Case Number: 1305834/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Mr A Siddique	**AND**	**Oltec Group Trading Limited**
Claimant		**Respondent**
HELD AT Birmingham		**ON 2, 3 and 4 December 2019**

EMPLOYMENT JUDGE Self
Mr S Woodall
Mrs E Shenton

Representation

For the Claimant: In Person

For the Respondent: Mr A Tinnion - Counsel

RESERVED JUDGMENT

1) It is declared that the Claimant's claims of race discrimination are well-founded and succeed.
2) Remedy will be determined at a hearing to be listed in due course.

REASONS

1. On 4 December 2018 the Claimant lodged a claim at the Employment Tribunal wherein he asserted that he had been discriminated because of his race. A Response was lodged within the required time by the Respondent and the matter was next considered at a closed preliminary hearing on 7 March 2019 before EJ Broughton.
2. He identified that the Claimant was British of Pakistani descent and that the Claimant asserted that he had been directly discriminated against when he was not appointed to either the role of Facilities Manager (FM) or Security

Team Leader (STL) in or around February 2018. There is a point taken on whether or not the Claims have been lodged in time. If the claims were not lodged within the statutory time limit, then the Tribunal would need to determine whether it would be just and equitable for time to be extended.

3. The two comparators were Debbie Dimmer (FM) and Jason Lashley (STL) who were both white and not from Pakistan. The PH Order went on to say that the primary facts that the Claimant wished to rely upon to shift the burden of proof was "a number of alleged anomalies and inconsistencies, including some that were only revealed in its grievance process". If the Claimant is able to do that then the issue would be whether a non-discriminatory reason for any proven treatment can be made out by the Respondent.

4. The statutory background to this case is as follows. Direct discrimination is dealt with, so far as is relevant, at section 13 of the Equality Act 2010 (EqA):

13 Direct discrimination
(1) 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.

5. Section 39 EqA reads as follows:

39 Employees and applicants
(1) An employer (A) must not discriminate against a person (B)—
(a) 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.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment.

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service.

(c) by dismissing B.

(d) by subjecting B to any other detriment.

6. Issues relating to time limits are detailed at section 123 EqA:

123 Time limits
(1) [Subject to [**sections 140A and** ***[section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—***
(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period.

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

7. The burden of proof in cases such as this are set out at section 136 EqA:

   136 Burden of proof
   (1) This section applies to any proceedings relating to a contravention of this Act.

   (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.

8. The basis of direct discrimination is that discrimination will be shown if an employer treats his employee less favourably than it treats or would treat others and if it can be shown that the reason for that treatment was because of a protected characteristic, which in this case is race. Direct discrimination is rarely blatant and claims under the litigation present special problems of proof since those who discriminate do not advertise or at times even know of their prejudices. In order to combat that problem, the burden of proof provisions detailed above are in play. Whilst race needs to be a cause of the less favourable treatment it does not need to be the only or the main cause.

9. Under the burden of proof section, the first stage is where the Claimant will seek to shift the burden of proof onto the Respondent by establishing what is commonly called a "prima facie case of discrimination". Under section 136(2) EqA it is clear that will be met where there are facts from which a court could decide in the absence of any other explanation that a contravention of the act has occurred.

10. The evidence in this case concluded after two days of oral evidence with closing submissions on the third morning. It was decided that a Reserved Decision would be given, and the Tribunal deliberated for the rest of that day.

11. It cannot be said that the hearing moved seamlessly at all points. There was delay on the first morning when bundles were not brought. Having read into the case and started hearing the Claimant's evidence it appeared that there had been inadequate disclosure of documents and the parties were given an opportunity to bring the case to some form of order with the consequence that approximately thirty five pages were added on the second morning.

12. On day two the oral evidence of the Claimant was concluded and then the Tribunal heard from Mr Jordan, Mr Paton and Mr Edwards from the Respondent. Closing submissions followed on Day three. We took all of what we heard into account and in addition we also considered the witness statements of the parties and the documents within the bundle and anything that was relevant and brought to our attention.

