Case Number: 3324801/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Jones	**v**	**The Secretary of State for Health and Social Care**

Heard at: Reading (via CVP) **On**: 14-17 December 2021

Before: Employment Judge Eeley
Ms S Hughes
Mr A Morgan

Appearances

For the Claimant: In person
For the Respondent: Ms M Tutin, Counsel

JUDGMENT having been sent to the parties on 22 January 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claim form in this case was presented to the Tribunal on 29 October 2019. The issues in the case were distilled and recorded at an earlier preliminary hearing as per Employment Judge Vowles' Case Management Order [page 44]. The claimant brought a claim of s.13 direct race discrimination in relation to the respondent's failure to appoint him to a job that he applied for in March/April 2019. The second complaint pursued by the claimant was an allegation of victimisation contrary to s.27 of the Equality Act 2010, namely a failure to offer the claimant a post in May 2020 when he says he should have been on the reserve list following his earlier, unsuccessful job application. There was also a potential jurisdiction issue for the Tribunal to consider, namely whether any of the claims were presented to the Tribunal outside the primary limitation period and, if so, whether it would be just and equitable to exercise our discretion to extend time to allow the claims to proceed and be determined on their substantive merits.

2. In order to determine the case the Tribunal received written witness statements which were supplemented by oral evidence. We heard from the claimant and from the witnesses for the respondent. The respondent presented evidence from Mr Darren Clehane who was the Senior Business Development Manager at the relevant time. Secondly, the respondent called Mrs Carolyn Johnstone, who was an Assistant Business Development Manager at the relevant time. Mr Thomas Dwyer, Human Resources Operations Supervisor gave evidence, as did Mr James Wood, Head of Recruitment in Human Resources. The Tribunal was also referred to (and read the relevant documents within) an agreed bundle which ran to 418 pages plus two tranches of a supplemental bundle provided by the claimant. Those two tranches ran to 387 pages and 37 pages respectively in the pdf document which we considered. We also had the benefit of skeleton arguments on behalf of both parties, which were then supplemented by oral submissions. We thank everyone involved for their assistance in presenting the case to this Tribunal.

3. A procedural matter arose for our consideration. The respondent's name, as originally stated in the title of the proceedings, is now amended, by consent, to "The Secretary of State for Health and Social Care" because Public Health England (which was the relevant body during the course of the events which led to this claim) has been abolished and replaced by a different body. That has happened since the events with which we are concerned. As the claimant was never employed by Public Health England and, therefore, TUPE was not a live issue, the Secretary of State accepted that he was the correct respondent should any liability arise in the claimant's claim.

Findings of Fact

4. At the material time for the purposes of this case, Public Health England ("PHE") was an executive agency of the Department of Health and Social Care. The claimant is a black Barbadian man in his fifties, resident in the UK for over twenty years. They are the parties to this claim.

5. On 8 March 2019 the claimant applied for the role of Assistant Business Development Manager with the respondent. It was a role which was to be based at PHE in Chilton, Didcot. The claimant filled in an application form detailing his qualifications. That application form was not referred to within the hearing bundle. However, we can see from the claimant's witness evidence (which was not contradicted) that the claimant has degrees: a BA in Foreign Language Studies, an MSc and a PHD in Organisational Management. The claimant's CV indicates that his employment experiences had a strong marketing theme running through them, along with elements of sales. His experience was largely in the private sector in terms of the number of jobs he had had, although we note some public sector work when he worked for the Tourist Board in Barbados between 1992 and 2000.

6. The recruitment process for the March 2019 vacancy seems to have involved two separate stages. Stage 1 (or what the claimant referred to as Stage 1)

involved the consideration of the applicants' written application forms. We find as a fact that it was effectively a 'sift' stage to decide who the appropriate candidates would be to invite to interview. (Stage 2 was the subsequent interview stage). The process designed and adopted by the respondent at Stage 1 was for two individuals, Mr Clehane and Mrs Johnston, to mark the application forms. They would sit separately from each other, using separate log-ins for the computer system, and score the application form according to the job specification and in particular by reference to the essential and desirable characteristics set out in the job particulars.

7. The shortlisting criteria for this process were set out in the bundle in a document which started at page 214 (see in particular p215). It set out the 'essential criteria' and the 'desirable criteria' in each category. We understand and accept that both Mrs Johnston and Mr Clehane did not confer when carrying out this scoring process but instead input their scores onto the respondent's system (known as 'TRAC') on a separate basis. The system then tallied the scores up, gave them the scores and gave an output as to who had scored well enough to be called to an interview.

8. After this process had concluded it was decided that the claimant and several others should be called to interview. Seven candidates were initially called to interview. For one reason or another, three of those seven dropped out leaving four candidates who had made arrangements for an interview with the respondent. The interview day was scheduled for 28 March 2019. We heard a lot of evidence around candidate B and how or why he should not have been put through to the Stage 2 interview. Our conclusions, having heard the evidence, are that the respondent's witnesses both independently scored candidate B and the claimant as meeting the requirements for an invitation to interview. There is nothing in the evidence to suggest collusion between those two witnesses in carrying out the scoring exercise.

