



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101196/2020**

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**Hearing Held by Cloud Based Video Platform (CVP) on 1-3 December 2020**

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**Employment Judge A Jones  
Tribunal Member Dr S Singh  
Tribunal Member Mrs L Grime**

**Mr A Muhammed**

**Claimant**

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**William Grant and Sons Distillers Ltd**

**Respondent**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

It is the unanimous decision of the Tribunal that the Tribunal does not have jurisdiction to consider the claimant's claim.

#### **Introduction**

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1. The claimant lodged a claim of race discrimination on 26 February 2020. There were two case management preliminary hearings in the case and by the time of the final hearing, there was an agreed statement of facts, a list of issues and a joint bundle of productions. It had been agreed in advance that written witness statements would be appropriate for use in the case.

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2. The hearing took place on the Cloud Video Platform. The claimant represented himself and the respondent was represented by Counsel. The claimant gave evidence and the Tribunal heard from five witnesses for the respondent. The written witness statements were taken as the evidence in chief of the witnesses.

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3. The claimant indicated during the course of his evidence that he was no longer relying on his allegation that the failure to appoint him to the role of Inventory

Audit Controller was an act of race discrimination. The claimant accepted that Mr. Garcia, the successful candidate was better qualified than him for the role.

### Findings in fact

4. Having listened carefully to the evidence, considered the documents referred  
5 to and the submissions of parties on the conclusion of the evidence, the Tribunal made the following findings in fact:
5. The claimant is a 36 year old man, who was employed by the respondent from  
4 December 2017 until 1 December 2019. He was employed on a fixed term  
10 contract which was initially until 1 March 2019 but was extended to 1 December 2019.
6. The claimant is from Glasgow and is of Pakistani heritage.
7. The claimant was employed as a Distribution Admin Team member, within the  
respondent's Wet Goods operation in Bellshill, Glasgow.
8. He received monthly gross pay of £2319.
- 15 9. The claimant had previously worked as Distribution Manager at United Wholesale Scotland Ltd in Glasgow.
10. The claimant developed a manifest for use by the team in which he was  
employed which improved reporting and efficiency in the team. This document  
was an MS Excel based spreadsheet which was partly automated by the  
20 claimant using VBA (visual basic for applications) programming scripts. This had not been part of his core role but his IT and problem-solving skills meant that he was able to carry out these duties in addition to his normal duties. He did not receive any additional pay for these duties.
11. The claimant found his core duties mundane after a short period of time. He  
25 was keen to advance in the company and keen to take on a role with more responsibility. He worked in a small team of four.
12. In May 2018, the claimant was interviewed for a permanent role with the  
respondent in the capacity of Inventory Audit Controller. The claimant was not  
successful in his application for this role. The successful candidate was a

Mr Joaquin Garcia. Mr Garcia was highly qualified and experienced. The recruitment process was led by Mr Dieste who was the claimant's manager at the time. He was accompanied at the interviews by Mr Rennie. During the course of the hearing, the claimant accepted that the appointment of Mr Garcia was not an act of race discrimination.

13. The claimant sought feedback from Mr Dieste on his application. The claimant was advised that he had come across as over eager and overconfident.
14. In the latter part of 2018, a Mr Ian Welsh was appointed as Warehouse Manager, leading the claimant's team. Shortly thereafter a permanent role for a Distribution Admin Team Member was advertised. This was the role the claimant was carrying out on a fixed term basis. The claimant applied for this role.
15. The claimant was again unsuccessful in his application. Although he was interviewed for the role, the post was given to another colleague who was also employed on a fixed term contract at that time, a Ms AS. Ms AS had been in the role on a temporary basis for around a year before the claimant had been employed. Ms AS had trained the claimant in the job when he first joined. Ms AS did not have the same level of IT or technical skills as the claimant. The claimant had trained Ms AS in use of the programme he had developed for use by the team. Ms AS was from Albania and was white.
16. The respondent's recruitment process involves competency-based interviews where candidates are all asked the same questions and asked to provide answers to questions which are linked to the role they are to perform. All interviewers ought to be trained in the use of this system.
17. The interviews for this role were led by Mr Welsh. He had not been trained in the use of this recruitment process as he was new to the business.
18. The claimant asked for feedback in relation to his application.
19. Mr Welsh advised the claimant that Ms AS was more qualified than him for the role. While Ms AS had more experience in the role, in fact the way in which the claimant and his colleagues were carrying out their duties was being

automated and the use of IT and the manifest created by the claimant was increasingly important. Ms AS did not have more qualifications than the claimant to carry out the role.

