2. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time limit;
30.3. the conduct of the Respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the Claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the case;
30.4. the duration of any disability of the Claimant arising after the date of the accrual of the cause of action;
30.5. the extent to which the Claimant acted promptly and reasonably once he knew whether or not the act or omission of the Respondent;
30.6. the steps, if any, taken by the Claimant to obtain legal or other expert advice and the nature of any such advice he may have received.

31. It is only the 1st ACAS conciliation process that pauses the three month time limit. A second ACAS conciliation process between the same parties does not stop the clock: **HM Revenue and Customs v Mr Serra Garau** [2017] UKEAT/0348/16/LA.

32. **Amendment**. The relevant law when dealing with applications to amend a Claim Form is as follows (**Selkent Bus Co Ltd v Moore** [1996] IRLR 661). The tribunal must take account of all the circumstances, with the paramount consideration being balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Factors to consider include:

32.1. the nature of the amendment application itself, i.e. whether it is minor or substantial;
32.2. the relevant time limits and, if the new claim is out of time, to consider whether the time should be extended under the appropriate statutory provision. The lack of a good reason for a delay is not necessarily fatal to an application to amend. A Tribunal could fall into error if it concentrated entirely on the reason for delay at the expense of other factors, particularly that of prejudice: refer to

Pathan v South London Islamic Centre [2013] UKEAT/0312/13 and **Szmidt v AC Produce Imports Ltd** [2014] UKEAT/0291/14.

32.3. the timing and manner of the application;

33. Different types of discrimination are different claims and amendments to plead new discrimination claims are likely to be refused on the grounds that they seek to introduce entirely new claims (**Ali v Office of National Statistics** [2005] IRLR 201 and **Harvey v Port of Tilbury (London) Ltd** [1999] IRLR 693, EAT);

34. A cause of action is a set of facts that give rise to a legal remedy. The focus needs to be upon the facts that are alleged. If an amendment is in effect no more than or little more than applying a different legal label to the same set of facts, it is not a fresh cause of action; it is identifying rather a different way of looking at precisely the same facts for the convenience of the court and to enable justice to be done (**Redhead v London Borough of Hounslow** [2011] UKEAT/0409/11);

35. What is required is a focus on the substance of the amendment and the extent to which it gives rise to, on the one hand, minor or technical amendments at the low end of the spectrum, or a wholly new allegation raising altogether new matters not previously raised at the other end of the spectrum (**Abercrombie & Ors v AGA Rangemaster Ltd** [2013] ICR 213, CA).

36. In **Chaudhry v Cerberus Security Monitoring Services Ltd** [2022] EAT 172, HHJ Tayler emphasised the need to identify the amendment or amendment sorts and thereafter the need to balance the injustice and/or hardship of allowing or refusing the amendment or amendments, taking into account all of the relevant factors, including, where appropriate, those referred to in **Selkent**. In **Selkent** factors generally relevant to the exercise of discretion include (i) the nature of the amendment, (ii) the applicability of time limits and (iii) the timing and manner of the application. However, these factors are not a checklist to be ticked off. The keywords are '*the balance of injustice and or the hardship of allowing or refusing the amendment*'.

37. **Strike Out**. The following principles are relevant when considering an application to strike out a claim:

37.1. the power should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly** [2012] IRLR 755, at para 30*)*;

37.2. Cases should not, as a general principle, be struck out on this ground when the central facts are in dispute (**North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603);

37.3. The correct approach for a tribunal to adopt is to take the claimant's case at its highest, as it is set out in the claim, unless contradicted by plainly inconsistent documents (**Ukegheson v London Borough of Haringey** [2015] ICR 1285*, EAT,* at para 21);

37.4. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances (**Anyanwu v South Bank Students' Union** [2001] IRLR 305*, HL)*;

37.5. That said, the above guidance is not to be taken as amounting to a fetter on the tribunals' discretion (**Jaffrey v Department of the Environment, Transport and the Regions** [2002] IRLR 688 at para 41*, EAT)*;

37.6. Whilst striking out discrimination claims will be rare, where there is a time bar to jurisdiction, or where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, strike out may well be appropriate (**Chandhok v Tirkey** [2015] IRLR 195*, EAT*, paras 19 & 20 (Langstaff J)).

