EMPLOYMENT TRIBUNALS

Claimant: Jaroslaw Wisniewski

Respondents: Express VPN at Kape Technologies PLC (First Respondent)
Kape Technologies (Second Respondent)
Kape Technologies PLC (Third Respondent)

Heard at: London Central (by CVP) **On:** 24 October 2023

Before: Employment Judge Lumby

REPRESENTATION:

Claimant: Presenting himself
Respondent: Mr T Goodwin, Counsel

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

Respondents

1. The First Respondent and the Second Respondent are removed as parties to the proceedings because they are not legal entities.

2. The Third Respondent is removed from the proceedings because the correct respondent is Network Guard Pte. Ltd.

3. Network Guard Pte. Ltd is added to the proceedings as the correct and only respondent.

Jurisdiction

4. The claimant was not an employee of the Third Respondent or any subsidiary of it (including Network Guard Pte. Ltd) at the relevant time.

The claim for breach of contract is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

5. The claims for discrimination are dismissed because the Tribunal does not have jurisdiction to determine them.

6. All claims brought by the claimant are therefore dismissed.

REASONS

The claims and the issues

1. This is the judgment following a preliminary hearing to determine the correct respondents to this case and whether the Employment Tribunal has jurisdiction to hear it.
2. By a claim form received on 19 May 2023 the claimant has brought claims against each of the respondents alleging discrimination on grounds of age, disability, religion or belief and sex as well as a claim relating to breach of contract and a reference to whistle blowing. The claims are all denied by the respondents.
3. The claim is that the claimant was unlawfully rejected on his application for a job (International Content Strategist / Copywriter) following an on-line interview on 25 January 2023, and that the respondents failed to respond to his email of 28 February 2023 alleging discrimination.
4. The claimant thinks there may have been age or sex discrimination because a young woman was appointed. The disability claim relates to his contentions that is he neurodivergent and has had PTSD and depression due to the responsibility of caring for his father. The breach of contract claim was that the respondent broke their promise to take him to the next interview stage.
5. A preliminary hearing was held on 4 August 2023 where it was agreed that a further preliminary hearing would be held to decide who is the correct respondent and whether the Employment Tribunals of England & Wales have jurisdiction to hear the claims (the key question being whether there is sufficient connection with the UK).
6. The respondents contended at the initial preliminary meeting that the only legal entity is Kape Technologies PLC, which is a holding company for many subsidiaries. ‘Kape Technologies’ does not exist, even as a trading name. ‘Express’ and ‘Express VPN’ is a product and trade name, but not a legal entity. The respondents further submitted at that hearing that Kape Technologies PLC (and the other named respondents) are not the correct respondents at all. They say the correct respondent is a Polish company, ‘Cognegic sp. z o.o’. (‘sp. z o.o’ is the Polish equivalent of ‘Ltd’.)

7. The respondents also asserted at the initial preliminary hearing that Kape did not advertise the post or carry out the interview. They say the person who carried out the interview was from Cognegic. The claimant showed an email he had received from diana.nevzoreanu@kape.com. The respondents said that all employees in the Group (over 30 separate subsidiaries) have email addresses ending '@kape.com' – it did not mean they have any connection with Kape.

The hearing

8. The hearing was heard online, using CVP, by agreement between the parties. Before the hearing, the claimant confirmed that he was located in the United Kingdom at the time of the hearing.
9. The claimant did not wish to be addressed as 'Mr'. His form of address is 'Living Man Administrator'. At the hearing, he asked that he be addressed as 'Jaroslaw', which was how he was addressed by all participants.
10. I have heard from the claimant, and I have heard from Mr Goodwin on behalf of the respondents. Mr Michael Studd also appeared as a witness for the respondent. Mr Studd is the Head of People – Business Partnering and Strategies for Kape Technologies plc and employed by Network Guard Limited, part of the Kape Technologies Group.
11. The documents I was referred to were a bundle comprising 221 pages, a witness statement from the claimant and two witness statements from Mr Studd, written submissions from Mr Goodwin on behalf of the respondents, a skeleton argument from the claimant, two emails from the claimant relating to the location of Kape Technologies PLC and lay-offs by them and a 125 page authorities bundle.
12. Mr Studd's second (supplementary) witness statement was submitted on the morning of the hearing and had not been seen by me or the claimant in advance of the hearing. The claimant was given time to review this and, having listened to submissions, I agreed to its admission on the basis that it helped clarify issues in relation to the respondents.
13. The respondents objected to various disclosures within the bundle requested by the claimant on the basis they were of limited evidential value and were in part seeking to cast a shadow over one of Kape Technologies PLC's founders. The claimant said they were important to his case as to how the company was set up and how it operated, lacking transparency. Having considered the submissions, I concluded that the bundle would be admitted in its complete form but, in identifying the relevant facts of the case, I would give appropriate weight to its relevance.
14. The claimant on a number of occasions made disparaging comments about the respondents' counsel and solicitors (Blake Morgan), accusing them of twisting facts and acting in a manner deliberately designed to disadvantage him and prevent a playing field. I saw no evidence of this and noted throughout the polite and professional manner in which the respondents'

representatives have behaved. I find no evidence of malpractice or unprofessional behaviour by them at any point.

Findings of facts

15. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Kape Technologies

16. Kape Technologies PLC is the publicly listed entity within the Kape Technologies group of companies. It is incorporated in the Isle of Man as a public limited company with its objects expressed to be “Holding company, owner of several subsidiaries in various jurisdictions engaging”.

