EMPLOYMENT TRIBUNALS

Claimant: Mr M Kler

Respondent: Quill Pinpoint Limited

Heard at: Manchester (by CVP) **On:** 29-30 June 2021
1 September 2021
(in Chambers)

Before: Employment Judge McDonald
Ms M T Dowling
Mr S T Anslow

REPRESENTATION:

Claimant: In person
Respondent: Ms A Smith (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The correct name of the respondent is Quill Pinpoint Limited.

2. The claimant's claim that he was directly discriminated against by the respondent because of race fails.

3. The claimant's claim that he was directly discriminated against by the respondent because of religion or belief fails.

REASONS

Introduction

1. The claimant says that he was directly discriminated against by the respondent when the respondent rejected his applications for the role of Data Migration Analyst in early 2019. By the time of the final hearing the claimant had withdrawn his claims of race related harassment and religion or belief related

harassment. They were dismissed on withdrawal by Employment Judge Dunlop in her Judgment of 8 December 2020.

The Issues

2. The issues in the case had been identified by Employment Judge Dunlop at the preliminary hearing on 7 December 2020. They were:

Jurisdictional Issues

(1) Whether the claimant has lodged his claim out of time and to the extent that the claimant presented his claim after the expiry of the normal time limit for presenting the compliant, whether it is "just and equitable" pursuant to Section 123 of the Equality Act 2010 to allow the claimant to bring the claim out of time.

(2) Having regard to the fact that the claimant commenced early conciliation against "Quill" has the claimant complied with the requirement for ACAS pre-claim conciliation.

Discrimination on the grounds of race

(3) The claimant relies on his ethnic and national origin for his claim and defines himself as being "Asian, of Indian descent".

(4) Was the claimant treated less favourably than a hypothetical comparator has or would have been treated because of race contrary to Section 13 of the Equality Act 2010? The less favourable treatment relied on is the manner in which the respondent dealt with the claimant's job application i.e. its failure to offer him an interview and/or to appoint him to the role.

Discrimination on the grounds of religion or belief

(5) The claimant's religion is Islam.

(6) Was the claimant treated less favourably than a hypothetical comparator has or would be treated because of his religion or belief contrary to Section 13 of the Equality Act 2010? The less favourable treatment relied on is the manner in which the respondent dealt with the claimant's job application i.e. its failure to offer him an interview and/or to appoint him to the role.

3. In relation to the exact claim being brought, the claimant has to bring his claim within either section 39(1)(a) or (c) i.e. discrimination in the arrangements made as to the way that the respondent decided to whom to offer of a job or in not offering a role.

4. The claimant confirmed that the chronology prepared by the respondent was correct and that the last incident he relied on as being an act of discrimination was

the rejection of his application by Mr Bryan on 14 May 2019. The claimant lodged his claim form on 12 August 2019 and that final act was therefore in time for the purposes of the time limit under the Equality Act 2010. However, the respondent says that the earlier rejections of the claimant's application for the Data Migration Analyst vacancy on 27 March 2019 and on 29 April 2019 are out of time. The claimant says they are part of a continuing act.

The hearing

5. The claimant represented himself. The respondent was represented by Ms A Smith of counsel. There was an agreed bundle ("the Bundle") consisting of pages 3-233. References to page numbers in this Judgment are to page numbers in the Bundle. There was also a brief cast list and a chronology. At the start of the hearing, the claimant confirmed that the dates of incidents set out in the chronology were agreed.

6. The claimant gave evidence and for the respondent we heard evidence from Julian Bryan (Managing Director of the respondent) ("Mr Bryan"), and from Corrine Blake, the respondent's HR Manager ("Ms Blake"). Each witness had provided a written witness statement. The claimant was cross examined by Ms Smith and the respondent's witnesses by the claimant. The witnesses also answered brief questions from the Tribunal.

7. We dealt with the preliminary issues at paras 10-11 below on the morning of the first day of the hearing. We heard evidence over the remainder of the first day and most of the second day. We then heard oral submissions from Ms Smith supplementing her written Skeleton Argument. We allowed a brief adjournment before the claimant's oral submissions to give him an opportunity to read Ms Smith's written Skeleton Argument. The claimant then made his oral submissions. He confirmed he had had an opportunity of reading Ms Smith's Skeleton Argument.

