# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Maritz

**Respondent:** Bluthner Piano Centre Limited

**Heard at:** London Central (via CVP) **On:** 11th and 12th April 2022

**Before:** Employment Judge Nicklin
Ms G Carpenter (Tribunal Member)
Mr S Hearn (Tribunal Member)

**Representation**
Claimant: in person
Respondent: Mr G Baker, Counsel

**Note:** This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

# RESERVED JUDGMENT

1. It is the judgment of the tribunal that it is not just and equitable to extend the time limit for presenting the claim of direct race discrimination.

2. The tribunal does not have jurisdiction to hear the Claimant's claim of direct race discrimination.

3. The claim is dismissed.

# REASONS

*Numbers in square brackets in these written reasons refer to the joint hearing bundle*

**Introduction**

1. By a claim form presented on 16th June 2021, the Claimant brought a single claim of direct race discrimination in relation to his dismissal as General Manager from the Respondent company.

2. The Claimant was employed from 23rd November 2020 in this role until his dismissal on 5th March 2021 (by letter dated 4th March 2021). The Claimant

says that his dismissal was less favourable treatment compared to an actual or hypothetical comparator because he is of South African origin.

3. The Claimant began the ACAS Early Conciliation process on 28th March 2021 and the certificate was issued on 30th March 2021.

4. The claim was case managed by Employment Judge Davidson at a hearing on 20th October 2021. The parties agreed the issues to be decided in this case at that hearing (set out below). One additional issue was raised at that hearing concerning a claim about Health and Safety endangerment under the Employment Rights Act 1996. A short draft of that claim was submitted by the Claimant on 2nd November 2021. During discussion at the beginning of this hearing, it was established that the complaint the Claimant has on this issue concerns a general requirement for him to attend his place of work during the winter lockdowns of 2020-21 in circumstances where he considered himself to be especially vulnerable owing to his health. The Claimant confirmed this was a health and safety issue (i.e. not discrimination) but agreed that it did not fall within the legislative provisions concerning a health and safety claim based on a detriment or dismissal. The requirement for him to attend the office during those lockdowns was not imposed because of any complaint or action taken on his part. For these reasons, and in the circumstances, the Claimant confirmed that he was not seeking to amend his claim and considered that this was a matter on which he may take advice and, if appropriate, pursue in another forum. The parties were therefore agreed that the tribunal should proceed to hear the single complaint of direct race discrimination.

5. The tribunal had a 145-page bundle and 3 witness statements. The tribunal was also provided with an amended skeleton argument from the Respondent's counsel, dated 5th April 2022.

6. The witnesses were the Claimant and, for the Respondent, Mr Roger Willson and Mr Thomas Neubauer. The tribunal has considered these documents and heard live evidence from the Claimant and Mr Willson. On the second day of the hearing, the tribunal refused to hear live oral evidence from Mr Neubauer because he was attending the hearing remotely from Germany and the Respondent had not established that it was lawful for him to give evidence to a UK tribunal from that country. Oral reasons for that decision were given during the hearing. Written reasons will not be provided unless either party requests written reasons concerning that decision within 14 days of the date this judgment is sent to the parties. The Respondent did not request an adjournment and, in the circumstances, invited the tribunal to consider his written evidence.

7. Accordingly, the tribunal has also considered Mr Neubauer's written statement which has not been the subject of cross examination. The tribunal has a broad discretion to make its own judgment about the weight that is proper to attach to his written evidence. We accept that we are not bound to simply reduce the weight attached to his statement by virtue of him not having given oral evidence. Although not a requirement in the tribunal's Rules of Procedure, the witness statement bears a statement of truth and is signed as such.

8. Prior to closing submissions, the Claimant had advance notice on the afternoon of the first day that, if Mr Neubauer did not give oral evidence, he would be able

to set out any challenges he wished to raise in respect of Mr Neubauer's statement. He was also given additional time on the second day of the hearing, as he requested, to prepare his closing submissions and to consider what, if anything, he wished to say about Mr Neubauer's written evidence.