17. The company is headquartered in London and has a branch there under the name of Kape Technologies. The UK is its main country of operation but it operates internationally.

18. A structure chart has been provided with the bundle showing that Kape Technologies holds directly or indirectly a number of subsidiaries, which are referred to as the Kape Technologies Group. All relevant entities for these purposes are 100% ownerships.

19. These subsidiaries include Network Guard (UK) Limited and Network Guard Poland sp. z o.o. The former is registered in the United Kingdom, the latter in Poland.

20. Network Guard (UK) Limited is a 100% subsidiary of Network Guard Pte. Ltd, a company registered in Singapore; Network Guard Pte. Ltd is a 100% subsidiary of Kape Technologies PLC. Network Guard Pte. Limited was formerly known as Kape Acquisition Pte. Ltd.

21. Network Guard Poland sp. Zoo is a 100% subsidiary of Kape Technologies (Cyprus) Limited, a company registered in Cyprus; Kape Technologies (Cyprus) Limited is a 100% subsidiary of Kape Technologies PLC.

22. Cognegic sp. z o.o is a company registered in Poland. It is not shown as an entity within the Kape Technologies Group and it is understood to be under separate ownership.

23. Neither the ‘Kape Technologies Group’ nor ‘Kape Technologies’ are legal entities in their own right, they are simply expressions to describe the Kape Technologies PLC group of companies.

24. Network Guard Poland sp. z o.o was established in summer 2023, after the events leading to this claim. Before that employees were hired by a third party and then transferred to Network Guard Poland sp. z o.o once it became operational. One of these employees was Patrycja Dziewialtowska-Gintowt, a talent acquisition sourcer who was involved in the recruitment for the role for which the claimant applied. Her employment contract was initially with Cognegic sp. z o.o and dated 04.05.2022. On '1 czerwca 2023' she became an employee of Network Guard Poland sp. z o.o. 'Czerwca' is the Polish for June (identified from an internet search).

25. Kape Technologies PLC through its group of subsidiaries provides privacy software. It trades through a variety of brands, one of which is called ExpressVPN. It acquired the ExpressVPN brand in September 2021.

26. It is agreed by the parties that Express VPN is a brand. There are no legal entities owned by Kape Technologies PLC by that name and any legal entities called Express VPN or ExpressVPN incorporated in the United Kingdom no longer exist, the last one being dissolved on 27 September 2016.

27. It is necessary to make a finding of fact on who owns the Express VPN brand. The bundle contains both a London Stock Exchange announcement of the acquisition of ExpressVPN and a press release by it regarding joining the Kape Technologies PLC group. The stock exchange announcement is made by Kape Technologies PLC and "announces that its wholly owned subsidiary has entered into a sale and purchase agreement to acquire certain assets, liabilities and service entities together comprising the ExpressVPN business…". It goes on to say that "At the same time, and in order to part fund the Acquisition, Kape announces that it intends to raise gross proceeds of US$354 million by means of an underwritten placing to institutional investors…". The wholly owned subsidiary was not identified.

28. The ExpressVPN press release refers to joining forces with Kape or Kape Technologies and refers to itself as "first and foremost, a privacy company". It does not provide any assistance on who specifically acquired the brand.

29. Mr Studd in his first witness statement identifies the acquiring subsidiary as Kape Acquisition Pte. He also confirms that Kape Technologies PLC has never directly owned ExpressVPN. As referred to above, Kape Acquisition Pte is a company incorporated in Singapore and now known as Network Guard Pte. Ltd. In addition, it was Network Guard Pte. Ltd who entered into the service agreement with Cognegic sp. z o.o in relation to Polish operations prior to the establishment of Network Guard Poland sp. z o.o. No evidence has been provided that suggests it has ceased to hold the

ExpressVPN brand. Accordingly I find that ExpressVPN is owned by Network Guard Pte. Ltd.

30. Historically Kape Technologies PLC employed employees direct, mainly the CEO and non-executive directors. Since January 2022 it has instead moved to using subsidiary companies for employing staff and now has only one direct employee. All other UK employees are employed by Network Guard (UK) Limited. Local staff in other locations are employed by the relevant local subsidiary.

The job application

31. The Kape Technologies Group employs international content strategists/ copywriters. They are recruited to build content and engage with specific markets in the local language. It is therefore a key part of the role that applicants speak that language. It is, however, not necessary for a local role for the applicant to be based in the relevant country. The group, for example, employs a South Korean speaker based in London to provide content for the South Korean market. In that case, she is employed by Network Guard (UK) Limited.

32. In 2022 the group began a search for an international content strategist/ copywriter to work in the Polish market on the ExpressVPN brand. The initial search was for a freelance consultant but this was unsuccessful. The role was then re-advertised on a different basis, both in London and elsewhere.

33. The bundle contains LinkedIn posts advertising the role. There is a post by Diana Nevzoreanu (who identifies herself as Talent Acquisition Lead/EMEA/Cybersecurity @ExpressVPN @ Kape T…) which begins:

    "To all my #Polish speaking friends – my colleague Patrycja Dziewialtowska-Gintowt is looking for a bilingual #Polish & #English speaking Content Strategist to join our global Brand & Communications team at #ExpressVPN. This is a contract role and you can work remotely from anywhere in Europe."

