EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No; 4105779/2016

Held in Glasgow on 18th & 25th May 2017 with further submissions made and Deliberation Hearing on 1st August 2017

Employment Judge: Claire McManus

Mr Ahsan Khan	**Claimant**
The Scottish Housing Regulator	**Respondent** **Represented by:-** **Mr M Carey - (Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

- Section 50 of the Equality Act 2010 applies to the exercise undertaken by the Respondent in assessing individuals for suitability for placement on a list of individuals who could be called upon to act as a Statutory Manager.

- The Claimant's claim of direct discrimination is a claim against the Respondent under Section 50(3)(a) and (c) of the Equality Act 2010

- The Claimant's claim of indirect discrimination against the Respondent is a claim under Section 50(3)(a) of the Equality Act 2010.

- The Claimant's claim of victimisation against the Respondent is a claim under Section 50(5)(a) and (c) of the Equality Act 2010.

- The Claimant's claim against the Respondent of direct discrimination was brought by the Claimant within the provisions of Section 123(a) of the Equality Act 2010 and can proceed.

- The Claimant's claim against the Respondent of indirect discrimination was not brought by the Claimant within the provisions of Section 123(a) or (b) of the Equality Act 2010 and is dismissed by reason of time bar.

- The Claimant's claim against the Respondent of victimisation was not brought by the Claimant within the provisions of Section 123(a) or (b) of the Equality Act 2010 and is dismissed by reason of time bar.

- The Claimant's application for the Response to be struck out in terms of Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 is refused.

REASONS

Background

1. The ET1 in this case was lodged with the Employment Tribunal on 28/12/2016, bringing claims of direct discrimination, indirect discrimination and victimisation against the Respondent. The protected characteristic relied upon is race. The ET3 response was lodged on 25/01/2017. The claims are refuted and preliminary issues of time bar and jurisdiction were raised by the Respondent. A Preliminary Hearing ('PH') for the purposes of case management took place on 23rd February 2017. The Note issued following this PH is dated 24th February 2017. That Note sets out that a PH was to be arranged to determine:-

   (a) Whether the terms of Part 5 of the Equality Act 2010 applied to the exercise undertaken by the Respondent, which exercise is said to

have resulted in discriminatory acts being committed by the Respondent.

(b) Whether the claim has been brought out of time and if it has been whether it is just and equitable to be permitted to proceed.

2. On 11th April 2017 the Claimant wrote to the Tribunal Office (copied to the Respondent's representative) making an application to strike out the Response on the grounds of the Respondent's unreasonable conduct. It was agreed that this issue would also be addressed at the arranged PH, which was extended to 2 days, to be held on 18th and 25th of May 2017.

3. A Joint Bundle was prepared for the PH containing documents relied on by each party. References in this Decision to document numbers in brackets refer to documents in that Joint Bundle. Evidence was heard at this PH from Christine McLeod (Director of Regulation in the Governance and Performance Division of the Scottish Housing Regulator) and from the Claimant. All evidence was given on oath or affirmation. Lodged witness statements were spoken to, followed by cross examination and re-examination, or in the case of the Claimant, an opportunity for the Claimant to say what he wished to clarify points raised by the Respondent's representative in cross examination. Both parties helpfully produced written submissions, which were spoken to at the PH on 25th May 2017.

Issues

4. After discussion at the PH, the questions for this Tribunal were agreed as being identified as:-

(a) Whether the Respondent's arrangements for assessing individuals for suitability for placement on a list of individuals who could be called upon to act as a Statutory Manager for the Scottish Housing Regulator are "arrangements" made by the Respondent within the

terms of the Equality Act 2010 (i) Section 50(3)(a) or (c) or (ii) Section 50(5)(a) or (c). (To avoid any confusion arising from use of the word 'arrangements', the Tribunal referred in its Judgment to the 'exercise undertaken by the Respondent', which is the wording identified at the PH on 23rd February 2016.

(b) If Section 50 of the Equality Act 2010 does not apply, then whether Section 39 of that Act applies.

(c) Were the claims of -

(i) direct discrimination

(ii) indirect discrimination

(iii) victimisation

brought by the Claimant within the provisions of Section 123 of the Equality Act 2010.

(d) Whether the Response should be struck out on the application of the Claimant on the grounds of the Respondent's alleged unreasonable conduct in terms of Section 37(1)(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

5. When considering parties' submissions, EJ McManus became aware of certain authorities which had not been referred to by either party and which may be relevant to the issues of time bar. An email was sent to both parties on 21/06/2017, giving both parties the opportunity to comment on these authorities, being the Decision of the EAT in *McKinney -v- London Borough of Newham* 2015 ICR 495 and in *Chaudhary -v- Royal College of Surgeons of Great Britain and Ireland and others.* [2001] UK EAT 975/99/1907 (19th July 2001) and also the decision of the Northern Ireland Industrial Tribunal

in *Cushnahan -v- Northern Ireland Office* 2007 NIIT 167 05 (30th April 2007). Both parties were given 28 days to submit any comment they wished to make on the application or otherwise of these cases to the approach which should be taken by the Tribunal in its consideration of the time bar issues in this case. Both parties made further submissions on these cases. A Deliberations Hearing for the Tribunal's further consideration took place on 1st August 2017.

Relevant Law

Equality Act Section 50

6. Section 50 is set out in full at [Doc 22/1]. It was accepted by the Respondent that subsection (2) applies to the circumstances of this case. The relevant subsections for the purpose of this PH are (3) and (5): -

> "(3) A person (A) who has the power to make an appointment to a public office within subsection (2)(a),(b) or (d) must not discriminate against a person (B) –
>
> (a) in the arrangements A makes for deciding to whom to offer the appointment;
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> (b) as to the terms on which A offers B the appointment;
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> (c) by not offering B the appointment.
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> [(4) re. harassment is not relevant to this PH]
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> (5) A person (A) who has the power to make an appointment to a public office within subsection (2)(a), (b) or (d) must not victimise a person (B) -

(a) in the arrangements A makes for deciding to whom to offer the appointment;

(b) as to the terms on which A offers B the appointment;

(c) by not offering B the appointment."

7. It was accepted that subsections (6) to (10) of this Section 50 do not apply to the present claim as they refer to persons "appointed to the office" i.e. already appointed. That cannot include the Claimant, or any person on the list who has not yet been appointed as an interim manager.

8. Equality Act 2010 Section 123:-

"(1) [Subject to [Sections 140A and 140B],]Proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

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

9. Equality Act 2010 Section 140B:-

"(1) This section applies where a time limit is set by Section 123(1)(a) or 129(3) or (4). But it does not apply to the dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of Section 140A.

(2) In this section –

(a) Day A is the date on which the complainant or applicant concerned complies with the requirement in subsection (1) of Section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the date on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by Section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by Section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with D and ending one month after DP the time limit expires instead at the end of that period.

(5) The power conferred on the Employment Tribunal by subsection 1(b) of Section 123 to extend the time limit set by subsection 1(a) of that section is exercisable in relation to that time limit as extended by this section.

10. Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:-

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above."

Findings in Fact

11. The following facts, material to the issues for this PH, were agreed or established:-

(a) The Respondent is the independent regulator of around 160 Registered Social Landlords ('RSLs') and 32 local authority housing services in Scotland. The Respondent was established on 1st April 2011 by the Housing (Scotland) Act 2010 ('the HAS'). It is an office in the Scottish Administration, being an independent, non-ministerial department, led by a Board of non-executive members, directly accountable to the Scottish Parliament. The Respondent's sole statutory objective is to safeguard and promote the interests of (circa 600,000) current and future tenants of social landlords, around 40,000 people who are or may become homeless, and people who use housing services provided by RSLs and local authorities, such as around 118,000 homeowners and over 500 Gypsy/ Traveller families. The Respondent regulates social landlords to protect the interests of their service users by assessing and reporting on (i) how social landlords are performing their housing services and (ii) RSL's financial well-being and standards of governance. The Respondent is directly accountable to Scottish Ministers and is subject to the Public Sector Equality Duty. Through a Framework Agreement with the Scottish Government, the Respondent receives various support services from the Scottish Government. The Respondent has the statutory duty to promote equalities under the Housing Scotland Act 2010 Section 3(2)(c).

(b) The Respondent is required in terms of the Housing (Scotland) Act 2010 ('the HSA') to set standards of financial management and governance for RSLs in Scotland. It is these regulatory standards that the Respondent has regard to when they assess an RSL's performance, actions and decisions and judge whether there are serious risks to tenants' interests. The Respondent has powers

under the HSA to intervene in a RSL to secure improvements. The Respondent has the authority and power to make an appointment of a Statutory Manager (also known as an Interim Statutory Manager) for an RSL in certain circumstances. An appointment to a position as Statutory Manager is an appointment to public office to carry out a statutory function for the purposes of section 50 of the Equality Act 2010. The Respondent generally first works co-operatively with the RSL to investigate and address the concerns. If the concerns are of a serious or urgent nature and it considered by the Respondent that the RSL does not have the willingness or capacity required to deal with the situation and effect improvements, then the Respondent sets out the interventions it will take in a published Regulation Plan and appoints a Statutory Manager to the particular RSL. The time commitment and length of appointment varies between appointments. The RSL is responsible for the Statutory Manager's remuneration and expenses. The Consultants appointed by the Respondent as Statutory Managers operate on a daily rate paid by the RSL but determined by the Respondent.

(c) As at 25th May 2017, the Respondent had used this strategy intervention power to appoint a Statutory Manager to an RSL on six occasions, the first appointment being in December 2014. The Respondent specifies the remit for each individual appointment, reflecting the reasons for the appointment being made such as dealing urgently with any immediate serious risks such as potential insolvency; addressing and resolving the issues of concern which required the appointment, such as the RSL's failure to meet the Regulatory Standards set by the Respondent; supporting the RSL's Board to address serious governance weaknesses and carrying out a strategic review or assisting and supporting the RSL's Board to initiate and commission any required investigations and take any necessary actions arising from the investigation reports.

(d) The Respondent's Annual report for 2013/14 was presented to the Scottish Parliament's Infrastructure and Capital Investment Committee on 14 January 2015. Following from that, and oral evidence being heard by that Committee, the Infrastructure and Capital Investment Committee wrote to Michael Cameron (Chief Executive of the Respondent) on 5th February 2015 (Doc 18). That letter invited a response from the Respondent on concerns raised by the Respondent's stakeholders re transparency and alleged lack of proportionate actions and expressed concerns, "that a culture of mistrust could be developing within the sector'. In this letter (at Doc 18/2) the Committee outlined some of the stakeholder concerns, including concern that the Respondent was not "fulfilling its statutory requirements in its approach", and examples of practices such as the "reluctance on the SHR's part to allow minutes of meetings". The letter stated that 'The Committee feels that it is imperative that the sector has trust in the regulatory process and confidence in its dealings with the SHR" (At Doc 18/3). In its response to the Committee of 5th March 2015, the Respondent highlighted that it was 'exploring the potential to develop a procurement framework agreement that both the Respondent and RSLs could use to appoint skilled and expert consultants as Statutory Managers and Interim Chief Executives.

(e) The Scottish Parliament expressed in a report (at Doc. 20C) its concerns generally about the need to improve existing employment and recruitment practices "otherwise we cannot confront any underlying racism and discrimination" (Doc. 20C, second page, finding 9). The recommendation in this report (at Doc. 20C) was that, "The Scottish Government should show leadership in tackling the deep-seated issues which our inquiry has uncovered, and commit to long-term concentrated action."

(f) In response to criticism of the Respondent from its stakeholders in respect of a perceived lack of transparency in how and who was selected to be an Statutory Manager, and concern among the stakeholders about the cost of an Statutory Manager, the Respondent undertook an exercise to publish a selection list. This selection list was to name individuals considered by the Respondent to be suitable for appointment as a Statutory Manager. The Respondent initiated the project to develop the selection list in July 2015. In developing this project, the Respondent considered the public appointments process and the Scottish Government's procurement framework and sought procurement advice. There is no defined statutory appointment process for the appointment of Statutory Managers. The appointment to a post of Statutory Manager is not subject to mandatory rules on public procurement.

(g) The exercise to develop the selection list of individuals considered by the Respondent to be suitable for appointment to an RSL as Statutory Manager ('the selection list') was approved by the Respondent's Board on 23rd November 2015. In February 2016 a project team was formed to develop the assessment process for this selection list. There was discussion with stakeholders on the daft role profile, with consideration on the identification of appropriate criteria to enable assessment of the suitability of individuals to perform in the role of Statutory Manager. The key objectives of the process were identified as:- to increase openness and transparency; to have assurance that the required skills, experience and knowledge are readily available; to control and potentially lower costs for the RSLs on appointment of a Statutory Manager.

(h) On 17th June 2016 a Notice (Doc 8/1) was published on the Respondent's website stating that the Respondent wanted to:-

> "develop and publish a list of people with suitable skills and experience which we can select from when we require to make a statutory appointment of a manager to a social landlord."