8. There was no time for us to deliberate and make our decision during the hearing. At the end of hearing we directed that the claimant should send his written submissions to the Tribunal and the respondent by 21 July 2021. The respondent could then send any written reply by 4 August 2021.

9. We met on 1 September in chambers to make our decision. We had received written submissions from the parties. We deal at paras 12-14 below with two points arising from the content of the claimant's submissions. We have not set out the parties' submissions in full in this judgment but have taken them into account in reaching our decision and refer to them below where appropriate.

Preliminary Issues

10. The parties were agreed that the correct name of the respondent is Quill Pinpoint Limited. By consent the respondent's name is amended to that.

11. At the start of the first day, the Tribunal considered whether the claim should be allowed to proceed at all. The respondent submitted that the claimant's early conciliation certificate was deficient, and that the Tribunal should reject his claim

under rule 12(1)(f) or 12(2)A of the Employment Tribunal Rules 2013. That was on the basis that the name given on the early conciliation certificate ("Quill") and the name given on the claim form ("Quill Software" and, subsequent to amendment, "Quill Pinpoint Limited") was different from that given on the early conciliation certificate. Having heard submissions from the parties, the Tribunal decided that the difference amounted to a minor error and it was in the interests of justice to allow the claim to proceed. The Tribunal gave oral reasons for its decision. Neither party requested those reasons in writing.

The claimant's written submissions

12. Before setting out our findings of fact we deal with two points arising from the claimant's written submissions.

13. The first point is that at the start of those submissions he states that because of the time spent in dealing with the preliminary issues noted above, "I was prevented from completing cross examination". Because the claimant was acting in person, we allowed him a significant amount of leeway in his approach to cross examination. The Employment Judge did on more than one occasion have to remind him of the issues in the case and the need to ensure that his questions in cross examination were relevant to those issues. However, we as a Tribunal are satisfied that the claimant was not "prevented from completing cross examination".

14. The second point is that in his submissions the claimant included further evidence not before us during the hearing. That included photos of the entrance to the building where the respondent was based and the reception desk in that building where the claimant worked. We agree with the respondent's submission in reply that we cannot take into account those photographs and the other evidential material included in the claimant's written submissions in reaching our decision. There was no suggestion that it was material which was unavailable before the hearing and there was no explanation of why it could not have been included in the Bundle. In any event, on reviewing the material to decide whether it should be admitted, the Tribunal's view is that our decision would have been the same even had that material been taken into account.

Findings of Fact

15. In this section of our judgment we set out our findings of fact about what happened. Where there is a dispute between the witnesses about what happened, we have explained whose evidence we preferred and why.

<u>Background facts</u>

16. The respondent is a legal accounts software provider which provides legal software solutions and outsourcing services to various clients. The claimant was never employed by the respondent.

17. The claimant has a number of IT qualifications. He has a BSc in Computing, an MSc in Database and Web-based systems and a PG Dip in Software Engineering. His CV (pp.99-101) shows work for Fujitsu and BT (1992-1995) in IT

related roles; 10 years working in office administration and as IT warehouse support staff via recruitment agencies (1995-2005); time spent as a TEFL tutor while a student (2005-2012) followed by roles in IT both as an employee and freelance software engineer (2012-2015). He taught Cryptographic Algorithms, Cyber Security Threats and Algorithms in Java to MSc students at the University of Manchester from October 2016 to September 2017.

18. Until late May 2019 the respondent's Manchester office was located in a building called Barclay House. The offices within Barclay House were serviced offices. The respondent paid a service charge to the building owner to deal with all issues relating to building management, including ensuring the building and car park were clean and tidy and ensuring the toilets were stocked with toilet roll and other relevant products as required. The claimant worked for the building owner as a Building Manager. His role involved manning the reception desk for the building and providing concierge services to all the tenants at Barclay House.

The claimant's concierge role

19. Barclay House was sold for redevelopment in 2018 and during late 2018 and 2019 all the tenants were in the process of leaving it. The respondent was the last tenant to leave the building. It did so on or around 17 May 2019. We find that for the 6 months leading up to that departure the building owner reduced the services being provided to the tenants, including cleaning of the communal areas and provisioning of the toilets (pp.102-104).

20. In practice, the claimant was the day to day point of contact between the tenants and the owners of the building. The reduction in services provided by the owner left the claimant having to carry out tasks such as ensuring there were enough toilet rolls (and buying more if not) and that there were appropriate boxes for disposing of sanitary products in the female toilets.