9. The claimant focussed on the fact that the candidate B does not have a degree and took issue with the fact that both he and candidate B went through to an interview. He felt that candidate B's qualifications and experience had been overvalued and his own qualifications had been undervalued. However, the respondent's witnesses rightly took us to the essential criteria for the post at page 215. They refer to education to 'degree or higher level in business and/or science or equivalent level of experience of working at a similar level in a specialist area.' This means that there was, in fact, more than one way for a candidate to meet the essential criteria. A degree was not the sole route. Other equivalent experience would achieve the same outcome. The Tribunal pauses to note and to observe that it is only right that this should be the case if an employer wants to increase diversity within its workforce, particularly by reason of age. It is the only way to compare application forms from a wide range of candidates fairly, including those from so-called non-traditional backgrounds. It is common nowadays for there to be no specific degree requirement but rather a requirement for degree level experience in the alternative. This may not, of course, apply in some of the regulated professions (such as the medical profession) but we are not concerned with such a profession in this case. So, it is not unusual not to require the paper degree qualification. This enables

employers to carry out a proper comparison, for example, between a young candidate with a degree but who is effectively straight out of university with little or no work experience, and an older applicant with plenty of 'on the job' experience but no paper qualification, such as a degree. Without this equivalence metric it would be impossible to consider the wider range of candidates applying to any given post in the modern workplace. On the face of it there is nothing wrong with the respondent putting two candidates through to interview, one of whom is qualified by a degree and the other of whom is not, so long as the respondent's own criteria have been properly and fairly applied.

10. We heard evidence from Mr Clehane and Mrs Johnston about how they carried out the scoring on the application forms. We found that both markers gave cogent evidence as to their reasoning for sending applicants through to the second stage. Judging and assessing the application forms required them to look at the breadth of the information provided on the form as against the criteria. The scorers had to use their judgment as to whether the application form met those criteria. They had to look at previous work experience and consider whether, in candidate B's case, it met the 'degree equivalence' criterion. They provided the evidence of equivalence that they had found in candidate B's application form. We had our attention drawn, in particular, to a number of matters. Firstly, candidate B had significant public sector experience working in the NHS. This was seen as an important factor as he would have knowledge of the culture and the particular features of the NHS as a public sector organisation. That would be pertinent to the role for which he was applying. Furthermore, he had experience of running his own business over a number of years and from that the scorers rationally deduced that he would have personal experience of business development, cost pricing and dealing with customers, again all pertinent to the job role in question with the respondent. There was evidence of him having worked with Cable & Wireless, a large organisation, and there was a rational assessment that this candidate had carried out project work and would have had to work to deadlines and work within a team. Even if that experience were further in the past, those project management skills would still remain and would still be relevant and indeed could be updated as required. Many of these observations relate to the concept of transferable skills. It is perfectly reasonable for an employer in the respondent's situation to look for evidence of such transferable skills.

11. The claimant put it to the respondent's witnesses that candidate B was 'just a care worker' but the documentary evidence suggests that he had been a rehabilitation therapy manager and was considering training as a physiotherapist so the claimant's generic description of him as a care worker perhaps understates the level of his expertise and ability. It is also relevant to note the respondent witness's observation that the respondent rarely has candidates with such public and private sector experience and that this was something of particular interest and relevance to the respondent. This would be something they would want to probe further at interview.

12. Nothing that this Tribunal has heard suggests that this was not an honest account of the witnesses' marking process. The evidence suggests, and we find, that they genuinely rated both the claimant and candidate B as suitable to

go through to the next stage. There was nothing untoward in this. Indeed, we also note that at this stage of the process there was no differential treatment between the claimant and candidate B. Both candidates got through to the second stage, as did two further applicants, C and D. It appears, on the evidence that we have heard, to be a rational decision based on cogent justifications. Unfortunately, the claimant appears not to agree with a value system or marking system where a formal paper qualification does not push an applicant up to the top of the rankings automatically. However, for the reasons already stated, it is open to a respondent to have the 'degree or equivalent' metric that we have examined.

13. Once the application forms have been scored we move to stage 2, which is the interview stage. On 28 March the claimant was interviewed for the position. Four candidates (including the claimant) were to be interviewed for the vacancy. The pre-prepared process was that interviews would be conducted by a panel of two: Darren Clehane and Carolyn Johnston. Mr Clehane was designated as the hiring manager. He had the overall recruitment responsibility for managing the process. Carolyn Johnston worked as an Assistant Business Development Manager and was line managed by Mr Clehane. She was doing the same job as the vacancy that the claimant was applying for. During the interview process the claimant and the other candidates were asked the same seven questions, which were each scored out of a maximum of five marks. Scores from both panel members were then to be added together to give the final score. The maximum score available to each candidate was 70. The claimant's score was 52.5. All four candidates were then ranked from highest to lowest score. All four candidates achieved scores which meant they were of an appointable standard. The top score was achieved by candidate B and was a score of 55.5 marks. The claimant was ranked second highest in the rankings. The top scorer was offered the role, subject to references and pre-employment checks, on 2 April 2019. He was offered the role and accepted it on the same day.

14. A word in passing about candidate C, about whom we heard much evidence. Candidate C was one of the four candidates taken to Stage 2. He underwent a different process at interview for various reasons which we now set out. He was unable to attend on 28 March. The respondent offered alternative dates for interview but candidate C could not accommodate an interview the following week (due to work commitments) and the suggestion was therefore made that an interview could take place via Skype on 29 March. An invitation was duly sent out and was tentatively accepted by candidate C. When the 29 March appointment came around, candidate C could not log on. The respondent therefore asked him to carry out his interview by using the freephone number with which he was provided. The candidate was not sure whether it was actually a free phone number or whether he would be charged the cost of a lengthy telephone call. The solution arrived at was for the respondent to call candidate C on his mobile phone (so that it did not cost the candidate anything) and to carry out the interview in that way. The time taken to resolve this initial problem, however, meant that by the time a solution was arrived at, a significant portion of the interview slot had already elapsed. Carolyn Johnston had an alternative meeting which she had to attend. She had to be elsewhere, so the decision was taken that Darren Clehane would be the one interviewer to carry

out the telephone interview. The agreement reached between Mrs Johnston and Mr Clehane was that Mrs Johnston would look at Mr Clehane's notes of answers given by candidate C to the interview questions. She would look at the answers given and between them they would agree an appropriate level of score for each answer. That score would then be doubled to reflect the same total available marks as if two separate scores were given (i.e. it would give a score out of a maximum of 70).