(i) From 20th June until 7th July 2016, an advertisement appeared on the Respondent's website and in 'Inside Housing' (a publication for housing professionals) inviting applications for inclusion on the selection list. Interested persons were invited to contact named individuals within the Respondent's organisation (Margaret Sharkey or Helen Shaw) for more information and an application pack. An informal chat was offered. The Statutory Manager application pack (Doc 9) includes an application form, the Statutory Manager Role Profile and an equalities monitoring form (Doc 9/9). The Respondent's Statutory Manager Role Profile is at Appendix A of the application pack (Doc 9/6 – 9/8). This lists 'Essential Criteria' for that role, under the headings of 'Experience', 'Knowledge' and 'Essential Skills'. The first criterion listed under "Experience' (at Doc 9/6) states:-

> "You will have a proven track record of successfully carrying out interim senior officer roles in regulated organisations with serious governance and / or financial management. And delivering improvements and lasting change."

(j) From the outset of the project, the Respondent intended to use this selection list as a preliminary selection stage for its appointment of Statutory Managers. Since the publication of this selection list the Respondent has used the selection list as a preliminary selection stage for its appointment of Statutory Managers. Under the heading "How we will manage the list" in the application pack (at Doc 9/3) the Respondent sets out how the selection list is used. This states:-

"SHR (the Respondent) wishes to develop a list of individuals with suitable skills and experience to carry out the Statutory manager role. We intend to use the list to select candidates if we need to appoint a manager to a social landlord. When making appointments we must be assured that the proposed individual has the required experience, skills and knowledge to ensure that the landlord makes the changes needed to bring its performance, governance or financial management to an acceptable level and deal with its problems.

The list of potential statutory managers will be in place for three years, and we will keep the list under review. We may run mini- competitions for each appointment, or, if we need to act urgently, make a direct appointment. In the exceptional circumstances of no list members being available, or if we require additional skills, we may make a direct appointment outwith the list.

Being on this list does not guarantee that an individual will be selected for appointment during this period.

We will provide full briefing when we make an appointment and will agree communication and reporting arrangements with the manager at that time."

(k) This application pack further details the Statutory Manager appointment process as follows:-

"We can only accept applications from individual applicants rather than from a company or organisation with its own legal identity.

> We will discuss the anticipated time commitment for an appointment with candidates before any appointment is made. We will expect a significant proportion of the time to be spent on site at the social landlord's premises. In the initial stages of an intervention an appointment can be full time. We also expect candidates to be flexible in working evenings and weekends in order to attend meetings or other engagements if required."

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(l) Interested persons were invited to submit "a CV demonstrating how you meet the criteria and complete the enclosed application form". The closing date for submission of applications was 8th July 2016. The Respondent received 25 submitted applications for inclusion on the selection list. Twenty one Equalities monitoring forms were submitted. These Equalities monitoring forms were monitored by the Respondent's employees separately to those involved in the sift of applications.

(m) The Respondent conducted a first stage sift of applications from 27th July until 5th August 2016. The Assessment Panel for this process was composed of three of the Respondent's Assistant Directors and its Regulation Manager (Mr Keenan, Ms Sharkey, Ms Shaw and Ms Sneddon). They met for the purpose of conducting this first stage sift on 27th & 29th July and 2nd, 3rd and 5th August 2016. On 12th August the Respondent's Project team for the development of this selection list met to agree next steps and the administration of notifications following the first stage sift. On 15th August 2016 the results of the first stage sift was notified to unsuccessful applications i.e those who had not survived the first stage sift. In the period from 16th August until 27th September 2016, references were sought for individuals who were through to the second stage of the process for appointment to the selection list. On 28th September 2016 the Respondent produced and published its selection list, listing named

individuals considered by the Respondent to be suitable for appointment as a Statutory Manager ('the selection list').

(n) The Claimant submitted his application to be included in the selection list on 8th July 2016. The Application Form, as completed by the Claimant, is at Doc 10/1. The Claimant stated in his covering letter with his application "I am aware that I do not have a track record of carrying out interim senior officer roles, but hope that this will not prevent consideration of my application". The Claimant's believed that in circumstances where he had made it clear in his application that he had "equivalent experience from 25 years working in permanent senior roles" he did not expect the Respondent to adhere rigidly to the "previous interim experience" criterion.

(o) The Claimant did not contact Ms Sharkey or Ms Shaw prior to submitting his application. The Claimant's application was assessed by the Assessment Panel on 29th July 2016. The Candidate rating sheets completed in respect of the Claimant's application is at Doc 12/1. The Claimant was not successful at this first shift stage of the process. The selection criteria was applied to the Claimant and the decision made that the Claimant was not successful at the first stage sift, on application of this criteria, was made on 29th July 2016. The Claimant received notification of this decision from Ms Margaret Sharkey on 15th August 2016. Ms Sharkey sent an email to the Claimant on 15th August 2016 informing him that 'unfortunately (his) application did not fully demonstrate the required experience, skills and knowledge as set out in the role profile and that (the Respondent) (was) unable to consider (his) application any further' (Doc 14/2). The Claimant was offered feedback (Doc 14/2).

(p) On 20th August the Claimant sent an email to Ms Campbell informing that he did wish to take up the offer of feedback. The Claimant stated (Doc 14/2):-

> "Please let me know the best days/times to contact you in October, as I am very busy over the next few weeks."

Mr Keenan sent an email to the Claimant on 23rd August 2016 proposing some dates in October for this feedback conversation. On 11th October 2016 the Claimant emailed Mr Keenan to arrange a time for the feedback conversation. His email began :-

> "Sorry I have not replied to you before now. I am free the remainder of this week if you are available?"

The call was arranged to take place between Mr Keenan and the Claimant on 13th October. Prior to this meeting, Mr Keenan prepared a typed version of the candidate rating sheet for the Claimant. The Claimant spoke to Mr Keenan on 13th October 2016 for the purposes of the Claimant being provided with verbal feedback on his application to be included in the selection list. Mr Keenan summarised the strengths and weaknesses in the Claimant's application and explained to the Claimant the importance of relevant experience of going into troubled organisations, providing stability at a time of crisis and bringing about effective change. The Claimant asked how he could gain this experience.

(q) On 8th November 2016, ACAS received notification from the Claimant that he intended to bring a claim to the Employment Tribunal about Respondent's failure to include him on the selection list. The Respondent did not receive this notification and it was not communicated to them by ACAS. On 22nd November 2016, the Claimant notified the Respondent of his intention to make a claim to the Employment Tribunal in respect of the Respondent's failure to shortlist him for appointment to the list of potential statutory managers by sending an email to the Respondent's Chief Executive (Mr Cameron) and Ms Sharkey, copied to ACAS and Mr Muirhead

(Doc 16/1). The Claimant attached to this email a list of questions about the process, requesting a reply by 2nd December 2016. A 'holding' email was sent in reply to the Claimant by Christine Macleod. A substantive reply to the Claimant's questions was set to him by Christine Macleod on 16th December 2016 (doc 1/23).

(r) The Claimant has experience of an Employment Tribunal, having been successful in a Race Discrimination claim against Angus Council in 2008 (Judgment at Doc 23). The Claimant was legally represented in that claim. No issue of time bar arose in respect of that claim. The Claimant has some knowledge of employment law but is not a qualified solicitor. The Claimant is a highly educated man, holding an MA degree, a BSc (Hons) degree, an MPhil degree and a Graduate Diploma in Law. His CV, as submitted with his application form to the Respondent, is at Doc 10/5 – 10/8. This states in relation to his Law Diploma that he 'scored 90% for Employment Law project). This project was on the application of equalities law in the workplace. He did not cover time bar issues in this project. The Claimant is a corporate member of the Chartered Institute of Housing. At the time of submitting these claims he was employed as Chief Officer of Clackmannanshire Council, with responsibility for a department employing around 300 staff, providing a number of services, including housing management. The Claimant is an ordinary member of the Housing & Property Chamber, First Tier Tribunal for Scotland.

(s) The Claimant believed that his claims against the Respondent had to be lodged within 3 months of the date when it was communicated to him that he was not successful at the first sift stage. That decision was communicated to the Claimant on 15th August 2016. The Claimant believed that his claims must be submitted by 14th November 2016. The Claimant believed that he had submitted his claims before that date by his contact with ACAS on 8th November

2016. The Claimant did not seek legal advice on the statutory time limit for his claim. The Claimant referred in his statement to having 'consulted all the guidance and legislation available'. The Claimant did not consult 'all the legislation and guidance available' before submitting his claim in this matter to the Employment Tribunal. The Claimant did not consider the provisions of Section 123 of the Equality Act 2010 before submitting his claims. The Claimant did not seek appropriate legal advice on the time limits relevant to bringing his claims. The Claimant had the means to obtain appropriate legal advice on the applicable time limits and could have done so. The Claimant did not consider the terms of the Equality Act 2010 Code of Practice prior to submitting his claims. The Claimant was confident in his understanding prior to submitting his claims that the time that the three month time limit would apply from the date he had knowledge of the decision. The Claimant did not consider it necessary to seek specific legal advice on any issue in respect of the date when a claim in respect of this matter should be lodged. The first indication to the Claimant that his claims may be timebarred was in the Respondent's submitted ET3.

(t) In the period immediately following him being notified of the Respondent's decision, the Claimant was busy with personal affairs. The Claimant had sold his previous home in Thornhill, Dumfries and Galloway and had bought a flat in Dunblane. The Claimant was renovating the flat in Dunblane and was spending a lot of time travelling between his homes in Thornhill and Dunblane. He was seeking to settle his family in Dunblane ready for the new school term in August 2017. In the period from August until November 2016 the Claimant's personal and family life arrangements took priority for him over his claims against the Respondent in respect of this matter.

(u) Following his discussion with Mr Keenan on 13th October 2017, the Claimant had reflected on the feedback given to him before deciding

to bring a claim against the Respondent in respect of this matter. The Claimant believed that bringing a claim against the Respondent could have serious repercussions in respect of his career, given the Respondent's considerable powers in social housing in Scotland. That consideration was a factor in the Claimant's delay in making his claims against the Respondent.

(v) The selection list was published on the Respondent's website on 28th September 2016. The individuals named on the selection list are considered by the Respondent to be suitable to be appointed as a Statutory Manager. All Statutory Managers appointed since September 2016 have been appointed from the selection list. In addition to two appointments of a Statutory Manager from the selection list, at least two Housing Associations have commissioned a consultant from the selection list as Interim Chief Executive. Since the inception of that selection list, as at 25th May 2017, no appointments to Statutory Interim Manger had been made outwith the selection list.

(w) Inclusion on the selection list is not a guarantee of appointment as a Statutory Manager. Individuals named on the list may not be appointed to a post of Statutory Manager. The selection list may be used by an RSL to source suitably qualified people to carry out non-statutory management roles, without recourse to the Respondent. The assessment exercise conducted by the Respondent in their preparation of the selection list was an evaluation of individuals' suitability for the role of Statutory Manager. Inclusion in this selection list is admitted by the Respondent as clearly being a significant preliminary step in the Respondent's process for making an appointment to Statutory Manager, as and when the need arises.

(x) In October 2016 the Respondent published what was intended to be 'comprehensive guidance' about the process of appointment of

Statutory Managers in their leaflet "How We Work: How we appoint managers and governing body members' (Doc 15/1). Before making an appointment of an individual to a RSL as a Statutory Manger, the Respondent takes account of the potential managers daily payment rates and any conflicts of interest and confirms that the individual is able to meet the time commitment required. Two Statutory Manger appointments made by the Respondent had concluded as at 25th May 2017. These appointments lasted for 12 months in one case and 24 months in another. All of the individuals appointed as Statutory Mangers prior to 25th May 2017 were self-employed consultants prior to their statutory appointment. The individuals who have been appointed as Statutory Managers are appointed to that post as self-employed consultants. 'Appointees' are issued with an appointment letter which does not purport to be a "contract" but instead sets out the terms and conditions of appointment. Statutory Managers are appointed as individuals, personally required to carry out the work, with no right of substitution. They are to be available throughout the unspecified duration of the appointment. The Statutory Manager is at all times directly accountable to the Respondent. The Respondent provides instructions to the Statutory Manager at the beginning of, and throughout, the appointment. There are detailed reporting requirements, and the Statutory Manager is subject to ongoing performance review, with failure to meet the Respondent's standards or implement its instructions potentially resulting in the removal of the Statutory Manager from the selection list. No employed person has ever been appointed by the Respondent as a Statutory Manager. There would be likely to be practical difficulties for such an individual's employer, given the level of commitment required and the uncertain duration of the period of appointment as Statutory Manager. Membership of the list demonstrates the Respondent's "approval". The Respondent will not challenge an RSL on an appointment it makes from the selection list.

RSLs may make a direct appointment of a consultant from the selection list.