9. The tribunal has very carefully considered all of the evidence and has considered how much weight it should attach to Mr Neubauer's evidence given that the Claimant has not been able to ask him questions. We accept the Respondent's submission that Mr Neubauer was an available and willing witness in circumstances where he was unable to give oral evidence. However, where a conflict of evidence has arisen between the Claimant and Mr Neubauer to which Mr Willson was not a party (principally, the contents of a telephone discussion on 4th March 2021), the tribunal has approached Mr Neubauer's evidence with caution because his account was not tested by the Claimant's questions. We have not, therefore, drawn any adverse inferences from Mr Neubauer not giving oral evidence but, as above, we considered that it was in accordance with the overriding objective to exercise caution in dealing with any material conflict of evidence between these two witnesses.

10. In the event, the tribunal has resolved most conflicts of evidence having regard to the Claimant's evidence and Mr Willson's evidence, who was cross examined. Where the tribunal has made findings in relation to Mr Neubauer's evidence, it concerns matters which were uncontentious or facts which are made out by other corroborating evidence such as contemporaneous emails.

## Issues

*Time limits*

11. Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

    11.1. Was the claim made to the tribunal within 3 months (plus any Early Conciliation extension) of the act to which the complaint relates?

    11.2. If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide:

        11.2.1. Why were the complaints not made to the tribunal in time?
        11.2.2. In any event, is it just and equitable in all the circumstances to extend time?

*Direct race discrimination*

12. Was the Claimant's dismissal an act of direct race discrimination?

    12.1. The Claimant's ethnic origin is South African.
    12.2. It is accepted that the Respondent dismissed the Claimant.
    12.3. Was that less favourable treatment?
    12.4. If so, was it because of his ethnic origin?

## Findings of Fact

*Background matters and recruitment of the Claimant*

13. The Respondent is a UK based subsidiary of the German, family-owned company: Julius Bluthner Pianofortefabrik GmbH. The Bluthner brand is an international piano manufacturer and the Respondent sells its instruments from

its London showroom on Baker Street. The Respondent also offers other services such as lessons, seminars and studio hire.

14. The London showroom is ultimately a small operation, led by a general manager, supported by other sales and technical staff. The Managing Director is Mr Thomas Neubauer who is based in Leipzig, Germany. Mr Willson was a previous CEO of the Respondent. He retired in 2013 but has continued to work for the Respondent on a consultancy basis since retirement and, during an interim period when a past general manager left the business, he oversaw the company and the recruitment of a new general manager.

15. There have been several general managers over recent years. In 2020, the Respondent was looking for a new general manager. A sales manager at the London office, Mr Chalmers, advised Mr Willson that another piano business was closing with redundancies. The Claimant was, at that time, employed by that other business until its closure. The Claimant was referred to Mr Willson through Mr Chalmers.

16. The Claimant duly applied for the general manager role and was offered the job. His employment commenced on 23rd November 2020. A signed copy of his contract appears in the bundle at [57].

17. The Claimant accepted in his evidence that he had a South African accent and that both Mr Willson and Mr Neubauer knew he was of South African origin when he was recruited for the role.

18. The tribunal accepts the Respondent's evidence that it employs staff of various backgrounds in London and in the wider parent company. This is because:

    18.1. This evidence was set out in both witness statements of the Respondent and Mr Willson was not challenged; and
    18.2. On balance of probabilities, it is more likely than not that a business with companies arranged across different countries will engage persons of differing nationalities. We note, for example, at paragraph 18 of the Respondent's Grounds of Resistance [32], that the Respondent has previously sent a Bulgarian and French piano tuner to Leipzig for instruction in the past. There is no reason to doubt this is the case from the evidence heard and presented.

*The Respondent's concerns about the Claimant's approach to the business*

19. We accept, on the basis of the emails produced in the bundle, that the Respondent had formed the view that the Claimant had a significantly different approach to the business and operation as compared to Mr Willson and Mr Neubauer. We do not make findings about how far each concern relied on by the Respondent in this case is justified as it is not necessary in order to determine the claim.

20. In particular, the Respondent formed the following concerns:

    20.1. A lack of attention to company email style, including the failure to copy in Mr Willson to emails sent to Mr Neubauer, as instructed [94]. There is evidence of Mr Willson reminding the Claimant of this in an email sent on 2nd March 2021 [100].

20.2. A perceived lack of attention to detail. For example, in an email from Mr Neubauer to Mr Willson on 24th November 2020, Mr Neubauer complained about a failure (by the Claimant and another colleague) to pick up spelling mistakes [70].

