



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Khan

**Respondent:** Nucleus Central Limited

**Heard at:** Manchester

**On:** 22 and 23 May 2018  
24 May 2018  
(in Chambers)

**Before:** Employment Judge Slater  
Mr A G Barker  
Mrs S J Ensell

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Bailey-Gibbs, Solicitor

# JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. The Tribunal does not have jurisdiction to consider the complaints of discrimination in relation to applications made in September and October 2016 and April to May 2017.
2. The complaints of direct sex, race and age discrimination in relation to applications made in July and August 2017 for the posts of Associate Medical Writer and Account Services/Client Services are not well-founded.
3. The remedy hearing provisionally arranged for 20 September 2018 is cancelled.

# REASONS

## Complaints and Issues

1. The complaints and issues were identified at a preliminary hearing on 4 January 2018. It was identified that the claimant complained of direct sex

discrimination, race discrimination and age discrimination in relation to recruitment in relation to the following applications:

No.	Date of Application	Post Applied For	Person dealing with Application
1	23 September and 4-7 October 2016	Associate Medical Writer	Janet D'Mello
2	April/May 2017	Account Executive	Cat Neill
3	July/August 2017	Associate Medical Writer	Mrs Murton
4	August 2017	Account Services/Client Services	Mrs Murton

2. The claimant complained of direct sex and/or race and/or age discrimination in relation to the failure to shortlist and appoint him to those posts.

3. The issues to be considered in relation to the complaints of direct discrimination were identified as follows:

- (1) Were the complaints presented in time (including consideration of whether acts formed part of a continuing act of discrimination) or, if not, is it just and equitable to consider them out of time?
- (2) By not shortlisting and appointing the claimant to the posts for which he applied, did the respondent treat the claimant less favourably than it treated or would have treated others in the same material circumstances?
- (3) If so, was this less favourable treatment because of the protected characteristics of sex and/or race and/or age?
- (4) In relation to age only, if the respondent has treated the claimant less favourably on grounds of age, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

4. At the start of the final hearing the claimant made an application to add a further complaint of direct sex and/or race and/or age discrimination in relation to an application made on 23 September 2015 for the position of Medical Writer with Claire Davis being the person who dealt with the application. The Tribunal decided not to allow the application for reasons which were given orally. These were as follows. The complaint the claimant wished to add was not included in his claim form. It was not referred to at the preliminary hearing when the complaints had been clarified. The claimant said he was reminded of it by a reference in the bundle and the respondent's witness statements. The witness statements were exchanged on 23 March 2018 and the bundle had been provided earlier. The claimant could have made the application earlier but did not do so. We did not consider that the fact that

the claimant is not a lawyer and is not represented prevented him from writing to the Tribunal saying he wished to add another complaint. It was a matter of common sense that he should notify the Tribunal if he wished to add any further complaints after the complaints had been identified at the preliminary hearing. The complaint would be considerably out of time if presented now. Potentially, it could have been just and equitable to extend time if the application had been made immediately after the claimant had been reminded of the job application, but we did not consider that it would be just and equitable to extend time now to allow the claim to be brought when the claimant had not acted for some months after being reminded of the relevant facts. The claimant is not prevented by our decision from relying on this application as background to his complaints. He is still able to pursue all the complaints he identified at the preliminary hearing. The Tribunal did not consider that the claimant would suffer significant prejudice if the application to amend was not allowed. However, if the amendment was allowed, the respondent would have to deal with an allegation without prior notice if the hearing went ahead as scheduled. The most relevant witness, Claire Davis, was not being called to give evidence. She no longer works for the respondent. We did not know whether she would be available to attend if the hearing was postponed. We did not consider it to be in the interests of justice to postpone the hearing in the hope that the respondent could obtain further witness evidence. The respondent would be prejudiced if the case went ahead now by not having the most relevant witness evidence available. If the case were postponed, the respondent would be put to further cost and expense with no guarantee the witness would be available. The Tribunal considered that the prejudice to the respondent in granting the amendment was greater than that to the claimant in refusing it. Applying the principles in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 EAT, the Tribunal considered all factors and decided not to allow the amendment.

5. As noted below, during our deliberations, we identified that it appeared that the claimant was not only complaining about not being shortlisted and appointed for actual current vacancies but was also complaining that he had not been selected for the “talent pool” from which candidates for future vacancies might be selected. This had not been specifically identified as an issue at the preliminary hearing. Had the Tribunal not considered that the complaints including failure to select for the “talent pool” would fail on other grounds, the Tribunal would have considered whether we needed to seek further submissions from the parties as to whether we could consider the matter of selection for the “talent pool” and, if so, any arguments which the parties wished to put in relation to this matter.