(y) The Respondent's guide to "How we appoint managers and governing body members" (Doc 15) sets out the process followed when an individual is appointed as a Statutory Manager from the selection list is made. At Section 5.2 of this it is stated:-

> "We will establish that the potential manager has no inappropriate or unmanageable conflicts of interest which would prevent an appointment being made. We will also confirm that the manager is able to meet the time commitment required.
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> We will set out in writing to the landlord the name of the appointed manager, the start date and period of appointment, the purpose of the appointment and the specific remit of the manager, plus the quoted rates. We will also set out these details to the appointed manager. ...We will also brief the manager in detail at the start of the appointment about:-
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> - The organisation
> - The background to the decision to appoint the manager
> - The Role and responsibilities of the manager
> - Relevant timescales
> - Reporting requirements
> - Arrangements for remuneration and termination of the appointment.

> The manager will be accountable to us and will report directly to us on progress. We will require the appointed manager to comply with any of our directions about the performance of the manager's functions (and we may remove the manager for failure to comply). The manager must conduct himself/herself in accordance with our issued remit, our Regulatory Standards of Governance and Financial Management, and all relevant good practice and codes of governance. We will require the manager to confirm his/her acceptance of the terms and conditions of the appointment."

(z) This guide further states at Section 5.3, 'Period of Appointment' :-

> "It is for the Regulator to determine the period of appointment of the manager (Section 59 of the Housing (Scotland) Act 2010). The appointment will be subject to such terms and conditions as we deem necessary and appropriate to enable the manager to fulfill the remit.
>
> The terms and conditions may vary from case to case however we would be likely to set out details about the start and end of the appointment, the time commitment required, and any review arrangements."

(aa) This Guide states at Section 5.8, 'Monitoring the manager's appointment':-

> "We will require an appointed manager, as a condition of his/her appointment, to submit regular reports to us about progress in carrying out the terms of the appointment. The substance of such reports would normally be shared with the governing body/housing committee except in cases where it

would be inappropriate because of the particular nature of the report.

We will monitor and review the manager's performance, and we may terminate the appointment if he/she fails to adhere to the specified terms and conditions, for example if the manager fails to provide information or to implement instructions. In these circumstances we will consider their continued inclusion on our selection list.

We may issue directions regarding the exercise of the manager's functions during the period of appointment. Nearing the end of the period of appointment we will formally review the effectiveness of the appointment and whether it should be terminated or extended."

(bb) The Respondent's Agenda response is dated 10th February 2017 (Doc 4/10). This completed Agenda reflects the position understood by the Respondent's representative at the time of its completion. This completed Agenda makes no reference to two Statutory Manager appointments having been made from the selection list. These appointments were made in the period between the Respondent's representative gathering the facts relevant to the Respondent's agenda and when the agenda response was submitted. The Respondent's paper apart to its Agenda for the preliminary hearing (Doc 4/7) was sent to the Tribunal by email on 10th February 2017, (at 18.16). This states:-

"None of the applicants who were selected for the Respondent's list has been appointed to a public office. Instead, they have been placed on a list of individuals with suitable skills and experience to carry out the statutory

manager role. Those individuals may never be appointed as statutory managers."

And

"The Respondent has made no arrangements, yet, for deciding to whom it will offer the appointment of statutory manager."

(cc) As at 23rd February 2017, two appointments had in fact been made from the selection list. The first appointment, to Arklet Housing Association was made on 1st February 2017. The second appointment, to Wishaw and District Housing Association was made on 6th February 2017. Notice of these appointments was published by the Respondent on 1st and 9th of February [Docs 19/1 and 20/1] and were within public knowledge. The Respondent's representative learned of these appointments on 23rd February, shortly before the Preliminary Hearing. The Note of the PH on 23rd February (at Doc 5/4) states the following at paragraph 13:-

"Mr Khan also said that the Respondents said that a list had been compiled from which appointments might or might not be made. His understanding was that appointments had now been made from that list. Mr Carey said that at the time form ET3 and the Agenda were prepared to no appointment had been made from the list. Within the last two weeks, however, an appointment had been made from the list. He said that the nature of that appointment was akin to consultancy. The person was not an employee of the Housing Regulator. Equally the person was not an employee of the housing association which they were assisting.'

(dd) Ms Macleod is a member of the Respondent's Executive Management Team and is the Director responsible for making the statutory appointments and for instructing the Respondent's representative in this case. Ms Macleod was present at and instructing the Respondent's representative at the PH on 23rd February 2017. At that time Ms Macleod had knowledge of the appointments made from the selection list.

(ee) On 11th April 2017 the Claimant applied for strike out of all or part of the Respondent's response on the grounds of unreasonable conduct under Rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013, relying on the Respondent's position at the PH on 23rd February 2017. The Claimant relied on the Respondent misinforming the Tribunal about appointments from the selection list .

(ff) The Claimant provided some specification of his direct discrimination claim in the Claimant's completed Agenda form (at Doc 3/10). In response to the question : "if you complain about direct discrimination (i) what is the less favourable treatment which you say you have suffered (include the dates of this treatment and the person or persons responsible)" he stated:-

> "On 15th August 2016 I was advised by the Respondent that I was not being appointed to its list of statutory managers. The notification came from Margaret Sharkey, an employee of the Respondent. I do not know the names of all the panel that made the decision.''

In response to the question : "Why do you consider this treatment to have been because of a protected characteristic?" he stated:-

> "Nine white British candidates were appointed. I am as well qualified and experienced as most if not all of the candidates

> appointed to the role. The Respondent refused to provide any equalities and diversity information relating to either the selection panel or the successful candidate. The Respondent has previously selected only white British candidates for these roles, without advertisement or open competition."

(gg) The Claimant provided some specification of his indirect discrimination claim is in his completed agenda form (at Doc 3/11). The Claimant states the 'provision, criterion or practice' which he says the Respondent applied to him as:-

> "The requirement to have previous experience of the role of an 'interim senior officer'. This cannot be objectively justified. Anyone with my qualifications and experience could carry out the role."

(hh) The Claimant provided some specification of his victimisation claim is in his completed agenda form (at Doc 3/12). The Claimant relies on the protected act in respect of his victimisation claim being:-

> "Around August and September of 2012' I made allegations that the Respondent had discriminated against me on the grounds of race contrary to the Equality Act 2010".

The Claimant there describes the disadvantage he suffered as a result of doing this protected act as:

> "On 15th August 2016 I was advised by the Respondent that I was not to be appointed to its list of statutory managers., an employee of the Respondent. I do not know the names of the other selection panel members."

The Claimant there states that he considers that this was because he had done a protected act because:-

> "Following the complaint I made in 2012, the Respondent refused to investigate my complaints fully and instead reacted by trying to force me out of the job that I held at that time. When I applied for this appointment in 2016, I was as well qualified as most of the nine candidates that it appointed to the list of statutory managers. This failure to select me follows the pattern of behaviour established in 2012."

(ii) The ACAS Early Conciliation certificate in respect of the Claimant's claims was issued on 28th November 2016. The Claimant lodged his claims against the Respondent of direct discrimination, indirect discrimination and victimisation with the Employment Tribunal on 28th December 2016.

Respondent's Submissions

12. The Respondent's representative presented written submissions which are summarised as follows.

Does this matter fall within Section. 50(3)(a) of the 2010 Act?

13. The Respondent accepted that it is an office holder in the Scottish Administration by virtue of the Housing (Scotland) Act 2010 (Consequential Provisions and Modifications) Order 2012 (SI 2012/700). Section 212(7)(d) of the 2010 Act (general interpretation), which provides that any part of the Scottish Administration is a member of the executive. The Respondent accepted that it is therefore a public office for the purpose of Section 50(2)(a) of the 2010 Act (Public offices; appointments, recommendations for appointments etc.) [Doc 22/1]. The Respondent accepted that it is subject to the duties set out in Section 50 when it appoints interim managers

under subsection 57, 58, 79 of the Housing (Scotland) Act 2010 [doc 21/1]. It was accepted that Section 50 of the Equality Act 2010 applies to the appointment of a Statutory Manager It was not accepted that Section 50 of the Equality Act 2010 applies to the inclusion of an individual on the selection list of those suitable to be appointed as a Statutory Manager.

14. The Respondent's position was that Section 51 (public office: recommendations for appointments) does not apply to the Respondent. It does not have "power to make a recommendation for or give approval to an appointment to a public office". Its power is to "appoint" an interim manager in certain circumstances.

15. It was accepted that, as part of the Scottish Administration, the Respondent is subject to the general public sector equality duty set out at Section 149 of the 2010 Act; with reference to Section 150(2) and Part 3 of Schedule 19 to that Act. The Respondent relied upon not being listed in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 and not being subject to the duties set out therein. It was submitted that if the circumstances of the claim are not covered by Part 5 (Work) of the 2010 Act (Section 120(1)(a)) [doc 22/1], then the Employment Tribunal does not have jurisdiction to determine the complaint.

16. It was submitted that the Respondent's assessment exercise for inclusion on the selection list was not an appointment to a public office, rather that individuals on the list may be appointed in future, or they may not. The Respondent relied on inclusion on the list carrying no guarantee of appointment and that individuals not on the list may be appointed. It was acknowledged that the list may be used by RSLs to source suitably qualified people to carry out non-statutory management roles, without recourse to the Respondent. It was acknowledged that the assessment exercise consisted of an evaluation of individuals' suitability for the role of Statutory Manager and so was clearly a significant preliminary step in the Respondent's process for making statutory appointments as and when the need arises.

17. The Respondent relied on Ms MacLeod's evidence that the Respondent applied public procurement principles to its assessment of candidates suitable for its list. It was submitted that the intention was in effect to create a procurement framework which can be "called on" as and when needed and was not a typical public appointment process, where interested individuals are invited to apply for a vacant statutory office, for example a chair of a public body. The Respondent relied on the fact that at the time the list was created there was no specific "appointment" in mind; although clearly the need for future appointments was anticipated and, 2 appointments have since been made. It was submitted that the expression "*the* appointment" in subsections (3)(a) and (5)(a) suggests that the provision applies when a person is deciding to whom to offer a *particular* appointment; not any appointment that may arise in future. It was submitted that the decision as to who should be offered an appointment can only be taken when the circumstances requiring such an appointment are known and such a decision would depend on a number of factors, including: an individual's suitability for the specific role; their availability; price; conflicts of interest; likely duration of the appointment; geographic location.

18. It was submitted that the Respondent cannot be bound by a duty not to discriminate against the Claimant when at the relevant time it was not "deciding to whom to offer the appointment" and that that does not appear to be the effect of the wording of subsections (3)(a) and (5)(a).

19. It was acknowledged that the Tribunal may take a broad view of "the arrangements A makes for deciding to whom to offer the appointment" as encompassing all steps preliminary to any future appointment; including the Respondent's creation of the list of suitable individuals and may consider that such a broad interpretation is consistent with its general duty to protect the rights of individuals such as the Claimant from discrimination. It was acknowledged that where such rights flow from European legislation (in this

case the Race Directive 2000/43/EC) the Tribunal may interpret domestic legislation broadly to resolve any ambiguity; in this case to protect individuals like the Claimant who put themselves forward for inclusion on a list at a time before any appointment is on "offer".

20. It was conceded that the Respondent had been unable to find any judicial consideration of the wording of subsection (3)(a) or its predecessor provisions which clarifies this point one way or the other. It was acknowledged that the wording used ("arrangements…") is identical to the wording used in Section 39(1)(a) in relation to employment and that the Employment Statutory Code of Practice notes (at para 16.43) in relation to *employment* that: "Arrangements for deciding to whom to offer employment include short-listing, selection tests, use of assessment centres and interviews. An employer must not discriminate in any of these arrangements…". It was submitted that that situation can, though, be distinguished from the Respondent's assessment exercise: it was not employment; the Respondent's list is not a "short list" i.e. a list of candidates to be interviewed for an existing role. It was submitted that these circumstances were more closely analogous to a procurement exercise: applications were evaluated against criteria (including price); scored; and a list (or framework) was produced for future use if needed. It was submitted that although there was no legal requirement to conduct this exercise using the public procurement model, this ensured a fair and open competition for the delivery of interim manager services, using a process that is used across the public sector and which ensured that the procurement principles of transparency, equal treatment, non-discrimination and proportionality were met. It was submitted that the remedy for challenging a failure to meet these principles is judicial review.

21. It was submitted that if the subject matter of this claim is not a complaint relating to a contravention of Part 5 of the 2010 Act, this would not mean that the Respondent was free to discriminate against individuals seeking inclusion on the list. It was submitted that as the process was run using

procurement principles, the Respondent was subjecting itself to the fair and lawful application of those principles, which include non-discrimination. The jurisdiction rules in the 2010 Act do not prevent a claim for judicial review (Section 113(3)(a)); a remedy frequently invoked to challenge procurement decisions by public authorities.

22. It was submitted that much of the Claimant's claim, as set out in Form ET1, his subsequent submissions and in his evidence, emphasises (in his view) the Respondent's failure to comply with the public sector equality duty and its equality obligations under the Housing (Scotland) Act (e.g. paras 16 to 26 of the Claimant's statement). It was submitted that much of the Claimant's apparent dissatisfaction with how the Respondent conducts its business generally would arguably be more appropriate for a Judicial Review than an Employment Tribunal, given that failure in respect of a performance of the public sector equality duty does not confer a cause of action in private law (Section 156 of the 2010 Act) but could be subject to judicial review.