15. We accept that this was a different process to that which the claimant and the other two candidates went through. However, we also accept that this different process was applied out of a genuine desire to facilitate an effective interview for this candidate. There is nothing to suggest that race played any part in this decision. Indeed, there is no evidence to suggest that either Mr Clehane or Mrs Johnston would know the race of candidate C as they did not physically see the candidate. Race could not form a conscious or sub-conscious part of their decision making process, particularly given the redactions made to the other documentation including the application forms.

16. The outcome of the scoring for candidate C was that he was appointable but he was not first or second on the ranked list of applicants. We also find that if it subsequently transpired that Mrs Johnston and Mr Clehane needed to offer the post to candidate C it would be done with the pre-condition that he would not be offered the job without a face to face meeting first. This was done to mitigate the difference in treatment and as a safeguard. In the event this issue never arose in practice given that the first choice candidate accepted the job offer. The respondent's eagerness to facilitate the interview for candidate C indicated that they were pleased to get a pool of suitable candidates through the sift to interview stage and they did not wish to lose any more potential good candidates by a process of attrition. As already noted, three candidates had already fallen by the wayside and would not be coming to interview even though they had got through the sift. The respondent's evidence indicated that its previous experience of managing to get sufficient suitable candidates through to an interview stage had not always been a happy one. They therefore wanted to maximise the chances of getting appointable candidates for the role. We accept that this was the genuine reason that the respondent's witnesses acted as they did in relation to the interview and assessment of candidate C.

17. A question arose in the course of the evidence as to what role the conclusions drawn at Stage 1 of the process should play (if any) in Stage 2, the interview. The claimant essentially suggested that the scores at Stage 1 should, in some way, be carried forward to Stage 2 and influence the decision making at that stage. However, we find that that was not the respondent's written policy and procedure. Nor is there a broader legal principle or rule that this has to be the approach taken by a fair and non-discriminatory employer. Mr Wood gave a good explanation as to why, in fact, not carrying Stage 1 scores forwards into Stage 2, is actually designed to minimise discrimination (or the risk of it) rather than let it leak into the system. Effectively, the respondent's policy is to let those who are interviewed start the interview with a 'clean sheet' and with the interviewers holding no pre-conceptions about them based on the contents of their application form. The form itself has fulfilled its function of ensuring that

the correct and suitable candidates get a chance at the interview. It is effectively a gatekeeping mechanism. Once candidates are at interview they have the opportunity to answer all the same questions as each other, according to their skills and experience. They may well draw some of their answers from the information which would be visible on the application form, or they may not. That is a matter of choice for each candidate in performing at an interview but it is giving everyone a fair chance so that the respondent can assess how they perform on the day. The respondent can assess how the candidates demonstrate their competence and suitability for the role against the relevant criteria.

18. Mr Clehane explained, and we accept, that the length of the notes taken at interview regarding each candidate's answers does not directly and necessarily correlate with the quality of the answer. Mrs Johnston also noted how difficult it can be to take a comprehensive note and listen to the answer properly at the same time. It is a material and important factor to note in this case that the scores are awarded in 'real time' actually at the interview. They are not based on a review of the notes after the event. Therefore, any shortcomings in the notes is not so relevant to the fairness and appropriateness of the score given at the time. It may make the process more difficult to look at after the event but the notes do not determine the score given. The oral answer to the question determines the score and the answer is reflected in the notes.

19. It is also important to note that the claimant asked the respondent's witnesses to compare the answers given by candidate B and himself. For this purpose he drew up a table with the answers side by side and critiqued how he was scored as compared to how candidate B was scored against the respective questions. However, this is not the way that the respondent actually carried out the scoring. They did not compare the candidates against each other. They assessed each candidate against a scoring matrix. In fact, the respondent witnesses made the very valid point that this was the first time that they had been asked to look at the scores alongside each other and compare the candidates with each other. The task on the day was in fact to mark the candidate against the criteria and not to mark each candidate against the others and indeed we heard evidence that that is what took place.

20. We also heard evidence that the questions set in this exercise had been used on a number of occasions for recruitment to similar jobs. So both of the people marking the interviews were aware of the kinds of answers which had been given in the past by successful candidates and which might be anticipated this time around. We find that the interview process is designed to ask the same question of each candidate and give equal opportunity to those candidates to demonstrate their experience and skills as against the job specification. The claimant says that the system is too subjective and that it could mask discrimination. We find that this system was as objective as it could be in the circumstances, particularly where an interview process forms part of the selection procedure. We understand why the claimant contends for an objective process. We also note that he referred, in his submissions to us, to doing the interview under 'laboratory conditions'. This is an indicator of the standard to which the claimant is holding the respondent. We conclude that

laboratory conditions (or anything approaching laboratory conditions) are not feasible or reasonably practicable in the context of an interview process involving human beings. This is not a scientific experiment with that degree of control and standardisation. Marking a candidate's performance in interview will always necessitate an assessment by each individual interviewer of how they feel and observe the candidate to have performed against the scoring matrix. The interviewer has to draw conclusions as to what merits a particular level of score. It is unrealistic (and indeed impossible) to try and make it into a scientific answer.

21. Having heard the evidence we conclude that, in the circumstances of this recruitment exercise, the respondent's approach at interview provided the candidates with the best consistent interview experience possible. It is then for each individual candidate to perform well at interview and demonstrate their respective merits. We also note that at the conclusion of this process the differential between the claimant and the first ranked candidate was actually quite small.