### **Facts**

6. The Nucleus Global Group of Companies is a group of medical communications agencies providing full in-house consulting and communication services to the pharmaceutical and biotechnology industries and to healthcare professionals. The respondent carries out recruitment for the Group. Whilst the respondent has described the companies as “agencies”, they confirmed that they employ the people providing services to their clients rather than acting as an employment agency supplying candidates who are then employed by the end user. The respondent recruits all year round. Sometimes they advertise for specific jobs but they also welcome speculative applications and will consider candidates for a “talent pool” even if there is no specific vacancy at the time. If someone is accepted

for the talent pool then their details will be kept on file in the hope of a suitable vacancy arising.

7. There are two sides of the business: medical writing and client services. The positions of Assistant Medical Writer and Account Executive are entry level roles for these respective sides of the business. There are also senior level roles on both sides of the business. The claimant's complaints relate to failure to shortlist and appoint him to entry level roles on either side of the business as noted in the above table of complaints. An issue emerged, during the course of the hearing, which the Tribunal identified during our deliberations, as to the failure to select the claimant for the "talent pool" as opposed to the failure to appoint him to a current vacancy.

8. We were shown job descriptions for both the entry level roles. We note that these refer to the positions as entry level positions for those with no previous experience working in a medical communication and education agency. Amongst the essential requirements for both roles is included that a Life Science degree is essential, ideally combined with a higher qualification e.g. MSc, PhD, MD. We note that that the job descriptions make no mention of a requirement for therapeutic experience. As we will describe, the respondent made much of therapeutic experience being a requirement for the role and this being the principal reason for the claimant being rejected for roles by Cheryl Murton. We shall return in these reasons at a later stage to a finding as to the requirements for entry level positions. We comment only at this stage that we found it strange that there was no mention in the job descriptions of a requirement for therapeutic experience if this was an essential requirement for the roles and we are not persuaded by the evidence that this was because the job descriptions are generic.

9. The claimant has a Bachelor Degree from the University of Salford with joint honours in science, a MPhil in Biochemical Engineering from the University of Manchester, and a PhD in Pharmaceutical Science from the University of Manchester, which was awarded in 2001. Since obtaining his PhD the claimant has worked outside the field of science in various roles. The last roles mentioned on his career summary were as Special Adviser, Race Relations and Gender Equality 2011-2016, and as a Healthcare Management Consultant 2015-2017.

10. The claimant, having worked in London, was keen to obtain work in the North West so that he could look after his elderly mother.

11. It appears that the claimant's first approach to the respondent was in January 2014 when he applied for a role of Senior Medical Writer/Principal Medical Writer with the respondent. He was rejected for this role by Cheryl Murton as not having enough role related experience. We accept that candidates are required to have significant previous medical communications writing experience for this level of position. We accept that Mrs Murton considered that this was not demonstrated on the claimant's CV. The claimant makes no complaint of discrimination in relation to this rejected application.

12. In August 2015, the claimant approached the respondent by making contact with one of their directors, Stuart Gilbert. We understand that Stuart Gilbert, who was then Director of Client Services, is now the respondent's Managing Director. We note that Stuart Gilbert holds a BSc. In a note on the respondent's Taleo, their business

system, Stuart Gilbert wrote that, on 13 August, he had spoken to the claimant (a speculative call). He wrote:

“Seemed very nice with a very varied and interesting background, although not sure if he is what we at MTM are specifically after at the moment, but here’s the detail nonetheless. He is applying for a writer role but looks like he could be a lot more than that. Thoughts?”

13. Following this approach, the claimant had a telephone interview with Claire Davis for the position of Associate Medical Writer which, as noted above, is an entry level position. Claire Davis recorded on the Taleo system the notes of their conversation and her reasons for declining the application. We accept that the notes correctly record the conversation and Claire Davies’ reasons for rejecting the candidate. We had no reason to doubt that this reflected her view about the claimant. As to the reasons for declining the claimant, she wrote that he:

“Did not have a comprehensive understanding of medcoms, his communication style was unclear and convoluted. Discussed with Stuart directly, Stuart is happy for me to decline.”