23. It was submitted that the Respondent did not discriminate against the Claimant in any way during the assessment process and that the Claimant was treated fairly throughout. The Respondent's position was that the Claimant was not discriminated against directly or indirectly, and he was not victimised and if the Tribunal finds that the claim is within its jurisdiction, the Respondent will continue to defend its actions.

If Section. 50 does not apply, then whether s. 39 applies.

24. The Respondent relied upon their note of 30th March 2017 [Doc 7/1], which was submitted in response to the Claimant's note to the Tribunal dated 13th March [Doc 6/2], setting out an alternative basis for his claim. It was noted that the Claimant had asked the Tribunal [Doc 6/2, para 10] to "consider whether the Respondent's statutory managers should be classed as workers within the meaning of the Employment Rights Act 1996 Section

230(3)(b) and the Working Time Regulations 1998 Regulation 2, and therefore that the working situation falls within the definition of "employment" in the Equality Act 2010 Section 83(2)(a). See, for example, *Pimlico Plumbers Ltd and another v Smith*". It was submitted that it is not relevant for the purpose of this jurisdictional issue whether Statutory Managers are "workers" for the purpose of Section 230 ERA or the WTR, Regulation 2. It was submitted that the relevant provision is s. 83(2)(a) of the 2010 Act: *"Employment"* means:-

> "(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

25. It was submitted that if a person appointed by the Respondent as a Statutory Manager was engaged under a "contract personally to do work", that person would be covered by Section 39 of the 2010 Act [Doc 22/1]. It was submitted that the question whether appointment to a public office amounts to a contract depends on the specific facts and can be difficult to determine. The Respondent relied upon *Gilham v Ministry of Justice* (UKEAT 0087/16/LA); a whistleblowing case where the Employment Appeal Tribunal held that the terms of appointment to the public office of district judge did not amount to a contract.

26. The Respondent relied upon Ms MacLeod's evidence that the individuals who have been appointed as Statutory Managers are self-employed consultants and that 'Appointees' are issued with an appointment letter which does not purport to be a "contract" but instead sets out the terms and conditions of appointment.

27. The Respondent's position was that it is not necessary for the Tribunal to reach a view on this point one way or the other in order to determine this jurisdictional issue because Section 50(3) and Section 39(1) are in identical terms. It was submitted that whether appointment as a Statutory Manager is an appointment to a public office within Section 50(3) or "employment" ("a

contract personally to do work") within Section 39(1), or both, the jurisdictional issue turns on the meaning of "arrangements" for the purpose of those respective subsections.

28. The Respondent does not dispute that a person appointed as a statutory manager is entitled to the protections of Part 5 of the 2010 Act. It was submitted that an appointment by the Respondent of a Statutory Manager is most accurately characterised under the 2010 Act as an "appointment to a public office" under Section 50(3). However, if the tribunal disagrees and considers that a Statutory Manager is "employed" under a "contract personally to do work" under Section 39(1) of the 2010 Act the same jurisdiction point arises: was the Respondent's assessment exercise an "arrangement" which the Respondent made for deciding to whom to offer the appointment/employment? It was submitted that it was not.

Time Bar

29. The Respondent's primary position on time bar was that the period of 3 months set out in Section 123(1) starts with "the date of the act to which the complaint relates"; not the date when the decision was communicated. The Respondent's position was that the Claimant had until 28th October 2017 to bring a claim in time and that, taking all the circumstances into account, he had not acted reasonably in delaying to do so. The Respondent relied on *Virdi v Commissioner of Police of the Metropolis [2006 UKEAT 0373/06/RN]*, Mr Justice Elias, (President) at paragraph 25: "The question is when the act is done, in the sense of completed and that cannot be equated with the date of communication".

30. It was noted that there was no dispute over the key dates, events and documents. The Respondent relied on the chronology at paragraph 37 of Ms MacLeod's statement. It was submitted that it was not reasonable for the Claimant not to know or suspect at an early stage that he had a possible claim. It was submitted that the Claimant has offered no reasonable

explanation for why did he not present his complaint earlier. The Respondent's position was that the claim was submitted after the end of the period of 3 months starting with the date of the act to which the complaint relates. It was submitted that that period ended began on 29th July 2016 and ended on 28th October 2016. The Respondent relied upon the claims not being submitted until 28th December 2016 and the ACAS Early Conciliation Certificate being initiated on 8th November, in the Respondent's primary submission 11 days after the end of the 3 month period. The Respondent's position was that, asking the questions set out in *Barnes*, the Claimant knew, or ought to have known or suspected that he had a valid claim for race discrimination when he saw the evaluation criteria.

31. The Respondent's position was that the Claimant's claims of direct discrimination; indirect discrimination and victimisation are separate and severable claims and it is appropriate to consider each separately. It was submitted in respect of each head of claim that the chronology of events, considered alongside the relevant law, indicates that each claim was presented out of time. It was accepted by the Respondent that the latest date when time bar would begin to run was on 15th August 2016, when the Claimant was informed that his application was unsuccessful, but the Respondent did not accept that that was the date for the purposes of time bar .

Indirect discrimination

32. The Respondent's position in relation to the Claimant's indirect discrimination claim was that the "date of the act to which the complaint relates" for the purpose of Section 123(1)(a) is the date on which the Respondent applied the (alleged) discriminatory PCP to the Claimant in relation to his race. The Respondent relied upon the Claimant's specification of the PCP in his completed Agenda [Doc 3/11]. The Respondent's position was that the requirement of having a proven track record in interim senior officer roles requirement was published in the

Application Pack [Doc 9], along with all other aspects of the selection process, including the evaluation criteria, on 20th June 2016. The Respondent relied on the Claimant being fully aware of the application process and submitting an application on 7th July 2016 [Doc 10]. The Respondent relied upon the Claimant's statement in his covering letter with his application accepting that he does not have "a track record of carrying out interim senior officer roles' and hoping 'that this will not prevent consideration of my application", as showing that the Claimant had identified and acknowledged, by that date, that he did not meet the Respondent's first criterion listed under "experience". It was submitted that as this is clearly identified as an essential criterion the Claimant knew or ought to have known that his application would be very unlikely to succeed.

33. It was submitted that if the Claimant considered that this criterion (or indeed any other criteria) was a discriminatory PCP, he could have raised a claim with the Tribunal from the date the offending PCP was published: 20th June 2016. The Respondent relied upon the Claimant not doing so, and not raising any concern with the Respondent until 22 November 2016. The Respondent's position was that the latest date on which the Claimant could claim to be unaware of the offending PCP was 6th July 2016, the day before he submitted his application form which referred to it. The Respondent's position was that the date from which the 3 month time period specified in s. 120 should run could be as early as the date on which the Respondent published the (alleged) discriminatory criterion: 14 June 2016. It was submitted that the Claimant could have intimated early conciliation on that date. It was submitted that in respect of the indirect discrimination claim, the 3 month time period specified in Section 120(1)(a) then expired on 13th September 2016.

34. The Respondent's position was that the (alleged) discriminatory PCP was not conduct extending over a period and was not a continuing act in terms of Section 123(3). The Respondent's position was that the PCP was a fixed criterion to which the Claimant and all other applicants were subject from the outset. It was submitted in the alternative that to the extent that the PCP

was "conduct extending over a period" it could not extend beyond the date on which the candidate's application was considered and rejected by the Respondent. That occurred when the candidate rating exercise took place on 29 July 2016. Their alternative (*esto*) submission on the indirect discrimination claim was that the 3 month time period specified in Section 120(1)(a) expired on 28th October 2016.

35. The Respondent relied upon the Claimant not notifying ACAS that he intended to bring a claim (which would have "stopped the clock") until 8th November. It was their submission that that was 11 days late. Their position was that the extension of time by Section 140B of the 2010 Act does not, therefore, apply to the Claimant's indirect discrimination claim as the Claimant did not initiate early conciliation before the end of the 3 month period.

Direct discrimination

36. The Respondent relied upon Claimant's response in his completed Agenda at 3/10 with regard to his direct discrimination claim. The Respondent again relied on *Virdi* in their position that the question is when the act is done, in the sense of completed and that cannot be equated with the date of communication.

37. The Respondent's position was that the "system" that was followed was set out in detail in the Application Pack. It was submitted that the "failure to shortlist" was inevitable as the Claimant did not (by his own admission) meet the essential "proven track record" criterion. It was submitted that if this was less favourable treatment, it arguably occurred as early as the time of publication of the criteria (14th June 2016) or, at the latest, the date on which the Claimant submitted his application: 7th July 2016. It was submitted in the alternative, that the last date on which less favourable treatment could have occurred was the date of the candidate rating exercise: 29 July 2016. The Respondent's position was then that the last date for submitting a claim

for direct discrimination was either 6th October 2016 or, in the alternative, and at the latest, 28th October 2016. It was submitted that the extension of time by Section 140B of the 2010 Act does not apply to the Claimant's direct discrimination claim as the Claimant did not initiate early conciliation before the end of the 3 month period.

Victimisation

38. The Respondent relied upon the Claimant's specification of his victimisation claim in his completed agenda [Doc 3/12]. The alleged victimisation was denied. It was the Respondent's position that if the Respondent did victimise the Claimant (which was denied), then the date of the "act to which the complaint relates" for the purpose of Section 123(1)(a) is the date on which the Respondent subjected the Claimant to a detriment for the purpose of Section 27. The Respondent's position was that the detriment of "failure to select" him because of a complaint he made in 2012 could have occurred at any time after the Respondent's receipt of the Claimant's application (7th July) but could not have occurred later than the date of the candidate rating exercise, which took place on 29th July 2016. Their position was then that the latest date on which the 3 month period specified in Section 120 could then have expired was 28th October 2016, and that that was the last date for submitting a claim for victimisation. The Respondent's position was that the extension of time by Section 140B of the 2010 Act does not apply to the Claimant's victimisation claim as the Claimant did not initiate early conciliation before the end of the 3 month period.

Just and equitable

39. The Respondent's position was that the Claimant's claims were all lodged outwith the applicable statutory time limits and that it would not be just and equitable for the Tribunal to allow the claims late. It was submitted that the

extension of time is the exception not the rule and it is for the Claimant to convince the Tribunal that it is just and equitable to extend time. It was submitted that the Tribunal should consider the prejudice which each party would suffer as the result of the decision to be made and have regard to all the circumstances of the case; in particular the factors identified in *British Coal Corporation v Keeble & Ors [1997]; UKEAT/496/96* were relied upon.

40. It was submitted that following *British Coal Corporation v Keeble & oths,* the Tribunal is required to consider:-

> "The prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –
>
> i. the length of and reasons for the delay;
>
> ii. the extent to which the cogency of the evidence is likely to be affected by the delay;
>
> iii. the extent to which the party sued had co-operated with any requests for information.
>
> iiii. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.
>
> v. the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

41. It was submitted that when considering whether it is just and equitable to admit a claim late, a Tribunal should consider the Claimant's state of knowledge at relevant times and whether the Claimant's actions with regard to submitting a claim were reasonable. The Respondent acknowledged the position in *Clarke v Hampshire Electroplating* [1991] UKEAT 605/89/2409,

at para 18 that knowledge of the existence of a comparator may be relevant to the discretion to extend time. It was noted that in that case the Appeal Tribunal said:-

> "Under Section 68(6) the approach of the Tribunal should be to consider whether it was reasonable for the Applicant not to realise he had the cause of action or, although realising it, to think that it was unlikely that he would succeed in establishing a sufficient prima facie case without evidence of comparison".

42. It was submitted that it follows that a Tribunal will be entitled to ask questions about a Claimant's prior knowledge: when did he first know or suspect that he had a valid claim for race discrimination? Was it reasonable for him not to know or suspect it earlier? If he did know or suspect that he had a valid claim for race discrimination prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying? It was submitted that the Tribunal has to consider all the circumstances in order to decide whether it was just and equitable to consider a complaint presented outwith the statutory time limits. The Respondent relied upon *Barnes v The Commissioner of The Metropolis Independent Police Complaints Commission [2005] UKEAT 0474/05, 14 November 2005* and his Honor Judge Richardson's quotation at para 17, of *Mensah v Royal College of Midwives [1995] UKEAT 124/94* paragraph 6, setting out the approach later followed in *Virdi*:-

> "It is not correct to say that the time under Section 68(1) only runs from the date when knowledge is acquired, for example, of a comparable person of a different race or colour who has received more favourable treatment …… An act occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory. Knowledge is a factor relevant to the discretion to extend time. It is not a pre-condition of the commission of an act which can be relied on as an act of discrimination".

43. The Respondent relied upon *Bexley Community Centre t/a Leisure Link v Francis Robertson [2003] EWCA Civ 576, Auld, LJ; para 25:-*

> "It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

44. The Respondent's position was that the Claimant has given no good reason for the delay in submitting his claim. The Respondent relied upon the Claimant's position at paragraph 5 of his statement that "this is not a clear area of the law.". The Respondent's position was that this is not the case and that Section 123(1)(a) is clear and unambiguous: a complaint may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates. It was submitted that if the claims are admitted late, the prejudice suffered by the Respondent is that it will have to endure the time, cost and expense of defending a claim which, for the reasons set out in the ET3, it considers has no merit and which has been submitted late without any reasonable explanation by the Claimant and that that would not be just and equitable to the Respondent.