37.7. Claims should not be struck out unless there had been an intentional and contumelious default or an inordinate and inexcusable delay leading to a substantial risk that a fair trial is not possible or is such to cause serious prejudice. Refer to **Birkett v James** [1978] AC 297.

37.8. Where there is inordinate and excusable delay on the part of the Claimant and/or their representatives, which has created a substantial risk that serious prejudice has been, or will be suffered by the Respondent or that it is no longer possible to have a fair trial of the issues, the claim should be struck out (**Elliott v Joseph Whitworth Centre Ltd** [2013] UKEAT/0030/13). At paragraph 16: '*[On prejudice] what the court is looking for is something more to do with the case itself, such as memories fading, documents and witnesses going missing, the business going insolvent, a change of representation and cost*'.

My Conclusions

38. The Respondent asks the Tribunal to strike out all of the Claimant's claims, on the grounds set out in its strike out submissions. In considering each application I have applied the law, as set out above. It is necessary to take each claim in turn:

39. **Automatic Unfair Dismissal** on 30th April 2022 for asserting a statutory right to paid holiday on 22nd April 2022, pursuant to s104(1)(a) **Employment Rights Act 1996** ('**ERA**'). The Claimant claims that he requested paid holiday on 22nd April 2022 (thereby asserting a statutory right) and that he was then dismissed on one week's notice for asserting that right, in circumstances that made that dismissal automatically unfair. The notice expired on 30th April 2022. The Claimant notified ACAS of a dispute with the Respondents on 31st August 2022 and obtained his Early Conciliation certificate on 12th October 2022. On 23rd October 2022 the Claimant presented his Claim Form. A prior Claim Form had been rejected for failure to engage in early conciliation. The Claimant confirmed in evidence that, having worked in the UK for many years, he was well aware of ACAS. The Tribunal only has the statutory jurisdiction to determine automatic unfair dismissal claims for asserting a statutory right, pursuant to section 104 **Employment Rights Act 1986** ('the **ERA**') providing it is presented before the end of the period of three months beginning with the effective date of termination, or within such other period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months, pursuant to s111(2) **ERA**.

40. The Respondent asserts that this claim was presented out of time and that there is no reasonable prospect of time being extended. It also asserts that the claim is weak on its merits and on the evidence. The dismissal occurred at the expiry of the notice period on 30th April 2022. Judge Khan observed in the very first Case Management Hearing that this claim had to have been presented on 29th July 2022 but was not presented until 23rd October 2022. The Claim was presented outside of the period of three months beginning with the effective date of termination. To proceed the Claimant must rely on and avail himself of the 'escape clause' in s111(2) **ERA**. In my Judgment the Claimant fails on both parts of the escape clause.

41. Taking them in reverse order, the Claimant candidly accepted in his witness statement that he took the tactical decision to delay his Tribunal Claim until his Home Office visa application was well under way. He prioritised his wife's visa application over his Tribunal claim, in the belief that the visa application might be harmed by the Tribunal claim. The inevitable conclusion is that it was reasonably practicable for the Claimant to have presented his claim in time, but he chose not to do so. In applying the law (recited at paragraphs 21 and 22 above) I am obliged to conclude that it was reasonably feasible for the complaint to have been presented in time. If I am wrong on that, it is my judgment that the Claimant would have failed the other part of the statutory test as set out in s111(2) **ERA**. Is the further period that the Claimant requires a reasonable period? In my judgment it is not. The Claimant could provide no explanation as to why he allowed 6 full weeks for the early conciliation process when it was within his right to notify ACAS of a dispute and obtain an Early Conciliation certificate on the same day. Even after the certificate was provided on 12th October, he took just under 2 weeks, until 23rd October to present a Claim that he had already prepared (it having been presented and rejected, without having engaged with ACAS, at the end of July). The Claimant, once out of time, delayed by a period of just under three months. No acceptable explanation for that delay was provided by the Claimant.

