



EMPLOYMENT TRIBUNALS

Claimant: Mr A F Nikiza

Respondent: Royal Mail Group Ltd

Heard at: Leicester (by Cloud Video Platform)

On: 19 January 2021 and 1, 2, 3, 4 and 5 February 2021

Before: Employment Judge Ahmed

Members: Mr A Blomefield
Ms H Andrews

Representation

Claimant: Dr Mirza Ahmad of Counsel

Respondent: Mr Ian Hartley, Solicitor, Weightmans LLP

JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. The complaints of indirect race discrimination, victimisation and harassment are all dismissed.
2. The allegations of direct race discrimination, victimisation and harassment (with the exception of the allegations made as to acts that occurred in December 2018) are all out of time. It is however just and equitable to extend time in respect of all the allegations which were presented out of time.
3. The complaints of direct discrimination are all dismissed save as to the failure to appoint the Claimant to managerial roles in 2015/2016 and 2017 which are both upheld. The Tribunal declares that the Claimant was directly discriminated against by reason of his race in relation to the 2015/16 and 2017 selection exercises by not being appointed.
4. The issue of remedy is adjourned.

5. Case Management Orders as to the remedy hearing are given separately.

REASONS

1. By a Claim Form presented to the Tribunal on 9 April 2019 Mr Ange Freddy Nikiza brings various complaints of race discrimination, victimisation and harassment against his employers. The Claimant has been employed by the Respondent as an OPG (Operational Postal Grade) by the Respondent since 15 March 2003. He continues to be employed by the Respondent at the National Distribution Centre in Northampton. Mr Nikiza describes himself as of 'Black ethnic' background. The protected characteristic relied on by in respect of all of the complaints of discrimination, harassment and victimisation is race.

2. The Claimant has represented himself throughout these proceedings and remains on record as a litigant in person. He has however instructed Dr Mirza Ahmad of Counsel to represent him at this Hearing under the Direct Access Scheme. The Respondent has throughout been represented by Weightmans Solicitors and in particular by Miss Kate Hall of that firm and by Mr Ian Hartley Solicitor of the same firm at this Hearing.

3. At a Preliminary Hearing on 2 December 2019 Employment Judge Ord helpfully set out the list of 18 allegations of discriminatory treatment relied on by the Claimant. Subsequently, the Claimant wrote seeking to add further allegations and to rely on matters beyond the date of the presentation of the Claim Form (ET1). He has also referred to those in his witness statement. Dr Ahmad on behalf of the Claimant accepts that the Claimant has not been granted an amendment of his claim to allow those matters to be included nor indeed has any prior application for an amendment been made. No application to amend was made at this hearing. This ambit of the present proceedings therefore remains confined to the allegations and issues identified by Employment Judge Ord.

4. At this Hearing, the Claimant gave oral evidence on his behalf only. It is agreed that his wife's witness statement was relevant only to the issue of remedy only and was not therefore considered nor was she called to give evidence.

5. The Respondent relied on oral evidence from the following witnesses:

5.1 Ms Louise Shawcroft, a Recruitment Manager;

5.2 Ms Emily Scott, Head of Operations at the National Distribution Centre;

5.3 Ms Gail Harding, Plant Manager at the same location;

5.4 Ms Mia Edris, Customer Service Advisor in the Employment Case Management Team dealing with matters nationally;

5.5 Mr Danny Moore, a Late Shift Manager;

5.6 Mr Mohammed Munshi, Floor Manager;

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5.7 Mr Stephen Evans, Business Customer Advisor;

5.8 Mr Steven Edgley, Plant Manager

6. In coming to our decision we have taken into consideration the contents of all of the witness statements, the documents in the bundle and the submissions from the parties' representatives, to whom we are grateful.

THE FACTS

7. Mr Nikiza began his employment with the Respondent on 15 December 2003 as an OPG on a permanent full-time contract. He has continued to be based at the National Distribution Centre throughout his employment. In 2004 he reduced his hours to work part-time so that he could study for a degree. In 2007, he obtained a BA in Social Sciences from Coventry University. In 2008 he undertook a deputy managerial role as part of the Royal Mail Professional Development Scheme. The Claimant's unchallenged evidence was that he was then the only Black acting manager in his team. He says however that he was forced to step down from his role due to persistent harassment and unfair treatment by colleagues and senior management though it must be said that this does not form any part of this case.

8. In 2010 the Claimant joined the Royal Mail World Class Mail projects. In 2016 he received the Royal Mail Chairman's Award for being a 'Positive Change Champion'. Along with other colleagues he was at one time the editor of the National DC Communication Magazine which was launched in 2012. In 2017 he was appointed Deputy Champion for the Workplace Organisation Pillar which was rated 'Best Project' by the Royal Mail Group internal audit in relation to compliant safety standards and high efficiency/productivity.

9. By 2015, the Claimant having built up his cv, applied for a full-time role as a Deputy Manager. The details of his application are somewhat scant as Royal Mail have either deleted them or they are no longer available. It appears that the exercise stretched into 2016. We will refer to this as the 2015/2016 job application exercise which had an internal reference number of 9382.