22. The Tribunal moves on to deal with the concept of a reserve system and how that is supposed to work within the respondent's organisation. The outcome of the interview process is that the candidates have been scored by the interviewers and the two scores have been added together to give an overall score. They have been ranked in order of score, highest first. The job offer is made to the first candidate on the list, the highest ranking candidate. We heard and accept, however, that sometimes the number one top ranking candidate does not accept the role for some reason. Either the pay is not adequate or they have got another job in the meantime.

23. In such circumstances, the process operated by the respondent would be to go down the list in order of ranking and offer the job to the next person on the list until either someone accepts the job, or all of the appointable candidates on the list have been approached and rejected the job offer. In the latter eventuality the post would remain unfilled pending a further recruitment process. If someone on the ranked list of candidates accepts the job offer and some candidates rated as appointable remain on the list lower down the rankings, it is open to the respondent's hiring manager to create a reserve list. The reserve list essentially retains the details of all the appointable candidates from the selection process in rank order. This is retained for twelve months. If there is a subsequent recruitment need to the same or a similar post within the following twelve months, the hiring manager for that subsequent selection process can decide to use the reserve list and offer the job to the candidates on the list in rank order, again until someone on the list accepts it. This can be a useful alternative to running a fresh recruitment selection campaign. If a reserve list is used it may not actually fulfil the function of filling the post. In the intervening time between the creation of the list and the utilisation of the list there may be many reasons why the candidates on the list are no longer available or no longer interested in taking a job with the respondent. If a list is used the respondent works through it in rank order. Once they decide to use a reserve list to fill a vacancy there is no discretion about the order in which the candidates on the list are approached and offered the post. In that sense it is not a

discretionary process, once the respondent starts to use it. However, there is nothing in the respondent's policies and procedures to indicate that the creation of a reserve list is mandatory after a selection process. It is optional. There is no obligation to create the reserve list in the first place. Similarly, once the same or a similar job vacancy subsequently arises it is up to the hiring manager for that specific selection exercise to decide whether to hold a fresh recruitment campaign or to go to the reserve candidates on a pre-existing reserve list first. That is also optional. It is not obligatory or mandatory to use the reserve candidates first. So there is nothing in the policies and principles to indicate that the use of a list is mandatory where it is available. However, there are rules about how it should be used if and when the option to use the reserve list is taken.

24. Moving on in this case to consider the outcome of the recruitment process: how was that communicated? As previously stated, the respondent made the job offer to the successful candidate, which was accepted on 2 April 2019, subject to checks. That candidate went on to accept the job. There was no need to ask the second ranked candidate on the list (i.e. the claimant) whether he wanted to take the job. Mr Clehane did, in fact, decide to create a reserve list using the remaining candidates from this selection process. The claimant was the first person on the list given that the previous top scorer had already taken the job which was the subject of the original recruitment exercise. The outcome of the selection process was not communicated to the other three unsuccessful candidates including, but not limited to, the claimant. All three unsuccessful candidates were left in the dark about the conclusion of the process.

25. We heard, and we accept, that Mr Clehane uploaded the status options of "successful", "reserve" or "rejected" onto the respondent's TRAC system in relation to the candidates in the selection process. He incorrectly thought that the system itself would generate and send the unsuccessful candidates an email telling them that they were in fact on a reserve list. That belief was erroneous but, we find, it was a genuinely held belief. He was genuinely mistaken about how the system worked. He did not realise that he had to send the outcome to the other applicants himself. We find as a fact this was genuine and that he had no motive to not send the outcome letter to the unsuccessful candidates as soon as possible. Indeed the claimant was treated in the same way as the other unsuccessful candidates who, we understand, did not share the claimant's racial characteristics.

26. The claimant waited some time to hear about the outcome of his job application and eventually decided that he had no option but to contact the respondent and find out for himself. This resulted in Maria Miakhel sending a chaser email on 1 May 2019 reminding Mr Clehane to inform the unsuccessful candidates. There was no good explanation for his failure to do this. Mr Clehane merely forgot. It was an oversight. He did not communicate the outcome and he should have. There then followed a period of time when there were phone calls between the claimant and Maria Miakhel where the claimant chased the outcome of the selection process. Then, in June, he made phone call contact with an apprentice who denied knowing the outcome. The message was passed on to Maria to prompt Mr Clehane again. That happened and it

produced Mr Clehane's email to the claimant of 3 July, which is at page 127 in the bundle, where he informs the claimant that he is a reserve. The text of that email is of relevance and so we propose to read it into the record. Mr Clehane writes:

> "Dear Nicholas
>
> Very many apologies – I believed I had sent feedback on your interview, previously. It did take us quite a while to complete things. It was a very strong bunch of applicants and we felt all of you were appointable (you were our "reserve"). We offered to someone who had broader and more directly relevant experience but I have asked that you are kept on our lists – and I would hope that you would apply for any similar posts in the future. My best guess is that at least one very similar position will arise in about six months' time. There is a possibility that one – with greater emphasis on marketing – may appear sooner. In terms of feedback, I'll keep it simple and stress there were no negatives – it was just on the day there was a stronger candidate. Again, many thanks for taking the time to apply. And, again, I am so sorry that this did not get to you, sooner. Do get in touch (use this direct email rather than go through the system) if you want further details. All the best, Darren."

27. We find that the reasonable and objective reading of the contents of that email is that the claimant was being informed that he was on a reserve list, he was being encouraged to apply for future posts, there was a prediction that something similar might come up in the next six months (but no guarantee of that) and no guarantee, of course, that the claimant would get such a job. There was encouragement to apply if something with a particular marketing element arose. This suggests, perhaps, that the respondent's witnesses thought that this was where the claimant's particular strengths were. The reference to 'no negatives' was not, as the claimant suggests, an indication that he had given a flawless or perfect interview, whatever that may mean. Rather, it indicates that he did a good interview but someone else did a better one on this occasion. It indicates no obvious mistakes on which feedback is required to warn the candidate to avoid doing this in the future. It is a relatively good performance but someone else was even better. Hence the reference to 'no negatives'.

