EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000088/2023

5 **Held in Glasgow on 9 and 10 October 2023**

Employment Judge L Wiseman
Members K Ramsay and M McAllister

10 **Mr Kivanc Altin** **Claimant**

Live Argyll – Argyll and Bute Council **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

15 The tribunal decided to dismiss the claim.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal in which he complained of race discrimination in terms of section 13 of the Equality Act.
20 The claimant alleged he had been treated less favourably when:

   (i) he was not successful at interview in May 2016 for the post of Senior Duty Officer (grade LGE 8);

   (ii) he started a gymnastic coaching scheme in 2016 but was not given promotion;

25 (iii) he was offered a Senior Sports Coaching position in 2018 but this was not at grade 8;

   (iv) he was threatened at a return to work interview in November 2021 that if he was absent again because of a sports related injury he may not be paid sick pay;

(v) he took on more responsibility in June 2022 but not was given a promotion; and

(vi) he resigned in December 2022 and received no response from the respondent to his letter of resignation.

5 2. The tribunal heard evidence from the claimant; Ms Lorna Whyte, who is now retired but was previously the Business Operations Manager for the respondent; Ms Anne Brown, Senior Duty Officer, who was the claimant's line manager and Mr David Campbell, Area Operations Manager, who was Senior Duty Officer at the time. The tribunal was also referred to a number of 10 documents. We, on the basis of the evidence before us, made the material findings of fact set out below.

The issues for the tribunal to determine

3. The issues for the tribunal to determine are:

- did the respondent treat the claimant less favourably than it treated, or 15 would treat a comparator, in respect of the matters listed at (i) to (vi) above;
- if so, was the reason for the less favourable treatment because of the protected characteristic of race and
- were points any of the points (i) to (v) listed above timebarred.

20 **Findings of fact**

4. The claimant is Turkish. He commenced employment with Argyll and Bute Council in 2004 as a Lifeguard and Fitness Instructor. The claimant became a Duty Officer in 2006 and continued in this role until the termination of his employment on the 22 December 2022. The claimant's post was grade 7.

25 5. The claimant worked at Riverside in Dunoon. Riverside comprised a swimming pool and a gym. The respondent decided, in 2020, to relocate the gym to another local facility, Queens Hall.

6. Ms Anne Brown was the Senior Duty Officer at Riverside.

7. Mr David Campbell was the Senior Duty Officer at Queens Hall. He covered for Ms Brown during annual leave and absences.

8. The respondent owns and operates a number of facilities where there is a swimming pool and a gym. Riverside was the only facility which operated with only a swimming pool. Consequently, there was one Senior Duty Officer at Riverside, whereas in all facilities with a swimming pool and a gym, there were two Senior Duty Officers.

9. The respondent did subsequently give consideration to relocating the gym back to Riverside. Mr Campbell approached Ms Whyte regarding the employment of another Senior Duty Officer at Riverside if this happened. This proposal was made very much with the claimant in mind. In fact the gym did not return to Riverside and the proposal was refused because non-inflationary increases to the payroll were not being considered.

10. The Senior Duty Officer was responsible for everything to do with the pool, preparing rotas, recruitment, training and managing the staff. Ms Brown was the claimant's line manager. Ms Brown and the claimant worked opposite shifts. There were certain duties for which Ms Brown retained responsibility, but which could be delegated to the claimant. For example, Ms Brown was responsible for carrying out Inductions, but she would on occasion ask the claimant to carry out a site Induction for a new employee. Ms Brown was responsible for carrying out return to work meetings after a period of absence. There were two occasions when Ms Brown delegated a straightforward return to work meeting to the claimant.

11. Ms Brown was qualified as a trainer/assessor. The claimant was a designated competent person. This meant Ms Brown could delegate lifeguard training to the claimant on occasions when she was absent or unavailable. Ms Brown, as Senior Duty Officer, retained responsibility for ensuring all staff had the necessary training.

12. The respondent previously employed a Pool Plant Operative (grade 4) but when he retired he was not replaced and the Duty Officers took on the duties and responsibilities. Mr David Campbell, Senior Duty Officer, led on pool plant

maintenance. The claimant was recognised as being very competent in the pool plant duties.

13. Ms Brown reduced her working hours by 50% in 2015. The respondent advertised the 17.5 hours of her role which had become available.