42. Accordingly, it is my judgment that time would not be extended in this case, and as a result the Claimant's claim of automatic unfair dismissal for asserting a statutory right has no reasonable prospect of success and is struck out. It is not necessary to determine the merits of the claim had it been presented in time.

43. **Notice Pay**. The Claimant's Notice Pay claim is based on the assertion that when his zero hours contract was brought to an end on 19th July 2022 he was not given any notice of the termination of that zero hours contact or paid notice in lieu. The Respondent denies that any notice was due to the Claimant to terminate a zero hours contract, as he was a worker at the time and not an employee. Employment Judge Khan warned the Claimant of this at the Case Management Hearing on 15th March 2023, stating **[51]**: '*I explained to the Claimant that he will only have standing to bring a claim for notice pay if he was an employee at the relevant time. The Claimant will therefore need to show that he was an employee and not a worker when he was engaged on the zero hours contract which ended on the 19th of July 2022*'.

44. I have already referred to the Claimant's email to the Respondents dated 25th April 2022 **[203]** at which he explained the nature of the zero hours contract. He specifically stated that the Respondents did not have to offer him work and he did not have to accept it, based on his other commitments with other employers or other situations. This evidence leads me to the conclusion that this claim has no reasonable prospects of success. The Claimant himself confirms that there is no mutuality of obligations at all. As a self-employed contractors, the Claimant confirmed that the Respondents were under no obligation to provide him with work and that he was free to accept or reject work and to work for any clients of their choosing. He can have no notice pay claim.

45. In addition, notice pay claims must be presented within three months of the effective date of termination and rely on the same 'escape clause' in section 111(2) ERA as the automatic unfair dismissal claim. For the reasons stated above, the notice pay claim as no real prospect of success that time would be extended for it to be heard. In the circumstances, and for both of the reasons stated herein, this claim has no reasonable prospect of success and is struck out.

46. **Unlawful deductions from wages.** The unlawful deductions from wages claim is based on the Claimant's assertion that following an agreement in October 2021 to reduce his hours from full time to 12 days a month, the sums properly payable to him pursuant to s13(3) **ERA** was £1,550.00 per calendar month. The Claimant asserts that the Respondent, between October 2021 and April 2022, only paid him £1,200.00 per month, amounting to an unlawful deduction of £350.00 per month from October 2021 until April 2022.

47. It is a necessary precursor to any unlawful deductions claim that the Tribunal determines what sums are properly payable pursuant to s13(3) ERA. The issue for the Tribunal is the determination of whether a particular sum is properly payable under the contract. In the **Delaney v Staples (t/a De Montfort Recruitment)** [1991] 1 All ER 609, the Court of Appeal stated:

> *"A dispute, on whatever ground, as to the amount of wages properly payable cannot have the effect of taking the case outside s 8(3). It is for the industrial tribunal to determine that dispute, as a necessary preliminary to discovering whether there has been an unauthorised deduction. Having determined any dispute about the amount of wages properly payable, the industrial tribunal will then move on to consider and*

determine whether, and to what extent, the shortfall in payment of that amount was authorised by the statute or was otherwise outside the ambit of the statutory prohibition."

48. The starting point in determining the sums properly payable under the 2nd Contract, is the renumeration clause within it, at clause 9, which states that the sum payable is £1,550.00. It is then necessary to consider the Addendum, dated the same day, which states that the £1,550.00 is for documentation purposes only so that the Claimant can meet certain requirements as minimum earning. It states that his actual salary will be £1,200.00 and it is signed by both the Claimant and the Respondent **[224]**. The Claimant asserts that he was only paid £1,200.00. I am concerned by this document. If it is correct, it states, in terms, that the 2nd Contract is a false document, with an inflated salary, which both parties know to be false, designed to give a third party the impression that the Claimant's earnings meet certain minimum earning requirements. If the Claimant worked 10 hours a day then both the £1,550.00 rate and the £1,200.00 rate would be below the minimum wage. However the 2nd Contract stated that the Claimant was to work *some* hours between 7.30am and 5.30pm, not all of them, thus allowing for the possibility that the Claimant was paid at minimum wage levels (the Claimant has not claimed the contrary). It appears that the parties agreed to record a false higher figure in order to give the Home Office a misleadingly and false high impression as to the Claimant's earnings in support of his wife's visa application. Whilst this has the potential to suggest a willingness to deceive on both parties, it is nonetheless a written document, signed by both parties, confirming that the sums *properly payable* would be £1,200.00 per month and not £1,550.00 per month. This suggests that an unlawful deduction claim would have either no or little reasonable prospect of success.