13. There were times when the Claimant who had clearly worked hard on presenting his case persisted on a single point for longer than was necessary and merited and so was moved on. This was particularly the case when there was an answer given that he did not accept. The Claimant had identified a large number of points that it was important he asked questions about but it is also right to say that were some points of peripheral or of no relevance which he sought to spend the same amount of time on. There were times when it was not clear to the witness precisely what the question was from the point made by the Claimant and the Employment Judge endeavoured, at times, to frame the same in a question to assist the Tribunal and the witness. This is not to criticise the Claimant in any way who at all times was polite and courteous and prepared to accept what was said, but simply to reflect upon the limitations brought about by the unique situation he found himself in. The Respondent was professionally represented by experienced counsel whose questions were generally short and direct and so needed no such assistance. The Tribunal considers that their interventions were in keeping with and to further the overriding objective.

14. By a letter dated 16 June 2015 the Claimant was employed, from 17 June 2015, to be a Site Security Officer and we have seen the Claimant's contract of employment. On the Response form the Respondent asserted that it employed 708 staff in Great Britain and that it specialises in facilities management services. The services that the Respondent provides are over a wide range and include security services, cleaning services and yard workers. In essence, large corporations outsource certain of their functions to the Respondent and the Respondent provides their employees or employs individuals to fulfil that contract.

15. So far as is relevant to this case the client was Britvic and the Respondent was responsible for providing the above-named services to Britvic at its Rugby bottling plant which is accepted to be a very large operation.

16. In some of the late disclosure we saw some adverts for the FM role which was attracting a salary of £28,000 per annum in the first four advertisements and £30,000 in the last. Those adverts were on 22 August 2017, 22

September 2017, 29 November 2017, 4 December 2017 and 16 January 2018. There does not appear to have been any internal advertising for this role which needed to be filled because of the departure of the incumbent - Mr Baker.

17. We saw a number of manifestations of the Claimant's CV. In the last manifestation which was sent to the Respondent on 3 February 2018 the Claimant asserted that he had an extensive educational background in Human Resource Management and Information Technology which is correct as he has a Masters in IT from Abbottabad University in Pakistan 2002 and 2004 and a Postgraduate Diploma and a Masters in Human Resource Management from Coventry University. He also held a SIA licence which was necessary for the FM role.

18. From a work experience perspective, the Claimant appeared to have been almost continually employed at various sites for various companies as a Security Officer. We have looked through his responsibilities and are unable to detect any clear evidence that he had undertaken any management responsibilities in the period from 2005 to the date of these matters.

19. In his Claim form the Claimant states that he became aware of the two roles which are the subject of this claim in mid-January through Mr Baker who was his ex-supervisor. On 15 January the Claimant expressed his interest in the FM position and the following day Mr Baker sent through the job description. The Claimant sent his first CV to Mr Baker on 18 January and it was passed on to Mr Jordan within an hour that morning (71-73).

20. On 23 January 2018 Mr Baker sent through to Mr Jordan an e-mail in which he set out the details of the interviews that were to take place on 29 January for the FM role with Mr Baker, Mr Jordan and Brian Clarke (75). There were four candidates to be seen starting with the Claimant and then Ms Dirvanauskaite, Mr Adomako and lastly Ms Dimmer.

21. Mr Jordan told us that he did not have any set criteria against which he could mark the candidates and that he "interviewed them on their CV". The Claimant's interview was cancelled first thing in the morning because Mr Jordan had another appointment. Save for that assertion we have seen no evidence of the cause of the postponement or the resetting of the interview. Mr Adomoko attended for the interview but left very quickly expressing the view that he did not wish to proceed with his application and the other two female candidates were interviewed. For reasons which have not been explained, the Panel approach that was suggested in the letter from Mr Baker was not adopted, and it was only Mr Jordan alone who interviewed candidates.

