



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mr Nadir Awad Elkarim

v

Network Rail Infrastructure Limited

**Heard at:** Cambridge

**On:** 16, 17, 18, 23, 24, 25, 26 and 27 November 2020  
14 and 15 December 2020 (no parties in attendance)

**Before:** Employment Judge Ord

**Members (via CVP):** Ms S Laurence-Doig and Mr B McSweeney

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr J Braier, Counsel

## COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a hybrid (part remote part in person) hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A full in person hearing was not held because it was not practicable during the current pandemic for the Members to attend in person, they did so via CVP and all issues could be determined in this way.

## RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that the Claimant's complaints are not well founded and his claim is dismissed.

## RESERVED REASONS

### Background

1. The Claimant has been employed continuously by the Respondent since 5 February 2015 and is still in post as an Operational Planner based at the Respondent's premises at Milton Keynes.

2. After a period of Acas Early Conciliation lasting from 12 October 2018 until 12 November 2018, the Claimant presented his claim form to the Tribunal on 11 December 2018.
3. In that claim form the Claimant complained that he had been the victim of discrimination based on his race (the Claimant is a black African of Sudanese origin), his religion (he is a practising Muslim) and his age (the Claimant is aged 53 having been born on 18 October 1967 – at the time of the matters complained of, the Claimant was aged between 48 and 51 years).
4. The Claimant's complaints are that he has made a series of applications for internal posts within the Respondent between 22 July 2016 and 26 November 2018 and he has been unsuccessful on each occasion. He says that the Respondent was guilty of direct discrimination against him on the grounds of age and / or of race and / or of religion when rejecting his applications.
5. There were five roles to which the Claimant had unsuccessfully applied and about which he complains in these proceedings as clarified at the Preliminary Hearing held on 10 July 2019. They are as follows:
  - 5.1 Application 1: IRC1772713 (applied 22.07.2016);
  - 5.2 Application 2: IRC2070485/156196 (applied 26.05.2017);
  - 5.3 Application 3: IRC2070485/535907 (applied 20.11.2017);
  - 5.4 Application 4: IRC2112014/0156196 (applied 28.06.2018); and
  - 5.5 Application 5: IRC2129973 (applied 26.11.2018).
6. We refer to them in this Judgment by the application number given above; Application numbers 1, 2, 3, 4 and 5.
7. All those Applications were for the role of Economic Analyst.
8. The Claimant has not, in respect of any of his applications, reached the final selection stage of a face to face interview.
9. In his application to the Tribunal, the Claimant said that he had been "*promised*" a move to London and that he had made more than 40 unsuccessful applications whilst more than 17 colleagues with whom he had worked had been promoted and moved to other locations (apparently nearer their families). The Claimant lives in North West London. The allegation of a "*promise*" of a move was not pursued before us.
10. The Claimant also referred in his claim form to "*systematic discrimination*" by the Respondent's Human Resource team who were "*opposed to my*

*appointment from the beginning” and who it was alleged “continued to block my application for roles in London”.*

11. The Claimant specifically referred in his claim form to Application 4 which he said was blocked because of collusion between Victoria Carlin (Economic Analyst Manager), Taylor Saunders (Resourcing Business Partner) and Amy Allen (Resourcing Business Partner Support). The last named of those three is now married and uses her married name Amy Chalk, but we refer to her by her maiden name in this Judgment.
12. In his claim form, the Claimant referred in particular to having been required to pass a numerical reasoning test in respect of Application 4. After which he claimed he was “*blocked*” by the three named individuals to prevent him from being called for a face to face interview.

### **The Hearing**

13. The Claimant gave evidence and called Mr Nasir Khan. On behalf of the Respondent, evidence was given by Katharine Goulder (Senior Economic Planner), Amy Allen, Taylor Saunders, Victoria Carlin and Luke Gregitis (National Operations Centre Manager, previously: Amended Schedule Planning Manager, who considered the grievance brought by the Claimant).
14. Reference was made to a substantial bundle of documents. All witnesses gave their evidence by reference to typed witness statements which had been exchanged in accordance with directions previously given and each side made written submissions to which they added orally.

### **The Law**

15. The only complaints brought by the Claimant were complaints of direct discrimination.
16. Under Section 4 of the Equality Act 2010, age, race and religion or belief are all protected characteristics.
17. Under Section 13 of the Equality Act 2010, a person discriminates against another if because of a protected characteristic they treat that person less favourably than they treat or would treat others.
18. In respect of age only, Section 13(2) of the Equality Act 2010, states that if the protected characteristic relied upon is age, that person does not discriminate against another if it can be shown the treatment was a proportionate means of achieving a legitimate aim.
19. Under Section 123 of the Equality Act 2010, proceedings on a complaint of discrimination before an Employment Tribunal, may not be brought after the end of the period of three months starting with the date of the act to

which the complaint relates, or such other period as the Tribunal thinks just and equitable.

20. For the purposes of s.123, conduct extending over a period is said to be treated as being done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, that person is to be taken to decide on a failure to do something when they do an act inconsistent with doing it or on the expiry of the period in which that person might reasonably have been expected to do it.
21. Under Section 136 of the Equality Act 2010, in any proceedings under the Act, if there are facts from which a Court or Tribunal could decide in the absence of any other explanation that a person (A) has contravened the Act then the Court must hold that the contravention has occurred unless (A) can show they did not contravene the Act.
22. The simple facts of a difference in status and a difference in treatment only indicates a possibility of discrimination and are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities there had been an act of discrimination (Madarassy v Nomura International Plc [2007] EWCA Civ 33).
23. Unreasonable treatment is not enough to establish a prima facie case of discrimination, (Bahl v Law Society [2004] IRLR 799).