49. However, the Claimant faces the same 'time' problem as before. Judge Khan observed that this claim had to have been presented on 29th July 2022 but was not presented until 23rd October 2022. For the same reasons as set out elsewhere in this Judgment I find that it was reasonably practicable for the Claimant to have issued this claim and that the additional period that he would need to be in time is unreasonably long. In the circumstances this claim has no reasonable prospect of success and is struck out.

50. **Breach of Contract**. The Claimant now relies on 4 separate breach of contract claims, as follows:

50.1. [BOC1]: Breach of the express term contained in clause 9 of his 1st Contract dated to pay £2,000.00 net per calendar month. The Claimant asserts that the breach of contract occurred for the period between January and April 2021 when the Respondent only paid £1,200.00 net per calendar month, before reverting, from May 2021 to £2,000.00 per calendar month. Thus the Claimant claims a monthly loss for £800 for a four month period. However, as stated above, for the period between January and April 2021 the Claimant had agreed to a furlough style reduction to his pay to £1,200.00 because of the pandemic **[203]**. This agreement amended his contract. As such the payment of salary at the reduced level was not a breach of contract. This claim was first articulated by the Claimant in his correspondence to the Tribunal on 4th April 2023, nearly three years after the alleged breach. The merits of the claim are weak, and it is unlikely that an application to amend the Claim Form would be allowed. In the circumstances this claim can fairly be said to have no reasonable prospects of success. It is struck out.

50.2. [BOC2]: Breach of an express term reached in an oral contract with the 1st Respondent made on 23rd June 2021 and evidenced by a WhatsApp message sent from the Claimant to the 1st Respondent on 24th June 2021 **[205]** to the effect that the 1st Contract would be renewed by one year on identical terms on its expiry date of 30th September 2021 until 30th September 2022. The Claimant asserts the breach occurred when the Respondent refused to renew the 1st Contract and instead only offered a different, less favourable, contract. The WhatsApp message is set out above. It stated that the Claimant would like his contract to be renewed. That falls someway short of the assertion that the message was evidence that an agreement had been reached (rather than a statement of the Claimant's wishes) for an extension on identical terms (rather than renewing it for another year). The more fundamental issue for the Claimant on this point however, is that, regardless of what he may have wished for on 23rd June, he did sign the 2nd Contract with its reduced renumeration recorded in Clause 9. He then signed the memorandum of understanding and the Covid agreement email both of which confirmed an even lower level of pay. In the circumstances, a breach of contract claim based on an oral agreement, partly evidenced by a WhatsApp message the following day, that was then superseded by three further signed contracts, has no reasonable prospect of success. It is struck out.

50.3. [BOC3] Breach of an implied term reached in an oral contract with the 1st Respondent made on 23rd June 2021 and evidenced by a WhatsApp message sent from the Claimant to the 1st Respondent on 24th June 2021. The term that the Claimant asserts was or should have been implied into that oral contract is as follows: '*The Respondent will consult with the Claimant before making any major amendments to the terms of the oral contract that affect the Claimant*'. The Claimant asserts that implied term was breached when the Respondent elected not to renew the 1st Contract but replace it with different, less favourable, contract. The test for the imposition of an implied term into a contract is whether it is needed to give the contract business efficacy, in other words, to make it work. The oral contract into which the Claimant says the term should be implied is the contract that the Claimant asserts was reached on 23rd June 2021 to the effect that the 1st Contract would be renewed by one year on identical terms on its expiry date of 30th September 2021 until 30th September 2022. It is not necessary to imply any term regarding consultation on renewal to make that contract work. Even of the terms of oral contract could be established, and the insertion of the implied term that the Claimant relies on could also be established, it is clear that the Respondent and the Claimant did agree (ie consult) on the terms of the 2nd Contract that the Claimant signed, and the terms of the zero hours contract that the Claimant also agreed to. In the circumstances this claim has no reasonable prospect of success and is struck out.