20.3. A complaint that the Claimant lacked formality in addressing customers' emails. This was raised in an email sent on the Claimant's third day in the role [71].

20.4. On 14th December 2020, Mr Neubauer was concerned that the Claimant had given out a technician's details to a customer contrary to previous instructions given in an earlier email [80 and 71].

20.5. On 18th December 2020, Mr Neubauer and Mr Willson learned that the Claimant had, without consulting them, explored a new initiative with a finance provider with a view to offering finance options for instrument purchases [82].

20.6. Various customer enquiries directed to the Respondent's 'info@' email account had, in Mr Willson's view, been deleted without response.

21. On 3rd February 2021, the Claimant sent a voice message to Mr Neubauer via WhatsApp. A transcript of this message was produced in the bundle [97]. The Claimant said:

> "…*I wanted to add there is a lot of chefs in the kitchen here…I'm not here to please too many people, I'm really just here to keep an eye on the business and doing my job and make sure you're happy…happy with the results…*[Mr Chalmers] *isn't here at the moment so I'm able to send this voice text but I would like to speak to you I guess privately about this? Nothing sinister, it's just that yesterday I really struggled to keep an even kill here with lots of worthwhile opinions…maybe you can sense from my tone that I'm not all together happy. I'm not unhappy either I should add…but like I said, there is a lot of chefs*…(sic)".

22. During cross examination, Mr Willson referred to the Claimant saying that 'there are a lot of chefs in the kitchen' with reference to WhatsApp messages in the bundle. His apparent concern was that the Claimant was specifically referring to him and this was indicative of the Claimant's attitude and approach. The Claimant did not accept this and maintained that his message was in reference to Mr Chalmers. The tribunal accept that it is more likely that the message was in reference to Mr Chalmers as it expressly refers to it being possible to speak about the issue as he was not present at the time. Mr Willson's evidence on this point also included reference to events in the following month shortly before the dismissal decision which were plainly not part of this earlier message. However, we find that the concerns expressed by the Claimant highlight a broader dissatisfaction on the Claimant's part with the management and operation at the London showroom and this, on balance of probabilities, likely included his working relationship with Mr Willson. For example, in the message he says there were 'lots of worthwhile opinions' and 'a lot of chefs in the kitchen'. These comments suggest that the Claimant's style of leadership and management was at odds with the small team with whom he worked.

23. Mr Neubauer expressed his concern about the Claimant in an email to Mr Willson on 17th February 2021 after the Claimant had begun a period of self-isolation at home [99]:

"…*I think Sheldon being forced to take a little break is turning out to be a blessing in disguise. We have time to analyse his performance so far and get a much better understanding of what needs to be improved and where we would like his approach to be different in future*…".

24. The tribunal noted that the Respondent, save for some matters being briefly mentioned in emails, had not seen fit to fully address these matters with the Claimant during the first months of his employment. The Claimant's shock at the decision to dismiss him (as evidenced by his email response on 5th March 2021 [108]) is unsurprising given the lack of intervention on the Respondent's part, prior to dismissal. However, any such failure is not, on the Claimant's case, an allegation of discrimination in this claim.

*Dismissal*

25. The Claimant tested positive for COVID-19 and began isolating at home from 10th February 2021. Following a telephone conversation between the Claimant and Mr Willson on 1st March 2021 (whilst the Claimant was continuing to self-isolate) it was agreed that the Claimant would carry out some work at home. Mr Willson sent the Claimant an email on 2nd March 2021 setting out a number of tasks for him to complete [100].

26. On 4th March 2021 there was a telephone conversation between Mr Neubauer and Mr Willson to discuss the Claimant. We accept that this telephone call took place; it was the point at which the decision to dismiss was made and was followed up by an email exchange and draft termination letter. Further, Mr Willson was the only witness giving oral evidence who was a party to the call.