21. It was part of the claimant's case that he was treated in a degrading manner by the respondent's employees and given menial tasks to do. We accept that the claimant found some of these tasks he had to do degrading and embarrassing. We find that he was doing his best in difficult circumstances. However, we do not accept the claimant's evidence that he was treated in a derogatory manner by the respondent or its employees. His evidence about this treatment was vague and unspecific.

22. When asked in cross examination, the claimant was unable to provide details of any occasion when either Mr Bryan or Ms Blake made derogatory remarks to him. He did say that Mr Bryan had "ordered him" to clean the toilets. Mr Bryan denied that he directly ordered or asked the claimant to clean toilets or carry out other tasks. He accepted he would have asked that steps be taken to ensure that the toilets were cleaned. We prefer Mr Bryan's evidence on this point. We found him to be an honest witness who gave reliable evidence and was willing to accept when he had made mistakes (e.g. in relation to the "Friday Fun" email – para 45 below). We find that the claimant was asked to ensure the toilets were clean. We find that was not done in a derogatory manner and that it was a perfectly reasonable instruction for the

respondent as a tenant of serviced offices to give the claimant as the on-site representative of the building owner.

27 March 2019 to 17 April 2019 - the claimant's first application for the Data Migration Analyst Role

23. In March 2019 the respondent advertised a role for a "Data Migration Analyst" (pp.96-97) ("the Role") via its website, jobs websites and social media. On 27 March 2019 the claimant applied for that role by submitting his CV attached to an email expressing his interest (p.106-107). Ms Blake could not remember whether the claimant's email had come direct to the respondent's generic HR inbox or via the Indeed job website. Whichever is the case, we find that at that point the claimant had not emailed Ms Blake specifically by name but used a generic recruitment email address or recruitment website to contact the respondent. We find that at that point, Ms Blake did not connect the person submitting that CV with the person who sat on the Barclay House front desk.

24. It was part of the claimant's case that Ms Blake and Mr Bryan must have known that he was applying for the role because he had a pile of his CVs on the front desk of Barclay House with an invitation for anyone passing to take one. We accept that the claimant did have that pile of CVs on the front desk. However, we also accept the evidence from Mr Bryan and Ms Blake that neither was aware until later in the series of events that the claimant had IT qualifications and experience. We find that at this point their interaction with the claimant was limited to a greeting when they passed his desk on the way up to or down from the respondent's offices in Barclay House.

25. On 28 March 2019, i.e. the following day, Ms Blake emailed the claimant back (page 106) at 7.33am to tell him that the respondent had now filled the role. The claimant emailed back to ask Ms Blake to keep his details on file, and she did (p.106).

26. We accept the evidence from Ms Blake and Mr Bryan that at the relevant time the respondent was in the process of acquiring another company and the expectation was that one of the directors of that acquired company would take on the Role. As it turned out, that did not happen. However, we accept that as at 28 March 2019, Ms Blake believed that the Role was no longer vacant.

18 April to 28 April 2019 - the claimant's "second" application

27. On 18 April 2019 at 17:30 the claimant emailed Ms Blake noting that the Role was still showing as a live vacancy on the respondent's website (p.106). That email was sent direct to Ms Blake's email address rather than to a generic email address.

28. In his email the claimant said he had spoken to ACAS. ACAS had informed him to "ask [Ms Blake] if she had made a mistake in refusing his application". He said that if the Role had become available again recently he would be happy to be considered for it again and reminded Ms Blake that she already had his CV.

29. Ms Blake responded within 20 minutes to say that the Role had been offered but the candidate did not start. She explained the vacancy had then been put on hold as the manager of the department had left the business and therefore the priority was shifted to recruiting for that manager position. Ms Blake finished her email (page 105) by saying that she had spoken to their Client Services Director that week, that he did want to start actively looking to fulfil the Role and that she would send him the claimant's CV for consideration.

30. The Client Services Director was Mr Wormald. Ms Blake sent him the claimant's CV by email immediately after she had her email to the claimant (page 108). Her email simply says "Rizwan's CV!". The claimant suggested that the exclamation mark in Ms Blake's email had a negative or even aggressive connotation. Ms Blake denied that that was the case. She said that she regularly used exclamation marks in her emails and, if anything, the exclamation mark simply denoted excitement at there being a CV for the Role which was a vacancy they were anxious to fill. We accept Ms Blake's evidence on this point. We found her to be a credible witness. She had a reasonable recollection of events but was willing to acknowledge when she could not remember things, e.g. through which recruitment "channel" the claimant's initial email was received.