28. Moving forward, a new vacancy arose in May 2020. On 28 May 2020 the respondent advertised for a fixed term Assistant Business Development Manager. We will refer to this as the May 2020 job. Mr Clehane was the hiring manager for this post too. The vacancy had arisen more than twelve months after the creation of the first reserve list (on which the claimant was the top ranked candidate). Mr Clehane did not use the reserve list. Instead, he carried out a fresh recruitment and selection exercise and filled the post that way. He did not offer the role to the claimant or the other two candidates on the previous reserve list. The claimant said he continued looking for jobs throughout this period but did not know about this particular vacancy and, therefore, did not apply for it. He did not form part of the recruitment exercise and was not offered the job. Again, there is some relevant correspondence in the Tribunal bundle which starts with a chain of emails. The pertinent email is that which we find at page 211A of the Tribunal bundle. However, it is important to note that this is the last in a line of emails which cover pages 211A-D. That final email is on 29 May 2020 at 12:37 from Mr Clehane to Charlene Baffour, copying in Carolyn

Johnstone, James Taylor, Christine Scott. (Charlene Baffour was an employee within the HR division). In the email Mr Clehane states:

> "Hi again it just occurred to me – is there anyone in the "talent pool" that might be a suitable fit for this post? Anyone found appointable (but not the first choice) that may have asked to be considered for similar opportunities? A long-shot I know. Thanks. Darren"

29. That has to be viewed in the context of the email chain which starts at 211D. What does this Tribunal make of that email, taken in context? It indicates that Mr Clehane had initially completely overlooked the presence or option of a reserve list. We see him seeking guidance at the outset from HR to see what needs to be done to fill and recruit to the vacant post. In the exchange that we have seen, HR did not prompt him or remind him about the reserve list. So Mr Clehane followed their other instructions which were to enable the post to be advertised externally. That advert went live on 28 May. The very next day Mr Clehane sent the email at page 211A. Clearly, it has just occurred to him for the first time that there may be an alternative way to fill the vacancy. His reference to 'talent pool' is clearly a reference to the reserve list, although he does not use that terminology. That is the thing that he is driving at, the matter which he is referring to. It also indicates that he is waiting for HR to tell him if there is anything out there in the so-called talent pool for him to consider. It appears that HR never responded to that query and we find, therefore, that Mr Clehane had genuinely forgotten about the reserve list at the time that the application process went live. The issue never arose thereafter because HR did not come back to him and refer to the reserve list in question. If they had then he would have had to take HR guidance about how he could now use the reserve list option given that there was already a fresh recruitment campaign going live. The fact that Mr Clehane sent this email shows us that he had no intention or desire to exclude the claimant (or the others on the reserve list) from the process. He initiated a search for reserves, albeit not using the correct terminology. Why would he do that if he did not want the claimant to be reconsidered at this stage? The claimant made much of the terminology and the reference to "not the first choice". Mr Clehane's explanation of this phrase is, in our view, the reasonable and credible one. We find as a fact that what he was saying here was that the offer would not be made to the first choice i.e. the person who had already been offered the role or was already employed in the post. This was not a reference to the claimant being excluded from consideration. Taking the claimant's reserve list as an example, it was a reference to excluding candidate B, who would technically be the first person on the list but who was already in employment. We do not think that the claimant's interpretation of this wording to suggest that he was being deliberately excluded from consideration is credible or reasonable and we prefer the respondent's explanation of what this email means.

30. We also find that, in acting as he did, Mr Clehane did not breach any of the respondent's policies and procedures in relation to the use of a reserve list. We note that in any event, the reserve list which the claimant was on was already more than 12 months old by the time the second job was advertised. It was, therefore, obsolete and would not fall within the reserve list policy in any event. It was out of date and not apt to be used on this occasion.

31. We have some further findings of fact to make which fall perhaps slightly outside the core chronology of events in this case. We heard evidence about the claimant's requests for further information from the respondent about how the job process had been carried out. He corresponded at length with various staff at the respondent including those in HR. The material timeline is that Mr Dwyer first became aware of the claimant's application on 24 July 2019 when Maria forwarded him a complaint which she had received from the claimant (page 121). The complaint raised several matters but was mainly levelled at the fact that the claimant had not been informed of the outcome of his application promptly. Mr Dwyer tried to call the claimant that day and then sent him an email letting him know that Mr Dwyer had received his complaint (page 134). On 25 July Mr Dwyer sent the claimant a written response to his complaint answering his queries line by line (page 132-133). Mr Dwyer explained to him that the hiring manager, Mr Clehane, had failed to contact him after making his decision. Mr Dwyer apologised for this oversight. Mr Dwyer discussed the matter with Darren over the phone a few days later. It is also apparent that Mr Dwyer was unable to answer all of the claimant's questions partly because several of them enquired about the personal characteristics of the other applicants. Mr Dwyer advised the claimant to make a Freedom of Information ("FOI") request in respect of the outstanding information and documentation which he required (page 130).

32. The claimant replied claiming that Mr Dwyer should be able to share the information with him without him making an FOI request. Mr Dwyer referred the matter to the respondent's own FOI team on 29 July (page 136-137). On 31 July Mr Dwyer received a complaint from the claimant about what he described as the "unnecessary bureaucracy" involved in making an FOI request (page 139). The claimant asked Mr Dwyer to pass on his enquiries to the Freedom of Information team for him. Mr Dwyer acted on this and accordingly consulted Anita Bennett, the respondent's Freedom of Information manager who advised Mr Dwyer that a Freedom of Information request must come directly from the person making the request (page 138).