- 5 20. In November 2018, the claimant was interviewed for a further permanent role with the respondent, as Sub Contractor Transport Co-ordinator. This was a new role. The claimant was interviewed for this role by a Mr S Aitken, who at the time was the Internal Transport Leader. Mr Aitken was assisted by a Ms Dunster who was the Logistic Team Leader at the time. The claimant was unsuccessful.
- 10 21. The successful candidate for the role was a Mr Blair who, at the time, was the claimant's supervisor. Mr Blair had 10 years' experience in the whole process, had done his homework on requirements of the role, and demonstrated his knowledge at interview. He was considered on that basis to be a more superior candidate to the claimant.
- 15 22. Mr Aitken provided the claimant with feedback on his performance at interview. The feedback was constructive. Mr Aitken was of the view that the claimant would be better suited to the Global Technology Solutions Team as Mr Aitken was of the view that this was where his strengths and interests lay. Mr Aitken also advised the claimant that it had taken three years before he had been able  
20 to secure a permanent position with the respondent and the claimant should not be downhearted.
23. On 22 February, the claimant's fixed term contract was extended by 9 months.
24. In February 2019, the claimant was interviewed for a role as Shift Co-ordinator. The claimant was interviewed by Mr James Gray and Mr Welsh. The  
25 respondent was looking for a candidate who was used to leading teams, could make decisions quickly and find solutions. They were also looking for someone who had a track record of building relationships with external partners.
25. The claimant was unsuccessful in his application. The successful candidate was an external candidate, a Mr Fox. Mr Fox had previously held a senior  
30 managerial role in other industries and was looking for a move to the drinks

industry. Mr Fox gave better answers in the competency-based interview than the claimant. He had more relevant experience.

- 5 26. The claimant asked for feedback on his application. He was very downhearted that he had not yet secured a permanent role with the respondent. The claimant alluded to the possibility of his race being a factor in relation to his unsuccessful applications, when he said in an email on 13 March 2019 'my face might not fit in a team but I can't change my face' and 'it seems like I am constantly being overlooked for reasons other than my capability to meet the demands of a job'.
- 10 27. Mr Gray provided feedback by email on 18 March. He highlighted the claimant's strengths and explained what the respondent had been looking for from a successful candidate in this role. He also said that his view was the claimant's strengths were on the analytical side of the operation and that he should not get too downhearted. He advised the claimant to consider what direction he wanted to take and that if it was leading people to work with his leader to come up with a development plan to improve his skills, but that if it was analytical to keep doing what he was doing. Mr Gray also offered to speak to the claimant face to face. The claimant did not take up that opportunity.
- 15 28. The claimant was off work between 28 March and 12 April 2019. Although the claimant's sick lines said he was suffering from cold/flu, when he returned to work, he advised the respondent that he was suffering from stress.
- 20 29. A stress risk assessment meeting took place with the claimant which was attended by Mr Welsh and Ms Smillie, HR Manager on 23 April. The claimant was advised to complete a Performance Development Plan to address the issue of his career progression and that HR would be willing to help him with any interview preparation if required.
- 25 30. A follow up meeting from the Stress Risk Assessment meeting took place on 15 May. At that meeting, the claimant indicated that the lack of career progression was not bothering him as much as before, now he was feeling a bit better. He confirmed that he was looking at courses he could do in his own time but was feeling much more relaxed about it. The claimant was also advised to contact HR if he felt he needed any other support.
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31. In June 2019, the claimant was seconded to work on a project with Mr Garcia. The project was to create a manifest that was more automated.
32. Although the claimant was no longer working shifts, he was advised that he would still be paid his shift allowance so that he wouldn't be any worse off having been seconded to another role. This was confirmed in writing to the claimant in a letter dated 5 September. The secondment was to last until 31 October.
33. The claimant was advised on 30 October that his fixed term contract would end on 1 December.
34. The claimant was absent on sick leave shortly after this letter.
35. On 6<sup>th</sup> November, Mr Gray wrote to the claimant advising him of two vacancies in the Admin team.
36. The claimant forwarded various emails regarding his employment with the respondent to his personal email address on 13 November.
37. Although initially the claimant expressed an interest in these roles, he did not attend for an interview which had been arranged.
38. Mr Gray telephoned the claimant and offered to rearrange an interview for him. Initially the claimant advised Mr Gray that he didn't need the job, however, after encouragement the claimant indicated that he would attend, and a further interview was scheduled for 26 November.
39. The claimant did not attend the rearranged interview. He emailed Mr Gray to explain his reasons for not attending, stating 'I have been made to do extra work without any recognition or reward by multiple managers simply because I was a contractor and they could dangle the carrot of a ftc in front of me. I have been rejected from multiple jobs applications despite being the top candidate due to nepotistic (sic) hiring practices.'
40. An exit interview took place between the claimant and Ms Craig of the respondent's HR team on 29 November. Thereafter Ms Craig looked into some

