EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Khan**
Respondent:	**(1) Foresters Financials t/a Forester Life Limited** **(2) Foresters Holdings (Europe) Limited**
London South Region **By CVP**	
On:	**06 February 2024**
Before:	**Employment Judge Martin**
Representation	
Claimant:	**In person**
Respondent:	**Mr Braier - Counsel**

RESERVED JUDGMENT AT PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Claimant is not disabled by virtue of OCD or anxiety as defined in s6 Equality Act 2010.

2. The Claimant's claims for discrimination on the protected characteristic of disability are dismissed.

3. The Claimant's claims as set out in the reasons, were brought out of time and it is not just and equitable to extend time.

4. Those claims as identified in the reasons are struck out as being out of time.

RESERVED REASONS

1. This hearing was listed to consider whether the Claimant's claims had been brought in time and whether the Claimant was a disabled person as defined in The Equality Act 2010. Judgment was reserved because I was retiring on 29 February 2024 and therefore if written reasons were required they had to be prepared now. The hearing was listed for 1.5 days. Evidence and submissions were completed at the end of day one. I used the remining time to deliberate and write these reasons.

2. There was some disruption to the hearing as the CVP platform was not stable and some participants had to log out and log back in again. Despite this, a fair hearing was possible. I noted at the outset that the Claimant was claiming anxiety as a disability and therefore ensured he was told about the procedure and invited him to ask for breaks as and when he needed them. I heard evidence from the Claimant and submissions from both parties. I had before me a bundle of documents, the Respondent's outline submissions and a bundle of authorities. In the bundle was a disability impact statement from the Claimant and GP medical records going back for ten years.

3. Employment Judge Jones KC made orders at a preliminary hearing on 23 October 2023 in relation to this hearing. One order was that the Claimant provide a disability impact statement, which he did. The other was to provide a witness statement setting out why he did not bring his claims in time. The wording of the order was:

> ***Evidence in relation to Time Limits and Extension***
>
> *9. If either party wishes to put evidence before the Tribunal relevant to the question whether any claim is out of time and/or whether time should be extended if it is, they must set that evidence out in a written statement which they should send to the other party by 5 January 2024.*

   The Claimant did not provide a statement dealing with time limits and extension of time. I therefore did not have any evidence before me from him on this issue.

4. The Claimant relies on two impairments as disabilities: OCD and anxiety. The Respondent's position is that the Claimant does not meet the definition of disability in the Equality Act 2010. In relation to time, the Respondent's position is that certain claims are out of time, that there is no continuing act of discrimination and that it would not be just and equitable to extend time.

The law

5. The respondent helpfully set out in its submissions a full and comprehensive section on the law. For expediency, this is reproduced below as being an accurate reflection of the statues and case law as relevant to the issues I am to determine. I have set them out in full to aid the Claimant in understanding the decision made as the detail of the law cited is relevant. My findings and conclusions start at paragraph 42.

Disability

6. The Equality Act 2010 ('EqA'), s.6(1) defines disability as follows:

   A person (P) has a disability if—

   (a) P has a physical or mental impairment, and

   (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

7. The new para 5A of Schedule 1 to the EqA makes clear that the reference to a person's ability to carry out normal day-to-day activities includes a reference 'to the person's ability to participate fully and effectively in working life on an equal basis with other workers'.

8. As the EAT identified in Goodwin v Patent Office [1999] IRLR 4 [paras 25-29], the statutory definition of disability requires the Tribunal to consider four conditions:

   i. The impairment condition – whether the Claimant has a mental or physical impairment;

   ii. The adverse effect condition – whether the impairment affects the Claimant's ability to carry out normal day-to-day activities, and whether it has an adverse effect;

   iii. The substantial condition – whether the adverse effect is a substantial one; and

   iv. The long-term condition – whether the adverse effect is long-term.

9. The burden of proving disability lies on the Claimant: see eg Royal Bank of Scotland v Morris [2012] (UKEAT/0436/10), at [para 55]. Whether the Claimant chooses to do so by specialist medical evidence or simply by giving evidence himself, ultimately the question of whether the Claimant is disabled under the EqA is one for the ET to determine rather than for a medical expert to determine: The Guinness Partnership v Szymoniak [2017] (UKEAT/0065/17) [para 13].