14. We note that there is no reference to a lack of therapeutic experience as being a reason for rejecting the claimant.

15. Claire Davis then wrote to the claimant on 7 September 2015. She wrote that she regretted to inform the claimant that they would not be taking his application any further on this occasion. She wrote:

“While you certainly have a wealth of diverse experience, unfortunately it is not quite relevant for current opportunities within the Nucleus Group.”

16. Perhaps in an effort not to upset the claimant, she did not inform the claimant of her view that his communication style was unclear and convoluted. She also did not write that she was turning him down because he did not have a comprehensive understanding of medical communications. Had this application been the subject of a complaint to be considered by this tribunal, and had we heard from Claire Davis, we would have wanted an explanation as to why a comprehensive understanding of medical communications was considered a requirement for an entry level role.

17. In response to this email, the claimant telephoned the respondent. Another employee of the respondent, Jane Sowerby, dealt with his calls. Amongst other things, the claimant suggested that he had not been able to hear Claire Davis properly on the call. Jane Sowerby explained that Claire Davis had taken detailed notes on the call and therefore she felt the quality of the call had not jeopardised his application in any way. The claimant suggested that they had made their decision to decline him on a “whim”. He then mentioned about taking this to a Tribunal. Jane Sowerby recorded that she had read out Claire Davis’ phone interview notes and explained why they were not taking him forward. She wrote that she had explained:

“He did not have enough experience for senior client services roles and he was too experienced for entry level Medical Writer roles as we had a large candidate pool for entry level.”

18. We do not understand how Jane Sowerby identified this as being the reason for the claimant's rejection from what had been recorded by Claire Davis. Nevertheless, it appears that the claimant was told that he was too experienced for entry level Medical Writer roles. This is consistent with a subsequent email he sent to Stuart Gilbert on 8 September in which he recorded being told:

“I’m ‘underselling’ myself for the entry level position, but that is my choice surely? I’ve been out of Pharma for a while and this would be suitable for now. Further Jane said that roles are also adapted to suit the client/candidate skillset. So I’m a little perplexed really. Surely I can fit into organisation and add value to it in a role that suits my level of skills.”

19. Stuart Gilbert forwarded the email to Jane Sowerby who wrote to the claimant:

“As discussed this morning, we have reviewed your application at length and considered your experience for both the junior and more experienced position. We all appreciate how disappointed you are that we are not taking your application further. However, our decision stands.”

20. Jane Sowerby informed the claimant that if he wished to put a complaint in she could escalate this to the Group HR Director. The claimant replied that he was mature and experienced enough not to waste his time with the suggested route.

21. We note that Jane Sowerby did not inform the claimant that he was being rejected because of lack of therapeutic experience.

22. It appears there was no contact between the claimant and the respondent for about a year after his contact with Jane Sowerby. The claimant then attended a conference on 14 September 2016 at which he spoke to Janet D’Mello who was one of the people on a stall set out by the respondent.

23. On 15 September 2016, the claimant emailed Janet D’Mello saying that he wished to put himself forward as a Medical Writer. He received an auto acknowledgement of that email saying that Janet D’Mello was out of the office until 26 September and giving Cat Neill’s contact details if the matter was urgent.

24. On 23 September 2016, the claimant emailed Cat Neill expressing interest in the roles of Medical Writer or Account Executive in Manchester.

25. On 23 September 2016, Cat Neill acknowledged the claimant’s email. She wrote that Janet or Mariesa would contact him as they were managing the Account Executive and Medical Writer vacancies in their Manchester office. She asked him to forward his CV. We accept Cat Neill’s evidence that she did not know whether there were, in fact, any vacancies in Manchester at the time because she was not dealing with these.

26. On the same day, the claimant spoke to Janet D’Mello and said he would be sending his CV and cover letter.

27. Janet D’Mello was fairly new in the business at the time. She reported to Cheryl Murton. Janet D’Mello told us that, at the conference, she had really just been handing out leaflets and speaking generally about the company because she, at that

stage, did not have a lot of knowledge of the business. There was no doubt, in this context, that Janet D'Mello and Cheryl Murton spoke about the claimant's approach. Cheryl Murton mentioned to Janet D'Mello that she recognised the claimant's name and told her that she thought he might have complained in the past. Janet D'Mello looked at the claimant's details on the Taleo system and found from this that he had been declined before and that he had then made a complaint. We find that she read the notes made by Claire Davis and Jane Sowerby to which we have referred.