27. The conversation included Mr Neubauer telling Mr Willson about a previous conversation that day with the Claimant. Mr Neubauer reported to Mr Willson concerns about how the Claimant thought the task set by Mr Willson (as per his email on 2nd March 2021) was "a load of rubbish" and, in effect, Mr Willson should no longer be part of the management structure. We did not hear oral evidence from Mr Neubauer about these conversations and there is very limited evidence about it in the Claimant's witness statement. Given the earlier discussion between the Claimant and Mr Neubauer is disputed, we found that we could not determine exactly the words used in the conversation between the Claimant and Mr Neubauer, but we found that it was not necessary to do so. We are satisfied on the balance of probabilities that the Claimant raised objection to the tasks set by Mr Willson but duly completed them as he sent the work to the Respondent on 5th March 2021. We find that the reference in the termination letter sent to the Claimant on 4th March 2021 that 'not following instructions because he didn't agree with them' and that being unacceptable, supports the Respondent's contention that objection to Mr Willson's instructions was raised earlier that day.

28. We therefore find that when Mr Neubauer and Mr Willson spoke on the telephone on 4th March 2021, they had concluded that there was a division between themselves and the Claimant and there was a loss of trust. Both Mr Neubauer and Mr Willson formed the opinion, as set out in Mr Willson's witness statement, that the Claimant was "not a good fit for the business".

29. Both Mr Neubauer and Mr Willson jointly decided to dismiss the Claimant and the termination letter was sent to the Claimant by email at 18.04 on 4th March

2021. Having commented on the Claimant's objection to instructions from Mr Willson, the letter said:

> "…*the points you raised fundamentally contradict the values and beliefs firmly rooted in the DNA of our company. You have been involved in a different category of the piano market and it has become increasingly obvious that our approaches to business and visions for the future are not compatible*."

30. The letter states that the Claimant's employment was terminated forthwith but he would be paid for the full month of March, in excess of his contractual notice entitlement.

31. There was a difference in approach between the parties as to how to run the business. However, the tribunal finds that there is no evidence that the Claimant's nationality or ethnic origin played a role in the decision to dismiss him or in respect of his treatment leading up to the decision to dismiss him. Mr Neubauer and Mr Willson concluded that the Claimant's approach to the business and management role was not in harmony with their expectations but this was nothing to do with race, nationality or ethnic origin.

32. The Claimant relied in his claim form on a more general allegation [18-19] that Mr Neubauer and Mr Willson were uncomfortable with conversations that the Claimant had had with them about South Africa. However, we do not accept that the Respondent was uncomfortable with the Claimant's nationality or ethnic origin. The Claimant told the tribunal, when asked why any such conversation made the Respondent's witnesses uncomfortable, that it was to do with the way he conducted himself and explained a scenario regarding the manner of address the Respondent expected him to use in company emails. We did not find that this evidence established that either of the Respondent's witnesses were uncomfortable with the Claimant being of South African origin. In any event, such an assertion is unlikely given that it was Mr Neubauer and Mr Willson who were responsible for recruiting him, with knowledge of his nationality, in the first place.

33. We also note that, at paragraph 7 of the Claimant's witness statement, he says:

> "*I believe – even though the company was ostensibly highly supportive – the fact that my father was critically ill and I would be over in South Afrixa for 1 – 2 months and that I continued to test positives for COVID for so long was a major, if not the only reason, for the dismissal* (sic)".

34. This paragraph suggests that the Claimant believed that unavoidable absence was the primary reason for his dismissal. This does not support any finding that the decision to dismiss him was because of his nationality or ethnic origin.

35. The Claimant relies on Mr Chalmers as a possible comparator in respect of alleged less favourable treatment. He was a more junior employee in a sales role, having been employed by the Respondent since July 2012. He had more than two years' service (meaning he had additional statutory employment rights) in a different position within the company. We did not find it necessary to resolve any dispute between the parties as to Mr Chalmers' employment

because, for the purposes of any comparison, his material circumstances were substantially different to those of the Claimant.

*Time limits*

36. We find that the date of termination of the Claimant's employment was 5th March 2021. Whilst the Claimant was paid for the month, the termination letter is in clear terms: his employment ended forthwith. It did not continue for any period of notice. He was paid any notice entitlement in lieu of serving out his notice. The Claimant's contract provides for such a payment at clause 12.4 [65]. Later payment of any final salary owing does not necessarily mean that an employee remains employed until the date of payment. In this case, the employment terminated immediately.

37. The Claimant himself recorded the date of termination as 4th March 2021 on the ET1 claim form but contended at the hearing this ran on through March owing to the full month's pay. Whilst the termination letter is dated 4th March 2021, this was sent by email in the evening and not opened or accessed by the Claimant until 5th March 2021. We therefore accept the Respondent's submission that termination took effect from the later date of 5th March.