10. Every job vacancy within Royal Mail generates a very large number of applications. As a consequence, there is a sifting process. This is usually an online test setting a minimum benchmark. Those candidates that pass, usually by then only a small handful, are shortlisted for interview. In the recruitment exercise 9382, five candidates were successful and shortlisted for interview. They included the Claimant. It appears that the selection intended to appoint at least two successful candidates. In the final stages of the process there was an assessment of a prepared presentation and an interview based on competency-based questions. The six competency criteria were: 'I create value for customers, I own performance, I take action, I engage and involve, I work with others to win, and I support development and challenge'. The two assessors for that exercise were Ms Natalie Frow and Mr Steve Edgley.

11. In the presentation element the Claimant did rather well with a score of 4 points which was the joint highest. His eventual score was however 16 points which was the second lowest. The Claimant scored 2 in respect of each one of

the six competency criteria. In fact, he was the only one who had the same set of scores across the board for each of the competency criteria, the other candidates' scores varying depending on the criteria being assessed. No notes of any of the interviews or any documentation has been retained other than the score sheet itself. The Respondent did not call Ms Frow to give evidence on the grounds that she had left the organisation and could not be traced. It did not initially intend to call Mr Edgley (for the same reasons) but when it was pointed out that Mr Edgley but was still working for Royal Mail in another part of the country, and indeed had given evidence in another case for Royal Mail at a different tribunal hearing only a few months earlier than this hearing, a witness statement was somewhat hurriedly produced and he was called to give oral evidence. In his statement Mr Edgley says that the reason not to appoint the Claimant "was in no way connected to his race" but he does not give any information as to the merits of the successful candidates. The Claimant's unchallenged evidence was that Royal Mail appointed two Asian candidates.

12. It was also the Claimant's unchallenged evidence that neither of the two successful candidates were more experienced or qualified than himself. Mr Nikiza says that he sought feedback on why he had failed and was told by Ms Sandra Easton, the then Head of Planning and Control that he had been successful in most parts of the assessment process but that he had to take a re-assessment on the Fire Test. What appears from the only email that has been produced on the matter is that the Claimant seems to have undertaken an assessment on the Fire Test *prior* to the interview but he does not appear to have received any further feedback from Ms Easton as to why he had been unsuccessful.

13. In May 2017, the Claimant made a further application for a Deputy Manager's position. He passed the numerical online test meeting the benchmark and was put forward for shortlisting by way of interview. The job reference number on this occasion was 42224 which corresponds with the marking exercise. It is clear from the limited information retained that five candidates were shortlisted, including the Claimant. The two assessors this time were Ms Oonagh Gilfillan and Mr John Chillingsworth. The competency criteria this time were: 'open as to change, tenacity, leadership, commercial awareness and resilience'. The Claimant scored 12 in total on the competency-based assessment which was the second lowest overall. Again, there are no notes of any of the interviews, job descriptions or guidance on how the assessment was to be undertaken. Neither Ms Gilfillan nor Mr Chillingsworth were called to give evidence on the grounds that they had left the organisation and could not be located. The successful candidate was believed to be of Asian origin.

14. The Claimant's unchallenged evidence was that he had worked with the successful candidate in the cross-docking area for a number of years and did not regard him as any more suitable than himself. Indeed, he was asked to undertake him with training on some aspects of the role after the appointment. A few days after the assessments Mr Nikiza requested feedback. He attended an informal meeting with Ms Gilfillan. There are no notes or any documentation as to the feedback.

15. Following the 2017 exercise, the Claimant decided that he was never likely to succeed in promotion with the Respondent and therefore decided not to make

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any further applications. The Claimant did apply for a Driver's job but that does not appear to have been a serious application and the Claimant was unsuccessful. We only mention it for the sake of completeness. The Claimant does not rely on that application in these proceedings.

16. A number of allegations of race discrimination in these proceedings are in relation to the actions and comments made by Mr Danny Moore who is also employed by the Respondent. Mr Moore began his employment in 2000 and is White British. Both he and the Claimant worked as OPGs until at least 2003. Unlike the Claimant however Mr Moore has been promoted at least once during his career. In 2014 he was promoted to the role of Work Area Manager. He then became Late Shift Manager in October 2015.

17. The relationship between Mr Nikiza and Mr Moore was cordial in the early years. Mr Moore was at one time the Claimant's direct shift manager. From 2009 their relationship began to deteriorate after the Claimant made allegations of bullying and harassment against Mr Moore. Those allegations were investigated but not upheld. Mr Moore believes that Mr Nikiza has resented his career progress and that is the reason behind the Claimant's hostility towards him.

18. On 18 August 2017, the Claimant approached Mr Moore in the cross-docking area to report a health issue following foot surgery which the Claimant had undergone recently. In the course of those discussions, it is alleged that Mr Moore said to the Claimant: "*Oh you are volatile Freddy*".

19. In February 2018, the Claimant alleges that he attempted to speak to Mr Moore outside the manager's office in the cross-work area. The discussion suddenly and unexpectedly became hostile. The Claimant says that Mr Moore became aggressive and told the Claimant: "*I will treat you exactly as I want. Watch me*".

20. In May 2018, the Claimant alleges that Mr Moore deliberately delayed payment for overtime duties that had been performed several weeks earlier. The Claimant says he approached Mr Moore about it but was ignored.