33. Mr Dwyer passed this information on to the claimant, but he continued to complain about having to contact the Freedom of Information team himself. On 6 August 2019 Anita informed Mr Dwyer that she would contact the claimant directly (page 146). Eventually, Anita emailed Mr Dwyer to say that she was closing the claimant's case as the claimant had not provided any identification documentation (page 147). The Freedom of Information team went on to grant the claimant's Subject Access Request on 3 October (page 179-180) and Mr Dwyer provided them with copies of the respondent's recruitment and selection policy for that purpose.

34. On 16 October 2019 the respondent received a letter from the Information Commissioner's Office (the ICO) about a complaint made by the claimant (page 204). The claimant had apparently complained to the ICO that the respondent had failed to respond to his information request. Mr Dwyer made some further enquiries of Mr Clehane asking him when he had informed the other unsuccessful applicants of his decision (page 182). Anita responded to

the ICO on 28 October (page 207). Notably, at page 123 the claimant raises what he calls an official grievance. He notes that he has until 9 August to submit his claim. He is clearly aware of a time limit at that stage. On 24 July he requests information (or has requested information) which falls within Freedom of Information Subject Access Requests and Personal Identification Information. Asking for a mixture of these types of information gives rise to issues for the respondent to consider as to how they can properly handle this in line with compliance requirements (such as what compliance implications there may be for data protection).

35. The material finding of fact which we made from all of that evidence is that the respondent did not refuse to provide the information in the way that the claimant asserts. Rather, they were following their own procedures to ensure, as they saw it, compliance with the requirements of data protection law. Thus, where there was doubt about what was disclosable Mr Dwyer referred the matter to the Freedom of Information team and followed their guidance about what he could (or could not) disclose. He gave clear evidence that he would follow the guidance he was given. He would not refuse information that he was told by the team was disclosable. It is not relevant to the issues in this case (and the claimant's Equality Act claims) to decide whether or not the respondent did or did not understand the GDPR correctly. What matters is what caused them to act as they did: to exclude or disadvantage the claimant, or to follow the proper process as they understood it to be. Indeed, at one point the respondent said it would provide the documents if the claimant provided proof of identification. The claimant objected to doing this and so the parties were left at an impasse. At this stage, the factor which prevented the disclosure was not the respondent at all. Rather, it was the claimant's refusal to follow, what we consider to be a reasonable identification procedure. The respondent had a genuine concern that if they disclosed information about the profiles of the other candidates in such a small pool, it would render them identifiable. Whether this was right or not is certainly an arguable point and discloses the reason why they acted as they did. It shows that there was no conspiracy or desire to deliberately keep the claimant in the dark or cover up wrongdoing by the respondent.

36. We also make some observations regarding the training received by the recruiting officers. We find that Mr Clehane and Mrs Johnston followed the respondent's procedures regarding recruitment. The respondent had already designed those procedures to build in as many safeguards as possible against bias and discrimination. So by following those procedures there was already a level of safeguarding. We find that there was no material training deficit in relation to the two individuals involved in this recruitment exercise, which raises concerns about unconscious bias or discrimination when they carried out the recruitment exercise. Indeed, we heard evidence from both of them that they had had training on unconscious bias and were very much alive to the risks that this presented in the recruitment context. The claimant actually asked them what they had taken from that training. It was clear from their responses that they were alive to the risks and did their best to mitigate against them. We did not find that there was a training deficit which had a material impact on the process and procedure in this case.

37. Finally, at various points in the documentation the claimant has alleged deceit, conspiracy, fraud, etc on the part of the respondent's witnesses. We have to say that we found the respondent's witnesses to be straightforward and honest. We did not find that there was any malign intent or bad faith so we do not accept the claimant's assertions about fraud or deceit or other descriptions of a similar nature.

The law

38. Moving on to the applicable law in this case. The relevant legal provisions in the Equality Act 2010 are as have been cited by the parties. Section 13 is applicable in the case of a claim of direct discrimination. The relevant part of that section states: *"(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."* For the purposes of making a comparison we have to identify a comparator. Section 23 of the Equality Act (so far as relevant) has this to say regarding the comparator*: "(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."* We bear that in mind when considering and applying the law to the facts in this case.

39. In section 13 the crucial issue really is the so-called "reason why" question: "Why did the respondent treat the claimant as they did?" In most cases this will call for some consideration of the mental processes, conscious or subconscious, of the alleged discriminator (see Nagarajan v London Regional Transport [1999] IRLR 572). The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL Lord Nicholls stated: "a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

40. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The

decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

41. The further relevant section in this case is section 27 Equality Act 2010 which deals with victimisation and which states that: *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because- (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act."* Section 27(2) defines protected acts thus: bringing proceedings under this Act; giving evidence or information in connection with proceedings under this Act; doing any other thing for the purposes of or in connection with this Act; making an allegation (whether or not express) that A or another person has contravened this Act. The first in the list is 'bringing proceedings under this Act' and that is the relevant one for the purposes of this case.

42. A claimant seeking to establish that he has been victimised has to show two things: first, that he has been subjected to a detriment; and secondly, that he was subjected to that detriment because of a protected act.

43. Not offering a person employment may constitute an act of discrimination or victimisation (section 39 Equality Act). The EHRC Employment Code contains a useful summary of the treatment that may amount to a detriment: *"Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage….There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment*." (paragraphs 9.8 and 9.9). The situation must be looked at from the claimant's point of view but his perception must be 'reasonable' in the circumstances.