### **The Evidence**

24. The Claimant's witness statement was short. He gave no direct evidence concerning Applications 1, 2 and 3 in his witness statement. Although he did not explain this to be the case, he raised complaint about grammatical and spelling errors in his CV and covering letter being present after he had had assistance from Taylor Saunders with his CV in relation to Application 4, the fact that he had not only to undertake a numerical reasoning test in relation to Application 4, but that he was criticised for obtaining an extension of time to complete it and that further, after passing it, he was still required to meet other criteria.
25. The Claimant said he was "*offered the role informally*" by the Head of Economics who said to him, "*see you next year*" after a one week job experience.
26. The Claimant complained about a provision in relation to Application 4 and 5, that required Applicants to have a Degree classified as a 2:1 or higher and that he believed he met the criteria for the role and had unique experience.
27. The Respondent, as part of their evidence, said that they applied "*blind sifting*" to CVs submitted by Applicants in relation to Applications 4 and 5

to avoid any bias amongst those considering applications, including unconscious bias.

28. Mr Khan told us that until November 2019 he had been employed by the Respondent as Head of Commercial. He was also the Chair of the Respondent's Multi Faith Network. He had advised the Claimant to seek secondment opportunities to improve his prospects and skills and confirmed that as far as he knew there was no "*blind sifting*" in his department at the time he was there. The relevant department was Contracts and Procurement.
29. Katharine Goulder confirmed that as a Senior Economic Planner she was involved in recruitment from time to time, as were some of the other Economic Planners. She assisted with graduate recruitment before moving on to assist with CV sifting in 2017 and more recently had been involved in managing recruitment processes.
30. Ms Goulder confirmed that the recruitment process had evolved over time with the aim of streamlining the process and increasing its efficiency. In 2018 numerical reasoning tests were brought in to the recruitment process for the role of Economic Planner, as were what she called "*auto sift*" questions. Both of these steps were designed to reduce the pool of candidates requiring CV sifting.
31. In relation to Application 1, the Claimant gave no evidence at all. No documents had been found to still be available from that process. Ms Goulder did not believe she had been involved in it and could not say who had been. The Claimant gave no evidence about it and he did not ask the Respondent's witnesses any questions about it. Ms Goulder told us that CVs and applications are stored digitally for approximately two years and thereafter are destroyed.
32. In relation to Applications 2 and 3, Ms Goulder confirmed that the IRC numbers were the same (2070485), which was what she described as a "*dummy*" vacancy. There were, she told us, various Economic Analyst vacancies around that time. When the vacancy was first advertised with the additional reference number 535907, she could not recall any suitable candidates applying. So, a further advertisement was placed with the reference 535907 and the Claimant applied for this in Application 3.
33. As with Application 1, the Claimant gave no evidence about Application 2, nor in relation to Application 3. Ms Goulder was not involved in Application 2 as far as she could recall.
34. Some records in relation to the vacancies in Applications 2 and 3 were still within the Respondent's possession. Ms Goulder told us that there were 111 Applicants; 92 of those progressed to a CV sift and 6 individuals were invited to interview. One person was appointed.

35. At that time there were three people involved in the CV sifting, namely Mr Chris Stennett, Ms Goulder herself and Ms Lauren Hargreaves. Mr Stennett and Ms Hargreaves were Senior Economic Planners. That process was not "*blind*" sifting and took place in about December 2017.
36. Ms Goulder confirmed that on an initial sift undertaken by Ms Hargreaves, the Claimant met all of the Essential Criteria. Following an initial sift where the three individuals worked separately on different CVs, they met to consider all of the candidates who were considered to have met the Essential Criteria to form a short list for interview. This was done by looking at the CVs again and applying the criteria more strictly.
37. At that stage, the Claimant's Application did not progress. Ms Goulder could not recall what had happened, but on 22 January 2018 Mr David Harding asked the team of three for a copy of the Claimant's CV and the key reasons why his application was unsuccessful.
38. On 24 January 2018, Ms Hargreaves replied to confirm that the Claimant's Application had progressed to the second or possibly third sift, but other candidates provided evidence of higher academic grades. She referred to it being "*a shame*", but the Claimant had not referenced his time with the Economic Analysis Team or the work he did during that period.
39. Mr Stennett stated the key reasons for the Claimant's rejection were the limited description of how his economic analysis skills had been kept up to date since the Claimant completed his post Graduate Certificate in 2005/06. He considered the description of the Claimant's current role and how the skills might transfer to be weak and felt it looked as if it had been copied and pasted from a job description, or some objectives. He added that the Claimant had limited skills or experience which he had highlighted that would be valuable in the Economic Analyst role. He had not "*put together*" that the Claimant had spent a week with the team before he applied for the role.
40. Following that feedback being given to Mr Harding (the person who the Claimant claimed had informally offered him a job), Ms Goulder was not contacted again regarding Application 3.
41. In June 2018, the Claimant made Application number 4. Ms Goulder was at this time the hiring Manager. She had discussed introducing "*auto sift*" questions and had discussed this with Ms Saunders and Ms Allen. They collectively concluded that the introduction of three "*auto sift*" questions would be beneficial. The questions were included in the on line portal and every applicant had to confirm that they had the permanent right to work in the United Kingdom, had submitted a covering letter with their application and had a degree, or were predicted to obtain a degree, at grade 2:1 or above – alternatively, that they had practical experience of Economic Analysis or Investment Appraisal.