21. On 6 July 2018, the Claimant wrote a letter to Mr Moore headed: "*Expression of concern and requesting answers*". Although he put "*cc: HR Services, Sheffield*" at the top of the letter, the Claimant says that he had not intended to copy HR (based in Sheffield) and did not do so at that stage. It is alleged Mr Moore in fact sent this letter to HR and he did so in order to damage the Claimant's reputation. The letter made accusations of bullying and harassment against Mr Moore but did not refer to race as a motivating factor.

22. In the absence of a response from Mr Moore to the letter of 6 July 2018, the Claimant pursued the matter internally as a grievance. His grievance related to both the failure to pay overtime and Mr Moore's behaviour towards him.

23. The Respondent has a number of internal policies which deal with grievance, bullying and harassment. There are prescribed internal forms which must be used. There are two stages to a grievance whether it be an 'ordinary' grievance or bullying and harassment. An investigation is only undertaken at the

second stage.

24. There are also timescales within which grievances must be lodged. The grievance must be made within 3 months of the alleged event. There does not appear to be any internal extension provision. The time limit is from what we have seen applied fairly rigidly.

25. There is also a vetting process when a grievance is initially received. It is sent to the Employee Case Management Team and a member of the National Team decides whether the complaint should be dealt with under the grievance policy, the bullying and harassment policy or some other policy. Once it is allocated to a particular 'track', a manager is allocated to carry out an investigation and the expectation is that the manager is then bound to follow the rules of the track whether or not he disagrees with the initial allocation. The investigation appears to be no different depending on the track but there appears to be limitations on matters that can be considered as to the conclusion.

26. The use of the appropriate forms is also prescriptive. If the correct form is not used, it is returned to the employee for re-submission on the correct form. Despite that though an employee cannot circumvent the categorisation. Even if the bullying and harassment prescribed forms are used (or as in this case the heading of the document clearly states it is a 'bullying and harassment' complaint) it does not necessarily mean that it will automatically be treated as such if the facts set out do not justify it. There is thus an initial sift which is determinative of how it is to be viewed and over which the employee has no control. There are procedures to challenge it but on the evidence from Ms Edris it does not appear that it is easy to do so.

27. These procedures appear to have been agreed with the Communication Workers' Union of which the Claimant is a member. Where a complaint is made under either the grievance or bullying and harassment policies, a meeting should be arranged and where further investigations are completed, "relevant information should be shared with the employee". In one of the allegations it is said that the Respondent failed to share all the relevant information with him.

28. The relevant grievance in this case was initially handled by the Employee Case Management Team. They identified it as a 'grievance' rather than a 'bullying and harassment' complaint despite the clear words of the letter in bold underlined words saying it was bullying and harassment. The matter was then referred to Miss Emily Scott, Head of Operations to investigate and decide.

29. Miss Scott invited the Claimant to a meeting on 8 August 2018. She made it clear that she did not investigate the issues about bullying and harassment because the allegations related to matters beyond the time period of 3 months and no reason had been given why the complaint had been made late and outside the internal time limit.

30. Miss Scott partially upheld the grievance as to the delay in overtime but did not find uphold any other aspect of the grievance. She found that the Claimant had performed overtime on 8 May 2018 but it had not been paid until 6 weeks later which was 'unacceptable'.

31. Mr Nikiza appealed largely because Mr Moore was absolved of any blame. The appeal was dealt with by Mrs Gail Harding (nee Thurston), the Plant Manager at the National Distribution Centre. Mrs Harding held a meeting with the Claimant and his trade union representative on 24 November 2018. She also interviewed Mr Moore on two occasions. She took the same view as Ms Scott that any allegations relating to bullying and harassment were outside the 3 month time limit and so it was not appropriate to investigate them. In relation to Mr Moore she concluded that there was “nothing whatsoever to substantiate” what the Claimant was saying. She concluded that Mr Nikiza held a genuine but strongly held belief that Mr Moore was acting intentionally to provoke him and cause him personal stress and unease but that such a belief was unfounded. She concluded that the failure with regard to overtime pay related to human error and was not malicious or as a result of any intervention or negligence by Mr Moore. She wrote to the Claimant on 17 December 2018 with her findings. In the course of the discussions, it transpired that Mr Moore had made a statement to HR Services, part of which was read out to Mr Nikiza. Mr Nikiza subsequently requested a copy of this but his request was declined by Mrs Harding.

32. Whilst the appeal was being progressed further incidents occurred involving Mr Moore and also Mr Mohammed Munshi, who is employed by the Respondent as a Floor Manager. The background to these is that the Claimant had suffered a road accident on 26 July 2018 in which he sustained some minor injuries. A return to work meeting (referred to internally as a ‘welcome back meeting’) was conducted by Mr Munshi on 10 August 2018. There was a discussion as to a rehabilitation plan so that the Claimant could slowly build up his hours until he was fully fit. The rehabilitation plan covered 4 weeks from 6 August - 27 August at which point it was anticipated that the Claimant would return to full hours. In addition, Mr Munshi referred the Claimant to Occupational Health. The reply from Occupational Health was that the referral would not proceed because it was necessary for the Claimant to await the results of a specialist appointment whilst Mr Nikiza was undergoing physiotherapy sessions organised through his insurers. In order for Mr Munshi to better understand his situation Mr Nikiza attempted to give Mr Munshi a report from his insurers setting out further details of his condition. Mr Munshi declined to look at the report saying that it was nothing to do with Royal Mail.