28. Janet D'Mello emailed the claimant, acknowledging his call and writing that she looked forward to receiving his CV and cover letter. She then had a follow up conversation with the claimant. Janet D'Mello gave evidence that she said that, whilst roles were left on the website for "talent pool" for entry level positions, they were closed. We understand from this that she was telling the claimant that the actual vacancies which had led to the advertisements had been filled but the advertisements had been left on the website because it might attract people who could be suitable for future roles and, therefore, go into their talent pool. Whilst there was some confusion about the meaning of this part of her witness statement, the Tribunal understood ultimately that Janet D'Mello was not telling the claimant that the talent pool was filled. Given that Janet D'Mello had told the claimant that the advertisements remained on the website to attract candidates for the talent pool, we consider it more likely than not that there must have been some conversation as to why she was not taking the matter further to consider whether the claimant should be placed in the talent pool. It is in this context that a disputed part of the conversation occurred.

29. Shortly after this conversation the claimant sent an email to Janet D'Mello thanking her for the feedback and asking her to have another think about it. He wrote:

"I may not be a 'fresh bunny' but that has its advantages too. As mentioned in our conversation, I will be committed to developing my insights and skills and further demonstrate how my capabilities can be used to add value in a broad way. This is my main advantage."

30. It appears that Janet D'Mello made no notes of the conversation. The claimant made no notes of the conversation at the time. The claimant's subsequent email is the closest record in time relating to that conversation.

31. The claimant gave evidence that, in writing that he was not a "fresh bunny", he was quoting back to Janet D'Mello the term she had used. However, in other documents and at two different points in his witness statement and in cross examination of Janet D'Mello, the claimant used different formulations. There is a common thread, however, that the term "fresh" was used. We find, on the balance of probabilities, that the word "fresh" was used by Janet D'Mello in some context in this conversation. It appears from the claimant's email of 7 October that he understood the reference as being some sort of contrast to his experience. It is possible that this was not what Janet D'Mello meant by the comment and that the claimant understood it in this way because of having been told, in relation to a previous application, that he was overqualified for the entry level role. We consider that the "bunny" part of the comment is more likely to be the claimant's addition than a word used by Janet D'Mello. We note that the allegation about the use of the word "bunny" does not appear again in any correspondence or the claimant's witness statement. The

claimant has also alleged in evidence that reference was made to the respondent wanting somebody “younger”. The claimant has not satisfied us on the balance of probabilities that this was said. This was not recorded in the most contemporaneous record, which was the email of 7 October 2016, and the claimant has given a variety of formulations as to what he now believes was said, recording this a considerable time after the conversation.

32. We accept the evidence of Janet D’Mello that she did not progress the claimant’s application for the specific post because there were no roles for which he could be considered at the time. We have had no evidence to suggest there were still available vacancies. However, the Tribunal is unconvinced by her evidence that she also considered, on the basis of the claimant’s CV alone, that the claimant did not meet the requirements for the “talent pool” and that was why she did not make any further assessment of his suitability. She gave evidence that she made this decision on her own account without consulting a manager. Given her lack of experience in the organisation, we consider it unlikely that she would have considered herself able to make such a decision on the basis of the CV alone. As previously noted, Stuart Gilbert, after a conversation with the claimant, had thought it worth pursuing the matter further. At a later stage, Cheryl Murton thought it worth having an in depth conversation with the claimant. It is possible that Janet D’Mello decided it was not worth interviewing the claimant further because he had previously been rejected for a role as recorded on the Taleo system. However, this is not the evidence she has given to the Tribunal.

33. In the claimant’s email of 7 October, he also provided links for some roles and asked whether they could have another conversation to see how he could play an active role in one of the Senior Account Executive roles. Janet D’Mello mentioned to Cat Neill that the claimant might be calling her as he was enquiring about a role that Cat Neill was managing. We accept Janet D’Mello’s evidence that she did not know whether there was, in fact, any available role at the time. She mentioned to Cat Neill that the claimant had made a complaint before.

34. Cat Neill specialises in Client Services role recruitment. The claimant, during the course of the hearing, was unclear as to whether he was alleging any direct discrimination against Cat Neill.