22. There are no notes of this round of interviews and indeed there are no notes of any interviews at all by any person involved. We have heard varying accounts of what happened to Mr Jordan's notes because he assured us that he had taken some. Firstly, that they were destroyed by Mr Jordan soon after the interviews and secondly, they were taken up to Head Office and have not been located there as they were destroyed having been given to Anita Misson from HR. The Respondent has not proved to our satisfaction that there ever were any notes. If there were notes taken, whilst it is acknowledged that they

would not be needed to be retained forever, the speed of their alleged destruction makes no sense at all, especially taking into account that the Claimant raised issues shortly after he was rejected from the role.

23. Mr Jordan emailed Ms Dimmer at 1447 on the day of the first interview to confirm her second interview would be on 1 February at 1000 (76). Just before that at 1445 he did the same to Ms Dirvanauskaite to ask her to come for her interview at 0900 (82). Mr Jordan was then to see the Claimant for his first interview after Ms Dimmer. No explanation has been given as to why this order was chosen. There were no notes provided of any of these meetings either.

24. Mr Jordan indicated that the Claimant's CV was "only half a side of A4" which he identified as being at page 57 of the bundle. Page 57 is a full page yet that is what Mr Jordon said that he had. From a screenshot provided by the Claimant (p.143) the Tribunal is satisfied that the CV sent on 18 January and then passed onto Mr Jordan was a two-page document which is at pages 55 and 56. It is common ground however that the Claimant was asked to resubmit a fuller CV and that he would be re-interviewed then.

25. The Claimant has provided documents to show that he did so on 3 February 2018 and that CV ran to five pages (145-149). That is confirmed at page 84 in an email dated 6 February 2018. The Tribunal find that the evidence Mr Jordan gave about which CV of the Claimant was in his possession at any given time was unsatisfactory. The Tribunal rejects Mr Jordan's evidence on this point. His evidence was far from clear in a large number of areas and this was one.

26. The interviews took place on 1 February and again there is no paperwork to suggest that there were any objective criteria used, how the interviews differed with the first interview, if at all, and whether all the candidates were asked the same questions. Any notes of the interviews have not been made available / never existed / have been destroyed.

27. Mr Jordan stated that he put forward the Claimant's CV and that of the other two candidates forward to Britvic on 2 February. He states at para 11 of his statement:

    "As the FM manager would be working on the client's site and interacting with the client, it was ultimately their decision who to appoint. My role was to guide the client. The Claimant's fuller CV was put forward on 2 February. They were printed off and handed to the client".

28. The only CV that could have been sent to the client was the one that Mr Jordan had already suggested needed to be improved. On Mr Jordan's own evidence, the plan was to re interview the Claimant on his improved CV and that never took place. There is, in fact, no evidence, save for Mr Jordan's "say so" that anything was ever sent to Britvic or that they were the ultimate decision makers. There is not a single e-mail that appears to have been sent to Britvic or any communication the other way about either of the two positions.

29. If they were sent to Britvic, they were either not sent the Claimant's CV at all or were sent the Claimant's two page one which is clearly incomplete. If that is the case, it is little wonder that he was not selected for interview with Britvic. Mr Jordan said that he handed Britvic the new CV, but it is noteworthy that the 5 page CV was not disclosed by the Respondent and was not in the original bundle and so does not seem to have been with the accessible papers for this case.

30. The reason it cannot be correct that the Claimant's 5-page CV was sent on 2 February to Britvic is that it has now been established that the CV was not sent to Mr Jordan until 4.26 pm on 3 February which was a Saturday.

31. Mr Jordan's evidence is not accurate in this regard. He states that on 6 February the client contacted him to advise that they wished to interview the two female clients and not the Claimant. The Tribunal are not satisfied that Mr Jordan ever sent over the full CV of the Claimant. His role as he put it was to guide the client. If that truly was his role his failings would have guided the client only one way. He has not provided any real explanation as to why he acted in the way he appears to have done i.e. disadvantaging the Claimant.