50.4. [BOC4] Breach of an implied term in grievance clause the Claimant's 2nd written contract. The grievance clause in the 2nd written contract refers to a grievance policy. To that clause the Claimant asserts that the following clause was or should have been implied, as follows: '*In the event of a grievance being raised by the Claimant, a set procedure will be followed to determine that grievance*'. The Claimant asserts that the above mentioned implied term was breached by the Respondent when it failed to follow a set procedure for grievances that the Claimant raised on 17th March, 27th June and 28th June 2022. This is a new claim, which was first raised at the hearing on 23rd October 2023. It is necessary to amend the Claim Form to include it. It is difficult to see how such a term is necessary to make the grievance provision in the 2nd Contract work, and/or how the term (if it can be implied) was breached. The document referred to as the Claimant's first grievance (a text message negotiating his 2nd Contract) does not appear to be a grievance and

the later ones post date the 2nd Contract. In the circumstances this claim also appears to have little reasonable prospect of success. The application to amend the Claim Form to include is refused. Had it been present from the outset I would have considered that it had no reasonable prospect of success and struck it out.

51. **Direct Sex and Race discrimination**. The Claimant is male and Ethiopian British. He brings a claim of direct discrimination on the grounds of his sex and his race/nationality. For both claims the Claimant relies on the same acts of less favourable treatment. For both claims the Claimant relies on the same actual comparator. He compares his treatment to that of the Respondent's Housekeeper, Lisa Lister. She is female and Filipino British. The remaining incidents of less favourable treatment (some having been withdrawn) within the Claim Form are:

51.1. The Claimant was not provided with payslips whilst Ms Lister was. The Respondent asserts that the explanation for any difference in treatment was that the Claimant had a different employment status to Ms Lister;

51.2. Deducting Ms Lister's tax at source for the period October 2020 until July 2022 and not deducting the Claimant's tax at source. The Respondent asserts that the explanation for any difference in treatment was that the Claimant had a different employment status to Ms Lister;

52. The Respondent asserts that these claims should be struck out on the grounds that the Ms Lister was an employee of the Respondent and that the Claimant was a self-employed contractor, being a material difference between them. Furthermore, the Claimant's status as a self-employed contractor is the explanation for the difference in treatment which has nothing whatsoever to do with either the Claimant's race or his sex. I can see the force in this submission. The difficulty with it however is that it assumes that the Claimant's status, not just during his time on a zero hours contract, but throughout his engagement with the Respondents, as a self-employed contractor either has already been established, or is very likely to be established at trial, such that the claims should be struck out before hearing evidence, whilst that evidence is plainly in dispute. Guided by the principles that (i) discrimination cases should not, as a general principle, be struck out on this ground when the central facts are in dispute (**North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603), (ii) the correct approach for a Tribunal on considering a strike out is to take the Claimant's discrimination case

at its highest, as it is set out in the claim, unless contradicted by plainly inconsistent documents (**Ukegheson v London Borough of Haringey** [2015] ICR 1285*,* EAT*,* at para 21), and (iii) discrimination cases should not be struck out except in the very clearest circumstances (**Anyanwu v South Bank Students' Union** [2001] IRLR 305*,* HL*)* it is my judgment that this issue to proceed to a hearing, so that the Tribunal can consider all of the evidence and make a judgment on the treatment, the comparators and the reason for the treatment, after having heard all of that evidence.

53. For similar reasons I have decided not to make these claims the subject of a deposit order. The test for a deposit order is less strict: that a claim has little reasonable prospect of success, rather than no reasonable prospect of success, which is required for a strike out. If the Claimant's status is established, that he was at all material times a self-employed contractor in circumstances in which the Respondent was his client, then the Respondent's submissions would have had real force. However, it is my judgment that the issue of the Claimant's status is a trial issue that should be determined at the final hearing, as it is the Respondent's explanation for their treatment of the Claimant that has nothing whatsoever to do with the Claimant's sex or race. I note that the authorities referred to above which all state that striking out discrimination claims should be avoided where the central facts are in dispute, does not apply in quite the same way for claims that do not allege discrimination.