45. The Respondent relied upon the Claimant's position at paragraph 6 of his statement that "As any layperson would do prior to deciding to bring a case to a Tribunal I consulted all the guidance and legislation available" and the Claimant's position as clarified during cross-examination that he did not read the relevant legislation: Section 123 of the 2010 Act, before submitting his claim. The Respondent's representative commented on the Claimant's

reliance on the EHRC Employment Statutory Code of Practice, para 15.3, being:-

> "The Act says that the period for bringing a claim starts with the date of the unlawful act. Generally, this will be the date on which the alleged unlawful act occurred, or the date on which the worker becomes aware that an unlawful act occurred."

46. It was submitted that the first sentence of this statement is accurate but the second sentence is 'ambiguous and contradictory and is not an accurate statement of the legal position'. The Respondent, in any event, relied upon , the Claimant's position in cross-examination that he did not have regard to this Code before he submitted his claim. It was submitted that when asked to specify which "guidance and legislation" he consulted, the Claimant had been 'vague' and did not refer to specific law or documents.

47. It was submitted that the Claimant's concession in his statement [para 16, last sentence] that if the notification had been "sent out within the standard 2 or 3 working days from the decision then my claim certainly would have been well within 3 months of that date" did not make sense and there was no evidence to suggest that earlier communication of the decision would have prompted the Claimant to submit his claim, or initiate early conciliation, within 3 months of the alleged unlawful act.

48. It was submitted that the Claimant's criticism of the delay between the decision on the Claimant's application (on 29th July) and the communication to him of that decision on 15th August was unjustified. The Respondent's position was that in circumstances where 25 applications had to be assessed over several days by senior staff also engaged on other work, this was not an unreasonable delay. The Respondent relied upon Ms MacLeod's evidence as setting out a full and reasonable explanation of this process. It was submitted that the time period between the decision and

communication does not explain the Claimant's failure to submit his claim (or alternatively to begin early conciliation) within the 3 month period.

49. The Respondent relied upon the Claimant's position that around the time he received the Respondent's decision on his application he had moved house and therefore had to prioritise matters in his personal life over seeking feedback from the Respondent. It was submitted that although the Claimant may well have been busy with work or personal commitments during this period, this is not a sufficient reason to persuade the Tribunal that is just and equitable to extend time. It was submitted that it is reasonable to conclude that the Claimant could, if he wished, have submitted his claim in time.

50. The Respondent's position was that if this claim proceeds to a hearing on the merits it is likely that around a year will have passed since the events in question and although the Respondent has 'careful and complete written records' of the process, this delay is bound to have a detrimental effect on witnesses' ability to recall events accurately.

51. The Respondent relied upon the Claimant having emailed the Respondent on 22 November and the Respondent's answer on 16th December. It was submitted that that email showed that the Claimant had made up his mind at that point to submit a claim ("I intend…"), without giving the Respondent any informal opportunity to explain their process or reassure him that there had been no indirect or direct discrimination or victimisation. The Respondent relied upon the Claimant not taking up the offer of an "informal chat" about the assessment process with the Respondent's Margaret Sharkey or Helen Shaw [doc 8/1] even though he later claimed that he was victimised by Ms Sharkey because of matters dating from 2012. It was submitted that the Claimant could have raised his concerns formally or informally either with Ms Sharkey directly or with someone else at SHR and he did not do so. The Respondent's position was that the Claimant delayed, at his own request, obtaining feedback until 13th October; some 9 weeks after he was informed

on 15th August that his application was unsuccessful and that during that feedback conversation he gave no indication that he was unhappy with the process, or that he felt he had been discriminated against. It was submitted that the Respondent co-operated fully with the Claimant's request for information.

52. The Respondent's position was that the Claimant did not act with promptness once he knew of the facts giving rise to the cause of action. It was submitted that the Claimant could have been reasonably expected to identify any concerns with the evaluation criteria or the involvement of Ms Sharkey from the point he became aware of them and did not. It was submitted that the Claimant knew on 15th August 2016 that his application was unsuccessful yet he delayed the feedback conversation and said nothing during that conversation about unfairness or discrimination. The Respondent relied upon the Claimant taking no action until 8th November when he informed Acas of his intention to bring a claim and first informing the Respondent of his concerns on 22 November.

53. The Respondent relied upon the Claimant being a highly educated senior executive with 6 graduate or post-graduate qualifications, including a graduate diploma in law in which he achieved 90% in his dissertation on employment law, specifically equalities law in the workplace.

54. The Respondent relied upon the Claimant's evidence that he did not seek legal advice and his position in his application that he has "a very good knowledge of employment law, having worked closely with various specialist solicitors throughout my career" [Doc 10/4]. It was submitted that although the Claimant's position in his oral evidence was that his graduate diploma in law did not cover procedural matters such as time bar, he could reasonably be expected to know the importance of statutory time limits in employment law and the value of taking legal advice on this. The Respondent relied upon the Claimant being in a well-paid job and being reasonably expected to be able to afford to take advice on the question of time limits. It was

submitted that this is a straight-forward matter on which any employment lawyer would give quick and simple advice: time runs from the date of the act; if in doubt, get your claim in early. The Respondent relied on the Claimant choosing not to take legal advice and his response to being asked why not being "it seemed clear enough" and him being confident on this aspect of his claim. It was submitted that this was a misjudgment on the Claimant's part but it does not make it just and equitable for the Tribunal to admit the claim late.

55. The Respondent relied on the fact of the Claimant having brought a discrimination claim against a recruiting local authority in 2008 [Doc 23]. It was submitted that although the circumstances of that case are different from the present claim, the Claimant is someone with a very high awareness of the law in this area, and particularly the duty of public authorities to avoid discrimination when applying evaluation criteria. The Respondent relied upon the Claimant having been legally represented in his earlier claim and having had practical experience of bringing Tribunal claims with legal assistance and instructing employment lawyers in a professional capacity. It was submitted that this was relevant in consideration of the Claimant not having sought legal advice on the statutory time limit for these claims.

56. The Respondent relied on the Claimant's position in evidence that he had 'looked online' for guidance on time limits. It was submitted that sound general advice on the point was readily available online from a trusted source and that if the Claimant has done a "Google Search' for "time limit for discrimination claim" , that would have returned advice that the time limit would generally start to run from when the decision was made and not when it was communicated and advice to contact an experienced advisor.

57. It was submitted that, taking into account the Claimant's personal, professional and academic knowledge and experience of employment law, he had made no real effort to obtain information about the time limits

applicable to his claim or to obtain legal advice. It was submitted that although the Claimant claimed to have consulted legislation and guidance in general terms, it seemed unlikely that he consulted *any* guidance or legislation or he would have understood the relevant rule. It was submitted that it is more likely that the Claimant made certain assumptions about time bar, which turned out to be wrong, or alternatively, that the Claimant did not apply his mind to the matter of time limits until after the time limit had passed. It was submitted that the chronology of events - particularly the lengthy delay between receiving the Respondent's decision, seeking feedback and eventually initiating early conciliation - suggests that the Claimant was not, in fact, overly concerned about not getting on the selection list and only decided to bring a claim as an afterthought, well after the events in question occurred.

58. The Respondent's representative made further submissions with regard to the further cases identified by the Tribunal. In respect of ***McKinney***, it was submitted that His Honour Judge Peter Clark's analysis of the law on the question of when the 3 month limitation period begins to run is applicable to the present case. The Respondent's submission was that his analysis at paragraph 15(6) supports the Respondent's submissions on time bar, being that the 3 month time period for the purposes of Section 123 of the 2010 Act began to run against the Claimant at the time of the alleged detrimental act whether or not he was aware that a detriment had been suffered i.e. on 29th July 2016.

59. With regard to ***Chaudhary***, the Respondent's representative submitted that on application of the 'crystallisation approach to the present case, the Claimant's cause of action crystallised no later than 29th July 2016. It was submitted that 29th July 2017 was the very last date in respect of the indirect discrimination claim, the discrimination claim and the victimisation claim, 29th July being the 'very last day' on which the Claimant's cause of action could have crystallised. It was submitted that there was no continuing act of discrimination in the present case. It was submitted that applying the

approach in *Chauudhry* paragraph 20, the Tribunal is entitled to conclude that time in this claim ran for the purposes of Section 123 of 2010 Act from a date no later than the date on which it was decided that the Claimant would not proceed in the assessment process i.e. 29 July 2016. It was submitted that as was the case in *Chaudhary* even if the Claimant were to establish that the Respondent maintained a discriminatory policy extending beyond the dismissal of his application on 29 July 2016, there is no factual basis upon which the Tribunal could conclude that the policy was applied to the Claimant to his detriment after that event.

60. It was submitted then that time on the direct discrimination claim should run from the last decision taken on the Claimant's application ie. 29th July 2016. In respect of the victimisation claim, it was submitted that if the alleged act occurred (which was denied) then it was a 'one off act' which could have occurred any time after the receipt of the Claimant's application on 7th July 2016 but not after the decision was made on 29th July 2016.

61. With regard to the decision of the Fair Employment Tribunal in Northern Ireland in *Cushnahan*, it was submitted that only Article 76 of the Sex Discrimination (Northern) Ireland) Order 1976 is analogous to the relevant time bar provision in the present claim. The Respondent relied on the terms of Article 46 of the Fair Employment and Treatment (Northern Ireland) Order 1998 being concerned with 'the day on which the Claimant first had knowledge , or might reasonably be expected first to have had knowledge, of the act complained of.' It was submitted that this is 'quite different' to the terms of Section 123 of the 2010 Act. It was submitted that the Tribunal's conclusions in *Cushnahan* are inconsistent with the EAT authorities and the decisions in *Chaudhary* and *Mensah*.

62. The Respondent's position was that the correct legal position is stated in *Mensah*, as quoted in paragraph 11 of *Chaudhary*. It was submitted that *Cushnahan* involved the application at least in part of a different legal test, that the factual matrix was different than in the present case, that the

Tribunal in *Cushnahan* did not carry out 'the same rigorous analysis of the legislation and authorities as the EAT did in *Virdi*, *McKinley* and *Chaudhary*. The Respondent relied on the Tribunal's decision not being binding on the ET, unlike the EAT decisions. It was submitted that the Tribunal should not attach any weight to *Cushnahan* in its consideration of time bar in the present case. In the alternative, it was submitted that the approach taken in *Cushnahan* of time running from the date of knowledge of the comparator could only apply to the Claimant's direct discrimination claim, being the only claim where the Claimant relies on identifying a comparator.

Strike out

63. In respect of the Claimant's application for strike out of the Response, the Respondent's position was that the 'simple explanation' for the omission of any reference to the 2 appointments in the Respondent's Completed Agenda is that matters had 'moved on' between the point when the Respondent's representative had gathered the facts relevant to the Respondent's agenda and when the agenda response was submitted. The Respondent's Representative's recollection of the discussion at the PH was that it was acknowledged by both the Claimant and himself (on instructions from Ms MacLeod) that there had been 2 appointments. It was submitted that at that PH there was no implication from the Respondent that only one appointment had been made and that the reference to the singular 'appointment' rather than 'appointments' was an error in the PH Note. The Respondent's position was that there was no dispute over the facts: 2 appointments had been made and that the Respondent had no reason to conceal these appointments which are, in any event, public knowledge. The Respondent's representative's position was that the agenda [Doc 4/7] was submitted by him and is in his name. It was accepted that on the date it was submitted (10th February) it contained a factual inaccuracy, which was regrettable and was the Respondent's representative's responsibility. The Respondent's representative's position was that at the time of his submission of the Respondent's completed Agenda on 10th February he

was not aware that two appointments had been made from the selection list. It was submitted that the relevant facts were clarified at the preliminary hearing on 23rd February and the Tribunal had not been deliberately misled. It was submitted that at that PH there was no implication from the Respondent that only one appointment had been made. The Respondent's position was that there was no dispute over the facts: 2 appointments had been made. The Respondent had no reason to conceal these appointments which are, in any event, public knowledge. The Respondent relied on the position being clarified accurately at the PH and not being directed by the Tribunal following the PH to amend any of its documentation.

64. The Respondent's position was that there was no unreasonable conduct by the Respondent. It was submitted that the situation relied on by the Claimant does not meet the standard of "unreasonable conduct" for the purpose of Rule 37(1)(b). It was submitted that striking out the Respondent's response in whole or in part would be entirely disproportionate to what is a minor and irrelevant factual inaccuracy that was appropriately corrected at the PH on 23rd February. It was submitted that striking out the response to the claim, or any part of it, for this reason would be disproportionate, unfair to the Respondent and inconsistent with the Tribunal's overriding objective to deal with this case fairly and justly.

