RESERVED **Case Number: 2603366/2023**

EMPLOYMENT TRIBUNALS

Claimant: **Mr. R Mbah**

Respondent: **Toyota Motor Manufacturing UK Ltd**

Heard at: **Nottingham**

On: **13th June 2024**

Before: **Employment Judge Heap (sitting alone)**

Representation
Claimant: **Mr. O Ngwuocha - Solicitor**
Respondents: **Ms. N Spencer - Solicitor**

RESERVED JUDGMENT

1. The Claimant's application to amend the claim is refused.

2. The issue of jurisdiction in respect of the complaints of race discrimination are to be determined at the final hearing.

3. Allegations one and two as set out in the Orders of Employment Judge Smith dated 19th April 2024 are **not** pursued as allegations of discrimination. The issue of whether they have no or little reasonable prospect of success has therefore not been determined.

4. The complaint of constructive dismissal is not struck out nor made subject to a Deposit Order and will proceed to a full hearing.

5. Case Management Orders are attached.

RESERVED REASONS

BACKGROUND & THE ISSUES

1. This Preliminary Hearing followed on from one which was conducted by Employment Judge Smith on 19th April 2024. At that hearing, Employment Judge Smith listed this open Preliminary hearing for the purposes of dealing

with the following matters:

1.1. To consider whether to strike out the first and second allegations of race discrimination identified at the first Preliminary hearing under Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") or, alternatively, for deposits to be Ordered to be paid in respect of those same complaints under Rule 39 of the Regulations;

1.2. To determine whether the race discrimination claims were (partly or in their entirety) presented outside the relevant time limit provided for by Section 123 Equality Act 2010, and if so, whether the Tribunal is in a position to determine whether it is just and equitable to extend time in relation to any claim presented out of time; and if it decides that it is in a position to do so, whether it is just and equitable to extend time;

1.3. To determine whether the constructive unfair dismissal claim had little reasonable prospect of success and whether a Deposit Order should be made in respect of it under Rule 39 of the Regulations;

1.4. To determine the Claimant's application to amend the claim if one had been made to include a further allegation of race discrimination that on 13th September 2019 a Scott Doyle had called the Claimant a "faggot" and a "twit"; and

1.5. To make any further Orders necessary for the full merits hearing.

2. As I shall come to below, I took those matters slightly out of order during the course of this hearing.

THE HEARING AND PRELIMINARY MATTERS

3. The Preliminary hearing was listed for one day of Tribunal time. I had read the relatively lengthy bundle prepared for the Preliminary hearing the day before the hearing. Shortly before the hearing was due to commence I was handed a sort witness statement from the Claimant and a statement and supplemental statement from Keira Dosanjh of the Respondent.

4. In respect of the latter, whilst I noted that Employment Judge Smith had made provision in his Orders for the supply of witness statements I had envisaged that that would be limited to the issue of jurisdiction. I expressed some concern to Ms. Spencer that the statement of Ms. Dosanjh appeared to envisage that I would be making findings of fact in respect of the underlying complaints. My concern was that if I was to do that but not strike out the complaints (which would not be the case for the constructive dismissal claim because I was not tasked with determining any strike out issue) then such findings might bind a future Tribunal and it is clear that there is a dispute between the parties on those facts.

5. The Claimant's witness statement did not deal with the question of jurisdiction but, as I shall come to below, I have not dealt with that today as a result of what

the position of the Claimant now is in respect of the date of the last allegation of discrimination complained of. I come to that further below.

6. I did express to Mr. Ngwuocha, however, that paragraph 3 of the Claimant's witness statement appeared to me not to be the case that was recorded within the Orders of Employment Judge Smith. I come to that further below because we have spent some considerable time today attempting to discuss and clarify what allegations of race discrimination are in fact being made.

7. I have not heard any evidence from the parties but I have taken the Claimant's case at its highest when reaching my conclusions.

8. By the time that I had heard from the parties on all of the issues and we had had lengthy discussions about the scope of the claim there was insufficient time to deliberate and to give Judgment and accordingly that Judgment was reserved.