54. In addition to the above claims of sex and race discrimination, the Claimant also relied on additional matters that were not pleaded within the original Claim Form, namely:

    54.1. Letting Ms Lister use the toilet in the Respondents' home, but not letting the Claimant use it. The Respondent asserts that the explanation for any difference in treatment was that Ms Lister worked as a housekeeper inside the main residence and the Claimant did not;

    54.2. Providing an employment reference for Ms Lister but not the Claimant. The Respondent asserts that, in terms of providing a reference the circumstances of the Claimant and Ms Lister were materially different;

    54.3. Agreeing by November 2021 to take Lisa Lister back into the Respondents' employment after she had left on 30th September 2021, but not agreeing to take the Claimant back into their employment after he left in May 2022, after

he asked if he could return by email on 27th June 2022. The Respondent asserts that, in terms of returning to work, the circumstances of the Claimant and Ms Lister were materially different;

54.4. Allowing Ms Lister paid holiday without issues, but treating the Claimant less favourably whenever he asked for paid holiday, as follows: (i) when the Claimant asked for paid holiday in August 2021, the Respondent agreed, but then told him that the terms of his 2nd Contract would be changed to his detriment; (ii) on 22nd April 2022 when, in the course of contract renewal negotiations, the Claimant asked for holiday pay to be included he was dismissed;

54.5. On 27th April 2022 when the Claimant asked for accrued holiday from 1st October 2021 the Respondents denied any such payment and only paid it after the Claimant had been required to prove that it was due to him.

55. It is necessary to consider whether the Claimant's Claim Form should be amended to allow these claims to proceed. They were raised for the first time at the 3rd Case Management Hearing on 23rd October 2023. In considering this point I have been guided by the legal principles relating to amendments, as set out above. The allegations are additional examples of alleged discrimination, which the Claimant seeks to add to his existing sex and race discrimination claims. They are part of the factual matrix and could properly be raised as examples of unfavourable treatment for the purpose of raising an inference of discrimination. The Tribunal will need to hear evidence on them in any event. They do not raise new legal claims. Whilst there has been a considerable delay between the Claim Form and the 3rd Case Management Hearing on 23rd October 2023, the Claim is still within the early stages of Case Management, and the issues in the case will not be finalised until this Judgment is sent to the parties. In the circumstances I will allow the Claimant's Claim Form to be amended to include the new claims of sex and race discrimination (as set out in paragraph 54 above), subject to one proviso. It is part of the Respondent's case that the said allegations are out of time. This Judgment, which will allow the Claim to be amended to include them, is not determining the issue of time. That will require applying the just and equitable extension provisions, and that task is properly a trial issue. The new claims of sex and race discrimination are allowed, but the issue of whether they have been presented in time, or whether it would be just and equitable to extend time, remains an issue for the final hearing.

56. Having allowed the amendment, it is now necessary to determine whether the new claims should be struck out and/or subject to a deposit order. For the reasons stated above the new claims are fact sensitive and following the guidance referred to above, it is my judgment that the new sex and race claims should go to trial. The application to strike them out or to subject them to a deposit order is refused.

57. **Discrimination on the grounds of religion or belief**. The Claimant asserts that he was asked to drive at weekends during his 2nd Contract starting on 1st October 2021, which were considered by him to be days of religious observance, which he agreed to do under duress. The Respondent accepts that the Claimant was asked some of the time at weekends but could refuse to drive if he wished. The Claimant's 2nd Contract came to an end on 30th April 2021. The Claimant should have been issued by 29th July 2021. The Claimant's Claim Form at that time was rejected due to a failure to complete the Early Conciliation Process. As a result it was not issued until October 2021.