35. On 27 April 2017, Cat Neill and the claimant had a conversation which was a general discussion about his interest in Client Services positions at Nucleus. We accept Cat Neill’s evidence that there were no entry level Client Services roles available at the time. There is a dispute as to whether Cat Neill explained that therapy area knowledge would be a requirement for any role. Cat Neill says she did say this; the claimant disputes it. Given the findings we make later in these Reasons relating to the asserted requirement for therapeutic experience for entry level roles, we consider it unlikely that Cat Neill did say this at the time. Cat Neill did not go on to assess the claimant for the talent pool; she frankly told the Tribunal that she could not remember why this was the case but said that, whether they go on to do this when there were no specific roles available, may depend upon what time they have available at the time and whether the particular candidate stands out.

36. On 2 May 2017, the claimant sent an email saying that he would be happy to discuss an Account Executive role with a starting salary of £28,000. Cat Neill replied the same day writing that, as discussed, there were no live vacancies for Account



Executive level in Manchester or Macclesfield but said she would keep him in mind when the situation changed.

37. On 24 July 2017, the claimant emailed Cat Neill when Cat Neill was on leave asking whether they could progress their discussion. Cat Neill said that she did not reply to this email because she was aware that Cheryl Murton was then in dialogue with the claimant.

38. The claimant emailed Cheryl Murton on 24 July 2017, asking to discuss a few positions he had seen on the respondent's website. They arranged to speak on 31 July 2017 and the claimant sent his CV to her in advance. The claimant has made various complaints about delays on the part of Cheryl Murton in dealing with his application. We do not consider it necessary to make any findings of fact in relation to the fact or reasons for delay since it does not appear to us that this can shed any light on the issues which we have to determine.

39. In the event, Cheryl Murton and the claimant had a brief telephone conversation on 31 July 2017. Cheryl Murton told the Tribunal that she did not take formal notes of this conversation but took some brief notes. However, it appears these have not been disclosed and they did not form part of the bundle of documents. Cheryl Murton also told us that she wrote her witness statement about this conversation on the basis of her memory of the conversation rather than referring to any notes. Cheryl Murton and the claimant arranged to have a longer discussion to talk about the claimant's experience and possible opportunities.

40. Cheryl Murton says that she told the claimant in this conversation about the areas of therapy experience that they were looking for, and they concluded in this conversation that the claimant did not meet those requirements. We find, on a balance of probabilities, that Cheryl Murton did not, in this telephone conversation, inform the claimant that his experience did not match the current vacancies. This would not be consistent with the conversation on 24 August 2017 in which she says she informed the claimant that, due to the specific therapy area focus of the roles, they would not be proceeding with his application. This conversation would make no sense if she had already given him this information. Also, we note that, in the respondent's grounds of resistance, the respondent does not say, in relation to this conversation, that Cheryl Murton told the claimant that his experience did not match the therapy areas required.

41. We accept Cheryl Murton's evidence that a telephone interview of this nature normally takes around 20-30 minutes. However, on 10 August 2016, a call of around an hour took place between Cheryl Murton and the claimant. Cheryl Murton made a detailed note of the conversation. This note gives headings for what the claimant was asked and also records follow up questions and the claimant's responses. The claimant had asserted in his witness statement that there was no discussion of therapeutic areas; however, he conceded, in looking at this note, that there was mention of therapeutic areas. It may be that the claimant had confused this conversation with the earlier telephone conversation.

42. We find that the notes are an accurate summary of what was said in the conversation. We note that Cheryl Murton did not record that she said anything to the claimant in this conversation about what therapeutic areas they were looking for experience in or the current vacancies. Unlike Claire Davis who recorded notes of a

similar telephone interview on the respondent's Taleo system, it does not appear that Cheryl Murton made such a record of her conversation on the respondent's system. We have not been shown any note on the respondent's system as to why Cheryl Murton decided not to accept the claimant's application.

43. The claimant went on holiday shortly after this telephone conversation and, after his holiday on 21 August 2017, he emailed Cheryl Murton to prompt her for a response to his application.

44. On 24 August 2017, there was a conversation in which it is agreed that Cheryl Murton informed the claimant that, due to the specific area focus of the roles, they would not be proceeding with his application. His application had been in relation to currently available Assistant Medical Writer positions.

45. Cheryl Murton's evidence to this Tribunal was that she had decided that the claimant was not suitable for the talent pool because of his lack of depth of experience in specific therapy areas and because of communication issues (she said she had to spend a long time getting the claimant to provide the necessary information on the telephone). However, she says she did not inform the claimant about this because he moved on in the conversation, expressing interest in advertised Client Services positions which he said did not require specific therapy experience. The claimant later emailed Cheryl Murton links for these positions.