31. During the afternoon of that same day, the claimant and Mr Bryan had had a brief conversation at the front desk. We do not accept that, as suggested by the claimant, the meeting between him and Mr Bryan took place between the claimant sending his email to Corinne Blake at 17:30 and his emailing his CV to Mr Bryan at 17:37. We prefer Mr Bryan's evidence that that meeting took place during the afternoon.

32. The chat between the claimant and Mr Bryan took place because one of the respondent's employees had alerted Mr Bryan to the fact that the claimant was a computer programmer. Mr Bryan asked the claimant about his IT experience and the claimant told him that he had applied for a position with the respondent but been rejected. Mr Bryant gave the claimant his business card which had his direct email address on it and suggested he send him his CV. The claimant emailed Mr Bryan his CV at 17:37 that day (p.116).

<u>29 April 2019 to 17 May 2019 – the further email exchanges</u>

33. At 10:03 on 29 April Mr Bryan emailed Ms Blake saying that he needed to reply to the claimant and "put him to bed, so to speak" (p.110). His email said that he did not think the claimant was suitable as a data converter but could do with seeing what the job advert said. When asked in cross examination about the delay in getting back to the claimant, Mr Bryan said that was partly because he was deflated because the claimant's CV did not show the required data conversion experience and partly because he was involved in the final throes of the business acquisition referred to earlier. As we have previously said, we found Mr Bryan a credible witness and accept his evidence on this point. We note that he had raised the issue of responding to the claimant with Ms Blake before the claimant had chased either of them by email on 29 April.

34. Ms Blake emailed Mr Bryan at 10:17 that day (p.110) sending him the job spec and saying, “I don’t think he is suitable”. At 10:46 on 29 April 2019 the claimant sent Ms Blake an email asking for an update (page 109). She emailed Mr Wormald and Mr Bryan to say that the claimant had emailed again and asking Mr Bryan whether she was going back to the claimant or whether Mr Bryan would. The claimant suggested that the exclamation mark she used in her email “He’s emailed me again!” denoted exasperation or frustration on Ms Blake’s part. We accept her evidence that that was not the case.

35. A few minutes later at 10:56 Mr Bryan emailed the claimant (page 116). He thanked him for forwarding the CV and acknowledged that the claimant had also emailed Ms Blake. Having had a look through the CV against the requirements for the Role Mr Bryan said that he really could not see the match and was afraid therefore that he did not see the merit in arranging a meeting or interview. He wished the claimant all the best. We accept Mr Bryan’s evidence that his genuine assessment was that the claimant’s CV did not demonstrate the data conversion experience the respondent required for the Role.

36. On 3 May (page 115) the claimant responded to Mr Bryan, expressing his surprise at his feedback on his application for the Role. He set out his various qualifications and experience and said that in his view all of that showed that he was very suitable for the role, especially for an interview. He said that he “wondered if there is any other reason why firstly my application was refused by Corrine at 7.30am before she had even arrived at work, and secondly you have not managed to match my key skills against this role which they clearly do”. He asked, “Is there another reason why you have turned down my application?”.

37. Mr Bryan responded at 8:27 on 10 May and said that he had looked at the claimant's CV again and at the job description (p.114). He explained the real “must have” was data conversion experience and the claimant’s CV and subsequent emails showed no experience of that. He explained that the claimant lacked a core skill required for the Role.

38. The claimant emailed back at 10:55 on 10 May (p.112-113) sending further detail, including saying that he was familiar with data conversion and that that skill went hand in hand with data migration. He explained he had converted data from and to different database vendors, including the data types used within those individual databases. He concluded by saying that he hoped that Mr Bryan would agree that he had shown his suitability for the role and that he was immediately available, willing to relocate and looking forward to hearing from Mr Bryan.

39. Mr Bryan emailed back at 6:49 on 14 May (page 112) to say, “Many thanks but we are not going to pursue your application any further and the matter is now closed”.