58. However, for the reasons stated above in relation to the Claimant's claims of sex and race discrimination, it is my judgment that the time issue should be for the final hearing Tribunal to determine. On the facts, the Respondent accepts that it did ask the Claimant to drive on his days of religious observance, but that he could refuse to if he wished. This is a trial issue. The Respondent's application to strike out the religious discrimination claim or to subject it to a deposit order is refused.

Conclusion Summary.

59. All of the Claimant's claims, with the exception of his claims for sex and race discrimination, and discrimination on the grounds of religion or belief, have been struck out. The Judgment is as follows:

59.1. **The Claimant's automatic unfair dismissal claim is struck out.**
59.2. **The Claimant's notice pay claim is struck out.**
59.3. **The Claimant's unlawful deduction from wages claim is struck out.**
59.4. **The Claimant's 4 breach of contract claims are struck out.**
59.5. **The Claimant's direct race discrimination claim shall proceed to trial.**
59.6. **The Claimant's direct sex discrimination claim shall proceed to trial.**

59.7. **The Claimant's claim of discrimination on the grounds of religion or belief shall proceed to trial.**

60. An updated List of Claims is attached at Annex 1 to this Judgment.

61. A Notice of Hearing, listing this case for case management shall be sent to the parties for a ½ day listing, in person, to determine (i) the finalised List of Issues and (ii) the directions for trial. The hearing will NOT reopen the List of Claims which are now set out in the attached Annex 1 to this Judgment.

8th January 2024

_____

Employment Judge Gidney

Sent to the parties on:
10/01/2024
For the Tribunal:

Annex 1 – Final List of Claims

Direct Sex and Race discrimination.

1. The Claimant is male and Ethiopian British.
2. For both claims the Claimant relies on the same acts of less favourable treatment.
3. For both claims the Claimant relies on the same actual comparator. He compares his treatment to that of the Respondent's Housekeeper, Lisa Lister. She is female and Filipino British.
4. The allegations of less favourable treatment are:

    4.1. The Claimant was not provided with payslips whilst Ms Lister was. The Respondent asserts that the explanation for any difference in treatment was that the Claimant had a different employment status to Ms Lister;

    4.2. Deducting Ms Lister's tax at source for the period October 2020 until July 2022 and not deducting the Claimant's tax at source. The Respondent asserts that the explanation for any difference in treatment was that the Claimant had a different employment status to Ms Lister;

    4.3. Letting Ms Lister use the toilet in the Respondents' home, but not letting the Claimant use it. The Respondent asserts that the explanation for any difference in treatment was that Ms Lister worked as a housekeeper inside the main residence and the Claimant did not;

    4.4. Providing an employment reference for Ms Lister but not the Claimant. The Respondent asserts that, in terms of providing a reference the circumstances of the Claimant and Ms Lister were materially different;

    4.5. Agreeing by November 2021 to take Lisa Lister back into the Respondents' employment after she had left on 30th September 2021, but not agreeing to take the Claimant back into their employment after he left in May 2022, after he asked if he could return by email on 27th June 2022. The Respondent asserts that, in terms of returning to work, the circumstances of the Claimant and Ms Lister were materially different;

    4.6. Allowing Ms Lister paid holiday without issues, but treating the Claimant less favourably whenever he asked for paid holiday, as follows: (i) When the Claimant asked for paid holiday in August 2021, the Respondent agreed, but then told him that the terms of his 2nd Contract would be changed to his

detriment; (ii) On 22nd April 2022 when, in the course of contract renewal negotiations, the Claimant asked for holiday pay to be included he was dismissed;

4.7. On 27th April 2022 when the Claimant asked for accrued holiday from 1st October 2021 the Respondents denied any such payment and only paid it after the Claimant had been required to prove that it was due to him.

Discrimination on the grounds of religion or belief.

5. The Claimant is Christian.
6. The Claimant relies on a hypothetical comparator.
7. The Claimant asserts that he was asked to drive at weekends in his 2nd fixed term contract starting on 1st October 2021, which were considered by him to be days of religious observance, which he agreed to do under duress.
8. The Respondent accepts that the Claimant was asked some of the time at weekends but could refuse to drive if he wished.