42. The process was that the candidates who passed those questions (by confirming “yes” to all) would be invited to complete an on line numerical reasoning test and if they passed that, the CV and covering letter would be “*blind sifted*” manually.
43. Blind sifting involved the removal of all personal information so that those sifting the CVs could not be aware of the name or personal details of the applicant. Each person involved in sifting the CV had a copy of agreed criteria to be used to assess the CVs and covering letters.
44. All candidates who progressed to the numerical sequencing test and achieved a score in the 70<sup>th</sup> percentile or above were blind sifted and scored with the top seven applicants invited to interview.
45. Ms Goulder told us that the reason for including a numerical reasoning test was because of the large number of applications which the Respondent received when advertising Economic Analyst roles. This made it, on her evidence, difficult and onerous to manually sift the CV and covering letter of every applicant. Further, some applications were said to be from unsuitable candidates such as people with no degree qualification, or other poor academics and who supplied covering letters which were not relevant to the vacancy.
46. The Claimant complained about the fact that he had to undertake the numerical reasoning test. He spoke about this to Ms Carlin who at the time was sitting close to Ms Goulder.
47. Ms Goulder and Ms Carlin confirmed that the decision to implement changes to the application process (removing a video interview stage and introducing a numerical reasoning test), was because the Respondent already used the numerical reasoning test in other application processes so that it was readily available and that introducing that test avoided having to review lots of video interviews. They believed it would be a more efficient way of determining each candidate’s arithmetical capabilities.
48. The Claimant spoke to Ms Carlin by telephone on 9 July 2018. He said he did not understand why he was being requested to complete a test when he had a degree and he should therefore be exempt. He complained that he had not been required to complete a test previously and said that it must have been put in place to block him personally.
49. Ms Carlin’s evidence, which we accept – it was not challenged, was that she explained to the Claimant that all applicants for the Economic Analyst role would be required to complete the test in order to aid the sifting process. She confirmed it was not designed to block his application.
50. The Claimant then asked about obtaining an extension of time to complete the test and Ms Carlin suggested he should contact Recruitment Support. Ms Carlin told us she had to repeat to the Claimant that the test was not being applied to him alone and completion was a required formality.

Because the Claimant had been, in Ms Carlin's view, frustrated and annoyed, she made a note of the conversation once it was concluded and Ms Goulder was asked to review that note and confirm it was accurate from what she had heard of what Ms Carlin had been explaining to the Claimant.

51. The Claimant passed the numerical reasoning test and his CV progressed to the blind sift / short listing stage. His CV for Application 4 was sifted by Andrew Howie (Economic Planner) and Lauren Hargreaves (Senior Economic Planner).
52. The Claimant did not pass the sift. He asked for feedback. The Essential Criteria cut off for short listing was 75% pass, the Claimant had scored 60%. He did not have the appropriate level of degree and his subsequent experience and Post Graduate Certificates were considered to only partially meet the requirement.
53. Whilst the CV and covering letter demonstrated knowledge of and interest in transport, economics, transport policy and rail, that was the criteria he met most strongly. He did not give strong examples for the questions relating to analytical skills and planning / delivering priorities and did not meet the criteria for qualifications because he did not give grades for his degree in economics and development studies.
54. The Claimant's further studies and qualifications were recognised under "Desirable Criteria, further education in economics / related areas" but those criteria were only used to rank candidates who had met the short list cut off for Essential Criteria.
55. Spelling and grammatical errors were identified in the claimant's covering letter and one reviewer commented that the Claimant mentioned examples of Analysis and Transport Appraisal / Forecasting without explaining them very well.
56. That feedback was provided by Ms Goulder, Ms Allen and Ms Carlin on 23 July 2018.
57. Ms Goulder had told us that it was highly unusual to provide feedback to candidates who did not reach the interview stage, but she did so, as she recalled it, because the Claimant was meeting the Human Resources team in order to help him understand the recruitment process.
58. Ms Goulder said that the two successful candidates in relation to the post covered by the Claimant's fourth Application had scored, on the one hand in the 95<sup>th</sup> percentile on numerical reasoning and at 80% on the blind sift, while the other successful candidate scored in the 78<sup>th</sup> percentile on numerical reasoning and 100% on the blind sift.
59. Ms Goulder's next involvement was in relation to Application 5. By this stage a fourth auto sift question had been added, the newest one asking



whether an application for the same role had been made within the previous six months. Ms Goulder said she had included that question because having recently completed the recruitment round which included the Claimant's Application 4, she did not consider it realistic that an unsuccessful candidate in that process would have obtained sufficient additional experience to improve their application in the intervening three months.

60. The Claimant applied and his application was automatically rejected because he confirmed that he had applied within six months.
61. Uniquely, however, his application was allowed to progress. The Claimant had advised Victoria Carlin that he had gained more experience in the area of Economic Appraisal and Analysis and believed he had gained valuable experience furthering a presentation about the Economic Appraisal of Crossrail. That email to Ms Carlin was passed on to Ms Allen who said that whilst the policy was not to consider applicants who had applied within six months, because the role was open until 10 January 2018 – by which time the six month period would have elapsed in the Claimant's case – the application would be considered. The Claimant was told that blind sifting would take place; that process was explained to the Claimant.
62. Ms Goulder said that she would be in a position to recognise the Claimant's application as a result of the detailed feedback which she had given to his previous application (Application 4) so felt it was appropriate to arrange for another colleague to perform the blind review of the Claimant's application. She therefore arranged for this to be done by Tobie Cusson, (who had been involved in the sifting process for others) and Jonny Allen (who had not). She sent each a copy of the Claimant's CV and covering letter, an example of a high scoring CV and covering letter and an example of a low scoring CV and covering letter. She also provided the score sheet with the applicable scoring criteria.
63. The average score given by those two individuals to the Claimant was 17.5. That is the lowest score of all applicants (including the Claimant's, 14 were blind sifted). This was the only application scored by Mr Allen.
64. Mr Cusson had initially scored the Claimant at 21, but this was reviewed down to 19 on review of the Claimant's academic qualifications. Had the scoring remained as it was, at 21, the Claimant would still have been bottom of the sift with an average mark of 18.5 (he would have been jointly bottom with the candidate identified as Number 6 on the score sheet we have seen). Of those candidates scored by Mr Cusson (all 14 candidates) one of the candidates scored 18; one scored 20; and all of the others scored more than 21.
65. Ms Carlin again asked Ms Goulder for feedback regarding the Claimant's application. Ms Goulder observed there was no material difference

between the application made for the previous post (Application 4) and this one (Application 5), therefore the previous feedback was still applicable.