32. On 6 February the Claimant emailed Mr Baker enquiring about an update on the progress of his FM application and also confirming that he wanted to be considered for the Security Team Leader role which had been discussed previously and which had been "advised by Bill". On the following day Mr Jordan via Mr Baker's email account indicated that the Claimant had been unsuccessful in the FM recruitment and stated that "I am not ready to announce who will be selected for the Team Leader position until I am satisfied that the new FM manager has settled into the role." There is no mention of a forthcoming interview for the STL position.

33. The Claimant has become greatly exercised by why it was that Mr Jordan replied from Mr Baker's e-mail account. Mr Jordan gave an answer that related to him only visiting the site and internet issues relating to his own laptop and therefore replying to the Claimant's enquiry from Mr Baker's account for ease and speed. His explanation on this issue seemed to be reasonable and we do not consider that any nefarious conclusions can be drawn from him communicating in the manner he did.

34. On 7 February 2018 Ms Dimmer was sent an offer of employment conditional upon, inter alia, the passing of an SIA licence. Again, there is no documentation in relation to the alleged Britvic interviews. Whilst the individuals were to be working on the Britvic site and on the Britvic contract, they were still going to be the employees of the Respondent. It is understandable that Britvic will have wanted to have been assured that staff working on the contract were suitable but it does seem odd that on the Respondent's case the decision as to who was to be their employee was Britvic's decision alone.

35. In the Tribunal's view if that were the case Britvic were acting as agents of the respondent in respect of those recruitment matters and such a relationship is caught by section 109 (2) EqA and renders the Respondent liable for their acts or omissions under section 110 EqA.

36. Moving on to the Team Leader role Mr Jordan deals with this pithily in his statement:

"I interviewed the Claimant on 12 February 2018. Again, it was Britvic who ultimately decided who was successful. On 19 February 2018 Britvic advised that they would appoint Jason Lashley to the role. I advised Jason on 19 February. I advised the Claimant that he had been unsuccessful on an internal computer as there was no external wi-fi on site".

37. There is not a single document to support any of this account at all. The Claimant indicates that he did not even have an interview. Throughout both job applications there is not a single email / letter / note that would even suggest that Britvic were involved at all. There is no witness evidence from them. There has been no explanation / documentation as to:

    a) What went on at the alleged interview with the Claimant.

    b) Whether there was an interview with Mr Lashley and if so, what it consisted of.

    c) Precisely what was sent on to Britvic (if indeed anything was)

    d) No criteria for selection have ever been produced for this role and it appears highly unlikely that any objective criteria were provided taking into account its absence in the other role.

    e) The process that Britvic employed to offer the role to Mr Lashley and not the Claimant.

38. In short, the Tribunal has had no explanation at all as to why the Claimant failed in his application to be a Security Team Leader which with his experience in security he was reasonably suited for. The Tribunal prefers the Claimant's evidence that he was never interviewed for the job on the basis that Mr Jordan's evidence was unreliable and should have been able to be backed up by written or oral evidence and was not. If the Claimant's CV was considered by anybody (either Mr Jordan or Britvic) then the consideration it was given has not been detailed for us. Again no explanation has been given for why Mr Jordan failed to interview the Claimant for a job he was reasonably qualified and suited to do.

39. On 28 February the Claimant raised a formal grievance headed "Open Discrimination and Unfair Hiring of FM Manager and Team leader Positions at BRITVIC Rugby". The matters raised therein relates to treatment that is in actual fact wider than the job applications.

40. The grievance process is set out in the Employee Handbook. It sets out that if a formal grievance is made then there will be a meeting and that the Claimant would be entitled to appeal any decision that he did not agree with (42). The Grievance procedure is pithily described. There does not appear to be any specific guidance, policy or protocol for managers to follow when undertaking a recruitment process and when questioned none of the witnesses had any knowledge or understanding about the EHRC Code of Practice on Employment and in particular the guidance at Chapter 16 of that document

headed Avoiding Discrimination on Recruitment. In addition, there was no specific recruitment training given. None of the above provides any real grounds for confidence that recruitment was approached by the Respondent in an informed and/or professional manner.