38. As the only allegation of discrimination in this case is the dismissal itself, time began to run from 5th March 2021. Accordingly, the claim should have been presented by 4th June 2021. This time limit is extended to 6th June 2021 to allow for the two applicable days whilst the Claimant was engaged in ACAS Early Conciliation.

39. The claim was presented on 16th June 2021 and was therefore presented 10 days out of time.

40. Following dismissal, the Claimant obtained legal advice in March 2021. The tribunal was shown an invoice for a case review carried out for the Claimant by Monaco Solicitors [124]. The invoice is dated 29th March 2021.

41. On 19th March 2021, the Claimant sent the Respondent a letter before claim [116]. He told the tribunal that he had not obtained advice at the time of sending this letter. The letter threatens employment tribunal proceedings, albeit in reference to unfair dismissal and wrongful dismissal. At that point, the Claimant had a clear understanding that he could present a claim to the employment tribunal and, on the balance of probabilities, learned either through later advice or research that he must initiate the ACAS Early Conciliation procedure before presenting a claim. He duly did this on 28th March 2021, the day before he was sent an invoice for legal services from his solicitors.

42. We find that it is not unreasonable to expect the Claimant to have known about the time limits for presenting a claim based on the date of dismissal where he had received professional advice on a tribunal claim. We accept that the Claimant had not been through this process before and that he ultimately issued the claim himself, but we consider it is unlikely that the Claimant would have been advised about his ACAS Early Conciliation obligations and the claim he was to bring without any understanding of the 3-month time limit.

43. During this period, the Claimant's father was unwell. We accept the Claimant's evidence that his father's health deteriorated and it was, overall, a difficult time

for him. Since testing positive for COVID-19 on 10th February the Claimant had been unable to travel to South Africa to see him. He therefore remained at home during this time. The Claimant remained in the UK and was accordingly in a position to: take legal advice; write to the Respondent about his claims; initiate the ACAS Early Conciliation process and, having completed those steps, was able to issue his claim.

44. The Claimant was still recovering from COVID and we have taken this into account. He tested positive in February. He was well enough to accept work at the beginning of March and was, as above, able to obtain legal advice and begin the ACAS Early Conciliation procedure. There is no evidence that the Claimant's health deteriorated after March 2021 to explain why he waited until 16th June 2021 to present the claim.

45. We find there are no other reasons, on the evidence before us, to explain the delay in issuing the claim.

**Law**

*Time limits*

46. The relevant time-limit is found at section 123 of the Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within 3 months of the act to which the complaint relates. The tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable (as provided for in section 123(1)(b)).

47. The tribunal has a wide discretion to extend time on a just and equitable basis. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion is the exception rather than the rule (see Robertson v Bexley Community Centre [2003] EWCA Civ 894; [2003] IRLR 434, per Auld LJ). It was observed by Sedley LJ in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ; [2010] IRLR 327 that there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. Whether it is just and equitable to extend time is not a question of policy or law; it is a question of fact and judgment for the tribunal.

48. As confirmed by the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include, in particular, the length of and reasons for the delay. In Adedeji, the Court of Appeal confirmed that, depending on the circumstances, some or all of the suggested factors from the case of British Coal Corporation v Keeble [1997] IRLR 36 (which arose from a list of factors applied in personal injury claims in the civil courts pursuant to section 33 of the Limitation Act 1980), might be relevant matters to take into account:

    48.1. The extent to which the cogency of the evidence is likely to be affected by the delay.

    48.2. The extent to which the party sued had co-operated with any requests for information.

48.3. The promptness with which the Claimant acted once they knew of the facts giving rise to the cause of action (i.e. the claim).

48.4. The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

49. However, the tribunal should not rigidly apply these factors as if they are a checklist applicable to each case. The Court of Appeal in Adedeji referred, in particular, to the conclusions of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; [2018] ICR 1194 at paragraphs 18-19:

> *"18. … [I]t is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [Keeble]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [Afolabi]. …*
>
> *19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

*Direct race discrimination*

50. Section 39(2)(c) of the Equality Act 2010 ("the EqA 2010") prohibits an employer from discriminating against one of its employees by dismissing him. This includes direct discrimination because of a protected characteristic as defined in section 13.