THE ISSUES

9. As indicated above, we have spent some considerable time today seeking to establish the precise scope of the allegations in the claim. As I understand it that was also the case at the last Preliminary hearing when Employment Judge Smith distilled the allegations of race discrimination and the acts on which the Claimant relies as being destructive of mutual trust and confidence for the constructive dismissal complaint (which are the same) as follows:

   9.1. In 2011 the Claimant was refused a place on the Respondent's ATM training course;

   9.2. In 2012 the Claimant successfully obtained a place on the ATM training course but was kept waiting and not provided with any further information until 1st February 2013 when he was told that the Respondent would not be running any ATM training programmes in the foreseeable future;

   9.3. In October 2021 Darren Allen, whom the Claimant had trained, was recommended to go on the ATM course by section manager, Richard Campion, instead of the Claimant;

   9.4. On 21st March 2021 Mel[1] Martin prevented the Claimant from pursuing his grievance beyond stage 2 of the Respondent's procedure; and

   9.5. On an occasion prior to 10th July 2023[2], section manager Rob Payne and general manager Neil Martins decided to promote a group of more than 100[3] employees as temporary team leaders but not the Claimant.

10. I had not anticipated that there would be any difficulties with the allegations that formed the basis of the race discrimination complaints and the claim of constructive dismissal given that those matters had, as I understand it, been comprehensively discussed at the last hearing, recorded clearly in the Orders

[1] The parties are agreed that this is a typographical error and should read Neil Martin.
[2] I say more about the date of this incident below in the context of the jurisdictional issues.
[3] This is, as set out below, now said to be 140 employees not 100.

of Employment Judge Smith and at no point had Mr. Ngwuocha written to the Tribunal to correct the position if that did not accurately reflect the Claimant's case as the parties had been invited to do. I was unable to properly ascertain why Mr. Ngwuocha had not taken that step.

11. However, it became clear during the course of the hearing that Mr. Ngwuocha was saying that the Claimant's case was not as recorded by Employment Judge Smith. It took some considerable discussion to understand what the Claimant's case was now said to be. As I observed to Mr. Ngwuocha at the hearing, I became concerned that the scope of the claim seemed to be evolving on ever shifting sands and for that reason once discussions had finally made clear what the allegations were I have recorded them below and they will now stand as the final issues and will not be revisited again and particularly not at the final hearing.

12. There was firstly a discussion about the scope of the claim in the context of paragraph 3 of the Claimant's witness statement which set out that he was maintaining that the failure to promote him (which is the main plank of the claim) persisted until the effective date of termination of his employment. Mr. Ngwuocha maintained that that was the pleaded case as a result of the last line of the Claim Form on page 8 of the Preliminary hearing bundle ("PHB").

13. I do not accept that that is what is either set out in the Claim Form or that that is what could reasonably be inferred. It is clear that the Claimant was referring there to a final event in July 2023 (I come to the date of that later) and that he relied on that as being the last straw for the purposes of the constructive dismissal complaint. Nothing else happened after that in terms of any promotion opportunities and there was no suggestion that anyone else was promoted between then and the effective date of termination of employment. I do not therefore accept that the pleaded case (either in the Claim Form or in the later further and better particulars of claim) deals with an act ending on 31st August 2023.

14. Mr. Ngwuocha indicated later in the hearing that the first two allegations identified by Employment Judge Smith at page 67 of the PHB were not allegations of race discrimination. That then extended to all five of the allegations identified by Employment Judge Smith. At that stage it was then not clear what the allegations of race discrimination were actually said to be.

15. Mr. Ngwuocha indicated then that this was a failure to promote the Claimant from 2011 onwards but not on every day after that point but only when promotions occurred. We eventually managed to ascertain that the only other date complained of which was not recorded in the Orders of Employment Judge Smith was in 2018 which features at paragraph 15 of the further and better particulars prepared on behalf of the Claimant and that what was recorded by Employment Judge Smith as the third, fourth and fifth allegations of direct race discrimination were still pursued.