40. The claimant responded again on 16 May 2019 (p.112) saying that he was not happy with the manner in which the respondent and Mr Bryan had handled his application. He said that he knew that he matched all the skills in the job description and, having spoken to ACAS and taking their advice, he would like to formally complain of race discrimination against the respondent for the manner in which the

application for the role had been handled. He also mentioned in that email (for the first time in his emails) that since he started his current role at Barclay House in November 2018 he felt that many of the staff from the respondent's office had behaved in a racist manner towards him. He said this included, "making me perform a degrading role and trying to belittle and even humiliate me on occasions. I even heard slurs of a racist nature which I have already complained about to the new owners of the building".

41. Mr Bryan drafted a response to the claimant (p.118) which he emailed to Ms Blake for comment on 17 May 2019 (p.117). She made some amendments on that same day but it is accepted that the email was never sent to the claimant.

42. The email was headed "Friday fun". In the draft, Mr Bryan explained that one of the key "must have" qualities that the respondent was looking for was "data conversion experience". He said that the claimant's application and CV did not reference data conversion experience, which is why his application was rejected. He noted the claimant was fortunate because he was working in the building and had as a result of having the conversation with Mr Bryan had the opportunity of sending further details of his experience which Mr Bryan then reviewed. He said he had rejected the claimant's application because "at no point did you illustrate your must have experience in data conversion". Mr Bryan said that it was only when he had made that point clear to the claimant that the claimant had told him about his knowledge rather than experience. The email suggested that the Role required the jobholder to show initiative and that the claimant had not shown the initiative of reviewing the job role requirements and attempting to match his application to those skills at the first or the second attempt. Mr Bryan said that the application had been rejected based purely on a mismatch between the claimant's application and the job requirements for the Role, "nothing else".

43. Referring to the claimant's allegations about the way that the respondent's staff had treated him, Mr Bryan noted that the respondent's staff might well have asked the claimant as building concierge to support the respondent as a tenant. He recorded that "as the last occupant of the building there had been moments when the service provided by the landlord to meet his obligations had been below what should be expected. Staff will have asked you for your input to address those service issues. I cannot find any evidence to suggest that you specifically have been treated in anything other than a professional and courteous manner".

44. Ms Blake's additions were in green. She had added text to say that "it is the experience [of data conversion] that is key for this role and level which we are looking to employ at", and that the claimant had told Mr Bryan about his knowledge rather than experience. Ms Blake also added a paragraph near the end of the draft email saying that if the claimant had examples of how he felt he had been racially discriminated against by the respondent's employee he should put that in writing alongside the staff member's names so that Mr Bryan could investigate that properly with HR. It is accepted the claimant did not respond to that invitation.

45. Mr Bryan in his evidence acknowledged that he should not have titled his draft "Friday fun". He accepted that it was inappropriate. He explained that it was part of the respondent's culture to have a "fun Friday" and that he was also somewhat

demob happy because of the impending office move. We accept his evidence on that point.

46. Mr Bryan in thanking Ms Blake for her comments (page 117) noted in his email that the claimant "can't look at me!" and that he thought he would send the email once the respondent had left Barclay House. We find that the situation had at this point become embarrassing and difficult for the claimant and Mr Bryan who had to see each other most days (however briefly) by virtue of the fact that Mr Bryan had to pass the claimant's desk to get to the respondent's offices. respondent, which is why Mr Bryan decided to delay sending the email until the respondent had left. We accept that the email was not in fact sent. We find that the reason for that was that Mr Bryan simply overlooked doing so because at that time the respondent was moving wholesale from Barclay House to new premises.

Other evidence about why the respondent acted as it did/relevant to the burden of proof

47. The claimant was asked by Ms Smith in cross examination what evidence there was of racial or religious discrimination. In his witness statement the claimant had referred to racial harassment or derogatory comments and racial slurs which he said had been made by employees of the respondent. In cross examination he confirmed that he was not able to give precise details of individuals or dates when the incidents had happened. He said that the incidents were intermittent which made it harder to give dates. He said that he was unable to identify individuals because the behaviour towards him was generic. We found that evidence vague in the extreme. In oral evidence, the claimant suggested that he had raised complaints with Mr Fan, the building owner, but there was no evidence as to that before us. There was no evidential basis for us to find that the respondent's allegations of harassment, racial slur or derogatory comments by the respondent's employees were substantiated

48. In any event, the claimant did not suggest that either Ms Blake or Mr Bryan (the decision makers in relation to his application for the Role) had made derogatory remarks towards him or made remarks of a racial or religious nature. Neither could he explain why, if Mr Bryan intended to treat him less favourably because of race or religion, Mr Bryan had proactively asked him to send him his CV to his direct email.