14. The claimant, and two other employees, applied for the 17.5 hours Senior Duty Officer role and were interviewed for this role in May 2016. The questions asked at interview were set by Ms Lorna Whyte, Facilities Manager and Mr Paul Ashworth, Commercial Manager.

15. The claimant was not successful at interview. The post was offered to Ms Andrea Duran, who is Scottish and was a Duty Officer/Café Supervisor at Riverside.

16. The claimant did not seek feedback following the interview and did not raise a grievance regarding the outcome.

17. The respondent's policy is to retain documents for 3 years. Accordingly, the documents from the interview process were not available for this hearing.

18. The respondent introduced a gymnastic coaching scheme in 2016. The claimant accepted the opportunity to attend training to deliver this coaching. The claimant spent up to 10 hours per week delivering gymnastics coaching, and whilst he was doing this, his Duty Officer duties were covered by a casual Duty Officer.

19. The gymnastics coaching programme was very successful and so the respondent decided to introduce a Senior Sports Coach position in 2018. The job was developed with the claimant very much in mind. The new job role was put through the respondent's job evaluation process and was graded LGE 7.

20. The Senior Sports Coach position was offered to the claimant. He refused the post because it had been graded LGE 7 (the same as the Duty Officer post) and not LGE 8. The post was advertised and the successful candidate was a former gymnast, who is Scottish.

21. The claimant applied for, and was granted, permission to reduce his hours of work from 35 hours per week to 28 hours per week in 2019.

22. The claimant was selected for the Over 50s GB basketball team and took part in a tournament in 2021. The claimant injured his achilles tendon and was absent from work for a period of 3 months. The claimant attended a return to work meeting with Mr David Campbell in November 2021. Mr Campbell informed the claimant, as part of that meeting, that if there were repeated sports injuries causing absence from work then the respondent may consider not paying full sick pay.

23. The respondent had adopted the same approach to sports-related injuries causing repeated absence in the case of a Scottish employee who was a keen footballer. The respondent had advised that employee, during a Stage 3 absence meeting, that repeated absences for sports-related injuries could result in the respondent deciding to pay reduced, or no, sick pay.

24. Mr Campbell's remit included health and safety. He decided, in 2021, to move to a more formal health and safety committee structure. Mr Campbell invited the claimant, who was already IOSH trained, and a lifeguard, to take on the role of health and safety representative. The claimant accepted and became the health and safety representative for the Cowal area in June 2022.

25. The claimant resigned in December 2022. The claimant had met with Ms Brown for a return to work meeting. She understood the claimant would be returning to work the day after she commenced a period of annual leave. In fact the claimant did not return to work but sent a letter confirming his resignation.

26. Mr Campbell was covering for Ms Brown whilst she was on holiday. Mr Campbell did not reply to, or acknowledge, the claimant's resignation.

27. Ms Brown, upon her return to work, was shocked to hear the claimant had resigned. She believed Mr Campbell had dealt with the matter and so she did not respond to the claimant.

28. Mr Campbell accepted he should have responded to the claimant's resignation and that it had been an oversight on his part in circumstances where the claimant's resignation had caused difficulty for the respondent because his duties had to be covered at short notice.

5 **Credibility and notes on the evidence**

29. There were no real issues of credibility in this case. The respondent challenged the claimant in respect of the fact he had reduced his working hours in 2018 in order to pursue other work (the claimant is a very competent builder). The respondent had no difficulty with the claimant having another
10 job, but had discovered (whilst responding to the claimant's SAR request) that he had saved various documents (a presentation, some invoices and basketball coaching documents) to the respondent's server. The respondent described the number of documents as being "industrial". The respondent believed the claimant had carried out work in respect of these documents in
15 work time. The respondent submitted this impacted on the claimant's credibility.

30. The tribunal, in considering this point, noted the respondent took no issue with employees reducing their working hours in order to pursue other work. The respondent's issue was with the claimant using their system to produce/save
20 documents for that other work. The respondent, however, led no evidence regarding their policy on this matter. The tribunal, accordingly, had no basis upon which to assess whether there had been any misconduct by the claimant, and if so, the severity of such misconduct. Further (and for the same reasons) the tribunal could not accept the respondent's submission that this
25 matter impacted on the claimant's credibility.