44. The protected act need not be the sole cause of the detriment for a victimisation claim to be made out. Once again, the Tribunal must consider the mental processes, conscious or subconscious, of the alleged discriminator. The protected act just needs to be a 'significant influence' or factor etc in a Nagarajan sense. Detriment cannot be 'because of' a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred the claim for victimisation will fail (Essex County Council v Jarrett EAT 0045/15, Scott v London Borough of Hillingdon 2001 EWCA Civ 2005).

45. We have also been referred to the burden of proof provisions at section 136 Equality Act 2010. The relevant part of section 136 states:

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision….

46. The wording of section 136 of the Act should remain the touchstone. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

47. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the

respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.

f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

48. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

49. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

50. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

51. The fact that a claimant has been treated less favourably than a comparator will not be sufficient to establish discrimination unless there is 'something more' from which the Tribunal can conclude that the different treatment was because of the protected characteristic (Madarassy v Nomura International Plc [2007] IRLR 246). It is only if this provision is satisfied that the respondent is then required to prove that they did not commit the unlawful acts (section 136(3) Equality Act). The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

52. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

53. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

54. We also note the time limit provisions at section 123 Equality Act 2010. Proceedings on a complaint 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 Employment Tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

55. The case of Bexley Community Centre (t/a Leisure Link) v Robertson [2003] IRLR 434 indicates that the time limits are to be applied so that a decision to extend time should be the exception rather than the rule. There is no presumption to extend time. The onus is on the claimant to convince the Tribunal that it is just and equitable to do so. This Tribunal would therefore need to identify the reason why the claimant did not present the claim on time and consider the balance of prejudice between the respective parties. It may be appropriate to consider the factors in s.33 of the Limitation Act 1980 as per British Coal Corporation v Keble [1997] IRLR 336 although those factors are not to be used as a strict or mechanically applied checklist (Southwark

London Borough Council v Afolabi [2003] 800). All relevant factors should be considered and the balance of hardship between the parties considered. The section 33 factors include: 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 had co-operated with any request for information; the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

Conclusions

56. It is important for us to focus now on the conclusions in this case and we are going to address the direct discrimination claim first.

57. We have asked ourselves what is the identified alleged act of discrimination in this case? The alleged discrimination is the failure to appoint the claimant to the March 2019 role. The respondent clearly failed to appoint the claimant to that role. That constitutes detrimental treatment. The crucial question is who is the comparator which we should use to carry out the comparison exercise that s.13 requires? The first option is candidate B, that is part of the way the claimant puts his case. We have reviewed this and have concluded that we do not think that he was a suitable and appropriate comparator because there are too many differences in material circumstances between the claimant and candidate B quite apart from the difference in race. This is particularly so given what the claimant says about the alleged inferiority of candidate B's qualifications and experience as compared to the claimant. The 2010 Act asks us to find a similar comparator, not someone who could be considered inferior, as the claimant effectively characterises candidate B. If we were to do as the claimant requests, we would be answering the wrong legal question. There are too many differences between the claimant and candidate B in terms of their CVs, their experience and their interview performances for these to be proper comparators. So, with that in mind we look at a hypothetical comparator. What would be the material characteristics of the correct hypothetical comparator and what would have happened to them if they had gone through the same recruitment process as the claimant? Well, we find that the hypothetical comparator would be someone in the same pool of candidates as the claimant with the same information on their application form as the claimant and who performed similarly at interview and gave broadly the same answers to questions at the claimant. However, the hypothetical comparator would not share the claimant's race. The hypothetical comparator would be competing against the same three candidates as the claimant did at the second interview stage. How would the hypothetical comparator have been treated? We find that there is nothing to suggest that a white comparator would have been appointed to the role. We conclude that the outcome of the selection process would have been the same. The comparator would not have been appointed either. This is because the basis for the appointment decision was the evidence which was elicited during the recruitment process and as a

result of the proper application of the respondent's processes. The comparator would have obtained the same scores as the claimant and the process would have dictated that as the first ranked candidate, candidate B, would still be offered the job first. The hypothetical white comparator would have ranked second (i.e. first reserve). There is nothing in the evidence we have heard which leads us to draw an inference of discrimination. There is no evidence of any conscious or sub-conscious consideration of racial characteristics. Based on our findings of fact the claimant has not demonstrated that there is an inference to be drawn from breaches of process and procedure that there was discrimination on racial grounds. The respondent genuinely chose those who they assessed as the best candidate for the role based on their performance at interview on 28 and 29 March. There was no material breach of procedure from which the Employment Tribunal could draw an adverse inference of discrimination.

58. Indeed, the claimant did not fail the interview. He passed. He was listed second. He was ranked appointable. It is also notable that he was the first reserve on the list and could quite possibly have been offered the role if the number one choice refused, something which we heard happened quite frequently. There was a realistic possibility that he would get the role anyway. If race were a factor one might have expected to see him put further down the rankings or some manipulation to take place to rule out any realistic prospect of him being appointed as a second choice.

59. One might not have expected to see Mr Clehane ask the question about the talent pool in May 2020 if the intention or the sub-conscious motivation was to exclude the claimant from the post. Why ask a question about a talent pool if you, as a recruiter, do not want to run the risk of the claimant being appointed or at least considered for appointment? Also, and this is important based on the claimant's assertions, the successful candidate for the May 2020 job was not white. We were informed he was of Azerbaijani nationality and origin. This undermines the claimant's assertion before the Tribunal that Mr Clehane wanted to keep the team white and British because in the very next applications exercise a non-white, non-British employee was in fact recruited.

60. Our conclusion is therefore that the comparator would not be treated more favourably than the claimant. There would be no less favourable treatment of the claimant and the reason for the respondent treating the claimant as it did was nothing whatsoever to do with race.