41. The Grievance included potentially serious allegations. The Claimant described the recruitment process as a farce. He raised the issue of favouritism and discrimination across a number of other areas recruitment. One would think that the complaint would be taken seriously by the Respondent. Although acknowledged the following day a meeting was not set until 28 March, some 4 weeks later. No reason has been given as to why there was a need for such a delay. As it happened there was further delay as the meeting had to be postponed and the Grievance meeting was then set for 11 April 2018. Again, no reason for the additional delay has been provided.

42. It should be noted that the ACAS Code of Practice on Disciplinary and Grievance Procedures states that the formal meeting should be held "without unreasonable delay". The Tribunal do not consider, in the absence of any explanation, that the delay in this case of a grievance containing matters of discrimination, was in any way reasonable.

43. On 4 April at 0049 in the morning the Claimant raised further concerns about his workplace and what he described as "hostile conditions". He raised the issue about his grievance not being dealt with as part of the reason why he was going to resign (97). On 5 April Ms Knowles (Group HR Manager) wrote to the Claimant saying that she was "dissatisfied with (the Claimant's) decision to resign" in view of the matters raised. The hope was that an amicable resolution could be reached on 11 April and that he should attend but if he did not then a decision would be taken in his absence. The letter is brusque in tone and does not acknowledge any culpability on the part of the Respondent for the delay at all (98).

44. On 12 April following the meeting with Mr Paton the Claimant felt moved to withdraw his resignation as he seemed to be of the view that his grievance would be investigated. There are no minutes of the 11 April meeting or certainly none that are dated then. Within minute notes which are headed 27 April 2018 there is reference from Mr Paton as to discussions that he has had with Mr Jordan. There is no record of any of those conversations at all.

45. There is little to suggest that Mr Paton did anything much at all to investigate the matters raised by the Claimant. There is no record of any investigation at all and all there is to suggest any investigation at all, is his "say so". The delay was said to be because of complexities but what they were is not apparent. There is no record of either of the alleged meetings with Mr Jordan, and Mr Paton was seemingly unconcerned about the lack of any process at all in the recruitment and/or any record of it remaining. In essence and at best he asked Mr Jordan if there had been any connection between the Claimant's failure to get the roles and his race and just blithely accepted what he was told by Mr Jordan. On the evidence before us any examination was superficial at best with a distinct lack of any desire to be inquisitive and get to the bottom of the somewhat shambolic recruitment process. Mr Jordan had told Mr Paton that the final decision was made by Britvic.

46. In his letter dealing with the grievance (109-110) Mr Paton states:

"To conclude, we as a Company have made significant efforts to ensure that all of the points you have raised have been considered and dealt with as professionally and proficiently as possible".

The Tribunal do not consider that the Grievance provided a comprehensive response to many matters raised by the Claimant and what the "significant efforts" were remains a complete mystery. Further whilst the Tribunal acknowledges the realities of the workplace world and that Mr Paton would have had a substantial number of matters to be dealing with on a day to day basis, the Tribunal notes that the final letter detailing the grievance outcome was sent on 25 July 2018 almost 5 months after the grievance was lodged. We do not agree with the reasoning set out by Mr Paton at page 107 as to why there was such a delay and the time taken is symptomatic of the low priority the Claimant and his complaint of race discrimination ranked.

47. The Claimant appealed the Grievance outcome on 31 July (111-112) in which he raises his concerns about the lack of signs of any real investigation and outlines his causes for concern again. The appeal in stark contrast to the rest of the process was heard relatively quickly on 7 August 2018 by Mr Edwards. We have seen the notes of that meeting. In his witness statement Mr Edwards indicates that on his initial perusal of the papers he could not see why discrimination would have been a factor. He states that he needed to focus on the allegations of race discrimination rather than the more general points of criticism that the Claimant had about the process. That approach is puzzling. The race discrimination allegations were simply a part of the grievance. Further the failure to follow and proper normal process or the guidance given by the EHRC could of course also be valuable pieces of evidence from which discrimination could be inferred. Mr Edwards (and indeed Mr Paton) seemed to be looking for a clear and obvious proof that race played a part whereas in reality such clear signs are exceptionally rare.