Submissions

31. The parties gave oral submissions which are addressed in the section below.

Discussion and Decision

32. The tribunal firstly had regard to the relevant statutory provisions in section
30 13 of the Equality Act, which provides that a person discriminates against

another if, because of a protected characteristic, s/he treats that other less favourably than s/he treated or would treat others. The protected characteristic relied on by the claimant was race.

33. The tribunal next had regard to each allegation of less favourable treatment made by the claimant and we asked whether the alleged treatment had occurred; if so, whether the claimant had been treated less favourably than others were or would have been and if so, whether the reason for the less favourable treatment was because of the protected characteristic of race.

34. The first complaint related to the Senior Duty Officer interview in May 2016. We noted there was no dispute regarding the fact the claimant had applied, and been interviewed, for the post of Senior Duty Officer. The claimant was one of three candidates to be interviewed. The other two candidates (one male and one female) were both Scottish. The claimant was not successful at interview. The tribunal was satisfied that being unsuccessful at interview amounted to less favourable treatment: the claimant was treated less favourably than the successful candidate who was Scottish.

35. The tribunal must next ask whether the difference in treatment was because of the claimant's race. The tribunal, in approaching this question, had regard to the case of ***Nagarajan v London Regional Transport 1999 ICR 877*** where it was said that in answering the question the tribunal will be required to examine evidence as to what the relevant mental processes were in order to identify what operated on the putative discriminator's mind and caused him/her to act in that particular way.

36. The claimant sought to support his position by referring to the following points: (a) his lengthy experience and knowledge as a Duty Officer, (b) an assertion that the successful candidate had been mentored by Ms Brown and Mr Campbell; (c) his lifeguarding and pool plant expertise in comparison to the successful candidate whom, he alleged, had no pool plant certificate; (d) his assertion that he carried out Senior Officer duties and covered for Ms Brown when she was on holiday and (e) his assertion that Mr Ashworth had shown

him the scoring paperwork and his scores had been scribbled out and changed.

37. The tribunal considered each of the points raised by the claimant. We noted, in relation to point (a) that there was no dispute in this case regarding the fact the claimant was a very experienced, highly thought of and valued employee. The respondent did not however accept the claimant's assertion (point (d)) that he carried out Senior Duty Officer duties or that he covered for Ms Brown when she was on annual leave.

38. The tribunal, accepting the evidence of Ms Brown and Mr Campbell, found as a matter of fact that Ms Brown's annual leave was covered by Mr Campbell, who was at that time Senior Duty Officer at Queens Hall. The tribunal accepted Ms Brown did, on occasion, delegate some tasks to the claimant (lifeguard training, site induction and two return to work meetings) but we could not accept this amounted to the claimant carrying out Senior Duty Officer duties. There is a distinction to be made between having the responsibility for ensuring certain tasks are done (which lay with the Senior Duty Officer), and those duties. Ms Brown at no time delegated to the claimant the responsibility for certain duties. Further, the claimant accepted he had not ever been paid at Senior Duty Officer grade for the duties he did which indicated the duties he had carried out were not Senior Duty Officer duties.

39. Ms Brown and Mr Campbell both, in relation to point (b), denied they had "mentored" the successful candidate prior to the interview. They both accepted that if the successful candidate had asked questions about the operation of the pool plant, or had sought more information or wanted to be shown a particular operation, it would have been provided. The tribunal accepted their evidence and was satisfied there was nothing unusual in what had occurred and the successful candidate had not been coached in preparation for the interview.

40. The claimant challenged that Mr Campbell and Ms Brown had had a role in formulating the questions to be asked at interview. The tribunal preferred the

evidence of both witnesses that this was incorrect. The tribunal accepted the evidence of Ms Whyte when she confirmed she and Mr Ashworth had been responsible for preparing the questions. Mr Ashworth confirmed this evidence in his email at page 282.

41. The tribunal concluded, with regard to point (c) that the successful candidate met the essential criteria for the post of Senior Duty Officer. We also accepted Ms Brown's evidence that the successful candidate did hold the required lifeguard qualification at the time of the interview.