66. Ms Allen gave further detail of the steps that had been taken in relation to the Claimant undertaking the numerical reasoning test for Application 4.
67. The Claimant alleged that she had challenged the Claimant asking, "*How dare he*" go "*behind her back*" to obtain an extension of time to complete the test. Her evidence was that he had been told by her that the deadline would not be extended for sickness, but subsequently advised Ms Allen that he had agreed an extension to the deadline with the Recruitment Support Analysis and subsequently completed the test.
68. Ms Allen was made aware of this and said she would look into the matter and respond to the Claimant. Ms Carlin discovered that Recruitment Support had given the Claimant an extension of time and Ms Allen said that this was something that she had not experienced previously, but as the extension had been given and as the Claimant had passed the test, he was told that his application would proceed.
69. On 19 July 2018, Ms Allen wrote to the Claimant by email confirming his application would progress to the sifting stage and that his CV would be compared against the Essential Criteria for the role. She confirmed that he had met the minimum bench mark and his application was under consideration. She emphasised (as the Claimant had apparently not understood this) that the Claimant had not been selected for interview.
70. Ms Allen's evidence was that almost immediately after sending that email, the Claimant contacted her by telephone. He was upset as he had told his family he would be interviewed. She described the Claimant as aggressive and tried to explain the recruitment process to him to calm him down. No candidate would be called to a face to face interview on the basis of completing the numerical reasoning test, all CVs would be sifted to produce a short list for interview.
71. According to Ms Allen, whose evidence we accept – it was not challenged in any way – the Claimant said that he had a degree in Economics so should automatically have an interview and he accused Ms Allen of discrimination. When Ms Allen asked why he considered that to be the case, his reply was that he was entitled to his feelings. He said that Ms Allen would not cause him to change his mind and he would take legal action and take her to Court. Ms Allen said she was concerned by the tone the Claimant adopted and by the allegations he was making.
72. Ms Allen was particularly aggrieved because the Respondent had extended the deadline to the Claimant during two application processes where she had been involved (the other being for a Station Capacity Specialist role which had not formed part of the Claimant's complaints in these proceedings, but which we do refer to below) and had offered the Claimant a review of his CV with Ms Saunders. He had been given

feedback and had regular telephone contact during his applications which Ms Allen said was much more assistance than would normally be offered to a candidate. She offered the Claimant a face to face meeting.

73. Because of the situation which Ms Allen found herself in, she sought wider guidance from the Resourcing Team to give her support and ensure that she managed the position appropriately. It was agreed that the meeting with the Claimant would also be attended by Taylor Saunders as she had had some involvement with the Claimant previously.
74. The meeting was arranged for 24 July 2018. The Claimant said he would attend with his Line Manager. Ms Allen obtained feedback from Ms Goulder, including a check list of the criteria which could be applied to the candidates and showed how the Claimant had scored.
75. The day before the meeting, the Claimant contacted Ms Allen asking about the nature of the meeting. She said it would be to confirm the outcome of his application and explain the recruitment process to him and further, to allow him to ask any questions. Ms Allen said that the Claimant kept asking whether he was being invited to interview (Ms Allen was not aware at this stage that the sifting process was complete and said that details would follow after that).
76. Ms Allen considered the meeting on 24 July 2018 to be an informal discussion. No notes were taken. Ms Saunders confirmed that the Claimant had not been successful following the CV sift and offered him some detailed feedback based on what had been provided by Ms Goulder.
77. Whilst Ms Saunders was reading this feedback to the Claimant, she told us that he asked her to stop and asked what his rights were and how to raise a grievance because he wanted to take the matter to Court. He said he was being discriminated against on the ground of race, religion, age and his family.
78. He was asked to provide examples of discrimination, but did not do so and kept asking how to raise a grievance. As Ms Saunders and Ms Allen did not handle grievances themselves, they offered to show the Claimant to the Human Resources Team who would explain to him the grievance process. The Claimant said that was ridiculous and that Ms Saunders, if she did not know the process must be not very good at her job. In Ms Allen's evidence, he became heated and aggressive. To attempt to move the matter forward, Ms Allen left the meeting and returned with a member of the Human Resources Team (Rhona Thompson) who explained the grievance process to the Claimant.
79. The feedback which Ms Saunders had been reading was provided to the Claimant in writing by Ms Allen.
80. Ms Allen's next involvement related to the Claimant's Application 5. The Claimant made that application on 26 November 2018. Ms Allen

confirmed to the Claimant that the role had been blind sifted and he had not passed the sifting stage as he did not meet all of the Essential Criteria for the role. She offered the Claimant additional feedback.

81. The Claimant contacted Ms Allen shortly afterwards by telephone and on 12 December 2018, Ms Allen wrote to the Claimant again saying that they had agreed to consider his application on the basis that the role would be open until 10 January 2019. She confirmed that if the Claimant had wished to have extra time to review his CV or covering letter then that would have been acceptable on the basis that the role was still live. But the Claimant had not responded to the email and there had been no request to allow a redrafting of the Claimant's CV or covering letter.
82. On 26 July 2018 the Claimant raised a grievance, Mr Gregitis was appointed as the Grievance Manager. Mr Gregitis had no prior knowledge of the Claimant.
83. The Claimant's grievance related to allegedly unfair treatment during the recruitment process. The Claimant said that he had been subject to systematic discrimination by Human Resources and that Victoria Carlin, Taylor Saunders and Amy Allen had colluded to block his applications. He was aggrieved at having to complete a numerical reasoning test having not been required to do so during previous application processes. Having had assistance from Taylor Saunders to improve his CV, he felt he met all the criteria for the role, but was being "*obstructed*".
84. The Claimant was invited to a Grievance Hearing on 18 September 2018 at which he had the right to be accompanied. At the meeting, he confirmed the main focus of his grievance was his then current application (Application 4) and about Network Rail's recruitment process as a whole.
85. The Claimant said that he should have had a face to face interview because he met all the necessary requirements for the role. He had made applications for the role of Economic Analyst but had not been invited to interview despite receiving feedback and adjusting his applications. He also referenced another application (Station Capacity Specialist) not part of the case before us.
86. The Claimant said that he was unhappy at being requested to include his degree grade within his Application 4 and therefore decided to omit it. Although he had passed the numerical reasoning test, he was subsequently told his application had not been successful saying that the reason he was given was that there were too many grammatical errors in his application.
87. The meeting was adjourned to allow for further investigation. The Claimant sent an email to Mr Gregitis on 18 October 2018 relating to his desire to reapply for the advertised role. At that stage the Claimant had been told he could not apply, he said, which was in his view proof of continuous discrimination against him because of age, race and religion