of the issues raised by the claimant and respondent to him by email on 14 January.

41. The claimant has now set up a tech business developing apps.

#### **Observations on the evidence**

5 42. The claimant was on the whole a credible witness. The Tribunal formed the view however that he had reassessed what had happened to him while employed by the respondent. This impacted on claimant's reliability.

43. The respondent's witnesses were all credible and reliable. It was notable that the Tribunal did not hear from a number of potentially relevant witnesses as they were no longer employed by the respondent. This did not in the end impact upon the Tribunal's assessment of the evidence or its findings.

10 44. One issue of concern to the Tribunal however, was that the respondent's witnesses consistently appeared to be of the view that the fact that one of the claimant's comparators was of Albanian descent appeared to answer his concerns regarding race discrimination. It was particularly surprising that a senior member of the respondent's HR team should be of this view. Although the respondent's witnesses all indicated that the respondent took issues of race discrimination and inclusion and diversity very seriously, this was not the view formed by the Tribunal. In particular, the Tribunal was very surprised that there was no monitoring of recruitment information on the basis of race (or any other basis). The Tribunal heard that applicants had previously been required to fill in a diversity monitoring form with their job application. However, this had been abandoned apparently on the basis that the information was not used, so it was disproportionate of the respondent to gather this information. The Tribunal would have expected that a global company the size of the respondent's operations would have at the very least gathered information to inform any steps which might be required to improve diversity and inclusion.

25 45. Further, the respondent's witnesses consistently suggested that their recruitment procedures were robust. On the whole, the Tribunal accepted this as there was a structured competency-based interview process. However, the Tribunal was surprised that the forms assessing candidates in interview which

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were produced were not always complete and in particular did not contain scores. While it was suggested that scores might not be included if it was clear that a particular candidate was going to be successful, it seemed to the Tribunal that this undermined the objectivity of requiring scores in the first place.

### Issues to be determined

46. The first issue to be determined by the Tribunal was whether the Tribunal had jurisdiction to consider the claim of race discrimination. Specifically, the Tribunal was required to determine whether the claimant's claim was lodged in time, and if not, whether it would be just and equitable for the Tribunal to hear any part of the claimant's claims.

47. In the event that the Tribunal determined that it did have jurisdiction to consider any part of the claimant's claims, the Tribunal was required to determine whether the claimant had been discriminated against because of his race in relation to his application for three roles while employed by the respondent, that of Distribution Admin Team member in August 2018; Sub Contractor Transport Coordinator in November 2018 and Shift Coordinator in February 2019.