16. Ms. Spencer contended that the 2018 allegation would also need to be subject to an application to amend the claim. To any extent that that was needed I give permission for that amendment because all that it was doing was putting meat

on the bones of an already pleaded complaint – namely an allegedly continuing failure to promote the Claimant.

17. I have set out at the conclusion of these reasons what allegations now stand and given the shifting sands of this claim as I have already observed those will stand as the only ones which the Claimant is entitled to pursue.

18. For the avoidance of doubt, the allegations at paragraphs 2.1.1.1 and 2.1.1.2 of the Orders of Employment Judge Smith have been abandoned on instructions from the Claimant as allegations of race discrimination and they are now said only to be relevant background to allegation 2.1.1.3.

THE LAW

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

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

20. Rule 37 provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

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

21. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success.

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

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

23. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**.

24. Particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as enjoying no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim (see **Ahir v British Airways Plc [2017] EWCA Civ 1392**). Each case will, however, turn on its own facts.

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

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

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

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

27. The Tribunal is required to have regard to the means of a paying party both as to whether to make an Order and, if so, the amount of that Order. Otherwise, the setting of a Deposit which the paying party is not able to pay will amount to

a strike out by the back door (see **Hemdan v Ishmail & Anor 2017 ICR 468**).

Amendment applications

28. Amendment applications fall to be considered by reference to the guidance in **Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661 EAT**. That guidance requires a Tribunal to consider the following matters, although it is not necessary to stick slavishly to those factors. That guidance is as follows:

"Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions e.g. in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

29. The above factors need not be slavishly adhered to but the overriding issue to be considered in respect of all of those factors is a careful balancing exercise of the relative injustice and hardship of allowing or refusing the amendments.

AMENDMENT APPLICATION – CONCLUSIONS

30. As indicated above, I took the issues to be determined slightly out of order and deal firstly with the amendment application.

31. Again, I was concerned that the amendment application was also advanced on somewhat shifting sands. The basis of the intimated application which appears to have been referred to before Employment Judge Smith was to include within the scope of the race discrimination complaints the following allegation:

31.1. That on 13th September 2019 the Claimant was racially abused by Scott Doyle who had called him a "faggot" and a "twit".

32. By the time of this hearing the scope of the application had opened up further. It was now not just a complaint of race discrimination but was also said to be relied upon in the context of the constructive dismissal complaint. Equally, the allegation had also opened up and was now in two parts. The first part was the comments referred to above and the second was said to be a separate act of promoting Mr. Doyle at some point in July 2023 (I say at some point because s I shall come to below, the Claimant's position on that date has also changed).

33. I do not, in fact, need to deal with the second part of the amendment application because it is the Claimant's case that he was referring to Mr. Doyle as being included within the allegations set out at paragraphs 2.1.1.5 and 4.2.5 of the Orders of Employment Judge Smith. There does not, therefore, need to be an amendment in respect of this particular part of the allegation.

34. However, there plainly needs to be an amendment in respect of the first part which are the comments which it is said were made by Mr. Doyle to the Claimant.

35. I start by considering the relevant **Selkent** factors. The first of those is the nature of the amendment. I am afraid that I was unable to accept Mr. Ngwuocha's submissions that this was a minor amendment on the basis that the Claimant was already pleading other acts of race discrimination. The inference appeared to be that if a general head of claim was pleaded then the opportunity was there via further and better particulars to add acts which did not feature in the Claim Form. I do not accept that position, not least as a result of the decision in **Chapman v Simon [1994] IRLR 124** (and as articulated by Peter Gibson LJ at paragraph 44) that the Tribunal should confine itself to the issues raised by a Claimant in their Claim Form, subject to any amendment being allowed. The Claim Form should not be treated as the starting point from which claims are permitted to otherwise simply evolve (see **Chandhok v Tirkey [2015] ICR 527**).