49. In terms of whether or not Ms Blake and/or Mr Bryan knew that the claimant was a Muslim, we find that neither Ms Blake nor Mr Bryan knew for certain whether the claimant was a Muslim. Ms Blake acknowledged in cross examination that if specifically asked about it she would have assumed that he was because of his name. Mr Bryan said that he would not assume that somebody was a Muslim because their name included Mohammed. We find that the reality is that neither gave the claimant's religion any thought

50. The claimant in evidence said that his CV showed "Database Administration" experience. His evidence was that Database Administration encompassed and included data migration and data conversion. He said it was simply irrational for the respondent to reject him on the basis that he did not have data conversion experience when he could show he had database administration experience.

51. The claimant correctly pointed out in his evidence that the job spec for the Role includes "database administration experience" as a desirable quality (p.98). However, that is a "desirable" quality. The first "essential skill, qualification and experience" required for the Role was "a solid background in data migration/conversion". Mr Bryan's evidence was that for the respondent this was the core requirement and particularly important because of the nature of the data being "handled" which included solicitors' firms accounts which were subject to strict regulatory rules. We find the respondent was looking for someone with a track record in data conversion specifically, rather than someone who had carried out a more generic database administrator role which had included some data conversion. We find, as we have said already, that Mr Bryan's genuine assessment was that the claimant did not fit the bill for the Role based on the evidence in his CV and the follow up emails the claimant had sent him.

Relevant Law

The Equality Act 2010 claims

52. The complaints of direct race discrimination and of religion or belief discrimination were brought under the Equality Act 2010 ("the 2010 Act"). Section 39(1)(a) and (c) prohibit discrimination against a person in the arrangements made for deciding to whom to offer employment or by not offering them employment.

53. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(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."

54. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different, non-discriminatory reason for the treatment.

Direct discrimination

55. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

"(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".

56. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

57. It is well established that where the treatment of which the claimant complains is not overtly because of race or of religion or belief, the key question is the "reason why" the decision or action of the respondent was taken.

58. The protected characteristic need not be the only reason for the less favourable treatment but it must be an effective cause (**O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT**).

Time Limits

59. The time limit for bringing a discrimination claim under the 2010 Act appears in section 123 as follows:-

"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of three 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.

(2) …

(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." end of the period;

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

Continuing Acts

60. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding this question:

> **'The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.**

61. In considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

62. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

Just and equitable extension of time

63. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) of the 2010 Act, 'there is no presumption that they should do so…a tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

64. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

65. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly. It went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

Discussion and Conclusion

<u>Jurisdictional Issues</u>

(1) Whether the claimant has lodged his claim out of time and to the extent that the claimant presented his claim after the expiry of the normal time limit for presenting the compliant, whether it is "just and equitable" pursuant to Section 123 of the Equality Act 2010 to allow the claimant to bring the claim out of time.

66. As we explain below, we have found that the claimant's claims all fail. In those circumstances it is not strictly necessary for us to decide whether his claim was in time. Had we been required to do so we would have found that it was. We find that the claimant's applications formed a continuing act up to and including Mr Bryan's rejection in his email on 10 May 2019. That email confirms that Mr Bryan had "looked at the claimant's CV again" which we find was a fresh decision in relation to the claimant's application for an interview. We do not accept the submission made by Ms Smith that the second rejection took place on 29 April 2019. The latest act in the continuing act of discrimination was 10 May 2019. That being the case, the claimant was required to start the early conciliation process by 9 August 2019. He in fact did so on 2 July 2019 and filed his claim on 12 August 2019. Taking into account the early conciliation extension of time this means that the claim was filed in time.

(2) Having regard to the fact that the claimant commenced early conciliation against "Quill" has the claimant complied with the requirement for ACAS pre-claim conciliation.

67. We addressed this matter at the start of the hearing and decided that the claimant had complied with the requirement for ACAS pre-claim conciliation.

Discrimination on the grounds of race

(3) The claimant relies on his ethnic and national origin for his claim and defines himself as being "Asian, of Indian descent".

Was the claimant treated less favourably than a hypothetical comparator has or would have been treated because of race contrary to Section 13 of the Equality Act 2010? The less favourable treatment relied on is the manner in which the respondent dealt with the claimant's job application i.e. its failure to offer him an interview and/or to appoint him to the role.