34. This post is then reposted by Patrycja Dziewialtowska-Gintowt (who identifies herself as Sourcer, who will support you in career change) with the comment:

    "As said – I am looking for a bilingual Content Strategist (#polish and #english) to join our team at #ExpressVPN [there is then an emoji]

    So if you are interested in experiencing #LifeatExpressVPN and Chrzaszcz brzmi w trzcinie is not hard sentence to pronounce for you, apply! <3"

35. The job advertisement is in a similar vein, stating that “we’re looking for a talented polish Content Strategist to join our dynamic and diverse team of marketers, engineers, and designers”.

36. This is the role that the claimant applied for.

37. The role was being advertised before Network Guard Poland sp. z o.o. had been established. If it had been established, Mr Studd confirmed that a successful Polish based applicant would have been employed direct by that company. As it was not yet established, the intention was for such an applicant to be initially hired by a third party who would have a service agreement with a member of the Kape Technologies Group of companies. This was what in fact happened with the successful applicant.

38. However, it was not a foregone that the successful applicant would be employed in Poland. Mr Studd confirmed that if the best candidate for the job had been based in the United Kingdom, they would have been employed by Network Guard UK Limited.

39. The respondents argued that the person recruiting for the role was Cognegic sp. z o.o because Ms Dziewialtowska-Gintowt was employed by that company at the time. The claimant argues that it was the respondents recruiting for the role. I find that that the role was held out as being with ExpressVPN, as is clear on the face of the LinkedIn post and the advertisement. There was no reference to Cognegic sp. z o.o and Ms Dziewialtowska-Gintowt holds herself out as part of the ExpressVPN team and it is clear that she is acting on their behalf. ExpressVPN is a brand owned by the Kape Technologies Group.

40. The fact that Ms Dziewialtowska-Gintowt was employed by Cognegic sp. z o.o at the time is not relevant. Her role was intended to be transferred to Network Guard Poland sp. z o.o once it was established; the successful applicant was intended to be employed within the Kape Technologies Group either immediately if there was a relevant entity already in existence (as in the case of the UK) or when it was created (in the case of Poland).

41. If the claimant had succeeded in his application, I find that the possible employees would therefore have been either Network Guard (UK) Limited if he was primarily based in London or ultimately Network Guard Poland sp. z o.o if primarily based in Poland. The claimant contends that he intended the role to be from London and this was accepted by Mr Studd in cross-examination, when he stated that he understood that the claimant had applied on the basis he would be based in London. I therefore find that if the claimant had succeeded in his job application, he would have been employed by Network Guard (UK) Limited.

42. The claimant contacted Diana Nevzoreanu about the role. Her email address was diana.nevzoreanu@kape.com. It is clear from her LinkedIn posts and emails that she is part of the ExpressVPN team and that is part of the Kape Technologies Group. It has not been disputed that she was based in Romania. On 5 January 2023 she asked him by email to provide various pieces of information which were provided on 11 January 2023. She replied the same day, with her email signature referring to her as Talent Acquisition Lead/EMEA, her address as in Romania and containing links to LinkedIn and two websites, www.kape.com and www.expressvpn.com

43. On 19 January 2023 the claimant received an email invitation for interview via the GoodTime.io service provider and sent on behalf of Ms Dziewialtowska-Gintowt. That invitation had at the bottom her name and then the following:

    "Talent Acquisition Sourcer
    Express VPN
    patrycja.dg@expressvpn.com"

44. The interview occurred on 25 January 2023 between Ms Dziewialtowska-Gintowt and the claimant. It was an online meeting with both parties being in Poland at that time. The claimant was subsequently turned down for the role. The claimant contends that this is the first instance of discrimination against him, in this case by Ms Dziewialtowska-Gintowt. In addition, he contends that Ms Dziewialtowska-Gintowt assured him that he would be put through to the next stage. This is denied by the respondents and the claimant was nonetheless turned down for the role. Evidence has been provided in the bundle that she graded him as "Definitely Not" with the reason being that he was "Not a cultural fit". On the balance of probabilities, I find that no such assurance was given but it is not determinative either way to these proceedings.

45. The claimant was informed on 8 February 2023 by Ms Dziewialtowska-Gintowt that he had been unsuccessful in his application. The claimant asked for feedback on the same day and chased for this on 14 February 2023. On 20 February 2023 Samantha Lenehan emailed him, identifying herself as Head of Talent Acquisition and offering to have a conversation to explain what happened and "why we are not moving forward with your application". She does not state where she is Head of Talent Acquisition at but her email address is Samantha.l@expressvpn.com. Mr Studd refers to her as a colleague. It is therefore reasonable to conclude that she works for ExpressVPN (and so an entity within the Kape Technologies Group).

46. The claimant asked for written feedback instead by email on 20 February 2023, chasing again on 28 February 2023 and 17 March 2023. The claimant contends that this failure to respond or give written feedback was another

act of discrimination against him. The failure to do so would appear to be act or omission by either Ms Dziewialtowska-Gintowt and/or Ms Lenehan.

47. Both Ms Dziewialtowska-Gintowt and Ms Lenehan, by their words and their email addresses held themselves out as acting on behalf of Express VPN and it is clear they were acting on its behalf. Accordingly, I find that they were acting as agents (or probably in case of Ms Lenehan as an employee) of the owners of the ExpressVPN brand and so for some part of the Kape Technologies Group.

48. The advertised role was subsequently offered to another applicant, initially with Cognegic sp. z o.o. The role was based in Poland, paid in Polish currency and regulated by Polish law.

Law

49. Having established the above facts, I now apply the law.

Parties to claim

50. A claim may only be brought a person or persons, they must have legal status as an entity.

51. The Tribunal's rules and powers are governed by its rules of procedures set out in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Tribunal Rules"). Rule 34 of the Tribunal Rules states that:

    "The Tribunal may on its own initiative, or on the application of a party or any other party wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."