36. It is also not an answer as Mr. Ngwuocha submitted to say that there was no prejudice to the Respondent because they had known about this complaint from

the Claimant's grievance. The Respondent is entitled to know the case that it needs to meet in relation to this claim by reference to the Claim Form and not what might have previously been raised but which had not been included. If that was not the case again claims could and would simply continually evolve.

37. This additional complaint is, in my view, an entirely new factual amendment which is quite distinct from the Claimant's central theme which was that he was not promoted because of race discrimination.

38. I turn then to the applicability of time limits. The complaint that the Claimant seeks to add occurred in September 2019. The amendment application was not made until 10th June 2024. This complaint is therefore over four and a half years out of time. No explanation has been provided for that delay. There is not said to be something that has come to light that meant that the Claimant saw the comments in a different context or any other reason for delay or why it would be just and equitable to extend time. Given the significant passage of time, the fact that there is no contemporaneous documentation to assist with regard to the allegation and the cogency of the evidence will inevitably be diminished as a result of the delay the issue of time limits is extremely problematic and the Respondent, who would now be faced with seeking to defend this allegation, is significantly more prejudiced than the Claimant.

39. I turn then to the timing and manner of the application. The Claim Form was presented on 29th December 2023. Mr. Ngwuocha says that the additional allegations could not be included in the Claim Form because the online submission did not leave room to do that. Leaving aside the fact that there is nothing to substantiate that and there appeared to be plenty of room left in the relevant section of the Claim Form (page 8 of the PHB) that is not an answer to the issue because Claimants with lengthy claims frequently submit separate particulars of claim either at the same time as the Claim Form or shortly thereafter so as to set out the full claim. The Claimant has at all times been legally represented and Mr. Ngwuocha would have known that not all allegations that he wanted to pursue had been included in the Claim Form and how to rectify that. He did not, however, take any steps to do that until 10th June 2024 and despite having intimated an intention to make an application almost two months earlier at the Preliminary hearing.

40. It is no answer as Mr. Ngwuocha says that no time limit was stipulated by Employment Judge Smith to make the application. It would have been apparent at the Preliminary hearing that an amendment application was required and there were already problems by that point with regard to time limits. Despite that, there was further unexplained delay for a period of almost two months with the application being made only a few days before this Preliminary hearing. It should have been given priority and not let until the last minute. Both the timing and the manner of the application are therefore also problematic for the Claimant.

41. Although not definitive, I am also entitled to have regard to the merits of a potential allegation when deciding whether to permit an amendment. I therefore raised with Mr. Ngwuocha what the factual basis was that the Claimant would

rely upon to say that the comments were made because of race. That was because whilst they were offensive, and one in particular extremely so, they do not appear to have any particular racial connotation. Mr. Ngwuocha told me that the sole basis upon which these comments were said to be because of race was because the Claimant is black and Mr. Doyle is white. Reference was also made to other group leaders being white although I understand that to be made in the context of the second part of the application regarding the promotion of Mr. Doyle.

42. A difference in the protected characteristic of an alleged discriminator to that of the complainant alone is not going to be remotely sufficient to shift the burden of proof. If it was then in any case where the alleged discriminator did not share the same protected characteristic of the complainant there would be a prima facie case made out. For example, any man who subjected a woman to a detriment would on the face of it have done so because of her sex and the same being so for all of the other protected characteristics. It will require more than a difference in race between the alleged perpetrator and the complainant to make out a prima facie case and if the Claimant is not able to set out a proper basis on which there could be a reversal of the burden of proof at this stage the complaint would appear to me not to make it out of the starting blocks at trial. The balance of prejudice therefore clearly falls on the Respondent in having to expend efforts defending an additional complaint which appears to lack merit and no prejudice falls to the Claimant in not permitting him to advance an additional complaint which is highly unlikely to succeed even taking his case at its highest.

43. Taking all of those matters into account, this is a new factual allegation, it is out of time and substantially so and no explanation has been given as to why that is the case. The Claimant has at all times been legally represented and even though he and his representative knew at the last Preliminary hearing that an amendment application needed to be made there was a further delay in making it by almost another two months and only then shortly before this hearing. All of those factors and the question of merits weigh against granting the amendment.