10. The Tribunal needs to determine whether at the time of the alleged EqA breach the Claimant met the definition of disability. A Tribunal should not have regard to evidence about the impairment or its effect or length of effect after that date in order to make findings as to whether the Claimant was disabled at that date: see Richmond Adult Community College v McDougall [2008] IRLR 227, at [paras 24, 35] and All Answers v W [2021] IRLR 612, at [para 26].

The four conditions set out in EqA s.6 are considered in turn below.

Substantial

11. Substantial' is defined at EqA s.212(1) to mean 'more than minor or trivial'.

Long-term effect

12. EqA sch.1 para 2 provides the following in respect of long-term effects:

(1) The effect of an impairment is long-term if—
(a) It has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

13. In SCA Packaging Ltd v Boyle [2009] IRLR 746, the House of Lords made clear that the word 'likely' in this context means 'could well happen'.

14. The EAT made clear in Szymoniak [para 15] that the question is not about the length of time for which the condition has lasted but rather the length of time for which the effect on the ability to carry out normal day-to-day activities has lasted.

15. In Morris, the EAT made clear [para 61] that a Tribunal could not safely infer satisfaction of the long term effect requirement simply from the length of time for which medication for a mental impairment was prescribed, noting that the medication might only be precautionary rather than prescribed because of any assessment that the effects would last for that period. The EAT made clear that a tribunal is 'very unlikely to be able to make safe findings' on this point without the benefit of medical evidence specifically about it. The Tribunal then makes precisely the same point about likelihood to recur – namely it would be difficult to assess the likelihood of that risk or the severity of the effect if it eventuated without expert evidence on the point.

16. As the EAT emphasised in finding it was not open to the Tribunal in Morris to find the claimant disabled [para 63]:

> *The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common- sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.*

17. This position was approved of by the EAT in Szymoniak [para 14]. In Igweike v TSB Bank plc [2020] IRLR 267, the EAT acknowledged that there was not rule that an impairment cannot ever be made out without medical evidence, but then approved of Morris in noting it is a practical fact that in some mental impairment cases neither the individual's own evidence nor contemporary medical notes may suffice [para 50].

18. In Veitch v Red Sky Group Ltd [2010] NICA 39, the Northern Ireland Court of Appeal recognised that whilst the absence of medical evidence does not preclude a finding of substantial long term adverse effect, its absence may be of central importance in finding a claimant has not proved disability. The NICA explained [para 19] (emphasis added):

> *The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has substantial long-term adverse effect. The absence of medical evidence may become of central importance in considering whether there is evidence of long- term adverse effect from an impairment. Frequently in the absence of such evidence a Tribunal would have insufficient material from which it could draw the conclusion that long-term effects had been demonstrated.*

19. In Sullivan v Bury Street Capital Ltd [2022] IRLR 159, the Court of Appeal held in respect of the question of the likelihood of recurrence that [para 95]:

> *…although in many instances the fact that the SAE has recurred episodically might strongly suggest that a further episode is something that 'could well happen', that will not always be the case. Where, as here, the SAE was (in the judgment of the ET) triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the ET to find that it is not likely to recur.*

Impairment

20. In **J v DLA Piper UK LLP [2010] IRLR 936**, the EAT distinguished [at para 42] between clinical depression on the one hand and a simple reaction to adverse life events, such as problems at work, on the other hand, with the latter not per se amounting to an impairment. The EAT went on to recognise that if a Tribunal looks first at the question of adverse effect and finds the ability to carry out normal day-to-day activity substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely for the Tribunal to conclude the individual was suffering from clinical depression rather than simply a reaction to adverse circumstances.

21. 25. In **Herry v Dudley Metropolitan Council [2017] ICR 610**, the EAT observed [para 55] that para 42 of J v DLA Piper had 'stood the test of time and proved of great assistance to employment tribunals'. The EAT went on [para 56] to explain the following:

> *Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in*

> *other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess.*

22. Relatedly in Herry the EAT made clear (in light of J v DLA Piper's observation about the length of adverse effects) that [para 71]:

> *…there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period off work is not conclusive of the existence of a mental impairment.*

23. In Igweike, the EAT approved of the position in Herry. Of particular note, it held that [paras 53-55]:

> *…the discussion in Herry makes a more general point, that a reaction to adverse events or circumstances does not, even if a clinician describes it (in that case) as stress, necessarily by itself bespeak the presence of an impairment [para 53]*

> *…there is still a valid distinction to be drawn between a normal reaction to an adverse and tragic life event and something that is more profound and develops into an impairment [para 55]*

Adverse effect

24. Where there are two or more impairments (as in this case), you look at their combined effect in determining whether there has been the required substantial adverse effect: **Herry [2019] (UKEAT/0069/19**), at [para 31] (when Herry returned for a second time to the EAT).