Claimant's Submissions

Application of Section 50 of the Equality Act 2010

65. The Claimant relied upon the Respondent's acceptance that a statutory appointment of an interim manager by the Respondent under subsection 57, 58 and 59 of the Housing Scotland Act 2010 is an appointment to a public office for the purpose of Section 50 of the Equality Act 2010 ("the 2010 Act") as being agreement that his claims of discrimination fall under either Section 50(3)c) or 50(3)a) and for victimisation under section

50(5)a) or 50(5)c). The Claimant submitted that the Respondent's view of there being a jurisdictional issue of whether, or to what extent, its assessment exercise fell within "arrangements" for the purpose of s. 50(3)(a) of the 2010 Act suggests that every public appointment or indeed recruitment exercise could be split into two or more stages, the first stage being an initial sift or short listing, when any sort of unfair discrimination could be applied, with the employer being able to argue that this initial exercise played no part in the recruitment. The Claimant submitted that at some future point the selection list would be used to make appointments free from challenge and so the process for deciding who should be included in that selection list was 'arrangements' within the applicable statutory definition. It was the Claimant's position that inclusion on the statutory manager list should be regarded as the public appointment and his claims are based on 50(3)c) or 50(5)c). The Claimant's position was that if that was not accepted, then the alternative is that the Respondent's process must fall under the wider definition of section 50(3)a) and 50(5)a).

66. The Claimant's position was that is not clear what the Respondent claims this selection exercise was. The Claimant relied upon Ms Macleod's evidence that the appointments are not subject to the "rules on public procurement". The Claimant relied upon there being a 'fairly involved process to make these public appointments'. The Claimant relied upon the content of Doc 8 and Doc 9 and that two Statutory Managers have been appointed from this list. The Claimant relied on the content of the application pack that it is only in exceptional circumstances the selection list will not be used. It was submitted that the Respondent must consider then that it has appointed enough people to the selection list with sufficient skills, to meet its foreseeable needs. It was submitted that it must be clear that anyone rejected in this round of recruitment will not be appointed from the list, and it is hard to imagine they would be considered for a direct appointment in exceptional circumstances. It was submitted that the Respondent's recruitment to the selection list must fall within

"arrangements" for the purpose of Section 50(3)(a) and Section 50(5)(1) of the 2010 Act.

Application of Section 39 of the Equality Act 2010

67. The Claimant submitted that the Respondent had carried out a straightforward recruitment exercise, with the selection list being effectively a pool of workers, effectively on zero hours contracts and part of the 'gig economy'. It was submitted that the recruitment arrangements then fall to be considered under Section 39. The Claimant relied upon *Aslam v Uber BV [2017] IRLR 4, ET*; *Dewhurst v City Sprint (UK) Ltd Case no 2202512/2016 (5 January 2017)* and *Pimlico Plumbers Ltd and another v Smith [2017] EWCA Civ 51 CA* in his position that a Statutory Manager is a worker for the Respondent. The Claimant's position was that Ms Macleod's evidence that the people so engaged have all been 'happy to accept self employed status' cannot be regarded as determinative of their status. His position was that self employed status was not consistent with the recruitment, control, and direction of these 'workers'.

68. The Claimant relied upon the content of the application pack as showing that the Respondent exerts a high degree of control over the working arrangements of the statutory manager. He relied on the facts of Statutory Managers being appointed as individuals, personally required to carry out the work, with no right of substitution, required , that they are to be available throughout the unspecified duration of the appointment, that they are at all times directly accountable to the Respondent, that the Respondent provides instructions to the statutory manager at the beginning of, and throughout, the appointment, the detailed reporting requirements, and that the statutory manager is subject to ongoing performance review, with failure to meet the Respondent's standards or implement its instructions potentially resulting in the removal of the statutory manager from the selection list as suggesting that statutory managers should be regarded as the Respondent's workers.

Time Bar

69. The Claimant's position was that the date the Respondent's decision that he had not been successful in his application was communicated to him, being 15th August 2016, is the date from when the three month time limit starts and that his application was submitted in time. The Claimant's alternative (*esto*) position was that the date the time limit should start is 28th September 2016: when the successful applicants were placed on the statutory manager list.

70. In respect of his primary position, the Claimant relied upon "Equality Act 2010 Code Of Practice" - Employment Statutory Code Of Practice" (bundle 20D). The Claimant submitted that that Code of Practice was written after the decisions in *Virdi*, and the other authorities the Respondent relies upon, which, it was submitted would have been known to the Code drafters. The Claimant accepted that the Code isn't an authoritative statement of the law, but submitted that Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings. It was submitted that would suggest that paragraph 15.23 (page 207) applies in this case, which states:-

> "The Act says that the period for bringing a claim starts with the date of the unlawful act. Generally, this will be the date on which the alleged unlawful act occurred, or the date on which the worker becomes aware that an unlawful act occurred."

71. The Claimant submitted that these two statements were clear and not contradictory and that an applicant is unlikely to know of a discriminatory decision unless it is communicated to him, so that's when the time limit starts. The Claimant relied on the example given at 20D of the code, being:-

> **"**Example**:** A male worker applied for a promotion and was advised on 12 March 2011 that he was not successful. The successful candidate was a woman. He believes that he was better qualified for the promotion than his colleague and that he has been discriminated against because of his sex. He sent a questions form to his employer within two weeks of finding out about the promotion and the answers to the questions support his view. The worker must start proceedings by 11 June 2011"

72. The Claimant relied upon extracts from Harvey on Industrial Relations and Employment Law from para. 106.01, in particular the following:-

> 'Where a discrimination claim is based on a failure to select or promote the Claimant, the date is to be determined by asking whether a cause of action has crystallised, rather than by focusing on whether the Claimant felt that he had been discriminated against, for, as the EAT has pointed out, if the cause of action is not complete, there would be no point in bringing proceedings (*Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490*, *[1992] ICR 312, EAT*). In particular, the Claimant relied upon the following extract from the rubric of that decision: -
>
> > "Mr Clarke appealed against the dismissal of his application to make a claim that his employer H, was guilty of racial discrimination on the ground that his application was outside the three month time limit imposed by Section 68 of the 1976 Act. Although C, who was black, had felt discriminated against when his application for promotion to supervisor was turned down, he did not make his allegation until four months later when a white man was given the job.

> Held: Appeal allowed. His Lordship considered the application of Section 68 and concluded that the time of the "act complained of" referred to the time when the discriminatory act and the cause of action were "complete". The tribunal had to address whether C had actually suffered discrimination and C's feelings on the matter were not material. The issue was when the cause of action crystallised and this was for the tribunal to decide on the facts. If it had not crystallised, due to lack of comparison, it would have done so when the position was filled. If on the evidence it crystallised when C was rejected, the tribunal had to exercise its discretion under Section 68(6) with regard to whether it considered C acted reasonably when he failed to appreciate that he had a cause of action where no comparison existed. Generally, if there had been a delay a comparison could be needed unless the delay was only a matter of a "few weeks", otherwise the tribunal had to decide on the facts of each case."

The Claimant's position was that *Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490*, *[1992] ICR 312, EAT* supports his alternative position that the action was not complete until the list was actually published, on 28th September 2016.

73. The Claimant also relied upon extracts from Harvey on Industrial Relations and Employment Law from para 820, being:-

> "It is only when a prospective employer is in a position to offer employment that he can take a legally effective decision to select or reject an individual. It follows that until this point in time is reached, there is no act effective in starting the clock running for the three-month time limit. Thus in *Swithland Motors plc v Clarke [1994] ICR 231, EAT*, a prospective purchaser of a business, who was in negotiations with the receiver, held interviews with staff and took certain decisions not to employ certain individuals. These decisions

were taken some three weeks before the sale of the business was completed. The EAT held that time only started to run under SDA 1975 Section 76(1) when the alleged discriminator was in a position to offer employment, and that occurred only when the take-over had been completed."

74. The Claimant then relied upon *Swithland Motors plc v Clarke [1994] ICR 231, EAT* in his submission that in respect of each of the three heads of my claim, direct discrimination, indirect discrimination and victimisation, the three month time limit can only start either from when he was informed about the decision, or when that decision took effect, i.e. when the final list was agreed by the Respondent. It was the Claimant`s submission that *Virdi* does not apply to the circumstances of his direct discrimination, indirection discrimination or victimisation claim. The Claimant relied on the Respondent having cited no authorities to support their position that the indirect discrimination time limit should run from the date the job advertisement including the offending PCP was published.

75. With regard to the victimisation claim, it was the Claimant's position that he holds the Respondent responsible for the alleged victimisation. His position was that Ms Sharkey was one of four panel members and was the person the Claimant complained about previously. It was the Claimant's position that the Respondent, should have ensured that it actively manages any real or perceived conflicts of interest, and that Ms Sharkey should have been asked to stand down from the selection panel on receipt of his application. The Claimant's position was that he was only aware of her continuing involvement in the process when the rejection email was received.

76. The Claimant submitted in respect of all of his heads of claim that it cannot be the intention of the legislation that an employer can split up a recruitment exercise with the effect of claims then being time barred. It was submitted that this would allow employers to make a discriminatory recruitment decision, wait 13 weeks, and only then appoint and inform the unsuccessful

candidates, or to publish discriminatory criteria in a job advertisement, then wait 13 weeks before rejecting those they wished to discriminate against, knowing that they would be safe from any challenge and that that would make a 'complete mockery' of the 2010 Equality Act.

Just and equitable

77. The Claimant's position was that in the event of his claims being found to have been submitted outwith the applicable statutory period, then it would be just and equitable for his claims to be allowed. The Claimant relied upon extracts from Harvey on Industrial Relations and Employment Law at para. 830-833.1 and relied upon *Pathan v South London Islamic Centre UKEAT/0312/13 (14 May 2014, unreported)* where in his submission, the Employment Appeals Tribunal confirmed that the decision in *Robertson v Bexley Community Centre* that an extension of time does not require exceptional circumstances, rather 'what is required is that an extension of time should be just and equitable'. The Claimant also relied upon *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278* in his position that even where a Claimant fails to offer a good excuse for a late application the Tribunal is still expected to consider the balance of prejudice. The Claimant submitted that following *Ahmed v Ministry of Justice UKEAT/0390/14 (7 July 2015, unreported)*, the Tribunal is required to consider 'the Keeble factors' set out in *British Coal Corporation v Keeble [1997] IRLR 336*. He also submitted that following the Court of Appeal in *Southwark London Borough v Alfolabi [2003] IRLR 220*, although these Keeble factors will frequently serve as a useful checklist, there is no legal requirement on a Tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'

78. The Claimant addressed each of the factors set out in Keeble as follows:-

(a) the length of and reasons for the delay:- The Claimant submitted, that dependant on the Tribunal's view of the applicable date, the length of the delay could be anywhere between only a few days to a couple of months. The Claimant gave his reason for the delay as being 'simply this is far from a clear area of the law'. The Claimant further relied on 'the purely practical reason of why the claim wasn't submitted any earlier than it was' being that he had sold the family home in Dumfries & Galloway and bought a flat in Dunblane and 'had to divert all (his) energy and attention to the moves and renovations of the flat instead of pursuing this case'. The Claimant's position was that he had to seriously consider the possibly seriously detrimental effect to his career of bring a claim against the Respondent and that it 'took some time to arrive at that conclusion'

(b) The extent to which the cogency of the evidence is likely to be affected by the delay:- The Claimant relied on there being no evidence or suggestion in the Respondent's ET3 or Preliminary Hearing agenda that any delay in submitting his claim has adversely affected the clarity of evidence.

(c) The extent to which the party sued had cooperated with any requests for information:-The Claimant relied upon the period of 18 days between the Respondent making the decision not to select him (29th July 2016), and the date the rejection email was sent to me (15th August) as being unreasonable and material. The Claimant's position was that had this decision been communicated to him 'within a standard 2/3 days' then his claim would have been made 'well within the time limit'.

(d) The promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action:-The Claimant's position was that the 'only possible date' when he had knowledge of the facts

giving rise to the cause of action is 15th August 2016 and that he had acted 'well within three months from that date'.

(e) The steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action:-The Claimant's position was that there is no requirement to take legal advice in Tribunal proceedings and that he was 'confident at the time that the three month time limit would apply from the date I had knowledge of the decision' and 'simply didn't feel the need to seek specific legal advice on this point'. It was the Claimant's position that he adopted the 'common sense' position and that it cannot be the case that e.g. the indirect discrimination time limit starts immediately an advert is published, with the effect that the simple way to avoid discrimination claims being for employers to simply delay interviews until three months after such publication. The Claimant's position was that if had he obtained legal advice then 'from the sheer volume of apparently conflicting case law in this subject area' there 'must at least be some doubt' that his claim would have been submitted any earlier than it was.