44. Insofar as this allegation is now said also to be relevant to the constructive dismissal complaint, then save as for the issue of merits (the tests being different) the same considerations apply. I cannot see that the Claimant is prejudiced by not being able to add a very historic issue to reasons why he says that he had resigned. That is not least because he did not mention it at all before the amendment application and not even at the last Preliminary hearing in the context of the constructive dismissal claim when the issue of amendment was first raised.

45. For all of those reasons the amendment application is refused.

JURISDICTIONAL ISSUES

46. The next issue that I considered was to determine whether the race discrimination claims were (partly or in their entirety) presented outside the relevant time limit, and if so, whether I was in a position to determine whether it was just and equitable to extend time.

47. The Claimant's case is that there was a continuing act of discrimination (again the central theme being that there was a failure to promote the Claimant) ending with the final act complained of. The date of that last act is important because if it was, as was recorded by Employment Judge Smith, 10th July 2023 then all of the acts of discrimination were out of time. There is some controversy about the date because the Orders of Employment Judge Smith record that he was told unequivocally by the Claimant that the relevant date was 10th July 2023 but then he had sought to resile from that as a result of intervention by Mr. Ngwuocha. Mr. Ngwuocha tells me that that is entirely inaccurate and that none of that happened. Ms. Spencer says that her recollection was that what was recorded by Employment Judge Smith was exactly what had happened.

48. However, matters have moved on today. Mr. Ngwuocha now tells me that the correct date was in fact 20th July 2023 and he relies on page 152 of the hearing bundle which references that date. As I understand it, the Claimant is now saying that there was a separate announcement on 20th July 2023 where the 140 promotions were announced. If the Claimant is correct about that then the last act is in time, although only just.

49. I should record that the Respondent's case as set out by Ms. Spencer is that there was no promotion of 140 employees on 20th July 2023 or any other date and that the briefing which appears at page 152 demonstrates that because there is no mention of promotions.

50. It is accurate to say that there is no reference at page 152 to any promotions. However, the Claimant's position is that page 152 was an earlier briefing given on 17th July 2023 (which is also a date on the document) and that there was a later briefing memorandum issued on 20th July 2023 which is not the same document at page 152 but a later one. I should say that I had understood the Claimant to be saying that he had a copy of what he says is the 20th July 2023 memorandum in question because he had been nodding when I was asking that question of Mr. Ngwuocha. However, I was later told by Mr. Ngwuocha and then by the Claimant directly that that was not the case. Ms. Spencer says that there is no other later memorandum and that the only one is at page 152. She says that the reference to 17th July 2023 was a date of a discussion about the briefing with the actual briefing to the relevant teams (and issuing of the memorandum) taking place on 20th July 2023.

51. There is clearly a factual dispute between the parties about that and as I have already observed above I am not hearing evidence or making findings of fact about that which would bind a future Tribunal. For example, had I concluded that no promotions were made on that date but decided to extend time for the other complaints then there would be a difficulty for the full Tribunal if, after examination of all the evidence, they reached a different conclusion on the

promotion point.

52. My view, therefore, is that subject to the findings of fact made by the Tribunal but taking the Claimant's case at its highest it appears to have been presented in time. The Claimant's case is that there is a continuing act up until 20th July 2023 and given that I cannot definitively say that the last act was not within time (or did not happen) then the issue of jurisdiction is a matter best left for determination at the final hearing.

STRIKE OUT/DEPOSIT ORDER - CONCLUSIONS

53. I turn then to the question of strike out/Deposit Orders.

54. The first of those matters is in respect of what were, at the time of the first Preliminary hearing at least, the first and second allegations of race discrimination. However, Mr. Ngwuocha has confirmed today that those are **not** advanced as allegations of race discrimination and are relied on as background only and so there is no need to now consider whether to strike them out or make Deposit Orders in respect of them. I make plain, however, that Mr. Ngwuocha has made it abundantly clear after a lengthy period of time to take instructions that neither of those allegations are pursued as complaints of race discrimination and it is not now open to him to resile from that position and those complaints cannot be pursued in these proceedings other than in the context of the constructive dismissal claim.