Breach of contract claims

52. This tribunal has jurisdiction to hear breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). This jurisdiction is subject to certain preconditions, including that in paragraph 3 (c) of the Order, namely that the claim arises or is outstanding on the termination of the employee's employment. Accordingly the right to bring a breach of contract claim before this tribunal is limited to employees.

Discrimination claims

53. Claims alleging discrimination on the grounds of a protected characteristic are brought pursuant to the provisions of the Equality Act 2010 ("the EqA"). By section 39(1) of the EqA, an employer must not discriminate against a person in the arrangements the employer makes for deciding to whom to offer employment, as to the terms on which it offers employment or by not offering an applicant employment.

54. Under section 109(1) of the EqA an employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment. Section 109(2) provides that "Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal". By virtue of section 109(3) "It does not matter whether that thing is done with the employer's or principal's knowledge or approval".

55. In deciding whether a party is acting as agent for a principal, the Court of Appeal held in Ministry of Defence v Kemeh 2014 ICR 625, CA that common law principles are relevant when deciding whether there is a principal-agent relationship for the purposes of the predecessor provisions found in S.32(2) of the Race Relations Act 1976 (RRA). In Unite the Union v Nailard 2017 ICR 121, EAT, the EAT observed that, in determining whether there is an agency relationship, regard must be had to what, if anything, the putative agent was authorised to do. On the one hand, it is not essential to have the authority to bind the principal contractually. On the other hand, it is not enough to perform work for the benefit of a third-party employer.

56. Section 109(2) of the EqA also requires that the agent must be acting 'with the authority of the principal'. In doing so, it is clear from Ministry of Defence v Kemeh that this does not require authority for the discrimination but this must occur within the "carrying out the functions he is authorised to do'. A principal may therefore be liable for an act of discrimination even though it has not authorised it. This is emphasised by section 109(3) of the EqA which expressly states that the principal will be liable irrespective of whether it knew or approved of the act of discrimination.

57. I have been referred to various cases by Mr Goodwin in relation to the case law on employer identity, including Clark v Harney Westwood & Riegels (a Firm) & Ors [2021] IRLR 531, Clifford v Union of Democratic Mineworkers [1991] IRLR 518, Secretary of State for Education and Employment v Bearman and others [1998] IRLR 431, Autoclenz Ltd v Belcher [2011] UKSC 41 and Dynasystems v Moseley UKEAT/0091/17/BA) (unrept 25.01.18). I have given consideration to these.

Amendment decision

58. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.

59. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.

60. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

    a. The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

    b. The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

    c. The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

61. These factors are not exhaustive and there may be additional factors to consider.

62. The Balance of Prejudice: per HHJ Tayler in Vaughan v Modality Partnership UKEAT/0147/20/BA(V): [21] "… Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice … [26] a balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice. [27] Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it. [28] An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional costs; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

63. Adding or substituting parties: It has long been established that although this involves the application of discretion, and the balancing of justice and hardship, time limits are not an automatic bar, see Gillick v BP Chemicals Ltd [1993] IRLR 437 EAT(S).

Jurisdiction

64. The contractual jurisdiction of employment tribunals is governed by section 3 of the Employment Tribunals Act 1996 (ETA) and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623). Under section 3(2) ETA and Article 3 of the 1994 Order, for an employment tribunal to be able to hear a contractual claim brought by an employee, that claim must be one that a court in England and Wales would have jurisdiction to hear and determine. To ascertain this, regard must be had to the rules of international jurisdiction.

65. For claims brought after the end of the UK-EU transition period, the tribunal's jurisdiction is determined by section 15C of the Civil Jurisdiction and Judgments Act 1982 ('CJJA 1982'), as amended by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479). Section 15C(2) CJJA 1982, which applies where the subject matter of proceedings relates to an individual contract of employment, provides:

'The employer may be sued by the employee –

(a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled,

(b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or

(c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom or any one overseas country, in the courts for the place in the United Kingdom where the business which engaged the employee is or was situated (regardless of the domicile of the employer).'

66. Rule 8(2) of the Tribunal Rules is also relevant. It provides:

'A claim may be presented in England and Wales if –

(a) the respondent, or one of the respondents, resides or carries on business in England and Wales;

(b) one or more of the acts or omissions complained of took place in England and Wales;

(c) the claim relates to a contract under which the work is or has been performed partly in England and Wales; or

(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.'

67. A company 'resides' in England and Wales (or Scotland) for these purposes if it is incorporated in England and Wales (or Scotland) or if its central management and control are exercised there.

68. The claims in this case are brought pursuant to the EqA. That Act is silent as to territorial scope (i.e. what claims the Act extends to, simply those within Great Britain or also those with connections with overseas). According to the Explanatory Notes to the EqA, the decision to make no express provision as to territorial scope in the Act follows the precedent of the Employment Rights Act 1996 ('the ERA") and so the case law applicable that Act will apply equally to the EqA. This was confirmed by the Court of Appeal in Bates van Winkelhof v Clyde and Co LLP and anor 2013 ICR 883, CA where the court applied the principles established by the Supreme Court in Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389, SC, concluding that the connection with the United Kingdom must be

"sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim".

69. The general rule that emerges from the case law is that the ERA applies only to employment in Great Britain; exceptionally, however, it can extend to employees working abroad. The same principles will apply to the EqA.