51. Section 13 of the EqA 2010 provides that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.

52. Pursuant to section 23(1) of the EqA 2010, where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to make the comparison with an actual or hypothetical comparator.

53. In order for a tribunal to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

54. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant influence on the mind of the decision maker (Nagarajan v London Regional Transport [1999] IRLR 572, HL). The influence can be conscious or unconscious. It need not be the main or sole reason, but

must have a significant influence and so amount to an effective cause of the treatment.

55. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. There is a two-stage process. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.

56. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's race. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

57. The Supreme Court in Efobi v Royal Mail Group Limited [2021] UKSC 33; [2022] 1 All ER 401 held that section 136(2) of the EqA 2010 required the tribunal to consider all of the evidence from all sources, not just the Claimant's evidence, so as to decide the first part of the test.

58. We have had regard to the Court of Appeal's decision in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258, as well as the direction of the Court of Appeal in Madarassy v Nomura International Plc [2007] EWCA Civ 33; [2007] IRLR 246, CA which stated (at paragraph 56):

> *'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.'*

59. We are required to adopt a flexible approach to the burden of proof provisions. As observed in Hewage v Grampian Health Board [2012] UKSC 37; [2012] IRLR 870 (referring to Underhill J in Martin v Devonshires Solicitors [2011] ICR 352) the burden of proof will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we are in a position to make positive findings on the evidence one way or the other. We remind ourselves that, when considering these principles, we are not looking only for the principal reason for the treatment. We must properly analyse whether discrimination was to any extent an effective cause of the treatment.

60. When considering whether the Claimant has been subjected to less favourable treatment, Lord Nicholls observed in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285 (at paragraphs 11 and 12), that tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as he was. This will depend upon the nature of the issues and all the circumstances of the case. Tribunals may find it helpful to postpone determining less favourable treatment until after they have decided why the treatment was afforded to the Claimant.

**Conclusions**

*Extension of time – is it just and equitable to extend the time limit?*

61. The claim is 10 days out of time. The tribunal only has jurisdiction to hear this case if it is just and equitable to extend the time limit. This is a wide discretion. We conclude that, in the circumstances of this case, it is not just and equitable to extend the time for presenting the claim for the following reasons.

    61.1. The Claimant has not established a good reason for the 10-day delay in presenting the claim because:

        61.1.1. The Claimant was aware he had an employment tribunal claim to bring very shortly after dismissal. He obtained legal advice in March 2021 and sent the pre-action letter to the Respondent dated 19th March 2021.

        61.1.2. Whilst we recognise that his father's deteriorating ill health will have been a difficult time for the Claimant, this was not a sudden event occurring during, or close to the end of, the period for bringing his claim. The Claimant tested positive for COVID-19 in February 2021 following a pre-flight test where he was preparing to visit his father in South Africa due to his ill health. In the event, the Claimant remained in the UK and did not travel. He was able, during this period, to seek advice, send a pre-action letter setting out his claims to the Respondent and commence the ACAS Early Conciliation process in readiness for his claim. There is no evidence before the tribunal to explain why he did not proceed to issue the claim after that time until 16th June 2021.

        61.1.3. Furthermore, whilst the Claimant continued to test positive for COVID-19 for longer than he might have expected, this again did not interrupt his ability to pursue his claim in correspondence and with ACAS. It does not amount to a good reason for not presenting the claim to the tribunal until 16th June 2021.

    61.2. The Claimant has prepared his claim with the benefit of legal advice. He did not have a solicitor assisting him at the time the claim form was presented. The invoice produced in the bundle at [124] for legal services provided to the Claimant is dated 29th March 2021. No further evidence has been produced to show there was involvement from legal professionals any later. The Claimant did not believe there would be a time limit issue. However, we conclude that, having taken advice and become aware he had a claim to bring in the tribunal as early as March 2021, he was on notice to the requirements of bringing a claim (including, for example, the need to first engage in ACAS Early Conciliation).

    61.3. The length of delay is reasonably modest. However, a short delay does not, of itself, mean that it is just and equitable to extend the time limit. Otherwise, the statutory purpose of the 3-month time limit would be wholly undermined. We have taken into account, when balancing the relevant factors, that the delay was not of the type which would impact to any real degree on witness memories or the retention of documents and evidence.