33. The Claimant lodged a further grievance on 8 November 2018 making complaints of bullying and victimisation against Mr Moore. The Claimant believed he had been unfairly treated by Mr Munshi and the reason for that was because Mr Munshi’s actions were being orchestrated by Mr Moore, Mr Munshi’s line manager.

34. On 8 September 2018, the Claimant alleges that he was signing in on his usual shift at the correct time when Mr Moore saw him and shouted at him saying: “*What time do you call this?*” Evidently Mr Moore thought the Claimant was late. Mr Nikiza says he was not late and this act of being shouted at was motivated by his race.

35. On 11 October 2018, the Claimant alleged that he was asked to work on a volumetric machine which he had been trained on. The Claimant said he was also not fully fit at that time following his car accident. Mr Moore said that he had been

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told by Mr Munshi that the Claimant was fit to do any work. The Claimant complained that Mr Moore shouted at him. The Claimant tried to give his version of the events but Mr Moore refused to listen and told him to stop following him as he walked away.

36. The Claimant's complaints were once again categorised by the Respondent as a grievance rather than a bullying and harassment complaint. It was sent to Mr Stephen Evans, a Business Customer Advisor, to investigate and decide. Mr Evans concluded that when the Claimant had returned to work he was not properly supported by Mr Munshi nor provided with a proper welcome back plan which would have been expected given the Claimant's health issues. Mr Evans found that Mr Munshi should have sought further medical advice which would have helped the Claimant to return to full duties and he should also have read the letter from the insurers offered to him. The Claimant's grievances were upheld on these matters but not in relation to anything else.

THE ALLEGATIONS

37. The 18 allegations of discrimination are as follows:

- 37.1 That in or about 2015 the Claimant was not appointed to the role of Deputy Manager;
- 37.2 That the Claimant was not appointed to a Deputy Manager role in 2016;
- 37.3 That in May 2017 the claimant applied for 3 managerial roles for which he was unsuccessful;
- 37.4 That on 18 August 2017 Mr Moore said to him, "*Oh you are volatile, Freddy*";
- 37.5 That in February 2018 Mr Moore said to the Claimant: "*I will treat you exactly as I want. Watch me*";
- 37.6 That in May 2018 Mr Moore deliberately delayed overtime payment due to the claimant for 6-7 weeks and this was motivated by race;
- 37.7 That on 6 July 2018 Mr Moore informally passed a letter to HR which was designed to put the Claimant in a bad light and this was because of race;
- 37.8 That on 23 August 2018 Mr Munshi refused the claimant a rehabilitation plan and a referral to occupational health for reasons of race;
- 37.9 That on 8 September 2018 Mr Moore aggressively shouted at the claimant accusing him of being late when he was not, an act motivated or prompted by race;
- 37.10 That on 8 September 2018 Mr Munshi refused to accept or to read a report from the Claimant's insurers stating that it had nothing to do with the Royal Mail;
- 37.11 That on 11 October 2018 Mr Moore instructed the Claimant to work on a machine that he was not trained and that furthermore Mr Moore shouted at him and then walked away;

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- 37.12 That on 19 October 2018 Ms Scott mishandled matters involving the claimant by not considering bullying and harassment complaints which he had raised;
- 37.13 That on 30 October 2018 Mrs Thurston did not properly consider the issues that the claimant had raised about discrimination by Mr Moore;
- 37.14 That on 1 November 2018 the claimant's bullying and harassment complaint was returned and he was told that it would be investigated as a 'grievance' instead of a 'bullying and harassment complaint';
- 37.15 That in December 2018 the claimant formally requested a copy of a statement made by Mr Moore sent to Human Resources but Mrs Thurston failed or refused to provide the claimant with a copy;
- 37.16 That on 28 December 2018 Ms Thurston deliberately failed to deal with the claimant's allegations of discrimination that he raised in his appeal in her outcome report;
- 37.17 That on 3 January 2019 Ms Thurston rejected the claimant's request to deal further with fresh allegations against Mr Moore and closed the matter with no further action;
- 37.18 That in February 2019 the claimant was absent through sickness and was required to attend an occupational health assessment. He attended the assessment but an email was then sent (the claimant believed by Mr Moore) saying that he failed to attend which was not true.

THE LAW

38. The relevant statutory provisions are all from The Equality Act 2010 ("EA 2010") and are as follows:

Section 13 - direct discrimination

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Section 19 - indirect discrimination

- "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

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Section 26 - Harassment

- “(1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.”

Section 27 - Victimisation

- “(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
 - (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.”

Section 123 - Time limits

- “(1) 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.
 - (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
 - (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.
 - (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

Section 136 - Burden of proof

- “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention

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occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

The case law on time limits

39. In **British Coal Corporation v Keeble** [1997] IRLR 336, the Employment Appeal Tribunal suggested that Tribunals would be assisted by considering the factors set out in section 33(3) of the Limitation Act 1980. Those factors are, relevantly, the length of and the reasons for the delay, the extent to which the evidence is likely to be less cogent than if brought within the time allowed, the conduct of the defendant after the cause of action arose, the extent to which the Claimant acted promptly and reasonably once they knew of the possibility of taking action.