70. In Lawson v Serco Ltd and two other cases [2006] ICR 250, HL, Lord Hoffmann identified three categories of employees: (1) in the standard case, the question of territorial scope will depend on whether the employee was working in Great Britain at the time of dismissal; (2) the second category consists of peripatetic employees such as airline pilots who, owing to the nature of their work, do not perform services in one territory, and whose 'base' (the place where they start and end assignments) should be treated as their place of employment; (3) the third category consists of expatriate employees working and based abroad, who may in exceptional circumstances be entitled to claim unfair dismissal.

71. Lord Hoffmann gave two examples of circumstances in which an expatriate employee would enjoy unfair dismissal protection. The first was an employee posted abroad by a British employer for the purposes of a business carried on in Great Britain — for example, a foreign correspondent on the staff of a British newspaper. The second was an expatriate employee of a British employer *'who is operating within what amounts for practical purposes to an extraterritorial British enclave in a foreign country'*. There might be other qualifying situations but employees would need to show *'equally strong connections with Great Britain and British employment law'*.

72. Lord Hoffmann considered that the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of the ERA. He considered it 'very unlikely' that someone working abroad would be covered unless he or she was working for an employer based in Great Britain, but that by itself would not be enough. With reference to the facts of Financial Times Ltd v Bishop EAT 0147/03, he opined that an employee selling advertising space in San Francisco for a UK newspaper as part of its business conducted in London would attract the protection of the ERA. By contrast, an employee working for a business conducted by the paper or an associated company in the United States – for example, selling advertising space in the American edition of the paper – would not be protected.

73. Subsequent case law emphasises that it is not always necessary to slot employees into one of Lord Hoffmann's three broad categories. In Duncombe v Secretary of State for Children, Schools and Families (No.2) [2011] ICR 1312, SC, Lady Hale stated that, to be covered by the ERA, the employment relationship of an employee who is working or based abroad

must have 'much stronger connections' both with Great Britain and with British employment law than with any other system of law. In that case, the claimants had been employed as teachers in European Schools abroad by the Department for Children, Schools and Families. Relevant factors indicating a sufficiently strong connection with British employment law were that their employer was the UK Government; their contracts were governed by English law; they were employed in international enclaves governed by international agreements; and it would be anomalous if a teacher who happened to be employed by the British Government to work in the European School in England were to enjoy different protection.

74. In Crew Employment Services Camelot v Gould EAT 0330/19, the EAT considered it almost inevitable that, in assessing whether there is a sufficiently strong connection with the claimed jurisdiction, the tribunal will consider the strength of connection with other jurisdictions to see if the territorial pull is in fact exerted in the opposite direction.

75. Mr Goodwin has referred to the case of Bleuse v MBT Transport Ltd and anor [2008] ICR 488, EAT where it was considered that domestic courts must give effect to directly effective EU rights. He contends that this is inconsistent with subsequent and longer of effect following Brexit.

76. The UK's departure from the EU took effect on 31 December 2020 ('IP completion day'). Under the European Union (Withdrawal) Act 2018 (EU(W)A), EU-derived domestic legislation in force on IP completion day remains in force. EU law as it stood on IP completion day has essentially been incorporated into domestic law as 'retained EU law', and the case law of the European Court of Justice as it stood on IP completion day has likewise been incorporated as 'retained EU case law'. Furthermore, the doctrines of direct and indirect effect and the supremacy of EU law have been preserved, so that claimants in the employment tribunal can still rely on the direct effect of a Directive (so long as it has been recognised in case law by IP completion day) and can still seek to have domestic legislation interpreted, so far as is possible, so that it conforms with retained EU law.

77. However, paragraph 3 of Schedule 1 to the EU(W)A provides that no new claim may be brought based on failure to comply with any of the general principles of EU law, and no court or tribunal may disapply or quash any enactment or decide that any conduct is unlawful because it is incompatible with any of the general principles of EU law. Thus, in so far as the reasoning in Bleuse relies on the general EU law principle of effectiveness, it might be argued that it has not been preserved post-Brexit – although this is subject to transitional provisions covering cases brought before the end of 2023, and in any event the general principles of EU law continue to inform the interpretation of retained EU law. The scope for bringing a legal challenge

based on EU law will be greatly reduced once the Retained EU Law (Revocation and Reform) Act 2023 comes into effect.

78. Mr Goodwin has provided a list of (not authoritative or exhaustive) factors to consider taken from *Harvey on Industrial Relations and Employment Law* as follows:

Taking account of the case law, and when considering the connection with both Britain and with British employment law, factors relevant to the comparative exercise will include: (i) the amount of time, if any, the employee spends living and/or working in Great Britain versus the foreign country; (ii) the employee's place of domicile and residence status as well as the nationality and citizenship of the employee; (iii) where and why the employee was recruited; (iv) how long the employee has been and is likely to be an expatriate and what the situation was before and after this status; (v) in which country the employee's salary, pension and benefits are paid and in which currency; (vi) in which country the employee pays tax; (vii) the employee's line management structure and administrative support and where those things are based; (viii) the law of the contract, why it was chosen and whether the employee had any influence over its choice; (ix) where there is no choice of law, the applicable law per Rome I or II or the Rome Convention (or now, retained Rome I or II or the Convention as stated in Sch 1 to the Contracts (Applicable Law) Act 1990) (though the relevance of this is likely to be very limited: see below at para [117] ff); (x) any jurisdiction clause in the contract, why it was chosen and whether the employee had any influence over its choice; (xi) any other representations that were made by the employer about the applicability and protection of British employment law available to the employee; (xii) the identity of the employer and the extent of its connection with Great Britain; and (xiii) whether the employer will or may have diplomatic or state immunity in the courts of the country in which the employee performs their work...