and was in breach, in his view, of the diversity and inclusion policies of the Respondent and human rights law.

88. Mr Gregitis interviewed Ms Allen and Ms Saunders. The information they gave him was in accordance with the evidence they gave to us.
89. The grievance meeting with the Claimant was then reconvened and the Claimant was asked why he felt he was the victim of discrimination. His explanation was that he had the right experience to succeed in his application, the Manager of the Team thought highly of him, but he could not get an interview. He said Ms Allen and Ms Saunders had seen his CV prior to his application and the fact that he was unsuccessful because of its contents made him think they were deliberately preventing him. He was being subject, in his view, to systematic discrimination.
90. Mr Gregitis formed the view that the Claimant was concerned more broadly about general culture issues rather than his own individual position, to which he had tried to direct the Claimant's comments. The Claimant did not give specific examples of discriminatory conduct against him. In relation to the email of 18 October 2018, the Claimant said he felt discriminated against because the vacancy which was advertised said that those who had applied within the last six months need not reapply, which he had interpreted to mean that he could not apply. He said the mandatory requirement for a 2:1 degree was deliberately applied because the Respondent knew he did not have one and the six month stipulation was also in order to block him.
91. The Claimant also alleged that Ms Carlin had told him not to apply for the most recent role. As the application for that role post dated the Claimant's grievance, Mr Gregitis took the view that he should only investigate those matters which the Claimant had raised in his grievance.
92. Mr Gregitis did not uphold the Claimant's grievance. He said that CVs had been blind sifted by people independent of the rest of the recruitment process and did not consider the Claimant's CV could have been deliberately blocked. The application for the Economic Analyst role was unsuccessful following blind CV sifting and there was no evidence of discrimination during the application processes. The Claimant had been given an extension of time to complete the numerical reasoning test.
93. The Claimant appealed the grievance outcome, unsuccessfully.
94. It is against that background that the Claimant brings his complaint in these proceedings.

## **Conclusions**

95. Applying the facts found to the relevant Law, we have reached the following conclusions.

96. The Claimant complains in these proceedings about five specific applications which he has made for the role of Economic Analyst, all of which have been unsuccessful.
97. He says that he had been the victim of direct discrimination and says that three specific individuals (Ms Carlin, Ms Saunders and Ms Allen) had colluded to block his applications and in terms had conspired against him to ensure he was not successful.
98. In relation to the first of those five Applications, the Claimant advanced no evidence at all. The Respondent did not have any information regarding it, documents would have been destroyed approximately two years after the process was complete. Given that the Claimant gave no evidence whatsoever about this Application and did not identify any failure by way of act or omission by the Respondent or any person within it, nor did he cross examine any of the Respondent's witnesses in relation to Application 1, any complaints in relation to this Application must fail on their merits as the Claimant has not established any facts which could point us towards a finding of discrimination.
99. In relation to the second and third Applications, these were effectively the same recruitment processes. Ms Goulder confirmed to us that the first of those two vacancies had not attracted suitable candidates so the vacancy was re-advertised. The Claimant apparently applied both times but no documents are available in relation to the second Application and therefore any complaint of discrimination in relation to Application 2 must fail for the same reasons as Application 1. The Claimant gave no specific evidence about it, no documents were available and no specific acts or omissions had been identified by the Claimant as being potentially discriminatory.
100. Ms Goulder was involved in Application 3. Except by questioning the Respondent's witnesses, the Claimant did not make any positive assertions in relation to Application 3. He did not mention it in his witness statement at all.
101. Ms Goulder had been able to identify the fact there were 111 applicants for the vacancy, of which 92 proceeded to a sift and 6 people were interviewed, one of whom was hired. Her involvement was to assist with the sifting of applications which was done with two other people, both Senior Economic Planners: Mr Stennett and Ms Hargreaves.
102. That sifting took place in December 2017, but was not a "*blind*" sift (i.e. at that stage. The Respondent did not redact personal information from the CVs of applicants being sifted).
103. At this time there was also no requirement to provide a covering letter with any CV / Application.