42. The tribunal, with regard to point (e) noted the email from Mr Ashworth dated 13 April 2023 (page 282). Mr Ashworth, in that email, confirmed that due to the lapse of time he could not recall whether the claimant had asked for feedback, however, if he had he would have been given his score sheet and the notes made during the interview as this was standard procedure.

43. The claimant's evidence regarding this last point was somewhat confused. He asserted Mr Ashworth had shown him the paperwork which "had scribbles next to my scores where they had been changed". The claimant asserted he had been interviewed first and that his scores had subsequently been amended. The claimant, in his evidence to the tribunal, said he had not requested the paperwork but had been taken through it verbally by Mr Ashworth.

44. The tribunal noted the claimant, in cross examination, accepted he had been interviewed last. He also accepted he had not asked for the paperwork and had not sought feedback or raised a grievance about the outcome of the interview.

45. The tribunal took three points from the above. Firstly, that if the claimant was of the view that his scores had been changed and the reason for this was because of his race, he would have challenged this at the time. In fact, the claimant did nothing to challenge the outcome of the interview. Secondly, the claimant maintained the scores had been changed. The claimant did not suggest the scores had been reduced. Thirdly, if the claimant had asked for

feedback he would have been in possession of the paperwork. The fact he did not have the paperwork suggested he had not asked for feedback.

46. The tribunal, in addition to this, had regard to the claimant's own evidence regarding the interview which was that he had been nervous. Further, Mr Ashworth, in his email at page 282 said *"Although it was over 6 years ago my recollection of the interview was that Kivanc wasn't able to give the same standard of answers as that of the successful candidate. My overall observation was that he seemed unprepared, which was highlighted in the standard of response."* Ms Whyte, in her evidence to the tribunal, confirmed the claimant had not been the strongest candidate on the day which she described as being "disappointing" given his experience.

47. The claimant, in his submission, made reference to English not being his first language. The tribunal did not attach any weight to this in circumstances where the claimant had not, during his evidence or in any documents, referred to this.

48. The tribunal, having had regard to all of the points discussed above, concluded the reason for the less favourable treatment of being unsuccessful at the interview was not because of race. The reason the claimant was not successful at interview was because he did not perform as well on the day as the other candidates. We decided to dismiss this complaint.

49. The claimant asserted that following the interview he stopped being invited to management meetings and social events. The tribunal could not accept the claimant's evidence regarding these matters. The tribunal preferred the evidence of the respondent's witnesses. Ms Whyte held team meetings for the Bute and Cowal area and told the tribunal the claimant was invited to team meetings as appropriate. She confirmed the claimant (in common with other employees) would not be invited to all meetings – for example, he would not have been invited to a team meeting for Active Schools, but he was invited to attend team meetings where it involved his area of duty/responsibility/interest. There was also evidence that the claimant attended Health and Safety meetings.

50. Ms Whyte accepted she had sometimes had staff, including the claimant, to her house, perhaps 2/3 times a year. This was prior to 2017.

51. Ms Brown told the tribunal that prior to Covid the claimant had been invited to social events and she gave the example of a wedding celebration held in someone's house, and a poker night at her house.

52. The tribunal, for the reasons set out above, preferred the respondent's evidence and attached no weight to the claimant's assertion that he stopped being invited to team meetings and social events after the interview in 2016.

53. The second complaint made by the claimant was that he had started a gymnastics coaching scheme in 2016 but had not been given a promotion. The claimant asserted that he was not given more pay for working two jobs.

54. The tribunal, in considering whether the claimant was treated less favourably, had regard firstly to whether what the claimant alleged actually occurred. The tribunal found as a matter of fact that the gymnastics coaching scheme started because a demand for it had been identified through the Active Schools programme. The coaching scheme was one the respondent put in place: it was not an initiative proposed/started by the claimant.

55. There was no dispute regarding the fact the claimant was asked by the respondent if he wished to undertake training to deliver the gymnastics coaching: he agreed and was very successful in delivering the coaching. The claimant did not however "work two jobs". The hours required for delivery of the gymnastics coaching were part and parcel of the contracted hours of the Duty Officer role. The claimant did the gymnastics coaching as part of his Duty Officer role, and whilst he did that his other Duty Officer duties were covered by another Duty Officer.