DEPOSIT ORDER – CONSTRUCTIVE DISMISSAL COMPLAINT

55. I remind myself of the fact that I can impose a Deposit Order (but would not be obliged to do so) if I am satisfied that the claim or complaint has little reasonable prospect of success.

56. The main thrust of the Respondent's argument as to why a Deposit Order should be made in respect of this part of the claim is that the last act relied upon by the Claimant did not happen because there were no promotions as evidenced by page 152 and that the other matters were all historic so that the Claimant would be prevented from relying upon them.

57. I am obliged to take the Claimant's case at its highest and as indicated previously cannot make any findings of fact as to whether there were promotions or not on 20th July 2023. Whilst it is potentially going to be somewhat problematic that the Claimant does not have the later memorandum which he relies on and the Respondent says that it does not exist, it will still be a matter for evidence as to what was said on 20th July 2023 and whether there was a later document.

58. The Claimant's case is squarely that since 2011 he has been denied promotion when he says that candidates with lesser experience and skills were given those opportunities over him. If that is the case and he is correct that a significant number of people were promoted over him on 20th July 2023 when he was also a suitable – or more suitable – candidate then I cannot say that this part of the claim has little reasonable prospect of success. I therefore decline to make any

Deposit Order in respect of the constructive dismissal claim.

59. I do not wish this decision to give any suggestion to the Claimant that I consider the prospects of this part of the claim to be significant and I have already remarked that the lack of a copy of the later memorandum that he refers to is potentially problematic. However, as indicated above that will be a matter for evidence and I am not satisfied that there are little reasonable prospects of success as matters stand.

60. I do urge the Claimant and Mr. Ngwuocha, however, to ensure that they are engaging with the evidence as this claim progresses and to keep their assessment of the merits of all complaints advanced under constant consideration and, particularly, to give thought to the facts that will be relied upon to underpin the direct race discrimination complaints.

THE COMPLAINTS WHICH PROCEED TO HEARING

61. As set out above, it is necessary to have some clarity over which allegations are now proceeding and are permitted to proceed given the way in which the complaints advanced appear to be constantly evolving. Those are now set out below in respect of each separate complaint:

Constructive dismissal

62. The following acts may be relied upon by the Claimant:

(a) In 2011 the Claimant was refused a place on the Respondent's ATM training course;

(b) In 2012 the Claimant successfully obtained a place on the ATM training course but was kept waiting and not provided with any further information until 1st February 2013 when he was told that the Respondent would not be running any ATM training programmes in the foreseeable future;

(c) In October 2021 Darren Allen, whom the Claimant had trained, was recommended to go on the ATM course by section manager, Richard Campion, instead of the Claimant;

(d) On 21st March 2021 Neil Martin prevented the Claimant from pursuing his grievance beyond stage 2 of the Respondent's procedure; and

(e) On 20th July 2023, section manager Rob Payne and general manager Neil Martins decided to promote a group of more than 140 employees as temporary team leaders but not the Claimant.

Direct race discrimination

(f) In 2018 when the logistics department were offered places on the ATM course the Claimant applied but did not receive any response from the Respondent and circumstances that led to the loss or misplacement of his application were not fully explained to him;

(g) In October 2021 Darren Allen, whom the Claimant had trained, was recommended to go on the ATM course by section manager, Richard Campion, instead of the Claimant;

(h) On 21st March 2021 Neil Martin prevented the Claimant from pursuing his grievance beyond stage 2 of the Respondent's procedure; and

(i) On 20th July 2023, section manager Rob Payne and general manager Neil Martins decided to promote a group of 140 employees as temporary team leaders but not the Claimant.

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Employment Judge Heap

Date: 26th June 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/