61. We do not actually feel the need to rely on the burden of proof provisions in this case. We feel that we were able to make actual findings on the evidence as to the reasons why the respondent acted as it did. In any event we would have had a good degree of sympathy with the respondent's argument that the burden did not shift to the respondent to establish the non-discriminatory reason for treatment. We could not really discern anything other than the difference in treatment and difference in race (following the guidance in Madarassy.)

62. We turn to the section 27 victimisation claim. That claim is based on the protected act of presenting the Tribunal claim on 29 October (i.e. the ET1 claim form). The case was put involving one protected act. The claimant did not rely on any earlier threat to bring a claim. This was clarified with him by the Tribunal so we have decided the case based on the way that he put it. The respondent concedes effectively that there was a protected act but denies that there was any detriment on the grounds of the protected act. The causal link is absent, says the respondent.

63. The detriment relied upon by the claimant is the failure to appoint the claimant to the May 2020 post using the reserve list. We find that there were a number of material reasons why the claimant was not appointed at this stage to the May 2020 job. None of them related to the Tribunal claim or ET1. Those factors included the fact that Mr Clehane had forgotten about the reserve list when the application went live; the fact that he had not been reminded by HR about the reserve list; the fact that he had asked about the reserve list later and was not taken back to or referred to the claimant's reserve list by HR; the fact that the respondent's policy does not actually require the hiring manager to use a reserve list even if one is created; the fact that the policy relates to vacancies in the twelve months following creation of the reserve list so that the May 2020 job fell outside the material and applicable timeframe.

64. In terms of Mr Clehane's knowledge of the protected act, he was aware that the claimant was making all sorts of complaints about him including Freedom of Information requests and Subject Access Requests. At some stage he knew these complaints included complaints of discrimination and he knew, at some stage, that there was a claim form presented to the Tribunal. He was unable to narrow it down to a particular stage where he obtained that specific knowledge so we cannot be confident that he even knew of the relevant specific protected act at the time he did the recruitment to the May 2020 job. In those circumstances it might not even be possible for the protected act to have had the necessary causal impact on, or link to, his May 2020 recruitment decision. However, we say, for the avoidance of doubt, that we do not base our decision on that alone. We find that there was good evidence, aside from any lack of knowledge on Mr Clehane's part, that he did not fail to appoint the claimant to the post because of the protected act. We find as a matter of fact that he made the May 2020 recruitment decision for all the reasons set out at paragraph 63 above rather than because the claimant had brought a claim to the Employment Tribunal.

65. The result of our conclusions is that both the section 13 and the section 27 claims fail and are dismissed.

66. There was the remaining question of jurisdiction. If we had found discrimination the question would have arisen as to whether the claims were presented to the Tribunal outside the relevant time limit. We address that issue briefly for the purposes of completeness. The alleged act of direct discrimination took place on 2 April when the job offer was made to the successful candidate and was accepted by them because that was the date when the respondent failed to appoint the claimant. That was the date when someone other than the claimant

got the job. Taking into account ACAS Early Conciliation, anything which took place before 1 July 2019 was outside the relevant time limit. The claimant did not pursue an argument that there was a continuing act between the alleged direct discrimination in 2019 and the alleged victimisation in May 2020, but even if he had, we are looking at two acts which took place just shy of a year apart with nothing occurring in between to link them together. They are two distinct acts and two different types of discrimination. We would not have been convinced on the evidence that we heard that this was a continuing act and we refer specifically to the wording of s.123(3) of the Equality Act. 'Continuing act' is a convenient shorthand that people use to refer to acts which 'extend over a period' of time. In this case there is nothing which 'extends over a period.' Nothing relevant happens between the two separate points in time and the two recruitment decisions.

67. The question would therefore have been whether it is just and equitable to extend the time limit. We would have to look at the balance of prejudice between the parties. We find, based on the facts that we have cited above and the oral evidence the claimant gave us, that the claimant was aware in August that he had the raw material to make a claim. Looking at the documents, even on 24 July he mentions having until 9 August to present a claim. There was clearly an awareness on his part of time limits for presentation of a claim. If the claimant had been thinking of expiry of a time limit in August it is not at all clear why he did not then present his claim until the end of the following October. We conclude, in fact, that he put this off because he was on an information gathering exercise. He was looking for the evidence to bolster his claim. However, there was no good reason why he had to await the outcome of this process before putting the claim to the Tribunal. He had sufficient information and knowledge about the basis of the claim when he was informed on 3 July that he had not got the job. He was already suspicious (even on his own account) by that point in time. We do not consider that the information gathering exercise was a good enough explanation for the delay in presenting the Tribunal claim.

68. Considering the balance of prejudice, it is also important to look at the cogency of the evidence. We think there was a disadvantage to the respondent in terms of the impact of the delay upon the cogency of the evidence. An earlier claim would have resulted in earlier disclosure and a greater preservation of documents. It would also, importantly, mean that the witnesses who were giving evidence about oral answers given at an interview would be doing so much closer in time to the events that they had to recall and with a better recollection of the detail of what was said by the claimant and the other candidates.

69. As things are, the respondent has had to do its best to respond to these elements of the claim. Despite the claimant's criticisms, the respondent did in fact provide him with information and an explanation of its actions quite early on in the chronology. It gave him enough information to know that there was a claim for him to make if he wanted to present it to the Tribunal. The respondent certainly did not hamper or prevent the presentation of the claim in a timely manner after 3 July. On balance we would have concluded that it was

not just and equitable to exercise our discretion to hear the claim outside the primary time limit.

70. That concludes our reasons. A judgment will be issued dismissing the claims and formally amending the name of the respondent to the Secretary of State as previously indicated. The Tribunal offers its thanks to all those involved for their participation and assistance in the hearing.

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Employment Judge Eeley

Date signed: 21 April 2022

Sent to the parties on: 22 April 2022

For the Tribunal Office