First and Second Respondents

79. Neither the First Respondent nor the Second Respondents are legal entities. The First Respondent is simply a brand whilst the Second Respondent is just a term applied to the Kape Technologies Group. That group is likewise not a legal entity but a collection of entities.

80. As a result, neither should be a party to these proceedings. Accordingly, the Tribunal exercises its power under Rule 34 of the Tribunal Rules to remove them from the proceedings.

Correct Respondents

81. The claimant's claims are for discrimination and breach of contract. I have not considered the breach of contract claim here for the reasons set out below in relation to jurisdiction in respect of that claim.

82. The acts of discrimination complained are the rejection of the claimant's job application by Ms. Dziewialtowska-Gintowt and the failure to provide or respond to the requests for written feedback by Ms. Dziewialtowska-Gintowt and/or Ms Lenehan.

83. The respondents argue that Cognegic sp. z o.o is the party responsible for that discrimination, either as party recruiting for the role or by virtue of vicarious liability as Ms. Dziewialtowska-Gintowt's employer. The claimant argues that it was the respondents recruiting for the role.

84. I have found that it was entities within the Kape Technologies PLC group who were recruiting for the role not Cognegic sp. z o.o. All of Ms Dziewialtowska-Gintowt, Ms Nevzoreanu and Ms Lenehan held themselves out as working for and recruiting for either Express VPN or the Kape Technologies Group. ExpressVPN is a brand name owned by the Kape Technologies Group. Cognegic sp. z o.o was said to be assisting the respondents in that exercise pursuant to a services agreement. A copy of that service agreement has been provided.

85. By virtue of section 109(1) of the EqA, the employers of Ms Dziewialtowska-Gintowt and Ms Lenehan are liable for their actions. Ms Dziewialtowska-Gintowt was employed by Cognegic sp. z o.o but we have established that this was on behalf of the Kape Technologies group. It is not known who Ms Lenehan worked for but she held herself out on the same basis. Accordingly, by virtue of section 109(2) of the EqA, if they were acting as agents for entities within the Kape Technologies Group, those entities couldbe liable as principals for the actions of Ms Dziewialtowska-Gintowt and Ms Lenehan.

86. The key tests to ascertain whether they were acting as agents is whether they were acting on behalf of the Kape Technologies PLC group of companies or part of them and whether they authority to do so. Ms Dziewialtowska-Gintowt was able to make the decision not to proceed with the claimant's application and it is clear from the bundle that she was closely involved in the decision making process. As Head of Talent Acquisition, Ms Lenehan was able to give feedback on behalf of ExpressVPN. Both were clearly part of the process to recruit a person to the advertised role with ExpressVPN. I find on the facts available and on the balance of the balance of probabilities that both were acting as agents for ExpressVPN to recruit someone to work for it as an international content strategist/ copywriter to work in the Polish market on the Express VPN brand. As mentioned before,

as such they were acting as agents for entities within the Kape Technologies Group.

87. The second part of the test is whether they had authority to carry out the recruitment process. It needs to be ascertained whether the discrimination alleged occurred as part of the exercise of that function. It does not need to be ascertained whether the alleged acts of discrimination were authorised, merely that they were carried out when exercising the authorised function.

88. No express authority is contained within the bundle but it is clear from Ms Dziewialtowska-Gintowt's employment contract that she was employed to recruit employees and this is confirmed by the internal documents and by the evidence of Mr Studd. In the absence of any express authority, I find that she had implied authority to deal with the claimant's application, which would extend to rejecting it. Any discrimination in reaching that decision to reject him was therefore performed as part of the authorised function.

89. The same applies in relation to the provision of feedback, this is part and parcel of the recruitment process and so I find there would have been implied authority to provide this to candidates.

90. Accordingly, I find that Ms Dziewialtowska-Gintowt was acting as an agent for an entity or entities within the Kape Technologies Group with their authority. Ms Lenehan was either an employee of such entity or entities and so acting on their behalf in that capacity or was acting as an agent for them on the same basis as Ms Dziewialtowska-Gintowt.

91. The issue that then needs to be determined is which company within the Kape Technologies Group was acting as principal and so should be the respondent.

92. Mr Goodwin has referred me to various cases on employer identification which I have listed above and considered. He makes the point, however, (and I agree with this conclusion) that they are focused on the position where there is some form of employment contract in existence, looking at what parties actually agreed and what was their intention. They provide little assistance in the context of a discrimination claim, where the real question is in fact who committed the acts of discrimination and for whom were they acting when committing the alleged acts.

93. If the claimant had succeeded in his job application, I have found that he would have been employed by Network Guard (UK) Limited. However, the issue here is whether that company committed or is liable for any acts of discrimination. There is no evidence that either of Ms Dziewialtowska-Gintowt or Ms Lenehan were acting for or on behalf of that company or it was the principal in the process to recruit an international content strategist/

copywriter to work in the Polish market on the ExpressVPN brand. I therefore find, on the evidence before me, that the appropriate respondent would not be Network Guard (UK) Limited.

94. An alternative is Network Guard Poland sp. z o.o. That company did not exist then but the respondents accepted in submissions that it would have inherited the liabilities of Cognegic sp. z o.o. However, I have found that Ms Dziewialtowska-Gintowt was acting as agent and Ms Lenehan was acting as an employee or an agent for a principal within the Kape Technologies Group. Cognegic sp. z o.o was not within the Kape Technologies Group and so cannot be the principal. The agents already had implied authority and so that principal must already have been in existence. It cannot therefore be Network Guard Poland sp. z o.o. Accordingly I find that the appropriate respondent cannot be Network Guard Poland sp. z o.o or Cognegic sp. z o.o.