104. Ms Goulder confirmed that the Claimant met the Essential Criteria for the role following a sift by Ms Hargreaves. After that initial sift, all three people involved met to reduce the number of candidates who had met the Essential Criteria to form a short list for interview. This was done by re-sifting the CVs, applying the criteria more strictly.
105. The Claimant did not pass that subsequent sift. His Line Manager asked for feedback, prompted by the Claimant, and both Ms Hargreaves and Mr Stennett set out the reasons why the Claimant did not progress. Other candidates had provided evidence of higher academic grades, the Claimant did not reference his time with the Economic Planning Team, he gave only limited descriptions of how his skills had been kept up to date since completing his Post Graduate Certificate 12 years earlier and the description of his then current role and how the skills he used in it might be transfer was said to be weak and apparently copied and pasted from a job description, or some objectives. It was said that there were limited skills or experience which the Claimant had highlighted which would be of value in the role as Economic Analyst.
106. It is in relation to Application 4 that the Claimant offers some direct evidence. He says that he had had help from Ms Saunders with his CV and covering letter and was surprised that when he asked for feedback in relation to the Application, part of the feedback was that there were grammatical and spelling mistakes in the CV and covering letter.
107. The Claimant had been told that if he wanted to work with the Economic Analyst Team, he needed to pass a numerical test, but when he passed it he was told he still needed to meet other criteria.
108. Next, he alleged that Ms Allen had refused him an extension of time for completing the numerical test because of sickness and when he obtained that time extension, she had said,
- “...how dare you go behind my back and speak to HR in Manchester to give you permission to do the test”.*
109. The Claimant also complained that Ms Allen then wrote an email saying that despite passing the test, the Claimant’s CV and covering letter would have to be looked at again to decide who would be interviewed. He said that he had been informally offered the role by the Team who said that at the end of a one week placement “*see you next year*”, but that HR were “*blocking*” his applications. He also complained that the Respondent was looking to recruit “*new Graduates*” with a degree classification of 2:1 or better.
110. The Claimant says when he questioned this he was allegedly told by Ms Allen that no matter how many times he applied, his Application would never progress because they did not believe he was suitable for the role which resulted to his complaining to her Manager.

111. The Claimant's complaints in this regard are not supported by the contemporaneous evidence.
112. There were changes to the selection process for Application 4. First, the Respondent brought in three "*auto sift*" questions asking individuals for confirmation of their academic qualifications or practical experience of Economic Analysis and Investment Appraisal; requiring them to confirm a permanent right to work in the United Kingdom; and finally, to confirm that they had submitted a covering letter with their CV. Any candidate who failed to say "yes" to any of those questions would be automatically removed from the process.
113. The Respondent also introduced a numerical reasoning test as the next stage in the recruitment process. This was done to ensure that candidates of sufficiently high calibre progressed to the stage of having their CVs sifted and to reduce the number of CVs which had to be manually sifted and considered at the next stage.
114. These new stages in the recruitment process were approved by the person in charge of the recruitment process, Ms Goulder. She is not one of the people said by the Claimant to be conspiring against him, nor does she work in the Respondent's Human Resources Team which is the seat of the alleged conspiracy. They were decided upon by Ms Goulder over a month before the Claimant made any application and at a time when, on the Claimant's own answers in cross examination, he was not known to her.
115. The Claimant complained that the focus of the Respondent's approach was to find new, or recent Graduates. Again, the unchallenged evidence of the Respondent was that the targeting of recent Graduates was but one part of a multi-faceted advertisement strategy to reach the widest possible range of good candidates for the available posts. This included internal advertisement.
116. It is right to point out at this stage that the Claimant did from time to time during the course of the Hearing emphasise difficulties which he says people who shared his protected characteristics, or one or more of them, faced generally in life within the United Kingdom, within the Respondent in particular (although no detail was given) and as a result of certain recruitment decisions including the requirement for a 2:1 degree or suitable experience. However, as he was reminded regularly during the course of the Hearing, the Claimant did not bring a complaint of indirect discrimination.
117. In any event, we accepted Ms Goulder's evidence that targeting new Graduates was only part of the advertising and recruitment campaign which the Respondent undertook and applicants from that quarter would not be looked on more favourably than those applying internally, or from elsewhere.



118. The Claimant was clear in his own mind that the numerical reasoning test was put into the recruitment process specifically to eliminate him. He formed that belief, he told us, because when he was initially recruited he undertook a numerical reasoning test in which he did not score well, that the people making the decision in this regard would know that and therefore only introduced the numerical reasoning test because they were sure that the Claimant would fail and therefore his application would be unsuccessful.
119. There was no evidence from Ms Goulder, or Ms Saunders with whom she discussed this matter, that she was aware of the Claimant's earlier test result. There was no evidence that the introduction of the numerical reasoning test was designed with the Claimant in mind and with the purpose of defeating his application. We have accepted Ms Goulder's evidence that the reason why it was introduced was to reduce the number of unsuitable candidates whose application would otherwise fall for consideration by manual sifting of the CVs. There was no evidence put before us and the Claimant established no fact to support the suggestion that Ms Goulder and/or Ms Saunders introduced the numerical test with the Claimant in mind, or that they expected him to fail, let alone that the motivation to do so related to his race, religion or age.
120. The Claimant passed the test and apparently he considered that he would therefore be progressed immediately to a face to face interview for the vacant post, or posts. The basis upon which he formed this belief is difficult to understand because when he was advised that he had passed the test, he received an email from Ms Allen which confirmed that his application would be progressed to the next stage where his scores would be reviewed and his CV would be compared against essential criteria for the role. he had previously received a letter confirming he had met the minimum bench mark for the numerical reasoning test and that his application was under consideration. That letter did not advise the Claimant he had been selected for interview.
121. It is this "*second sift*" of CVs that the Claimant says was put in place to defeat him. We reject that. There had been no consideration of the contents of any applicants, CVs or covering letters at this stage. The three "*auto sift*" questions and the numerical reasoning test were put in place to remove from the process candidates who were in the view of the Respondent unable to meet obvious Essential Criteria which could be tested in that way.
122. The Claimant's CV was sifted by two people (Lauren Hargreaves and Andrew Howie) who were not known to the Claimant and about whom he makes no allegations of discrimination.
123. Further, the Claimant does not suggest that their marks were deliberately manipulated or otherwise interfered with by Ms Allen, Ms Carlin or Ms Saunders.