(f) The balance of prejudice:- It was the Claimant's position that as a result of not being added to the selection list he had lost the opportunity to take a redundancy package from his current employer, and potentially earn £335/day from work as a statutory manager, and/or potentially up to £1000 per day, working directly as a consultant for one of the RSLs, and was deprived of the opportunity to have 'varied, interesting, and prestigious work, which could be regarded as the pinnacle of a career in the housing sector'. The Claimant's position was that rather than being prejudicial to the Respondent's interests, a full hearing would be very much in its interests, and the interests of its stakeholders, and the Scottish Parliament. The Claimant relied upon the background reasons why the selection list process was put in place and in particular the

content of the letter from the Committee (Doc 18) and the content of The Scottish Parliament's report at Doc 20. The Claimant's position was that a full hearing would provide the Respondent with the opportunity to demonstrate transparency to its stakeholders and the Scottish Parliament and 'open up its appointment process to scrutiny' which 'may identify areas for improvement to confront any underlying racism and discrimination." The Claimant's position was that defending this case on the jurisdiction issues rather than the merits of the claim was not appropriate.

79. The Claimant made further submissions with regard to the further cases identified by the Tribunal. The Claimant submitted that the decision of the Tribunal in *Cushnahan* followed *Clarke –v- Hampshire Electro-plating Co Ltd* and the position set out in Harvey at paragraph 106.01, both of which the Claimant relied upon. It was submitted that *Cushanahan* is further authority that the earliest date the time limit can begin in this case is the date on which the cause of action crystallised. The claimant submitted that that date was when the decision was sent out on 15th August 2016. It was submitted that this is consistent with the analogy given in *McKinney* that 'time runs for bringing an appeal to this Tribunal from the date the Employment Tribunal Judgment is sent to the parties.' The Claimant submitted that *Cushanahan* also supports his alternative argument that it may be considered that time limit did not begin to run until the date when the statutory manager list was published (28th September 2016).The Claimant submitted that there would have been no grounds for him to bring a claim under any of the headings had the Respondent appointed him to the statutory manager list or appointed others from his ethnic background to the statutory manager list. The Claimant relied on there having been no subsequent EAT decision in *Cushnahan*.

80. The Claimant submitted that the circumstances in *Chaudhary* and *Mensah*, to which it refers, are based on 'entirely different circumstances' from a recruitment exercise. The Claimant relied on *Clarke* as being the leading

authority for recruitment cases. The Claimant relied on the comment at paragraph 15(3) in *McKinney* that in *Virdi*, (paragraph 24, that there may be cases where the relevant act is not done until it is communicated, Elias P agreed (paragraph 25). A similar concession was made on behalf of the employer in *Havill* (paragraph 17). The Claimant submitted that this supported his position that the time limit in this case began when the relevant act was communicated on 15th August 2016. It was submitted that this is analogous to the date of an Employment Tribunal's decision being sent to parties, not the date the Judge reached the decision or dictated the Judgment. The Claimant relied on *McKinney* and *Cushanahan* supporting his earlier submissions and that nothing in *Chaudharry* overrules *Clarke* or undermines the paragraphs in Harvey relied on by the Claimant. The Claimant's position was that the Respondent had not previously relied upon the cases identified by the Tribunal and that his submissions followed the line of authority in *Clark*e and are consistent with the position set out at paragraph 15.23 of the Equality Act 2010 Code of Practice.

81. The Claimant submitted that if his claims are held to be out of time, then *McKinney* supports his submission that it is just and equitable to allow the claim 'on the basis that the jurisdictional issues are complex and far from clear'. The Claimant relied on Judge Clark's comment in *McKinney* at paragraph 15(6) that 'the current state of authorities is less that satisfactory'.

Strike Out Application

82. The Claimant sought that the Tribunal strike out all (or part) of the response made by the Respondent, in terms of Section 37(1)(b) and section 37(1)(e) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013), on the grounds of the Respondent's unreasonable conduct and/or that the Tribunal considers that it is no longer possible to have a fair trial in respect of the response. The Claimant's position was that the Respondent 'appears to have deliberately misled the Tribunal on a material aspect of its defence'. The Claimant relied upon the

content of the Respondent's paper apart to its Agenda for the preliminary hearing (Doc 4/7) and the terms of the Note of the PH on 23rd February 2017. The Claimant's relied on Ms Macleod being a member of the Respondent's Executive Management Team, the director responsible for making these statutory appointments, and for instructing Mr Carey in this case and being present at the preliminary hearing on 23rd February 2017.

83. The Claimant's position was that as at the time of the PH on 23rd February, two rather than one appointments had been made. The Claimant refuted Ms Macleod's position in evidence that she felt the Employment Judge had noted the comments incorrectly; and that appointments, plural, was said. The Claimant's position was that that was not his recollection and questioned, if that was the case, why the Respondent had not sought to correct this immediately after the note of the hearing was provided. The Claimant relied upon Ms Macleod's evidence that she was working on these appointments for some weeks before they were announced. It was the Claimant's position that Ms Macleod had the opportunity to clarify the position at the PH on 23rd February and did not.

84. It was the Claimant's position then that in this regard the Respondent had 'deliberately provided inaccurate information to the Tribunal in its preliminary hearing agenda, and at the preliminary hearing, on a material aspect of its defence'. The Claimant's position was that if this was a genuine error, then the Respondent had had almost two weeks to correct it prior to the preliminary hearing, (from 10th February to 23rd February) but chose not to. The Claimant relied upon the Respondent not raising the mistake as a preliminary issue at the PH on 23rd February, and when presented with the opportunity to correct this at that PH, having answering inaccurately. The Claimant's position was that when under oath at the hearing held on the 18th May 2017, Ms Macleod offered a different explanation for this to that provided to Judge Gall at the hearing on 23rd February.

85. The Claimant relied upon the Respondent not taking steps to correct any genuine mistake made in its pre-hearing agenda either (i) in the period between 10th February and the hearing of 23rd February (ii) at the hearing on the 23rd Feb or (iii) in the six weeks following the date of the preliminary hearing and 11th April (being the date of the Claimant's application to strike out the response). The Claimant relied upon this conduct as being grounds for the Tribunal to strike out the response on the grounds of unreasonable conduct on either or both of the grounds 37(1)(b) and/or 37(1)(e) of the Rules of Procedure. The Claimant further submitted that given this conduct, the prospects for a fair hearing would be called into question, if the evidence that the Respondent provides cannot be regarded as accurate. The Claimant's position was that the Respondent 'appears to have deliberately misled the Tribunal on a material aspect of its defence".

Discussion and Decision

86. There was no real dispute on the material facts relevant to this PH, aside from the position in respect of the PH on 23rd February 2017.

Application of Equality Act 2010 Section 50

87. The Tribunal required to consider whether there is a distinction between inclusion on the selection list and subsequent appointment from this selection list to a role of statutory manager. The Tribunal took into consideration and attached weight to: -

- the Respondent's admission that Section 50 applies to appointments of Statutory Managers;

- the Respondent's admission that inclusion on the selection list is an important preliminary stage in the selection of Statutory Managers;

- the background reasons for the development of the selection list, as set out in the Findings in Fact at paragraphs (a) to (h).

- the Findings in Fact, (as set out at paragraphs (h) to (k) and (u) to (z) in respect of the process published by the Respondent that it would follow, and subsequently followed by the Respondent in its appointment of Statutory Managers.

88. In the circumstances of this case, the Tribunal considered it appropriate for a broad view to be taken of "the arrangements A makes for deciding to whom to offer the appointment", as encompassing all steps preliminary to any future appointment; including the Respondent's creation of the selection list of individuals considered by the Respondent to be suitable for appointment as a Statutory Manager. In so doing, the Tribunal took into consideration that the basis of this claim is the Race Directive 2000/43/EC. The Tribunal considered that in the circumstances of these claims, and in these Findings in Fact, such a broad interpretation was consistent with the general duty to protect from discrimination individuals such as the Claimant who put themselves forward for selection for an appointment. The Tribunal's decision was to interpret domestic legislation (Equality Act 2010 Section 50) broadly to resolve any ambiguity.

89. It is not in dispute that the appointment of a Statutory Manager is an appointment to a public office in terms of section 50 of the Equality Act 2010. It is not in dispute that the Respondent is a person who has power to make an appointment to that public office. The Respondent is a person ('A') who has power to make an appointment to public office in terms of section 50(3) and (5) of the Equality Act 2010. It is not in dispute that the exercise undertaken by the Respondent in assessing individuals for suitability for placement on the selection list of individuals considered by the Respondent to be suitable for an appointment as a Statutory Manager is an important preliminary stage of such appointments. Interpreting the legislation broadly to resolve any ambiguity, such an important preliminary stage is part of the

process of appointment to that public office. The preliminary process of assessment for inclusion in the selection list falls to be considered within Section 50 of the Equality Act 2010. Such assessment is part of the Respondent's arrangements for made for deciding to whom to offer the appointment under Section 50(3)(a) and 50(5)(a) of the Equality Act 2010. The word 'arrangement' does not come within the terms of Section 50(3)(c) or 50(5)(c). These subsections are in respect of failure to offer an appointment. Inclusion on the selection list is an important preliminary stage in the offer of an appointment as Statutory Manager. Subsections (a) and (c) of Sections 50(3) are not mutually exclusive. There is no 'or' between the subsections. Similarly, subsections (a) and (c) of Section 50(5) are not mutually exclusive. The circumstances of the claimant's claims of direct discrimination, indirect discrimination and victimisation are within Part 5 of the Equality Act 2010 (at section 50).

90. The Claimant's claim of direct discrimination is a claim against the Respondent under Section 50(3)(a) and (c) of the Equality Act 2010

91. The Claimant's claim of indirect discrimination against the Respondent is a claim under Section 50(3)(a) of the Equality Act 2010.

92. The Claimant's claim of victimisation against the Respondent is a claim under Section 50(5)(a) and (c) of the Equality Act 2010.

Application of Equality Act 2010 Section 39

93. Having determined that Section 50 applies to the circumstances of the claimant's claims, the question of the application of Section 39 does not require to be considered.

Time Bar

94. The Tribunal approached the consideration of the time bar position by considering when the Claimant's claims had crystallised. This followed the approach of the EAT in *Clarke*, as relied on by the Claimant. The Tribunal considered the date when each claim brought by the Claimant against the Respondent crystallised i.e. The date when each cause of action became complete.

95. The key dates as set out in the Findings in Fact with regard to the consideration of time bar are not in dispute. These are:-

29th July 2016 – Decision made that Claimant was not successful at first sift stage.

15th August 2016 - Claimant advised by email that his application had not been successful at the sift stage.

28th September 2016 - Successful applicants placed on published selection list.

8th November 2016 - Conciliation notification submitted to ACAS (Day A for the purposes of the Equality Act 2010 section 140B(2)(a)).

29th November 2016 - ACAS issued Early Conciliation Certificate

30th November 2016 - Day B for the purposes of the Equality Act 2010 section 140B(2)(b).

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28th December 2016 – ET1 submitted

96. The Tribunal considered the analysis of case law on the relevant date for the calculation of time limits under the Employment Rights Act 1996 and the

Equality Act 2010 in *McKinney-v- London Borough of Newham* 2015 ICR 495 to be helpful. The Tribunal approached the issue of time bar on the basis of determining the date of crystallisation of the claim. The Tribunal accepted the Respondent's submission that that the claims of direct discrimination, indirect discrimination and victimisation are separate and severable and the issue of time bar had to be determined separately in respect of each head of claim. The Tribunal adopted the approach of addressing in respect of each head of claim when the act was done in the sense of completed. This approach was in line with the approach in *Virdi*. The Tribunal accepted that following *Virdi* the date when the claim completed cannot be equated with the date of communication. That approach is consistent with *Clarke -v- Hampshire Electro-plating Co Ltd.* The Tribunal applied *Clarke -v- Hampshire Electro-plating Co Ltd* by determining the issue of when the cause of action crystallised. Following *Clarke -v- Hampshire Electro-plating Co Ltd* that is for the Tribunal to decide on the facts. The Tribunal applied the approach in *Mensah -v Royal College of Midwives* EAT 17th November 1995, as quoted at para 11 of *Chaudhary* that 'An act occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory. Knowledge is a factor relevant to the discretion to extend time. It is not a pre-condition of the commission of an act which is relied on as an act of discrimination.' This application is consistent with the wording of section 123 (1)(a) 'the period of 3 months starting with the date of the act to which the complaint relates'.

97. The basis of the Claimant's direct discrimination claim is that 'nine white British candidates were appointed'. This is set out by the Claimant at s4(ii) of Schedule 1 in his completed Agenda. In terms of section 123(a) the date of the act to which the complaint relates is 'the appointment of nine white British individual' to the selection list. That 'appointment' was inclusion on the published selection list. No such appointments were made to the selection list prior to 28th September 2016. That appointment was made on 28th September 2016. The cause of action of that direct discrimination claim

could not crystallise in the sense of being complete until that selection list was published on 28th September. The 'nine white British individuals' were not included in the selection list until that date. The Findings in Fact set out that references were sought in the period to 27th September 2016. The assessment process continued until 27th September 2016. The names of those individuals who were successful in their application for inclusion in the selection list were put on the selection list on 28th September 2016. That was the date when the Claimant's direct discrimination claim crystallised in the sense that it was complete.

98. The Tribunal did not accept the Respondent's submissions that that direct discrimination claim crystallised on 29th July 2016 and could not have occurred later than that date. On the undisputed facts, the first sift process took place in the period from 27th July until 5th August 2016. The Findings in Fact set out (at paragraph (l)) that in the period from 16th August until 27th September 2016, references were sought for individuals who were through to the second stage of the process or appointment to the selection list.