95. The job application was for an international content strategist/ copywriter to work in the Polish market on the Express VPN brand. If ExpressVPN had a legal entity, there may well be convincing arguments as why it was the principal for the agents. However, it is just a brand without separate legal existence. The question is therefore who owns that brand, as the owner should be the principal for the agents.

96. I have found that the ExpressVPN brand is owned by Network Guard Pte. Ltd, a company incorporated in Singapore. That entity also entered into the services agreement with Cognegic sp. z o.o. There is no evidence that any other subsidiary might be the principal. As the owner of the brand and the party contracting in relation to its development in Poland, the evidence suggests that it is the principal.

97. The claimant however contends (by implication) that the principal is Kape Technologies PLC itself, the Third Respondent to these proceedings. It is the holding company of the group and exercises central management and control. It is the 100% direct or indirect owner of all relevant companies within the group. It is attractive to argue that the holding company should be liable for all actions of its subsidiaries but this is to rewrite the law in relation to limited liability companies. It has structured the acquisition of the ExpressVPN brand so that it is owned by a different entity. It does not itself directly own ExpressVPN and no evidence has been advanced to suggest it acted as principal in relation to the agency of Ms Dziewialtowska-Gintowt or Ms Lenehan. As a result, I find that it cannot be the principal for the agents.

98. Accordingly, I find that the principal for the agents is Network Guard Pte. Ltd and it is the correct respondent in place of the Third Respondent.

99. As a result, the Tribunal exercises its power under Rule 34 of the Tribunal Rules to remove the Third Respondent from the proceedings.

Addition of Network Guard Pte. Ltd as respondent

100. The claimant at the hearing was unclear as to whether he wanted to apply for new parties to be added if his claim against the respondents could not proceed against them. It was explained that there may arise a position where none of the named respondents were the appropriate respondents and without substituting the correct respondent in, he would be left with no respondent and so no claim. He believed strongly that Kape Technologies PLC was the correct respondent but was open to adding other (predominantly UK based) parties. Network Guard Pte. Ltd was not discussed specifically, the claimant repeating his assertion that the subsidiary companies were there to prevent transparency and avoid liability, which he felt was ethically wrong. We are now in that position because all respondents to the original claim have been removed and a fresh party identified as the correct respondent.

101. Despite this lack of clarity on whether an application has been made (and the likelihood is that it has not), the Tribunal should nonetheless consider the position of its own initiative in accordance with its discretion in Rule 34 of the Tribunal Rules. In doing so, I have followed the same principles as though an application to amend had been made and have borne in mind the comments made by Mr Goodwin in this regard. These principles are set out above and include what are referred to as the Selkent Principles and also the test set out in Vaughan v Modality Partnership.

102. The amendment would be to substitute Network Guard Pte. Ltd for Kape Technologies PLC as the remaining respondent. This is not to change the claims being made or to add a new complaint. Mr Goodwin argued that to substitute in a new party went beyond simply ‘relabelling” the existing claim. He cited the fact that the claimant argued against it as evidence it must be substantial and it is clearly important from the claimant’s perspective. However, I do not agree with Mr Goodwin that this is a fundamental change, there is no new complaint, all that has happened is that correct respondent within the group has been identified. The issues and the required investigation remain the same and, indeed, it is likely that the relevant work has already been done.

103. I next considered timing. The discrimination alleged occurred in January and February 2023 and Mr Goodwin argues that so much time has passed that a claim is now well out of time and it would not be just and equitable to substitute a party now. On the other hand, the original claim appears to have been brought in time or thereabouts (this is not an issue before me to determine) and all that has happened is the wrong party within

the group has been named. This is not a new claim, merely a change in the respondent in an existing claim and the time limits should stand as at the time of the original application. In any event, this is not the sole determinant in deciding whether the substitution should be allowed, simply a factor to consider.

104. I then turned to look at the timing and manner of the application. It is likely that no application has been made; this would weigh against allowing the substitution. However, I find that the position arose from the claimant's deep seated (although misguided) belief that the Third Respondent is the correct party. In this context, he believed he was applying to the Kape Technologies Group and had no awareness of the identity of the correct owner of ExpressVPN before receipt of Mr Studd's witness statement. More importantly, I find that making the substitution will not delay the case or put the respondents in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier. As referred to above, this is merely changing a party and it is likely that much if not all of the work required for a full hearing has already been investigated.

105. In considering whether to allow an amendment, all the circumstances have to be considered, this may include the merits of the case. This is generally considered when a new cause of action is added, the Tribunal considering whether the new claim has any prospect of success. Conversely, in this case, by identifying the correct respondent and adding them as a party, the claimant's prospect of success increases, certainly in comparison to claims against parties who do not exist or who are not liable.

106. Finally, I have considered the balance of hardship and prejudice. Mr Goodwin argued that allowing a substitution would disproportionately affect the respondents, by the loss of their statutory defence and having to go to the expense of answering what he considered to be a hopeless case which even the claimant believed should be against another party. This is to overlook that without the substitution the claimant will be without a respondent and so be unable to seek justice, simply because he understandably made an error in identifying who the respondent should be.