124. What the Claimant did do was assert that blind sifting had not taken place. He relied on the evidence of Mr Khan who had previously been involved in recruitment in a different department within Network Rail and he said that in his part of the business, he was not aware of blind sifting being used. Ms Allen, Ms Goulder, Ms Saunders and Ms Carlin all confirmed that blind sifting had taken place and we accept their evidence. Ms Saunders had confirmed in her evidence that blind sifting was introduced to improve the fairness of the application process, notwithstanding the fact that it made the process more onerous because manual redaction of the CVs and covering letters were necessary.
125. The Claimant also alleged that the Respondent, in particular Ms Saunders, had ensured that his CV was not of a sufficiently high standard so that it would be rejected at the second stage, notwithstanding the fact that she had been asked, through Ms Allen, to assist the Claimant with a review of his CV. In his grievance to Mr Gregitis, the Claimant called this “sabotage”.
126. There are two parts to this allegation. The first was Ms Saunders advising the Claimant should include a degree classification. In fact, the Claimant did not accept this advice, but the reason it was being given was because it was relevant to an auto sift question and also the Essential Criteria for the job. The Claimant, by failing to give his degree classification, left those sifting his CV to presume he did not meet that criterion. As a matter of fact, they did so correctly.
127. The second part of the allegation relates to the subsequent reference to spelling and grammar errors in the CV and covering letter. Ms Saunders was clear in her evidence about this. She would not effectively redraft or rewrite the CV, she was giving advice as to its presentation and what should be contained within it. She said it would have been unfair on other applicants if she had gone beyond that and redrafted or rewritten the CV in whole or in part.
128. We accept Ms Saunders’ evidence about this. It was no part of her role to check the Claimant’s CV for spelling and grammar, but more importantly there was no evidence that she deliberately allowed errors of spelling and grammar to persist to ensure that the application failed, nor that she did so because of the claimant’s age, race or religion.
129. The Claimant accepted that it would not have been practicable for the respondent to interview everyone who had passed the auto sift questions and numerical reasoning test, but insisted that she should have been progressed to a face to face interview. He said that this was in part because he had demonstrated, by his repeated applications, that he wanted to work as an Economic Analyst.
130. Far from seeking equal treatment, or complaining about unequal treatment, the Claimant was therefore actually seeking preferential treatment. Even after careful explanation of the process by both the

Respondent's witnesses, Counsel in closing submissions and the Tribunal, the Claimant seemed unable to accept that what he called a "second sift" of CVs and which he said was a step inserted to defeat him because he had (unexpectedly in his view of the Respondent's position) passed the numerical reasoning test, was the first time any consideration was being given to the actual contents of the covering letter and CV submitted by all applicants, including the claimant.

131. The recruitment process which the Respondent carried out in relation to the posts for which the Claimant made his fourth Application was, we conclude, both appropriate and robust. There was no evidence whatsoever to support the Claimant's allegations that the steps which were put into the recruitment process were created with the aim of defeating his application, nor that the motivation for including neither a manual CV sift, auto sift questions or numerical reasoning tests, were designed not only to defeat the Claimant's application but to do so because of reasons connected with his race, religion or age.
132. The Claimant's fifth Application was made less than five months after Application 4. Notwithstanding the feedback which he had been given regarding his covering letter and CV when making Application 4, he made no significant changes to either of them when submitting Application 5.
133. During the course of the Hearing, but not before, the Claimant alleged that the Respondent had looked at the wrong CV when considering his Application 5. He said that the document in the Bundle was not the one that he had submitted. The CV on the system, the Respondents say, is the one that was considered and it is the applicant's responsibility to ensure that the CV on the system is the one for consideration.
134. The Claimant had not complained that the CV in the Bundle was the wrong CV. He had not identified this apparent issue prior to being cross examined after giving his evidence in chief and at no stage produced another, different, CV which he could say was the one submitted at the relevant time. The relevant covering letter had been amended to be re-dated and the Claimant referred for the first time to a preferred location. Otherwise, it had not been altered from Application 4.
135. The CV appears to have been completely unaltered and we accept the Respondent's position that that was the CV on their system.
136. In those circumstances, it is difficult to see how the Claimant can suggest that his Application was unfairly considered and in relation to Application 5 when he had failed to take account of, or make alterations to, his CV and covering letter to reflect the feedback he had obtained in relation to Application 4.
137. The Claimant was responding to an advertisement which indicated that those who had previously applied within the preceding six months need not apply for the newly advertised role. The reason for this was as the

Respondent's witnesses confirmed, that they considered it most unlikely that in the short intervening period previous applicants would be unlikely to obtain sufficient additional experience or other improvements to their position to meet the criteria when they had not done previously.

138. The Claimant, however, suggested that this was done to defeat him, but this is an allegation without any factual substance to it whatsoever. The reason given by the Respondent's witnesses was cogent and we accepted it. In any event, not only did it apply to all previous applicants, but the Claimant was, as far as we know uniquely, allowed to make his application notwithstanding the six month barrier. Thus, he was in receipt of more favourable treatment rather than the victim of less.
139. We should also add that whilst the Claimant said the six month rule was put in place to defeat him (and on the basis of the way he put his case, him alone) he did not advance any racial, age related or religious motivation behind the addition of this requirement.
140. The Claimant made two further complaints regarding Application 5. The first was that he was not allowed to amend his application. However, he did not seek to do so until after his application had been rejected.
141. He sought to reapply for the same post on the very last day applications had to be submitted. That application was automatically rejected by the on-line portal because he had already applied. The Respondent confirmed that this is an automatic rejection to avoid repeat applications from the same candidates and we accept that evidence which has no discriminatory motivation to it at all.
142. Second, the Claimant says it was inappropriate to sift applications before the deadline for submission. His assertion was that he had no experience of this having been done before, but Ms Allen confirmed that in each recruitment process applications would be considered and sifted in batches as they came in and it is clear from the sifting record we have seen that the Claimant's application was considered with 13 others at about the same time. There was no difference in the treatment the Claimant received, compared to other applicants, when his CV was sifted ahead of the application deadline.
143. Had the Claimant advised the Respondent that he wished to amend his application when he was entitled to reapply, it was confirmed that time would have been given for that provided the application was submitted before the 10<sup>th</sup> of January. The Claimant did not ask to do this after his application was rejected, or before.