### Relevant law

48. Section 13 of the Equality Act 2010 ('EqA') provides that

*"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.*

49. Race is a protected characteristic and this is set out in section 9 EqA, where race includes colour, nationality, ethnic or national origins.

50. Section 136(2) EqA provides that 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.



51. However, section 136(3) provides that subsection (2) does not apply if A shows that A did not contravene the provision.
52. Section 123 provides that a claim must be brought within three months of the act complained of or such other period as the employment tribunal thinks just and equitable.

### Submissions

53. The claimant provided a detailed and able written submission. In addressing the issue of time bar, the claimant's position was that evidence of obvious discrimination is rare. He indicated that he wanted to make sure that he did everything in his power to make changes to himself and to learn and improve and rule out every other possibility before concluding that racism was a factor in his unsuccessful job applications. He said that it was not until December 2019 that he concluded that the respondent did not wish to employ him in a permanent capacity. He said that he was given no assistance from his line managers with a personal development plan and that he had demonstrated that he was qualified for all of the roles he applied for. He submitted that the HR department did not have robust oversight to ensure that managers were making fair and impartial decisions.
54. The claimant indicated that he had understood that the time limit for lodging a claim did not run until the end of his employment.
55. The claimant referred the Tribunal to the cases of *Igen v Wong* [2005] IRLR 258 and *Madarassy v Nomura International plc* [2007] EWCA Civ 33. He indicated that the fact that the respondent was unable or unwilling to provide key documents or address the conduct of Mr Dieste and Mr Welsh who are no longer employed by the respondent result in the burden of proof shifting to the respondent to demonstrate that the decisions regarding recruitment were not tainted by race discrimination and that they had failed to do so.
56. The claimant also made reference to the small number of staff employed by the respondent who were not white.

57. The respondent's primary position was that the tribunal did not have jurisdiction to consider the claimant's claims as they were out of time. Reference was made to *Tyagi v BBC World Service [2001] IRLRL 465* as authority for the proposition that the failure to offer a role was a one-off act and not a continuing state of affairs. Therefore, it could not be said that there was a continuing course of conduct on which the claimant could rely. Rather each rejection required to be considered in isolation. There were substantial gaps between the rejections and different decision makers for each which all indicated that there was no continuing state of affairs.
58. It was submitted that there was no evidence which allowed the tribunal to exercise its discretion to extend the time limit on a just and equitable basis. The respondent had suffered actual prejudice in seeking to defend the claims due to the delay in their presentation. Reference was made to employees who had subsequently left the respondent's employment whose evidence may have been relevant and the policy to destroy unsuccessful applications within six months of appointment to a role.
59. The claimant was criticised for failing to raise any grievance despite being offered support by HR. Further it was clear he was considering the possibility of a claim in November 2019 when he forwarded emails to his personal email address. Notwithstanding this, the claimant did not raise a claim for a further three months.
60. In terms of the issue of liability, the respondent's position was that in no sense whatsoever could it be said that race was at play in the relevant decision making. Reference was made to comments made by a number of (white British) managers who shared their experiences of rejection in seeking to obtain permanent employment with the respondent. It was said that the respondent's recruitment process was robust, and competency based. The claimant did not cross the first hurdle of section 136. The claimant was required to point to something more than his race and failure to be appointed and had not done so. The claimant had also failed to identify comparators who were not materially different from him as all the comparators were better qualified or experienced than him or had performed better at interview.

61. The respondent also submitted that there was ample evidence that it had been supportive of the claimant by giving constructive feedback and project work to him; that there had been meetings with HR which were followed up and an exit interview. Further the claimant had been encouraged to attend an interview for positions which would have continued his employment with the respondent.

### Discussion and decision

62. The Tribunal considered first whether it had jurisdiction to consider the claimant's claims. It considered whether it could be said that the actions complained of, that is the failure to appoint the claimant to three roles (the claimant having withdrawn the allegation that the appointment to the role of Inventory Audit Controller was race discrimination) amount to a continuing act which crystallised on the termination of the claimant's employment or at some other stage.