40. In **Bexley Community Centre v Robertson** [2003] IRLR 434, the Court of Appeal held that there is no presumption to extend time and it is up to a claimant to convince a tribunal that it is just and equitable to extend time. The Court of Appeal also made it clear that the exercise of discretion (to allow a claim out of time) is the exception rather than the rule.

41. In **Chief Constable of Lincoln Police v Caston** [2010] IRLR 327, the Court of Appeal explained that there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. Whether a claimant succeeds in doing so is a question of fact and judgment.

42. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, the Court of Appeal (per Lord Justice Leggatt at paragraph 18) said this:

“First, it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33.”

The case law on the burden of proof

43. Section 136 EA 2010 deals with the important issue of the burden of proof in discrimination cases. This is sometimes referred to as the ‘reversal of the burden of proof’ provision.

44. The proper interpretation of section 136 EA 2010 was set out in the Court of Appeal case of **Madarassy v Nomura International Plc** [2007] IRLR 246, approving the guidance given in the earlier case of **Igen v Wong** [2005] ICR 931. Although **Madarassy** predates the EA 2010, the 2010 Act was effectively consolidating the legal position and thus the guidance remains relevant. The approach in **Madarassy** was

subsequently approved by the Supreme Court in **Hewage v Grampian Health Board** (2012) UKSC 37.

45. In **Madarassy**, the Court of Appeal made it clear that the burden does not shift to the employer simply on the Claimant establishing the difference in status (for example a difference in race) and the difference in treatment. Those 'bare facts' only indicate a possibility of discrimination, not that there was in fact discrimination. "Could conclude" in the wording of section 136 EA 2010 must mean that a reasonable Tribunal could *properly conclude* from all the evidence before it. Thus, the first stage of the two stage process envisaged by section 136 EA 2010 is to consider whether the Tribunal could properly conclude from the facts (if proved by the Claimant) whether discrimination is a possible explanation for the treatment.

46. At the second stage of the process (once the Tribunal is satisfied that the Claimant has proved facts from which an inference of discrimination can be drawn) the Respondent must provide a non-discriminatory explanation for its treatment of the Claimant. If, upon a balance of probabilities, the Respondent is not able to show that discrimination was not the reason for the treatment, the Claimant must succeed. If the Respondent discharges the burden by proving, for example, that a non-discriminatory reason for the treatment exists, then the claim must fail.

THE ISSUES

47. The issues are agreed as follows:

47.1 Have the Claimant's claims of direct and indirect discrimination, harassment and victimisation have been presented outside of the primary three months' time limit and if so do they form part of an act extending over a period in respect of which a timely complaint has been made? If not, is it just and equitable to extend time?

47.2 Did the Respondent do the 18 or so acts alleged as a question of fact?

47.3 Did the Respondent treat the Claimant less favourably and if so did they treat him or would have treated him less favourably others because of his race?

47.4 Did the Respondent apply a provision, criterion or practice ('PCP') to the Claimant. The PCP alleged is the repeated application of the Respondent's Grievance Policy to the Claimant's complaints instead of the Respondent's Bullying and Harassment Policy?

47.5 Did the Respondent apply (or would apply) the alleged PCP to persons who do not share the Claimant's protected characteristic of race?

47.6 Did the PCP put or would it put persons with whom the Claimant shares the protected characteristic at a particular disadvantage compared to others?

47.7 Did such repeated application of the wrong policy put the Claimant to a particular disadvantage when compared to others who do not share the Claimant's race?

47.8 If the PCP is established can the Respondent show that it was a proportionate means of achieving a legitimate aim?

47.9 Did the Respondent, through its employees – namely Mr Moore and Mr Munshi - harass the Claimant by engaging in unwanted conduct? If so, did such conduct have the effect of violating the Claimant's dignity and/or create an intimidating, hostile, degrading, humiliating or offensive environment? If it did was it reasonable for such conduct to have had that effect?

47.10 Since 2015 has the Respondent directly discriminated and victimised the Claimant by restricting and preventing his managerial career progression/advancement because of the Claimant's race and/or having committed a protected act? If so, are such allegations to be dismissed as having been presented out of time or is it just and equitable to extend time?

CONCLUSIONS

The out of time issue

48. We will deal firstly with the jurisdictional issue as to whether the allegations have been presented out of time and if so, whether time should be extended.

49. We agree with Mr Hartley's classification that the allegations can be grouped into three parts – the non-selection to the management roles, the grievances and/or bullying and harassment complaints and the specific allegations against individuals. Consequently, we do not find that all of these are a single act or an act 'extending over a period' within the meaning of section 123(3) of EA 2010. They concern different individuals, different occasions and entirely different factual scenarios. They are therefore, with the exception of the allegations post December 2018, all presented out of time. We have gone on to consider whether it is just and equitable to extend time.

50. In coming to our decision we have taken into consideration the so-called *Keeble factors* as well as the guidance in the cases set out above. We have not considered them as a form of checklist but looked at the matter in the round and all of the circumstances.

51. The length of the delay is clearly quite considerable and the reasons for the delay in bringing the claim are not entirely clear. Dr Ahmad on behalf of the Claimant submits that the Claimant did not believe that race was a factor in the treatment he received until December 2018 when he was denied access to a statement written by Mr Moore to HR. At that point he began to suspect race may have been a factor all along. Whilst it is difficult to see the link it is possible that the Claimant did not conclude that race was a factor until the latter stages when a number of events had occurred and up to then the Claimant gave the Respondent the benefit of the doubt.