56. The claimant was not able to name a comparator because no other employee started any similar schemes. The tribunal therefore had regard to how a hypothetical comparator would have been treated. We considered a hypothetical comparator would have been a Scottish Duty Officer who undertook gymnastics (or any other sport) coaching as part of their role. We

noted there was no evidence whatsoever to suggest promotion would have been given in those circumstances. In fact it appeared from the evidence of Ms Whyte that the coaching duties were equivalent to grade 5. Ms Whyte told the tribunal that the claimant not only did the gymnastics coaching, but also did classes in chair based exercise and aqua-fitness. All of these activities were equivalent to grade 5. The claimant's Duty Officer role was a grade 7 and therefore no additional payment would be made either to the claimant or any other Duty Officer undertaking the coaching.

57. The tribunal also noted the respondent has a job evaluation process in place to grade jobs. The situation is not one whereby management can "give" promotion as a reward. The claimant, had he believed the coaching enhanced the grade of his role, could have sought a re-evaluation of his role. He did not do so.

58. The claimant did name a number of other Duty Officers (all Scottish) and asserted he was the only long serving Duty Officer not to be appointed to a Senior Duty Officer. The respondent accepted those named by the claimant had been Duty Officers and were now Senior Duty Officers. The respondent rejected the suggestion the explanation for this situation was because of the claimant's race. The tribunal accepted the evidence of the respondent's witnesses that all of the respondent's facilities have both a swimming pool and a gym and therefore there was a requirement for two Senior Duty Officers. The claimant worked at Riverside which was the only facility where there was one Senior Duty Officer and this was explained by the fact Riverside was the only facility where there was just a swimming pool.

59. The claimant applied for the Senior Duty Officer position at Riverside in May 2016, and was unsuccessful. He had not applied for any other Senior Duty Officer position at other facilities.

60. The tribunal concluded, having regard to all of the above points, that the claimant was not treated less favourably than a comparator was or would have been. We dismissed this complaint for that reason.

61. The third complaint was that the claimant was offered a Senior Sports Coach position in 2018 but this was not a promoted post. There was no dispute regarding the fact the claimant's gymnastics coaching was very successful and as a result the respondent decided to create a Senior Sports Coach position. We accepted Ms Whyte's evidence that the creation of the job was done very much with the claimant in mind. The new post was put through the respondent's job evaluation process and graded 7. The claimant was offered the post but refused it because it was grade 7.

62. The claimant, in his evidence, suggested a draft job description (which he did not produce) had been discussed with him via email (which he did not produce) which had included the coaching of sports other than gymnastics. He believed that the job role was reduced when it went to advert, and limited to gymnastics. The claimant argued that it could not be right that he had been expected to coach a variety of sports, whereas currently only one sport is coached, but the grading of both was grade 7. The respondent's witnesses were not able to answer this directly because either they had not been involved or, through the passage of time, they did not recall. Ms Whyte told the tribunal there may well have been discussion about rolling the coaching out to other sports, but she considered it unlikely a job description would be changed because if it was changed it would have to go through the job evaluation process again (and this had not happened). Ms Brown told the tribunal that in terms of job evaluation the number of sports being coached would not alter the valuation of the core activity of coaching; and, that the evaluation is not a single number, but a range and so even if it increased for more sports (or reduced for less sports) it may not be enough to take it into the next grade.

63. The tribunal concluded that in circumstances where the Senior Sports Coach position was being created with the claimant very much in mind, it was more likely than not that there would have been discussions with him regarding the role. Further, there may very well have been discussions about rolling the scheme out to other sports. However, the post which was created was job evaluated before being offered to the claimant, and the grade was a grade 7.

If any changes were made to the role, it would have been evaluated again. The post advertised after the claimant rejected it, was a grade 7 post.

64. The claimant was not able to name any comparator because no Senior Sports Coaches are grade 8. We took from this that a hypothetical comparator, being a Scottish Senior Sports Coach, would also be employed in a grade 7 because there are no grade 8 posts.

65. The tribunal concluded from the above points that the claimant had not been treated less favourably than a comparator would have been.

66. The fourth complaint made by the claimant was that he was threatened at a return to work interview in November 2021 with no sick pay in the future. The tribunal noted there was no dispute regarding the fact Mr Campbell held a return to work meeting with the claimant in November 2021. There was a dispute regarding what had been said at that meeting. The claimant maintained he had been "threatened" with no sick pay in the future. Mr Campbell denied there had been any "threat" but beyond this he had no recollection of what had been said.