63. In *Tyagi v BBC World Service 2001 IRLR 465, CA* the claimant, who was of Indian origin, worked for the BBC World Service. He twice applied unsuccessfully for a particular post. Three months after his second application, his employment ended. One year later he brought a tribunal claim alleging that he had been discriminated against on the ground of race in relation to his applications. He argued that his claim was in time because the employer's recruitment policies were generally discriminatory towards him and other members of ethnic minorities in Britain, with the result that the act he complained of should be treated as being done at the end of the period during which those policies were in effect. In so contending, the Court of Appeal found that when applying for the relevant roles, T was no longer an employee but a job applicant. Any discrimination suffered would constitute a single act about which anybody — a job applicant or current employee — could complain to a tribunal so long as the complaint was brought within the three-month time limit.

64. The circumstances in *Tyagi* were similar to that of the present case. The Tribunal therefore concluded that the relevant time limit for the lodging of the claimant's claims was three months after his rejection from each individual post. There was no continuing act upon which the claimant could rely. This was not a case where the claimant was arguing that the processes and procedures

adopted by the respondent in relation to recruitment amounted to either direct or indirect discrimination. Although the claimant hinted at such a claim during the course of the hearing, by making reference to the small number of ethnic minority employees and alleged inadequacies in the respondent's appointment procedures, this was not the case which was pled by the claimant.

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65. The last act complained of therefore took place in February 2019 and the claimant's claim was not lodged until February 2020. The claim was therefore significantly out of time.

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66. The Tribunal went on to consider whether it would be just and equitable to exercise its discretion to extend the time limit. It considered the claimant's evidence that the claimant had believed that the time limit would not commence until the end of his employment. The tribunal concluded that even if this were the case, and the tribunal had reservations as to whether this was in fact the claimant's genuine belief, it was not a reasonable view to take in all the circumstances. The claimant was clearly an intelligent and able individual. He had become disenchanted with the respondent from the rejection of his fourth application in February 2019. It would have been reasonable for him to take steps to determine time limits at that stage.

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67. The claimant also at least inferred that his race may be a factor in his failure to obtain a permanent role in March 2019.

68. The tribunal did not accept the claimant's evidence that he only concluded that he had been subjected to race discrimination at the end of his employment.

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69. The tribunal also took into account the claimant's position in May 2019 where he indicated that he was not so concerned about the lack of his career progression by that stage.

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70. The claimant did not raise a grievance or otherwise seek to resolve matters internally. The tribunal had sympathy for the position that an employee, particularly on a fixed term contract would not wish to take any action which might impact on the likelihood of being engaged permanently. However, the tribunal was not persuaded that this had been the reason for the claimant's approach. It was clear that the claimant was willing to complain about his

treatment in relation to being required to carry out additional duties without additional payment. While the tribunal appreciated that raising allegations of race discrimination was more sensitive, nonetheless, the tribunal was of the view that if the claimant had believed that he had been discriminated against, he could have raised these matters more explicitly with the respondent.

71. The claimant had forwarded on emails to himself in November 2019, which appeared to be for the purpose of a potential claim. He contacted ACAS in December and still waited until February prior to lodging a claim.

72. Further, the Tribunal had regard to the prejudice suffered by the respondent in being required to defend proceedings which were out of time. There had been real prejudice to the respondent, in that two potentially key witnesses were no longer employed by the respondent. Further, relevant documentation had been destroyed six months after the appointment to at least some of the roles.

73. Therefore, taking into account all the circumstances of the case, the tribunal concluded that it would not be just and equitable to extend the time limit in relation to any of the specific claims advanced by the claimant.

74. On that basis the tribunal concluded that it did not have jurisdiction to consider the claimant's claims.

**A Jones**

**Employment Judge**

**24 December 2020**

**Date of Judgment**

**Date sent to parties**

**23 January 2021**