52. It is accepted that the Claimant had access to trade union advice and would thus have come across the three-month time limit in the course of discussions though there is no suggestion that he consulted his trade union in relation to the selection exercises.

53. The Respondent's primary submission on time is it has to be said in relation to the non-selection exercises where they say that the cogency of the evidence has been

affected through delay. Mr Hartley submits that memories are bound to be affected, and indeed have been affected in the case of Mr Edgley. Thus it is not just and equitable to extend time.

54. The difficulties presented by the delay are set out largely in the witness statement of Ms Shawcroft who, at paragraphs 5 and 6 of her statement, says:

“Unfortunately, the three people that Freddy says were responsible for the discriminatory behaviour, Sandra Easton, Natalie Frow and Oonagh Gilfillan have all left the business and we have not been able to establish contact with them to attend the Tribunal.

Furthermore, paperwork in relation to applications for roles where a candidate is unsuccessful is only kept for six months following the decision; successful candidates’ applications are kept for six years after the termination of contracts. This is in line with the requirements of legislation.”

55. Ms Shawcroft does not identify which legislation she refers to nor was she able to help us at this hearing on that point but in any event it is clear that the Respondent’s own procedures require paperwork for successful candidates to be retained for at least 6 years. Such paperwork may have shed light on why others were considered the better candidates particularly when it came to the subjective assessment where the Claimant lost ground. At the time proceedings were issued however it was well within the six-year period. In fairness to Ms Shawcroft she does not say in her statement that Mr Edgley was not available for the same reasons as the others but that was clearly the implication otherwise he would have submitted a witness statement along with the others. In addition to Mr Edgley being a witness for the Respondent in a tribunal hearing on another case on 27 November 2020 the solicitor representing the Respondent at that hearing appears to have been same solicitor who had the conduct of this case up to the hearing. It is therefore likely to have been known that Mr Edgley had not left the business.

56. In relation to Ms Frow and Ms Gilfillan, a quick internet search reveals that Ms Gilfillan left the Respondent in 2018 and is now employed by a UK business as is Ms Frow. There is no information on Mr Chillingsworth. No evidence however has been put to this Tribunal of any efforts made to contact Ms Frow, Ms Gilfillan or Mr Chillingsworth. It is possible that some may have left a contact address or may have sought a reference for a future employer after they had left the Respondent’s employ.

57. In any event, the fact that some of the relevant managers have left the business is no reason for them not to give evidence or to be called to give evidence if they could be located. If they were unwilling, they could be summoned by means of a Witness Order. It is often the case that Employment Tribunals will hear evidence from those who are no longer in the business. Even if there were insurmountable difficulties in contacting relevant witnesses, there is simply no explanation as to why the relevant documents have not been retained.

58. The principal cause of the difficulties for the Respondent in relation to the delay is therefore twofold: firstly, they have not made any known effort to contact relevant witnesses and secondly that they have not retained the paperwork. It is one thing to say that efforts were made to locate relevant witnesses but such efforts were

fruitless. It is quite another not to make any effort at all. In relation to not keeping documents of successful candidates that is in breach of Royal Mail's own procedures. In discrimination selection cases the documentation is often the key material because without that even if a claim was made in time it may be difficult for interviewers to remember all the relevant details without the documents being available.

59. The absence of relevant documentation therefore compounds the difficulties and makes it difficult even for those who are called to remember. In our judgment it would be unjust to shut out the Claimant for failings by the Respondent, particularly in breach of their own procedures. If the cogency of the evidence is affected through time it is because the Respondent has failed to retain documentation not because of the inability to remember. Had documentation been retained, and reasonable efforts made to trace and call former employees, delay was unlikely to have presented any substantial difficulties.

60. The main difficulty for the Claimant in relation to time is the apparent absence of a satisfactory explanation for the delay in bringing proceedings. We do not however read **Robertson** as authority for the proposition that where there is no satisfactory explanation then the claim must be rejected as out of time. In that respect, we bear in mind the dicta in **Morgan** that the tribunal has the 'widest possible discretion' and in **Caston** that there is no principle of law dictating how generously or sparingly the power to enlarge time is to be exercised. The balance of prejudice clearly favours the Claimant. He would be deprived of the possibility of a finding of unlawful discrimination on a technicality if he was to be excluded because of time limits. It is not his fault that the Respondent has not made any or any identifiable effort to trace relevant witnesses or to retain key documents.

61. Even if the explanation of delay by the Claimant is unreasonable we bear in mind the remarks in **Rathakrishnan v Pizza Express** [2015 EAT 0073] HH Judge Peter Clark rejected a submission that where there is an unsatisfactory explanation given for the delay it can never be just and equitable to extend time. That approach was followed (by a differently constituted EAT) in **Edomobi v La Retraite RC Girls' School** [UKEAT/0180/16].

62. Having regard to all the circumstances we consider that it is just and equitable to extend time in relation to all the allegations that are brought outside the primary time limit.

The burden of proof issue

63. We have considered whether the burden of proof passes from the Claimant to the Respondent in the first stage of the section 136 EA 2010 process such that the Respondent is then be obliged to provide a non-discriminatory explanation for the treatment of the Claimant.

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64. We consider that it is appropriate to consider the burden of proof separately in relation to the non-selection exercise, the grievance/bullying and harassment complaints and the remainder of the allegations.