67. The tribunal had regard to the evidence in respect of sporting injuries and sick pay. We noted there was no dispute that an employee, who was a keen footballer, but who had sustained a number of football injuries leading to absence from work, had been cautioned, at a stage 3 absence meeting, that repeated absence caused by sporting injury may lead the respondent to paying a reduced level, or no, sick pay. The claimant and the respondent's witnesses each recalled that this had been a topic of conversation among employees at the time.

68. The tribunal concluded from this evidence that Mr Campbell may very well have made the claimant aware, at the return to work meeting, that repeated absence caused by sporting injury may lead to sick pay being reduced. We preferred evidence of Mr Campbell to that of the claimant and found as a matter of fact that no "threat" was made.

69. The claimant named a number of comparators being Scottish employees who had been in receipt of sick pay whilst absent. The tribunal noted the named comparators were not employees whose absence had been caused by a sporting injury. We accordingly concluded these comparators were not in the same or similar circumstances to the claimant and were not a correct comparator.

70. The tribunal considered the correct comparator was a Scottish employee who had had an absence because of a sports-related injury. The only evidence before the tribunal of such an employee was the employee referred to above, who had been told that repeated absence because of sports-related injury may result in reduced or no sick pay. The tribunal acknowledged the claimant had not had repeated absence caused by sporting injuries and was not at stage 3 in the respondent's procedure, however we did not consider these factors to be material. The material point was that the respondent adopted a particular approach to absence caused by sport-related injury and the claimant was not treated less favourably than a Scottish employee in this respect.

71. The tribunal decided there was no less favourable treatment in the circumstances and we decided to dismiss this complaint. We should say that even if we had accepted a "threat" had been made at the claimant's return to work meeting, we would have found the claimant was not treated less favourably than a comparator because the Scottish employee who had sports injury related absence received the same "threat".

72. The fifth complaint made by the claimant was that he took on more responsibility in June 2022 but was not given promotion. There was no dispute regarding the fact the claimant became Health and Safety representative for Cowal in June 2022. There was also no dispute regarding the fact the claimant was not given promotion. The tribunal noted there was no suggestion that being Health and Safety representative was a Senior Duty Officer duty or responsibility and no evidence to suggest that taking on such a task meant the employee would be given promotion.

73. The claimant did name some comparators who had been Duty Officers and had become Senior Duty Officers. The tribunal understood those employees became Senior Duty Officers because they had successfully applied for the post. They were not "given" promotion because they had taken on more responsibility. The tribunal concluded the comparators named by the claimant were not a correct comparator.

74. The correct comparator would be a Scottish employee, employed as a Duty Officer, who had taken on a Health and Safety representative role (or a responsibility akin to that) and who had been given promotion. There was no direct evidence or evidence from which the tribunal could infer that a Scottish employee would have been given promotion. We say that because the evidence in fact supported the conclusion that the Scottish employee would have been treated in the same way as the claimant. There was nothing to suggest taking on a Health and Safety representative role merited a higher grade. Further, jobs/roles require to be evaluated through the respondent's job evaluation process: it is not within management's gift to "give" an employee promotion.

75. The tribunal decided to dismiss this complaint because the claimant was not treated less favourably than others were or would have been.

76. The sixth complaint made by the claimant was that he had submitted his resignation in December 2022 and had not received a response from the respondent for three months. The tribunal noted the respondent did not dispute this had happened.

77. The claimant did not name an actual comparator. The tribunal had regard to a hypothetical comparator and how they would have been treated. We considered a hypothetical comparator would be a Scottish employee who tendered their resignation in similar circumstances to the claimant. We, in considering how the hypothetical comparator would have been treated, had regard to the fact that as a matter of good practice, a resignation would be acknowledged shortly after receipt in order for paperwork, notice and arrangements to be processed. There was no evidence regarding the practice

of the respondent in responding to letters of resignation but we considered it more likely than not that resignations would be acknowledged promptly.