107. Taking this in the round and weighing all the factors, I find that substituting the wrong member of the group with the correct party is not a major amendment which would cause excess delay in the proceedings or extra cost to the respondents. They should not benefit from a windfall in disposing of the case simply because the claimant made a mistake based on what he knew and believed.

108. As a result, the Tribunal of its own initiative exercises its power in Rule 34 of the Tribunal Rules to substitute the Third Respondent with Network Guard Pte. Ltd.

Jurisdiction

109. Having established who the correct respondent is, the Tribunal must consider whether it has jurisdiction to consider the case.

110. The claimant's claims are for discrimination and breach of contract.

111. The Tribunal only has jurisdiction to hear claims for breach of contract when the claimant is an employee. In this case, the claimant is not an employee and so the claim for breach of contract is dismissed for lack of jurisdiction.

112. Section 39 of the EqA expressly prohibits discrimination in making recruitment decisions. Section 15C of the CJJA 1982 gives jurisdiction to the Tribunal to hear claims in relation to proceedings whose subject-matter is a matter relating to an individual contract of employment. However, as Mr Goodwin pointed out in his submissions, this is not of assistance here where there is no contract of employment.

113. Rule 8(2) of the Tribunal Rules does, however, provide more assistance. Paragraph (a) of that section allows a claim to be presented if any of the respondents resides or carries on business in England and Wales. The test of residence is whether the company is incorporated there or if its central management and control are exercised there. Kape Technologies PLC is incorporated in the Isle of Man but its central management and control are exercised in London. Network Guard (UK) Limited is incorporated in England and Wales. Accordingly both are resident in England and Wales and so satisfy the test. Network Guard Poland sp. z o.o by being neither incorporated or centrally managed and controlled from England and Wales does not satisfy the test. Network Guard Pte. Ltd by being incorporated in Singapore and without its central management and control being in the UK also does not satisfy the test. I have found that Network Guard Pte. Ltd is the correct respondent and so paragraph (a) is not satisfied.

114. It is noted that paragraph (b) and (c) of Rule 8(2) are not satisfied - paragraph (b) requires an act or omission complained of to have taken place in England or Wales. The interview took place in Poland where Ms Dziewialtowska-Gintowt and there is no evidence that the failure to respond or provide written feedback took place in England or Wales. Paragraph (c) requires a contract and work to be performed, neither of which occurred here.

115. Finally, paragraph (d) gives the Tribunal jurisdiction by virtue of a connection with England and Wales. This will apply if the Tribunal has territorial scope to hear the claim (i.e has jurisdiction) and will be used to identify where in the United Kingdom the claim should be heard. The connection with England and Wales advanced by the claimant is that he has a home there, his father lives and he wanted to work from there if successful in the claim. This paragraph will therefore be satisfied if the Tribunal has jurisdiction to hear the claim.

Territorial Scope

116. The final issue to be determined is whether the Tribunal has jurisdiction to consider the remaining claims by virtue of where they occurred. Those claims have been brought under the EqA and the determination needs to be made in relation to the occurrence of those alleged acts in the context of all the facts of the case.

117. Whilst I have considered the case law and the list from Harvey on Industrial Relations and Environment Law, much of this is less helpful as it is focused on actual employment rather than discriminatory acts alleged to have occurred before any employment began.

118. I have considered factors suggesting some connection between the claimant's application and the discrimination he contends on the one hand and Great Britain on the other, as follows:

a. The headquarters of Kape Technologies PLC is located in London
b. The claimant made it clear he wanted to work from there
c. The claimant has a base in London (although he was not able to recall the post code without checking)
d. The post was advertised in London

119. I have also considered factors suggesting some connection between the claimant's application and the discrimination he contends on the one hand and other locations on the other, as follows:

a. The owner of the Express VPN brand and the principal for the agents who are alleged to have carried out the discrimination is incorporated in Singapore
b. The post was focused on the Polish markets and would be administered from Poland
c. The successful applicant could work anywhere in the world
d. The claimant has a base in Poland
e. The post was advertised in Poland
f. No part of the application process occurred in Great Britain

g. The initial part of the application was dealt with from Romania
h. The interview was conducted in Poland
i. The alleged discrimination occurred in Poland
j. The successful applicant worked from Poland under a contract governed by Polish and was paid in Polish currency.

120. The factors relating to Great Britain are, by and large, incidental to the main factors, which is that this was a role aimed at the Polish market, it was where the recruitment occurred and the alleged discrimination happened. The group may be headquartered in London but the substituted respondent is based overseas. The role could be performed from anywhere and the fact that the claimant wanted to perform it in London is incidental. That was his personal choice rather than a requirement of the role.

121. The connections with Poland are much stronger, including the focus, the administration, the application process and the location of the alleged discrimination.

122. Having carried out this comparison and evaluation, I conclude that the claimant's relevant connections with Great Britain and British employment and discrimination law are not sufficiently strong to overcome the territorial pull of Poland or other lcoations. The factors clearly demonstrate a stronger connection with Poland and do not justify the conclusion that parliament must have intended the claimant's employment to be governed by British employment or equality legislation.

123. Accordingly, the Tribunal does not jurisdiction to consider the claimant's discrimination complaints and so they cannot proceed. They are therefore dismissed.

124. As the discrimination complaints are the only remaining claims, the case is dismissed.

125. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 15 to 48; a concise identification of the relevant law is at paragraphs 49 to 78; how that law has been applied to those findings in order to decide the issues is at paragraphs 79 to 124.

Employment Judge H Lumby
Dated 26 October 2023

Judgment sent to Parties on
27/10/2023