46. In a conversation on 7 September 2017, Cheryl Murton told the claimant that they would not be progressing his applications for the Client Services vacancies. The claimant put the phone down at this point. He says this was because he was upset. Cheryl Murton says she told the claimant that they were not progressing his applications due to the therapy focus of the current Client Services vacancies. The claimant says he was not told this. It is possible that he put the phone down before he heard this.

47. The claimant then wrote to Cheryl Murton on 12 September 2017, complaining about her handling of his application and making an allegation of discrimination, although without reference to any particular protected characteristic. He expressed incomprehension as to why he was not being appointed when he asserted he had the passion and transferable skills to fill the roles. He suggested that she let him know in writing why she thought he could not do the Client Services roles. Cheryl Murton did not put in writing her reasons for rejecting his applications but referred the matter to HR. On 12 September 2017, she prepared notes which she then sent to Michelle Garnier, Head of HR Europe, about her dealings with the claimant in the period 31 July to 12 September. She informed the claimant on the same day that she was passing the matter to Michelle Garnier.

48. In passing the matter to Michelle Garnier, we note that Cheryl Murton referred to why she was not progressing the application for current vacancies but made no reference to why she considered him not suitable for the talent pool. In relation to the Assistant Medical Writer role, she wrote that they needed specific expertise in immunology, immuno oncology and respiratory. She did not specify in her note to Michelle Garnier what the therapy areas required for the Client Services roles were.

49. Michelle Garnier wrote to the claimant on 13 September 2017. She wrote in relation to the Client Services positions that:

“As my colleague explained, we are currently looking for candidates who have knowledge and experience in the therapy areas of immunology and respiratory which you do not have. Unfortunately, we do not have any vacancies that would match your therapy area expertise at present.

We will of course retain your CV on file and should anything suitable become available we will be back in touch.”

50. This email suggests that Michelle Garnier did not understand that the claimant had been judged as not being suitable for anything which might come up.

51. The claimant then made a formal written complaint to Michelle Garnier on 21 September 2017. In addition to his complaints about Cheryl Murton, the claimant alleged that, in September and October 2016, Janet D’Mello had refused him for the role of Associate Medical Writer, telling him that he was not “fresh enough” and that other “younger” persons would be looked at. He also referred to his contact with Cat Neill, saying that she had told him she would keep him in mind when the situation changed but she did not do this, hence his attempts of getting in touch with Mrs Murton in July and August 2017. The claimant alleged discrimination and referred to sex, gender, race, religion and age discrimination.

52. On 25 September 2017 the claimant notified a potential claim to ACAS under the early conciliation process.

53. Investigatory meetings were held on 5 and 6 October 2017 in relation to the internal investigation. There are errors in the summary of the meeting with Cheryl Murton e.g. that the only reason the claimant had been declined for a role by Claire Davis was that Claire Davis had been unable to hear him properly. The summary also records that the claimant did not want to be deskbound, which did not fit with the roles he was applying for. Cheryl Murton’s notes of a follow up question to the claimant and its reply indicated that the claimant was willing to do the role, despite its deskbound nature.

54. Michelle Garnier responded to the claimant’s formal complaint on 12 October 2017. She denied discrimination on behalf of the organisation, and she asserted that, in relation to the role of Associate Medical Writer, Cheryl Murton had informed him that, as he did not have experience in the therapy areas of immunology and respiratory, they could not progress his application. In relation to the role of Account Executive/Senior Account Executive, she wrote that this required strong scientific knowledge in the relevant therapy area (currently the need being for immunology and respiratory experience) and that his experience and knowledge was not in those areas of expertise, therefore, they could not consider him for these roles. She wrote:

“The importance of having experience in the specific therapy areas (currently the need is immunology and respiratory) is a key requirement of all our roles at Nucleus.”

55. Michelle Garnier wrote that Janet D’Mello denied use of the language alleged during the call to him in September 2016.

56. The ACAS certificate was issued on 25 October 2017 and the claim presented on 7 November 2017. We found, based on the claimant’s oral evidence, that he did

not present a claim earlier because he was still hopeful, at that time, of getting employment with the respondent

57. We return now to the issue of whether therapeutic experience was a requirement for the entry level roles.

58. We had some difficulty in understanding exactly what the respondent was saying was required by way of therapeutic experience. Although this was referred to in the respondent's witness statements, this was not explained in the statements. Cheryl Murton gave some explanation in oral evidence. It was difficult to understand from her explanation how this differed from the academic scientific qualifications. She said, in practice, if candidates had a Bachelors, they would have work experience in the relevant field. She gave the example of research in the pharmaceutical field. The claimant has a PhD in pharmaceutical science.