48. On 9 August Ms Misson an HR Advisor wrote to Mr Jordan as follows:

"I understand that you recruited Debbie Dimmer for the position of Facilities Manager and that there is no paperwork available to support your decision.

Lisa has suggested that you create some paperwork now explaining the reason for your selection so we can provide this to Atif to give him some answers.

I would suggest that you look at essential/ desirable skills and experience that you would consider relevant to the post and perhaps give a score of 1-5 against these for Atif and the successful candidate Debbie. This could include:

Communication skills (measured at interview)

Years of experience in cleaning

Years of experience in security

Management Experience

Plus, anything else related to the job description

Could you please provide this as soon as possible as evidence so that we can conclude our grievance outcome letter to Atif"?

49. Lisa within this letter is Lisa Knowles. On 18 September, some 6 weeks later, again in the Tribunal's view, indicative of the lack of interest by Mr Jordan into the Claimant, he replied as follows:

    "During the interview process the attached CV were presented to Britvic management after I did the first interview with the three Applicants… Britvic management then decided that they only wanted to see Deborah and Diana and thought of Atif As a good Guard but not management material. I emailed Atif from Andrew Baker's site computer due to connection problems with my own laptop on site, to advise him that he had been unsuccessful on this occasion but thanked him for his interest in the position. Both Diana and Deborah were interviewed by Britvic Management (Steve Harrison and Clare Leedham) and they decided Deborah was suitable for the position of FM Manager.

    I based my interviews on basic skills and abilities to meet the job specification, this was not just a security position but a full FM role, they included some of the following points.

50. Effectively Human Resources have asked Mr Jordan to produce an ex post facto rationale of his decision on the FM Manager role, using criteria that he never actually formally used, so that there was some evidence upon which Mr Edwards could base his decision. In the Tribunal's view such an approach is disingenuous and dishonest. Evidence is being created of that which was not the considered criteria at the time.

51. Mr Jordan then sets out precisely the 4 criteria set out by Ms Misson and arrives at a total of 8 for the Claimant and Diana and 11 for Deborah. He then states:

    "I do not believe for one minute that I have been biased in appointing Deborah into this position, as it was a Britvic management decision. I have not been racist or judgmental in any form as Diana was of Polish nationality and I have acted entirely professional (sic) throughout the entire process".

52. It should be noted that there do not appear to be any enquiries at all into the role that the Claimant was best suited for which was the Security Team Leader.

53. Mr Edwards saw this document and his conclusion at 118 is as follows:

    "Apologies to (the Claimant) as our processes have fallen down and we've not followed usual procedure. However, having reviewed all CVs the Claimant would not have been selected for the roles as there were with more suitable skills and experience. No bias influenced the decision."

54. In a letter dated 19 September (the day after Bill Jordan's communication re the interview process) Mr Edwards wrote a letter stating that the decision on the

grievance stood. Reasons are given as to why this is the case. There is only mention of the FM Manager role in the letter and there is no ostensible reference to the Security Team Leader role. Indeed, Mr Jordan also did not address his mind to that position either.

55. **Conclusions**

The first matter to consider is whether the claims have been brought within the statutory time limit and if not whether it would be just and equitable for time to be extended.

56. The discriminatory acts in this case are the non-appointment of the Claimant to the two roles. So far as the FM role is concerned Ms Dimmer was offered the job on 7 February and it is this date from which time should run. The STL role was said to be given to Mr Lashley on 19 February and whilst we do not accept Mr Jordan's account, we do accept that a decision on this role must have been made by somebody at around this time.

57. Those two applications would amount in our view to "continuing acts" and for the purposes of the time limits the latest a claim could be made would be 18 May 2018. ACAS Early Conciliation was not entered into until 5 October 2018 and then concluded on 5 November 2018. That period was not within the primary time limit and so cannot be used to extend time. The Claim was brought on 4 December 2018 and so was brought approximately six and a half months out of time.