65. In respect of the non-selection exercises, we are satisfied that the Claimant has proved facts which satisfy the first stage of section 136 EA 2010 for the following reasons:

65.1 There is a no dispute that there is a difference in race between the Claimant and those appointed and thus there is a difference in treatment;

65.2 There is no doubt that there is a difference in terms of academic qualifications. We know that the Claimant was a graduate. There is no evidence that any of his comparators were similarly graduates. We recognise that a university degree was not apparently a requirement but to obtain a degree suggests a certain level of intellectual discipline and is relevant when considering suitability of appointment to a managerial role;

65.3 The unchallenged evidence of the Claimant was that he had spent time in an acting management role and thus had some experience he could call on. There is no suggestion that any of his comparators had similar experience;

65.4 The Claimant had undertaken an impressive range of activities that made him suitable for the role. In 2010 he had been invited to join the Royal Mail World Class Mail Projects. In 2017 he was a Deputy Champion for the Workplace Organisation Pillar. His project had been highly rated by the Royal Mail Internal Audit for best compliant safety standards, high efficiency and productivity. In 2016 he had received the Royal Mail Chairman's Award for being a positive Change Champion and that in each recruitment exercise, when faced with objective benchmark criteria, that he had succeeded on each occasion. There is no evidence that any of his comparators had gained similar levels of achievement and progression;

65.6 The Claimant's unchallenged evidence that he had on one occasion provided an induction session to a successful candidate. That suggests that he was deemed to have a level of experience and skill sufficient to provide training for a managerial role, something he would not be asked to do if he was considered incapable or incompetent generally.

66. For those reasons we are satisfied that burden of proof passes to the Respondent under the first stage of the **Igen** process. The Respondent is required to provide a non-discriminatory explanation for the failure to appoint the Claimant.

67. Mr Edgley was called to give evidence on the first of the applications but the reality is that Mr Edgley cannot remember any useful detail about the recruitment exercise. We make no criticism of Mr Edgley because he must have undertaken many interviews in his time and there is no reason why this one should stand out in his mind. He does say in his witness statement that Mr Nikiza's assessment was 'in no way connected to race' but it is not supported by any facts.

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68. In relation to the 2017 exercise, the Respondent has failed to call any evidence whatsoever to demonstrate that the reason for the Claimant's unsuccessful application was for any factor other than race. All of the competency criteria are subjective and thus open to interpretation and possibly discriminatory treatment. There is no explanation as to why the Claimant scored so low for leadership given that he had been in an acting managerial role. There is no evidence of feedback or explanation as to why an apparently intelligent individual did so badly at interviews or scored so low.

69. On a straight application of the burden of proof provisions, and in the absence of a non-discriminatory explanation, we conclude that the Respondent has failed to discharge the obligation imposed upon it by section 136 EA 2010 and accordingly the Claimant succeeds in relation to the non-selection allegations.

The remaining allegations

70. We now turn to the allegations identified above and our determination in respect of each. As a general observation we find that in relation to all of the allegations of bullying/harassment and the individual alleged acts/remarks we do not find that the Claimant has proved facts from which an inference of discrimination can be drawn and thus here the burden does not pass to the Respondent. The various remarks alleged are not race-specific and the Claimant himself did not until the start of these proceedings identify them as acts of racial discrimination. However, for the sake of completeness we shall deal with each of the allegations in turn:

On 18 August 2017 the Claimant reported that he was ill and Mr Moore said to the Claimant: "Oh you are volatile Freddy"

71. We are satisfied that Mr Moore did say to the Claimant that he was 'volatile'. It would be an odd remark to fabricate. Mr Nikiza is, judging by his demeanour in the Tribunal, a relatively calm individual. It is likely that he would have been offended by a remark suggesting he was 'volatile'.

72. Whilst we are satisfied that the remark was made we are not satisfied it has any racial element. It was made at a time when friendships had broken down and the Claimant did not himself at the time view it as a race-related comment.

In February 2018 the claimant attempted to speak to Mr Moore who became aggressive and said "I will treat you exactly as I want. Watch me" and walked off.

73. The whole episode has nothing to do with the Claimant's race. A conversation had become heated and Mr Moore was trying to defuse the situation. There was no allegation that the 'treatment' which is referred to was racist behaviour at the time.

In May 2018 Mr Moore deliberately delayed overtime payment due to the claimant for 6-7 weeks.

74. The Claimant's overtime allegation was investigated at some considerable length. It was found that whilst the delay was unsatisfactory (and instructions were

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issued on how to avoid such instances in the future), there was no racial motivation or intent. The Claimant was not alone in having his overtime payment delayed. There were others of a different race who also suffered delays. There was thus no less favourable treatment and certainly no less favourable treatment due to race.

On 6 July 2018 the claimant wrote a letter to Mr Moore informally to which no response was received and the matter was passed to Human Resources.

75. The absence of a reply was not because of race but because Mr Moore wanted the matter to be dealt with more formally and for human resources to be involved and so he passed things to them.

On 23 August 2018 Mohammed Munshi refused the claimant a rehabilitation plan and a referral to occupational health.