59. We fully accept that the respondent requires candidates to have a strong scientific background and accept that they consider their USP to be that all their people in Client Service roles as well as Medical Writer roles have a strong scientific background and are, therefore, able to engage with clients on this level and fully understand what they are dealing with.

60. The earlier refusals of employment to the claimant by Claire Davis, reiterated by Jane Sowerby, did not refer to therapeutic experience. The job descriptions did not require therapeutic experience. It appears to us that this explanation only appears in conversations from July 2017. We note that Cheryl Murton's witness statement says in relation to the Associate Medical Writer position:

"Whilst recruiting into such a position is considered to be entry level, it must be stressed that candidates must still have a very strong scientific background and, more often than not, a very strong therapeutic background, given the sector in which we operate."

61. This language suggests that therapeutic experience is not essential but desirable, unlike a strong scientific background which is an essential requirement.

### **Submissions**

62. The respondent spoke to written submissions. In summary, the respondent submitted that the reason the claimant was not progressed for each position was because he lacked the relevant experience that was required or there were no roles available at the relevant time. The respondent submitted that the claimant had not satisfied the burden of proof. He had failed to show any less favourable treatment. Even if the burden shifted to the respondent, there were perfectly cogent reasons why they rejected his applications; he did not have the expertise the respondent was looking to recruit.

63. The respondent submitted that any acts taking place before 26 June 2017 were out of time. They submitted that earlier acts were not part of a continuing act of discrimination as they represented individual decisions from three separate people, situated in two separate geographical locations. There was no good cause to extend time.

64. The claimant spoke eloquently about his situation but without engaging with the issues of how the Tribunal should reach a conclusion of unlawful discrimination. The claimant said in conclusion that he relied on the Tribunal to decide which of his protected characteristics had been harmed.

### The Law

65. The relevant law is contained in the Equality Act 2010 (EqA).

66. Section 13(1) EqA provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Section 4 lists protected characteristics which include sex, race and age.

67. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

68. For age discrimination, but not for sex or race discrimination, there is a justification defence. Direct age discrimination is not unlawful if the respondent can show that the treatment of the claimant was a proportionate means of achieving a legitimate aim: section 13(2) EqA

69. Section 136 EqA provides:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

70. The Court of Appeal in *Ayodele v CityLink Ltd and another* [2017] EWCA Civ 1913, has confirmed that there is an initial burden of proof on the claimant; the claimant must prove facts from which the tribunal could conclude that there was unlawful discrimination. The tribunal must consider all relevant facts, which includes evidence from the respondent as well as the claimant, in determining whether the claimant has established facts from which the tribunal could infer there was unlawful discrimination.

71. The fact that a claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift: *Glasgow City Council v Zafar* [1998] ICR 120 HL. In that case, the House of Lords held that a tribunal had not been entitled to infer less favourable treatment on the ground of race from the fact that the employer had acted unreasonably in dismissing the employee.

72. Section 39 (1) EqA provides that:

"An employer (A) must not discriminate against a person (B) –  
"in the arrangements A makes for deciding to whom to offer employment:  
(b) as to the terms on which A offers B employment;

(c) by not offering B employment.”

73. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

74. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

### **Conclusions**

75. In relation to each complaint, we consider first the merits of the complaint before addressing any issue of time limits and jurisdiction.

76. We consider first the complaint of discrimination in relation to the application in September and October 2016 for Associate Medical Writer, this application being dealt with by Janet D’Mello.

77. We have found that there were no available vacancies at the time and Janet D’Mello did not go on to make any detailed assessment as to whether the claimant was suitable for the talent pool relying, she said, on his CV. We have found that there was a conversation in which she gave some explanation to the claimant as to why she was not taking the matter further in relation to the talent pool in which she used the word “fresh”. The word “fresh” has a potential age connotation. There is no actual comparator in the case but a hypothetical comparator would be a younger person in the same material circumstances. All the material circumstances cannot be properly identified unless the reason for the rejection is determined.

78. We consider, in relation to the age discrimination complaint, that the use of the word “fresh” with its potential age connotations would be sufficient to pass the burden of proof to the respondent. Had we had jurisdiction to consider this complaint, we would not have been satisfied with the explanation which was provided for not considering the claimant further for the talent pool.