    61.4. The Respondent accepts that there is limited prejudice to it by allowing the extension of time. In light of the tribunal's findings on the evidence presented regarding the single claim of direct discrimination in this case, the tribunal concludes that there is also limited prejudice to the Claimant

in not extending time because there are no facts which could establish unlawful discrimination.

61.5. We remind ourselves that the absence of a good reason for the delay is not, by itself, determinative. In exercising our discretion, we have taken into account all the circumstances concerning the period prior to the presentation of the claim. In light of our conclusions about prejudice and our findings of fact, we conclude that the lack of good reason for not presenting the claim is particularly relevant in this case. We have considered that the Claimant was not represented at the time of issuing the claim, but, having regard to the information before him from March 2021, we conclude that neglecting, without good reason, to issue the claim within the time limit, running as it was from a clear point in time (i.e. the dismissal, which, on his ET1 claim form was recorded as occurring on 4th March 2021) is a factor of particular importance when considering whether it is just and equitable to extend time.

61.6. We did not find that all of the factors identified in Keeble assisted us in deciding this question although our findings about access to professional advice have, as above, been considered as relevant.

62. Accordingly, the tribunal does not have jurisdiction to hear the claim of race discrimination. The claim is dismissed.

63. Had the tribunal concluded that it was just and equitable to extend time, it would have proceeded to determine the remaining issues in the case in respect of discrimination. Having heard the evidence and made all of the relevant findings of fact, we set out below our conclusions on the discrimination claim, had we decided that we had jurisdiction to hear it.

*Direct race discrimination*

64. The Claimant's case at its highest was that he was treated less favourably because he is South African by reference to perceptions about his manner and approach. We conclude that any difference as to approach or manner was a difference of business style in this context (for example: email etiquette; customer relations; management organisation and the role of Mr Willson in the business) and nothing at all to do with the Claimant being South African. This is particularly the case given that the Respondent employed the Claimant knowing he was South African.

65. Given our finding that there is no evidence to show that nationality or ethnic origin played a role in the decision to dismiss the Claimant, or in respect of his treatment leading up to the decision to dismiss him, we conclude that the Claimant is unable to discharge the first stage of the burden of proof. There are no facts on which the tribunal could conclude, in the absence of an adequate explanation about dismissal from the Respondent, that the Respondent committed an act of unlawful discrimination. On the Claimant's own case, as set out at paragraph 7 of his witness statement, the dismissal concerned actual or potential absence from work owing to travel to see his father (which did not materialise) or in respect of self-isolation. We have taken into account all of the evidence and facts found and, on this basis, there is nothing to causally link the Claimant's race, nationality or ethnic origin to the decision to dismiss him.

66. Even if the Claimant had established the first stage of the burden of proof, we are satisfied on the facts found that, whilst the Claimant had good reason to be surprised by the decision to dismiss him (and may take issue with the lack of prior communication with him about the Respondent's concerns), the Respondent's reason for dismissal concerned its dissatisfaction with his approach to the business and a loss of trust. It had nothing to do with his nationality or ethnic origin. Further, we conclude that, having regard to our findings of fact, there is no reason why Mr Neubauer and Mr Willson would recruit the Claimant, knowing of his nationality or ethnic origin, only to go through the process of looking for yet another general manager in such a short space of time. As set out in the termination letter, it is more likely that the Respondent concluded that the parties were not compatible with each other as to their respective approaches to the business and visions for the future.

67. In the circumstances and having regard to the observations of the House of Lords in Shamoon, it is unnecessary for the tribunal to draw any further conclusions about less favourable treatment compared to an actual or hypothetical comparator because, on the facts as found, the Claimant's case cannot succeed as his dismissal was not because of his race.

**Outcome**

68. It follows that the tribunal does not have jurisdiction to hear the claim. Even if time had been extended by the tribunal, there are no facts on which the tribunal could conclude that the Claimant's dismissal was because of his race, nationality or ethnic origin. Accordingly, the claim would have been dismissed had the tribunal determined it had jurisdiction to hear it.

Employment Judge Nicklin

Date 21st April 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21/04/2022

FOR EMPLOYMENT TRIBUNALS