78. We next had regard to the fact that when comparing the treatment of the claimant and a comparator, the comparator must be in the same or similar circumstances to the claimant (like must be compared with like). So, it is appropriate to compare the resignation of a hypothetical Scottish Duty Officer, expected to return to work the day after the Senior Duty Officer has gone on holiday, but who (out of the blue) tenders their resignation and does not return to work. We concluded there was a chance the comparator would be treated in the same way as the claimant, but on balance, and because it is best/usual practice, we concluded the resignation of the hypothetical comparator would have been acknowledged shortly after it had been received. We were satisfied the claimant was treated less favourably than a hypothetical comparator would have been.

79. We next asked ourselves whether the reason for the difference in treatment was because of the protected characteristic of race. We have referred to the guidance from the ***Nagarajan*** case above. We, in considering this question, had regard to the fact Ms Brown was on annual leave and therefore she did not receive (or become aware of) the claimant's resignation until she returned from annual leave two weeks' later. Furthermore, when she did return to work she understood Mr Campbell had responded to the resignation.

80. Mr Campbell was covering for Ms Brown. In those circumstances it was for Mr Campbell to either acknowledge the resignation or forward it to HR to process. He did neither of those things.

81. The tribunal acknowledged the fact the claimant's resignation came as a complete shock to all. We also acknowledged that the resignation meant Mr Campbell had to, as a matter of priority, ensure the claimant's shifts were covered. This did not however explain or justify the failure to acknowledge the resignation.

82. We asked whether the subjective motivations of Mr Campbell, either conscious or subconscious, were in any way influenced by the claimant's

race. The tribunal had regard to the fact that Riverside operated with the Senior Duty Officer and the claimant working opposite shifts. Mr Campbell was covering the Senior Duty Officer role and in the absence of the claimant, he had, as a matter of urgency, to find cover for the claimant's role. The tribunal accepted this was a matter of priority because without cover the pool/facility may have had to close.

83. The tribunal accepted Mr Campbell's evidence that this was not a case where he decided not to reply to the claimant. It was a case where he forgot to do so. Mr Campbell told the tribunal that he had intended to reply – and indeed may have started to formulate a reply – but had been distracted and had forgotten to return to complete the reply.

84. The tribunal concluded from this evidence that the reason why Mr Campbell did not acknowledge the claimant's resignation within a reasonable time was because he forgot to do so in circumstances where he was distracted by covering his role, Ms Brown's role and ensuring the claimant's role was also covered. We were satisfied Mr Campbell's actions were in no way influenced by the claimant's race. The tribunal decided to dismiss this complaint.

85. The tribunal, in conclusion and for the reasons set out above, decided to dismiss the claim.

Timebar

86. The respondent argued that all claims with the exception of the claimant's resignation were timebarred. The claimant (although he did not address the issue of timebar in his evidence or submissions) relied on a continuing act to demonstrate the claims were in time (in terms of section 123(3)(a) Equality Act).

87. The tribunal, in considering the respondent's submission, had regard to the case of ***Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548*** where the Court of Appeal upheld the approach taken in the case of ***Commissioner of Police of the Metropolis v Hendricks 20023 ICR 530*** that the correct test in determining whether there is a continuing act, is

for tribunals to look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer.

88. The tribunal noted the claimant's employment ended on the 22 December 2022. The claimant contacted ACAS for early conciliation on the 20 December 2022 and received the early conciliation certificate dated 31 January 2023. The claim was presented on the 2 March 2023. The claim in respect of the claimant's resignation (point vi) above) was made in time: the issue for the tribunal to determine is whether there was a continuing act from May 2016 until the time of the claimant's resignation.

89. The tribunal, in considering the respondent's argument, had regard firstly to our above conclusions that there was no less favourable treatment of the claimant in terms of points (ii), (iii), (iv) and (v). We secondly had regard to the fact, therefore, that there was a period of some six years between the first and last alleged act of discrimination. We thirdly had regard to the fact that different people were involved in the first alleged act of discrimination (Ms Whyte and Mr Ashworth) and the last alleged act of discrimination (Mr Campbell). The tribunal concluded, having had regard to those factors, that the six alleged acts of discrimination were not a continuing act and accordingly, points (i) to (v) were out of time.

90. The tribunal, in conclusion, decided to dismiss the claim in its entirety.

91. Employment Judge: L Wiseman
92. Date of Judgment: 01 November 2023
93. Entered in register: 02 November 2023
94. and copied to parties