99. The date when the Claimant became aware or believed that 'nine white British' individuals had been appointed is not relevant for the purposes of this direct discrimination claim. The date when it was communicated to the Claimant that he had not been successful at the first sift stage (15th August 2016) is not relevant for the purposes of the direct discrimination claim.

100. Applying Section 140B of the Equality Act 2010, the period from the 8th November ('Day A') until 30th November ('Day B') (a period of 21 days) does not count for the purposes of Section 140B(3). In terms of section 140B(4) the time limit for the direct discrimination claim set by Section 123(1)(a) would, if not extended by the provisions of Section 140B(4), expire on 27th December 2016 (on the basis of the cause of action to which the direct discrimination claim relates occurring on 28th September 2016). That date is not within the period set out in the terms of Section 140B(4). Section 140B(3) applies. The practical effect of Section 140B(3) in this case is to

extend the time limit for the direct discrimination claim by 21 days to 18th January 2017. The claims were submitted on 28th December 2016. The direct discrimination claim was received within the statutory time period on application of section 123(1)(a) and section 140B of the Equality Act 2010. There is no need for consideration of the extension of the statutory period on just and equitable grounds. The direct discrimination claim is not time barred and can proceed.

101. The Claimant's indirect discrimination is based on the application of selection criteria applied by the Respondent being indirectly discriminatory to the Claimant. That indirect discrimination claim crystallised on the date of the application of that selection criteria i.e when the decision was made on 29th July 2016 that the Claimant was not successful at the first sift stage because he did not satisfy that criteria. It was on 29th July 2016 that the Respondent applied to the Claimant the criteria re previous experience, which the Claimant considers to be indirectly discriminatory. In terms of Section 123 of the Equality Act 2010, the date of the act to which the complaint relates is 29th July 2016. If the PCP relied on (the essential selection criteria) was "conduct extending over a period" it could not extend beyond the date on which the candidate's application was considered and rejected by the Respondent on 29th July 2016. The 3 month time period relevant to the lodging of that indirect discrimination claim began on 29th July 2016 and expired on 28th October 2016. The Early Conciliation Certificate was not lodged within that three month time period and therefore did not have the effect of putting that time period on hold. The Claimant's indirect discrimination claim was not brought within the provisions of Section 123(a). It falls to be considered by the Tribunal in terms of Section 123(b) whether that indirect discrimination claim was lodged within such other period as the Tribunal thinks just and equitable. The Tribunal does so below.

102. The Claimant's victimisation claim is based on Margaret Sharkey being involved in the decision that the Claimant was unsuccessful at the first sift

stage. Similarly to the indirect sex discrimination claim, that victimisation claim crystallised on the date when the Claimant was the subject of that first stage shift. The Claimant was the subject of the first stage selection on 29th July 2016. The victimisation claim, based on Margaret Sharkey's involvement in the decision, crystallised in the sense that it was complete on that date. There was no evidence before the Tribunal of Margaret Sharkey being involved in the decision re the Claimant's application prior to the date when his application was assessed (29th July 2016). In terms of Section 123 of the Equality Act 2010, the date of the act to which the complaint relates is 29th July 2016. The 3 month time period relevant to the lodging of that victimisation claim began on 29th July 2016 and expired on 28th October 2016. The Early Conciliation Certificate was not lodged within that three month time period and therefore did not have the effect of putting that time period on hold. The Claimant's victimisation claim was not brought within the terms of Section 123(1)(a) and it falls to be considered by the Tribunal whether that victimisation claim was lodged within such other period as the Tribunal thinks just and equitable under section 123(1)(b). The Tribunal does so below.

103. The Claimant was candid in his explanation as to why his claim was lodged when it was. As set out in the Findings in Fact at (r), in the period from August until November 2016 the Claimant's personal and family life arrangements took priority for him over his claim against the Respondent in respect of this matter. The claimant also relied on the law re time limits being complex and unclear. The Tribunal considered whether it was just and equitable to extend the time periods to allow the Claimant's claims of indirect discrimination and victimisation. The Tribunal's approach was that the same facts and considerations applied equally to both claims. In these considerations, the Tribunal followed the guidelines set down in ***Keeble.***

(a) the length of and reasons for the delay;

Both the indirect discrimination claim and the victimisation claim crystallised on the application of the first sift selection criteria to the Claimant on 29th July 2016. The statutory time limit in terms of Section 123 of the Equality Act 2010 expired in respect of both claims on 28th October 2016. Both claims were lodged 2 months late, on 28th December 2016.

The date of the Claimant's knowledge of his failure at the first stage sift selection is relevant to the reasons for the delay. The Tribunal did not accept the Respondent's submission that the Claimant could have known that he had a cause of action before it was communicated to him on 15th August 2016 that he had not been successful at the first sift stage. As set out in the Findings in Fact, the Claimant had offered the Respondent an explanation for his failure to meet the 'essential criteria'. The Claimant had an expectation that what he had submitted would be taken into account by the Respondent. The Tribunal does not accept that the Claimant could have properly raised his indirect discrimination claim on the publishing of the selection criteria.

The Tribunal took into account the Claimant's actions in respect of pursuing these claims in the period from 15th August 2016. The reasons for the delay were that the Claimant prioritised personal matters, was considering the implications of raising these claims and believed that the time limit for raising the claims was 3 months from the date of the email sent to him by the Respondent communicating that he had not been successful at the first shift stage. The reasons were not that the Claimant was prevented from acting from reasons such as his ill health. There was on element of choice on the part of the Claimant. He knew that he had the basis of an arguable claim but chose not to raise his claim until 28th December. The emails from the Claimant to the Respondent in this period show that he was busy

with other matters. The claimant proritised these matters over pursing his claims against the respondent.

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

The Respondent accepts that it has proper notes of the considerations made at the time of application of the selection criteria at the first sift stage. While accepting that a considerable time has passed, it is not considered that the cogency of the evidence will be materially affected by that factor. It was not submitted that the relevant personnel would no longer be available to the Respondents. It was not submitted that there may be further claims on this issue still to crystallise against the Respondents.

(c) the extent to which the party sued had cooperated with any requests for information;

In all the circumstances, including the claimant's delay in obtaining feedback about his application, the Tribunal did not accept the claimant's reliance on any delay in the Respondent informing him of the outcome of his application.

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

The date of communication to the Claimant (15th August 2016) is relevant to these considerations. The Tribunal accepted the Respondent's submission that the Claimant cannot be said to have acted promptly once he knew of the facts giving rise to the cause of action. The Claimant did not act promptly in gaining feedback as to the reasons for him not being successful at the first sift stage. The reasons the Claimant did not act promptly were again not such that

he was effectively barred from so acting e.g because of ill health. There was an element of choice on the part of the Claimant.

(f) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

The Claimant chose not to seek professional advice on this matter. The Tribunal accepted the Respondent's submissions that it was within the Claimant's means to obtain appropriate professional advice and he did not do so.

104. The Tribunal carefully considered the Findings in Fact in this case against the relevant law as set out in the relevant leading authorities referred to by the representatives. In its determination of this matter, the Tribunal had regard to the comments of the Honourable Mr Justice Elias in *Virdi,* and his reminder of the key points set out by the Court of Appeal in *Robertson –v- Bexley* 2003 IRLR 434. The Tribunal was careful to take all significant factors into account. The Tribunal considered all the factors set out in Section 33 of the Limitation Act 1980, which were commented on by both the Claimants' representative and the Respondents' representative.

105. Following *Verdi* (at paragraph 40) it is highly material to consider where the fault for the late lodging of the claims lies. Following *Virdi,* (at paragraph 40), if the blame for the late claim(s) cannot be laid at the Claimant(s)' door(s), then that is an important consideration in the exercise of the Tribunal's discretion. In the circumstances of these claims, the blame for the delay in lodging in the period between 15th August 2016 and 28th December 2016 is on the Claimant. The Claimant had reasons, as set out above. This does not detract from the fact that the Claimant delayed, did not act promptly to take the necessary action to protect his position with regard to these claims and did not seek appropriate professional advice on the matter. The Tribunal accepted the Respondent's position that the Claimant acted on the basis of his erroneous belief that the 3 month period

for lodging his claim ran from 15th August 2016, without seeking legal advice on that position.

106. The Tribunal accepted the Respondent's submission that if the Claimant had sought legal advice then it is likely that that advice would have been to submit the claim earlier. Given that the Claimant had chosen to prioritise other matters and was considering the implications of raising these claims, it is not certain that even if appropriate legal advice had been sought the claims would have been lodged timeously.

107. The Tribunal considered it appropriate to consider the reasons why the Claimant believed that the time limit ran from the date of knowledge. The Tribunal considered the Claimant's submissions on this point and his reliance on the guidance in the Code. The Tribunal accepted the Respondent's reliance on the Claimant's evidence that he had not consulted this Code prior to lodging his claims. The Claimant could not then properly rely on that as the basis for his belief that the three month time period ran from the date of knowledge. The Tribunal accepted the Respondent's submission that it could not be said that the Claimant consulted 'all the relevant guidance and legislation' prior to submitting his claim.

108. The Employment Tribunal time limits should be applied strictly. If there is another forum in which the claims can be pursued against these same Respondents, then that is a factor in consideration of the prejudice which both parties would suffer should the Tribunal's discretion not be applied. The Respondent argued that Judicial Review would be open to the Claimant.

109. The Tribunal was careful to bear in mind its overriding objective and was mindful that in *Virdi* (at paragraph 43) LJ Elias considered that that was an exceptional case, where he was confident that a Tribunal properly approaching the issue would be obliged to conclude that the only factor weighing against the extension of time was the availability of the legal action

against the solicitor, but that that on its own was not the legitimate reason for refusing to extend time, as it would simply give the Respondent a windfall at the expense of the solicitors. There is no possibility of legal action against professional advisors re the late lodging of these claims. The Tribunal was careful to consider all the circumstances, and the submissions by both parties representatives. The Tribunal considered the prejudice which each party would suffer as the result of the decision to be made. The Claimant would be unable to continue his claims of indirect discrimination or victimisation. On the basis of the Tribunal's decision re the application of Section 123 to his direct discrimination claim, that claim could proceed. The Respondent would not have to defend the indirect discrimination or victimisation claims but would still have to defend the direct discrimination claim.

110. The Tribunal considered whether in all the circumstances of each of these claims it was just and equitable to extend the time for the indirect discrimination and victimisation claims to be lodged. The Tribunal took into account all the relevant factors in accordance with *Keeble*. The Tribunal also took into account its overriding objective as set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The Tribunal requires to be just and equitable to both parties in its decision. The date of knowledge (15th August 2016) is a relevant consideration in the issue of whether it would be just and equitable to allow the late claims. It is not the correct approach to simply consider whether the claims were then lodged within 3 months of the date of knowledge. There was an element of choice on the part of the Claimant in prioritising other matters over pursing his claim and in considering the implications of him raising these claims. There were no circumstances preventing the Claimant from raising his claim within the statutory time period.

111. The Respondent is entitled to rely on the statutory provisions in relation to time bar. It would not be just and equitable in the circumstances of this case to allow the time barred claims for indirect discrimination and for

victimisation to proceed. In making this decision, the Tribunal took into account its decision that the direct discrimination claim was submitted within the applicable statutory time limit. The Tribunal considered that that decision did not detract from the factors which fell to be determined as set out in ***Keeble***. The direct discrimination claim is separate and severable. It does not fall that it is just and equitable for the indirect discrimination claim and the victimisation claim to be allowed because of the Tribunal's decision that the direct discrimination claim was submitted within 3 months of the date of crystallisation of that cause of action. That factor does not have weight such as to allow the time barred claims on just and equitable grounds. The Respondent is entitled to rely on the statutory time periods as having effect in respect of claims brought against them. The facts as to the reasons for the Claimant's delay in bringing the indirect and victimisation claim are not such as that it would be just and equitable to extend the period.

112. The Tribunal considered the Claimant's application for the response to be struck out in terms of Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Respondent's conduct relied on by the Claimant is not conduct which falls within the provisions of either Rule 37(1)(b) or (e), as relied on by the Claimant. There is dispute between the parties as to whether the Respondent clarified the position in their completed agenda in respect of one or two appointment having been made. In any event, the Respondent does not continue to rely on their having been no appointments made from the selection list. That was the position from the date of the PH on 23rd February. . The position in respect of the number of statutory appointments made has been clarified. There has been no prejudice to the Claimant's claim arising from the Respondent's position at the PH on 23rd February. The claimant had relied on having consulted 'all the relevant legislation and guidance in relation to his claim' and later retracted this position. It cannot be properly said that a fair hearing is no longer possible on the issues. To strike out the response on the basis of a position which has been clarified and which has had no

substantive effect on the Claimant's claim would be draconian and would not be in line with the Tribunal's overriding objective as set out in Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Employment Judge: Claire McManus
Date of Judgment: 11 September 2017
Entered in register: 11 September 2017
and copied to parties