76. The way in which Mr Munshi dealt with the matter was the subject of criticism internally by Mr Evans in his decision. We are satisfied that this was more a lack of attention on the part of Mr Munshi rather than less favourable treatment by reason of race. Mr Munshi did in fact complete a rehabilitation plan with the agreement of the Claimant and he did refer the Claimant to occupational health. What he failed to do was to refer the Claimant on a second occasion but the failure was not attributable to reasons of race.

On 8 September 2018 Mr Moore aggressively shouted at the claimant accusing him of being late.

77. We accept that Mr Moore shouted at the Claimant for being late but we are satisfied he is likely to have done so to anyone if he felt that they were late. Accordingly, there was no less favourable treatment.

On 8 September 2018 Mr Munshi refused to read a report from a specialist instructed by the Claimant or his solicitors stating that it had nothing to do with Royal Mail.

78. It is accepted that Mr Munshi did not read the letter/report which was offered but that as he now accepts was careless and inconsiderate. It was not motivated by the Claimant's race.

On 11 October 2018 Mr Moore singled the claimant out and stopped him working on his usual point of duty but instead instructed the Claimant to work on a machine that he was not trained on. The claimant said he was not trained on the machine but Mr Moore said to him that Mr Munshi had said he was fit to do any work. When the Claimant reiterated his health problems Mr Moore said, "You are shouting at me" and then later "Stop following me" as he walked away.

79. We are satisfied that the remarks alleged were made but they arose principally out of a misunderstanding as to whether the Claimant was fit to return to his full duties. We accept that Mr Moore is likely to have raised his voice at the Claimant but it was

part of the general breakdown in the relationship between the two and not for racial reasons.

80. We are satisfied that the Claimant was not instructed to work on a machine he was not trained on. He was undertaking work he usually does but in front of a different machine. He did not need to be trained to do what was required of him. The Claimant's real concern was that he was finding it difficult to physically undertake certain duties. The allegation is not made out on the facts.

On 19 October 2018 Ms Scott 'mishandled matters' involving the claimant by not considering bullying and harassment complaints which he had raised.

81. This appears to be an allegation of direct and indirect discrimination as well as harassment. We are satisfied that Ms Scott applied a PCP in handling the complaint as a grievance rather than a bullying and harassment complaint but there was no particular disadvantage to the Claimant in respect of his protected characteristic. The same would have applied to anyone regardless of race. The claim for indirect discrimination therefore fails. It is unnecessary to consider whether the PCP was a proportionate means of achieving a legitimate aim.

On 30 October 2018 Ms Gail Thurston did not properly consider the issues that the claimant had raised about discrimination by Mr Moore.

82. This is not factually correct and thus the Claimant has not proved the facts necessary for the burden to shift. We found Ms Harding's investigation to be detailed, thorough and beyond criticism. The fact that the Claimant disagrees with her findings does not imply any racial element.

On 1 November 2018 the claimant's bullying and harassment complaint was returned and the claimant was informed that it should be investigated as a grievance. The claimant says that the failure to investigate the matter as a bullying and harassment complaint was discriminatory.

83. This is largely a repetition of an earlier complaint and it is also a complaint of indirect discrimination. For the reason given earlier, namely the absence of a specific disadvantage, it is also dismissed.

In December 2018 the claimant formally requested a copy of a statement made by Mr Moore sent to Human Resources in July. Mrs Thurston failed to provide the claimant with a copy.

84. Mrs Harding refused to provide the Claimant with a copy of Mr Moore's statement to HR because she did not wish to escalate the matter but to draw a line under it. Unfortunately, the fact that Mr Moore had written a statement slipped out in the discussions and the Claimant then seized upon that fact and wanted a copy. However, the denial of the request was for reasons unrelated to race.

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85. We accept that under the Respondent's own procedure, the Claimant was entitled to a copy of the statement but the refusal to provide him with one was refused in order to bring the issue to a close not because of the Claimant's race. We are satisfied Mrs Harding would have come to the same decision for someone of a different race.

On 28 December 2018 Mrs Thurston deliberately failed to deal with the claimant's allegations of discrimination that he raised in his appeal in her outcome report.

86. We do not find that any failure to deal with allegations was 'deliberate'. Mrs Harding concluded that the working relationship between the Claimant and Mr Moore had broken down and made recommendations to change the Claimant's immediate line manager. She also recommended that Mr Moore should refrain from contact with the Claimant. She is likely to have done the same way regardless of race.

On 3 January [2019] Mrs Gail Thurston rejected the claimant's request to deal further with fresh allegations against Mr Moore and closed the case with no further action.

87. Ms Harding was entitled to refuse the request under Royal Mail procedures. There is nothing to suggest that she would have acted any differently for someone of a different race.

In February 2019 the claimant was absent through sickness and was required to attend an occupational health assessment. He was contacted by telephone. He attended the assessment but an email was sent (the claimant believes by Mr Moore) saying that he failed to attend which was not true.

88. This allegation is factually inaccurate and it became clear at the hearing that this was so yet it has not been withdrawn. No email was sent by Mr Moore to the effect that the Claimant had failed to attend an occupational health assessment. There has never been any suggestion by the Respondent that the Claimant failed to attend an occupational health assessment.

Remedy

89. There was insufficient time to deal with the issue of remedy. That is therefore adjourned to another date. Case management orders as to the remedy hearing are given separately.

Employment Judge Ahmed

Date: 24 March 2021

Covid-19 statement

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

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