68. It was not disputed that the respondent did not offer the claimant an interview for the Role. The central issue in this case is the "reason why" the respondent rejected the claimant's application(s) for the Role. We accept that the claimant was genuinely of the view that he was suitable for the Role. We accept that Mr Bryan and Ms Blake were genuinely of the view that he was not suitable for it.

69. As Ms Smith submitted, the claimant himself provided a number of different reasons why he suspected he was not interviewed. In addition to his race and his religion, they included that the respondent knew it would be difficult to replace him on the Barclay House front desk, a perception around his mental health and implausible reasons involving Cindy Crawford and Manchester gangs. Our view is that the claimant himself was at times uncertain about why he had been rejected. He was

clear, however, that the respondent was wrong to reject his application and there must be an unstated reason for that.

70. In terms of the evidence, however, there was nothing to support the view that the claimant's race or religion was an effective cause of the decision not to offer him the Role or an interview for it. We accept Ms Smith's submission that the claimant has not proved facts from which we could conclude that he was directly discriminated against because of race. He has not passed the burden of proof to the respondent. We found his allegations of racial slurs and racial harassment by the respondent's employees vague and unconvincing. He never suggested that Mr Bryan or Ms Blake, the decision makers on his applications, made any derogatory remarks towards him of a racial or religious nature. We found that Mr Bryan did not make non-racial or religious derogatory remarks to him in the context of cleaning the toilets.

71. When it comes to the "rejection" of the claimant's initial application for the Role by Ms Blake on 28 March 2019, we found that at that point Ms Blake did not know that it was the claimant who had applied for the role. In terms of why he was rejected, we accept the respondent's explanation that at that point it thought the role was going to be filled by the director of the company the respondent had acquired. We find that rejection had nothing to do with the claimant's race.

72. Dealing with the rejection of the claimant's second application by the respondent (initially on 29 April 2019 and subsequently by Mr Bryan on 10 May 2019), our conclusions are the same. We accept that Mr Bryan's assessment of the claimant's CV was that he did not have the necessary data conversion experience which Mr Bryan considered essential for the Role. We acknowledge that the claimant disagrees with that view, but it seems to us based on the evidence we heard that Mr Bryan was entitled to reach that view. Even if he was not, the point remains that if (as we have found) he genuinely believed that the claimant was not suitably qualified and experienced for the Role, the claimant's claim fails. There was no basis on which we could find that the burden of proof passed from the claimant to the respondent.

73. The claimant pointed to a number of issues which he suggested rendered the decision to reject his application suspicious. He relied on the use of exclamation marks by Ms Blake. We have found that they did not have the significance which the claimant attached to them. The claimant also suggested that the lack of involvement by Mr Wormald in the decision to reject his application was in some way suspicious. We accept the respondent's evidence that it made no sense for both Mr Wormald and Mr Bryan (senior directors of the respondent) to be involved in decisions on a recruitment application. We do not find that Mr Wormald dropping out of the process is a fact which in any way points to the rejection of the claimant's application being because of his race.

74. Our conclusion, therefore, is that the claimant's claim that he was treated less favourably because of race fails and is dismissed.

Discrimination on the grounds of religion or belief

(4) The claimant's religion is Islam.

(5) Was the claimant treated less favourably than a hypothetical comparator has or would be treated because of his religion or belief contrary to Section 13 of the Equality Act 2010? The less favourable treatment relied on is the manner in which the respondent dealt with the claimant's job application i.e. its failure to offer him an interview and/or to appoint him to the role.

75. For the reasons given in relation to the race discrimination claim, we also reject the claimant's claim that he was treated less favourably because of his religion. The claimant vehemently contested Mr Bryan and Ms Blake's contentions that they did not know whether the claimant was a Muslim or not. He said that it would have been perfectly obvious to them that because his name was Mohammed that he was a Muslim. We do not think that necessarily follows.

76. We find that neither Ms Blake nor Mr Bryan knew for certain whether the claimant was a Muslim. As the claimant explained in his evidence, he is a practising Muslim but does not adhere to all restrictions which other persons sharing that faith might do. We find that neither Mr Bryan nor Ms Blake really turned their mind to whether the claimant was a Muslim or not. That did not play any part in their decision-making process.

77. In those circumstances the claimant's claim that he was treated less favourably because of religion fails and is dismissed.

Employment Judge McDonald
Date 30 September 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
4 October 2021

FOR THE TRIBUNAL OFFICE