## **Summary**

144. In respect of all five Applications, the Claimant has not established any facts from which we could conclude that the matters he complains of amounted to discrimination. Accordingly, the burden of proof did not shift

to the Respondent in accordance with Section 136 of the Equality Act 2010 to explain a non-discriminatory reason for the treatment he received.

145. Even if that had been the case, however, the sifting processes, the introduction of blind sifting, the introduction of auto sifting questions and the requirement to complete a numerical reasoning test were all introduced into the application processes for entirely non-discriminatory reasons and were introduced to assist the Respondent to deal with matters in a more efficient way and ensure that they were more likely to secure the best candidates for the roles and manage the number of candidates advancing to interview.
146. The Claimant's allegation that he had been effectively offered the role of Economic Analyst had no evidential basis to it whatsoever and the Claimant did not pursue that during the course of the Hearing.
147. The Claimant's complaints that he was the victim of direct discrimination when his five applications were rejected, all fail on their merits. He has not established any evidence from which we could conclude that any discriminatory act took place and even if the burden of proof had shifted to the Respondent, we would have been satisfied that they had acted at all times in a non-discriminatory way.
148. The "*treatment*" which the Claimant received was having his application rejected. On each occasion the Claimant's applications for the role of Economic Analyst failed on their merits and on their merits alone.
149. For those reasons, the Claimant's complaints and each of them are dismissed.

### **Additional Matters**

150. During the course of the Hearing, the Claimant endeavoured to spread the net of his complaints rather more widely than the issues that had been identified at the Preliminary Hearing.
151. This included a complaint regarding an application he made for a position as a Station Capacity Specialist, in March 2018. This was not part of the case before us, it should be considered at best background information only. In respect of that application, the Claimant had been unsuccessful when his CV was one of a number to be considered by way of a blind sift. After the Claimant had been unsuccessful he challenged Ms Carlin about the matter.
152. The next stage, after the sift, would have been a video interview and the Claimant – according to Ms Carlin whose evidence we accept – said that his failure to progress was based on discrimination. Ms Carlin obtained a second opinion on whether or not the claim should have progressed, having two colleagues review the Claimant's application. They were split

in their view. One said they would have progressed the Claimant, the other said they would not.

153. In order to avoid all doubt, Ms Carlin decided that the Claimant should progress to video interview.
154. Subsequently, the Claimant requested an update as to the status of his video interview, but there had been no such interview submitted onto the system. That would usually mean that his application was automatically rejected, but it was still showing as 'live'. Ms Saunders undertook investigation and liaised with the external providers who operated the video interview system.
155. The conclusion reached was that the interview had only been partially uploaded before the uploading process was discontinued. The Claimant was apparently adamant that he had done all things correctly, so was given the opportunity to retake the video interview.
156. The Claimant completed the retake of the video interview in early June 2018 and it was then assessed by three people, Isabelle Milford (Head of Station Capacity), Sravan Patel (Station Capacity Planner) and Charlie Parker (Station Capacity Planner). They collectively scored the Claimant's video interview at 24%. The bench mark figure required to progress was 60%. They said that the Claimant had failed to explain what he understood about the role, why he was interested in it and what skills he had that were relevant. He had not addressed the main issues in one question and his response to another was described as "*not in the right ball park*".
157. Had we been required to deal with this matter, we would have found on the basis of the evidence we have heard about it that the Claimant's application was rejected on its merits and any complaint of discrimination would have failed. The Claimant did not establish any fact from which we could conclude that discrimination had occurred and the steps taken by the Respondent would have satisfied us that they behaved in a non-discriminatory way when rejecting the Claimant's application.
158. The Claimant had also alleged during cross examination of Ms Allen and Ms Saunders, that after he had failed in his third Application he raised a complaint to Mr Chris Rowley (Capacity Planning Director) and Sarah Liffen (Mr Rowley's Personal Assistant) and as a result of that complaint his treatment worsened.
159. It is first right to point out that the Claimant does not advance any victimisation claim in these proceedings. His complaint is of direct discrimination.
160. In any event, the matter was dealt with by Ms Liffen without involving Mr Rowley as far as the evidence shows. There was no evidence before us from which we could conclude that any action was taken against the

Claimant consequent upon him raising, as he did, his disappointment at not reaching interviews at the interview stage in relation to Application 3 when according to his complaint, he thought his experience should secure him an interview.

161. Finally, the Claimant advanced during the course of the Hearing, but not previously, the suggestion that the entire Economic Analysis Team were aware because he had spent one week in that team on work experience, that he was a practising Muslim, that he prayed five times a day and that the Respondent's premises in London lacked the proper designated Prayer Room so that there was gossip throughout the Team about the Claimant which spread to his being treated unfairly throughout subsequent application processes.
162. Not only was there not a single shred of evidence in support of this wide ranging conspiracy theory, but when Ms Carlin was asked about this (she being the only one of the Respondent's witnesses who was asked and she was asked at a time when Ms Goulder, Ms Allen and Ms Saunders had concluded their evidence), she pointed out that at the time the Claimant had undertaken his work experience she was on maternity leave and was not involved in the department at the time. Further, she was not aware of any gossip in the department, and the Claimant was not a matter of discussion within the Team.
163. The Claimant did not explain how he was aware of gossip taking place in an office where he was not based and in a team in which he did not work.
164. For those reasons, had the Claimant brought these matters before us, we would not have been satisfied that the Claimant had established any discriminatory acts by the Respondent in respect of those additional matters.

**Time Limits**

165. Given that each of the Claimant's complaints has failed on its merits, we decline to consider the issue of time limits.

8 January 2021

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Employment Judge Ord

22/03/2021

Sent to the parties on: .....

J Moossavi

.....  
For the Tribunal Office