58. The next issue for the Tribunal is whether it would be just and equitable for time to be extended. The Respondent was notified within 2 weeks that the Claimant considered that he had been discriminated against and indicated that they would be conducting a full investigation into the same. In the Tribunal's view therefore, they were placed on notice that a claim could be made at that stage and had ample opportunity to secure any evidence, conduct any investigations, get witness statements as part of that process.

59. Although the delay in bringing the claim of some six and a half months appears lengthy the Tribunal are satisfied that the reason why the Claimant delayed submitting a claim was because he wished to try and resolve the matters in house and indeed hoped and trusted that it would be dealt with in house and evidence of that can be shown from the withdrawal of his resignation in April. The Tribunal notes that the Claimant has been acting in person throughout. A properly dealt with grievance should have taken no more than a month to six weeks, including the appeal. Had that been the case the Claimant would have been well within the statutory time limits to bring his claims after entering Early Conciliation. The Tribunal notes that the Claimant entered into Early Conciliation just over 2 weeks after the grievance actually concluded and that the grievance took the Respondent six and a half months to complete with no satisfactory explanation why that was.

60. The Tribunal accepts that a prudent course advised by a lawyer may well have been to protect the Claimant's position by issuing a claim pending the outcome of the grievance and that is indeed a course that the Claimant could have taken. It would not have saved any time, however, as matters would not have

proceeded within the Tribunal until such time as the internal grievance was concluded.

61. We have a broad discretion to extend time if the facts call for the same. Time should not be extended as a matter of course. If time is not extended, then the prejudice to the Claimant will be great as he will not be able to seek compensation for a claim in which there are clearly questions for the Respondent to answer. We acknowledge that the prejudice to the Respondent of allowing this claim to proceed would be that they have to face such a claim whereas otherwise they would not.

62. The Tribunal does not consider that the cogency of the evidence has been adversely affected by any delay occasioned by the late filing of this claim because firstly, there would have been a delay in the proceedings pending the end of the grievance anyway on the balance of probabilities and secondly, the Respondent had already destroyed evidence very soon after the recruitment process or that evidence never ever existed.

63. The reason for the delay is that the Claimant sought to resolve things internally and genuinely hoped a solution could be found. The length of the delay was caused by the Respondent's tardiness in dealing with the grievance and its appeal. Once it was concluded then the claim was brought reasonably promptly thereafter.

64. The correct approach in circumstances such as these is set out in Robinson v Post Office (2000) IRLR 804 and is that whilst there is no general principle that it will be just and equitable to extend time when a Claimant awaits the outcome of internal proceedings, it may justify the extension of time as one of the factors in the case.

65. We note that there was no application by the Respondent to seek a Preliminary Hearing on this issue which is perhaps surprising taking into account the fact that this claim would clearly have been out of time.

66. We conclude that this is a case where time should be extended. The balance of prejudice favours the Claimant. We accept his reason for delaying and find that the length of the delay was governed by the Respondent's own tardiness. The Claimant applied timeously after the grievance appeal was rejected. The cogency of the evidence has not been affected.

67. This is a case where knowledge of the reason why the Claimant was not appointed to either of the two roles is wholly within the knowledge of the Respondent or those who they say they relied upon to come to the final decision Britvic management. The Claimant has no knowledge of their thought processes at all.

68. Ideally there should be a full and complete audit trail that should be available for the Tribunal to consider in coming to a conclusion on this matter. Assistance can be gained by a consideration of the Equality and Human Rights Commission: Code of Practice on Employment which was issued in 2011. The purpose of the Code is set out between sections 1.9 and 1.11. At 1.11 the Code is said to ***"help employers understand their responsibilities" and to "give***

employment tribunals … clear guidance on good equal opportunities practice in employment".

69. At paragraph 1.13 it is stated that Tribunals must take into account any part of the code that appears relevant to any questions arising in the proceedings.