79. The claimant has not suggested anything which might pass the burden of proof in relation to the complaint of sex discrimination. We conclude there is nothing in the evidence which we consider passes the burden of proof in relation to the complaint of sex discrimination.

80. The claimant has not suggested anything which might pass the burden of proof in relation to the race complaint. We do consider, however, that Janet D’Mello would be aware of the claimant’s likely race and colour from his surname. However, we do not consider this is enough, by itself, to pass the burden of proof to the respondent and there is nothing else which causes us to pass the burden of proof in relation to the race complaint.

81. The acts of Janet D’Mello would not form part of a continuing act of discrimination because we go on to conclude, as explained below, that there is no later act of discrimination.

82. The complaint about the acts of Janet D'Mello is considerably out of time. The reason the claimant has given for not presenting the claim earlier is that he did not consider the earlier matters to be claims at the time; that this was not enough at the time but later he thought that something was not right, and he did not want to bring a claim because he still wished to get employment with the respondent. The claimant accepted that he knew generally about the right to put in a claim. We find that it would have been easy for the claimant to obtain the necessary information to put in a Tribunal claim had he wished to do so at the time. The first allegation the claimant made to the respondent about this matter was in September 2017, around a year after the telephone conversation.

83. We conclude it would not be just and equitable to consider the complaint about the acts of Janet D'Mello out of time. The claimant knew about his rights, or knew enough to be able to research his rights. He knew all the facts on which the claim was based and, whilst we have sympathy with the claimant's desire not to prejudice his risk of future employment with the respondent, we weigh against this the prejudice to the respondent in Janet D'Mello being faced with an accusation more than a year after the relevant conversation. It may be that, had this matter been raised earlier, she would have had a better recollection and have been able to provide a satisfactory non-discriminatory explanation for the use of the word "fresh", and for her decision not to progress the claimant further in relation to consideration for the talent pool.

84. Given this finding on jurisdiction, it is not necessary for us to consider whether the complaint in relation to non-progression to the talent pool falls within the scope of the existing claim or to seek the parties' representations on this matter.

85. In relation to the application made in April/May 2017 for Account Executive handled by Cat Neill, we have found that there was no position available at the time. Therefore, there can be no discrimination in relation to the failure to shortlist and appoint to the position. Again, the talent pool issue potentially arises. However, we can see nothing in the evidence to pass the burden of proof to the respondent in relation to any of the protected characteristics. Indeed, the claimant himself was unclear in his evidence as to whether he was alleging direct discrimination against Cat Neill. Cat Neill provided a plausible explanation as to why she did not make an assessment of the claimant as to suitability for the talent pool at the time; this explanation being one which could apply to anyone i.e. the lack of time and the claimant not particularly standing out on the basis of the information available to her.

86. This complaint is presented out of time and it is not part of a continuing act of discrimination since we do not find that there was any later act of discrimination. For the same reasons as in relation to the previous matter, we conclude that it is not just and equitable to consider the complaint out of time.

87. In relation to the applications in July and August 2017 for Associate Medical Writer and Account Services/Client Services, these complaints are both presented in time. These applications were considered by Mrs Murton.

88. We conclude that there are no facts which lead us to pass the burden of proof in relation to the sex and race complaints.

89. In relation to the complaint of age discrimination, there is nothing to link this matter with age discrimination unless it can be linked with the comment made by Janet D'Mello nearly a year prior to this matter. However, unlike Janet D'Mello, Cheryl Murton did a full assessment of the claimant in a telephone interview lasting about an hour. We do not consider that Janet D'Mello's comment to the claimant can be attributed in any way to Cheryl Murton. We, therefore, conclude that the claimant has not proved facts from which we could conclude, in the absence of a satisfactory non-discriminatory explanation, that he was discriminated against on grounds of age; the burden of proof does not pass to the respondent. Had the burden of proof passed to the respondent, we would, for the reasons given in our findings of fact, have been sceptical about the explanation that refusal was largely or wholly down to the claimant's lack of relevant therapeutic expertise. We note that the respondent gave us no information as to who was appointed to the relevant vacancies and about their relevant therapeutic experience.

90. For these reasons we conclude that the complaints of unlawful direct discrimination are not well-founded.

Employment Judge Slater

Date: 18 June 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 June 2018

FOR THE TRIBUNAL OFFICE

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