70. Chapter 16 of the Code is headed Avoiding Discrimination in Employment. The following are parts of the Code which the Tribunal considers relevant in this case:

    a) 16.32 – An employer must not discriminate through the application process. A standardised process whether this is through an application form or a CV will enable an employer to form an objective assessment of an Applicant's ability to do the job and will assist an employer in demonstrating that they have assessed applicants objectively.

    b) 16.44 – An employer should make sure that these processes (short-listing / interviews) are fair and objective and that decisions are consistent. Employers should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions, in some circumstances, it could result in an Employment Tribunal drawing an adverse inference of discrimination.

    c) 16.46 – A list of records that should be kept which includes "records of discussions and decisions by an interviewer or members of the selection panel; for example on marking standards or interview questions"; "notes taken by the interviewer during the interviews"; "each interview panel member's marks at each stage of the process and "all correspondence with the candidates".

    d) 16.50 – Recommendations were made about short listing which include "wherever possible more than one person should be responsible for short listing applicants"; "the cut off score should be agreed before the assessment and then applied consistently to all.

    e) 16.57 – Staff involved in selection panels should have had equality training and training about interviews to help them recognise if they are making stereotypical assumptions and applying a scoring method objectively.

71. The Claimant asserts that he was treated less favourably because he did not get the FM role or the Security Team Leader role and the reason for that was his race. We have to consider whether or not there is evidence from which we can conclude that there is a prima facie case of discrimination. The Tribunal is of the view that there is ample evidence to reach that conclusion.

72. The recruitment exercise was a shambles. There has been no heed paid at all to the EHRC Code at any stage and Mr Jordan's evidence was largely, in our view, unreliable. There is no paperwork available for any of the steps at all and nothing for us to gauge as to why successful candidates were successful and why the Claimant was not. That is especially true of the Security Team leader role which was one that the Claimant seems to have been suited to. We are unconvinced as to whether we have been told the true reason for why the Claimant's interview was put back and have not been given a logical

explanation as to why the Claimant's first interview for the FM job was after the other two candidates second interview.

73. There were apparently no set criteria at any stage and HR asked Mr Jordan to retrospectively provide scores for criteria that he had not specifically used at the interview stage in order to give Mr Edwards something for the grievance. Such conduct is incredible and reflects very poorly on the Respondent. Mr Jordon interviewed on his own as opposed to the promised panel for reasons which are wholly unexplained and gave incorrect evidence about which CV that he provided to Britvic. His evidence was so unreliable that he has not even demonstrated to the Tribunal's satisfaction that he ever did send the CVs to Britvic and they had any part at all to play in it. The Respondent has not called anyone from Britvic to give evidence and if they were involved there is no evidence of how or why they came to their short-listing decision or how they finally came to offer the jobs.

74. On top of all of that the Respondent then failed to deal expeditiously or thoroughly with the Claimant's complaint of discrimination and in the Tribunal's view, at best, undertook a scant and wholly superficial investigation of which there are no notes at all. We do not overplay this part of the case however as it was neither Mr Paton nor Mr Edwards who took the decision not to offer the Claimant the job. It does demonstrate in our view a lack of scrutiny and concern for race related / equality matters in the workplace. It provides no more than a context of a culture within which Mr Jordan operated.

75. We accept that the Claimant applied for both roles but do not accept that Mr Jordan considered his applications adequately or indeed at all. We do not accept that the Claimant's case that the full CV was handed over to Britvic nor do we accept that Mr Jordan interviewed the Claimant for the Security Team leader role. Although Mr Jordan has sought to pass the decision making over to Britvic we do not accept on the balance of probabilities that this was so in the absence of any evidence to support that claim.

76. Wherever the truth lies as to the decision makers (i.e. Mr Jordan or Britvic) we have not had any explanation at all for why the Claimant was not successful for either role and on the basis that the burden of proof has clearly passed over to the Respondent in this case they have wholly failed to prove on the balance of probabilities that these recruitment decisions were in no way linked to the Claimant's race and it follows that the claims of race discrimination are well-founded and a date will be found to consider compensation for these breaches of the Equality Act 2010 and any recommendations that need to be made.

Employment Judge Self

25/02/2020