25. The focus of the test is on what the claimant either cannot do or can only do with difficulty. What a Tribunal must not do is to balance what a claimant can do against what they cannot do: **Elliott v Dorset County Council [2021] IRLR 880**, [paras 22-23].

26. In considering whether the impairment has an adverse effect on the person, a comparison needs to be made with the position of the same person absent the impairment (i.e. with how they would carry out that activity if they did not have the impairment): Elliott, [para 43].

27. In respect of OCD, it is acknowledged that the Secretary of State's 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) provides at B3 in respect of the comparison between the way in which a person with OCD might be expected to carry out the activity compared with someone without that impairment that:

> *A person who has obsessive compulsive disorder (OCD) constantly checks and rechecks that electrical appliances are switched off and that the doors are locked when leaving home. A person without the disorder would not normally carry out these frequent checks. The need to constantly check and recheck has a substantial adverse effect.*

28. In carrying out this process, there needs to be the establishment of a causal link between the impairment and its effect: **Patel v Oldham Metropolitan Borough Council [2010] IRLR 280**, [para 13].

Time Limits

29. The time limit for bringing an ET claim under s.13 EqA is set by s.123 EqA. The primary time limit is 3 months (s.123(1)(a)), subject to extension for ACAS early conciliation, which in the present case extended the time limit to one month after the receipt of the Early Conciliation Certificate (s.140B(4)). If a claim is not brought within the primary time limit, there is jurisdiction under s.123(1)(b) for the ET to extend time for 'such other period as the employment tribunal thinks just and equitable'.

30. Time commences when the act complained about is done, not when it is known about: Virdi v Metropolitan Police Commissioner [2007] IRLR 24, [para 25].

Continuing Acts

31. s.123(3):

> *…conduct extending over a period is treated as done at the end of the period.*

32. 36. The leading authority on continuing acts is Hendricks v. Commissioner of Police for the Metropolis [2003] IRLR 96, in which Mummery LJ explained [para 48] the Claimant has he burden of proving:

> *…either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'*

33. Mummery LJ distinguished [at para 51] between an act extending over a period on the one hand, and 'a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed' on the other.

34. The fact that different individuals are involved in the separate incidents said by a claimant to constitute an act extending over a period is a relevant factor (counting against the separate incidents forming part of a continuing act) but is not of itself conclusive: Aziz v. FDA [2010] EWCA Civ 304 [para 33].

35. At a preliminary stage, the burden is on a claimant to prove a prima facie case that a series or act extending over a period is made out: see Lyfar v Brighton and Sussex University Hospital Trust [2006] EWCA Civ 1548 [para 10].

Just and equitable extension

36. In Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, the Court of Appeal explained the wide discretion to permit an extension of time on just and equitable grounds [paras 23-24] and then emphasised [para 25] that:

    i. Time limits are exercised strictly in employment cases;

    ii. It is not for an ET to justify failure to exercise the discretion to extend time but for the claimant to convince the ET it is just and equitable to extend time; and

    iii. The exercise of the discretion is the exception rather than the rule.

37. The strictness of this approach was approved by the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23, a case in which the CA approved a refusal to extend time where the ET1 was presented just three days out of time, and where at [para 24] Underhill LJ approved of an EJ directing herself that there is:

> *…a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals.*

38. In Adedeji, the claimant put in his claim 3 days out of time (thanks to a misunderstanding as to the impact of putting in a second ACAS EC notification when the events were already covered by one submitted 6 months earlier). The ET found it not just and equitable to extend time in circumstances where to do so would not only bring within the ET's jurisdiction the claim which was 3 days out of time, but other historic claims falling 6 and 12 months prior to presentation of the ET1 [see para 22 and 25]. That decision was upheld by the CA. As Underhill LJ explained, whilst ETs often have to consider disputed events predating by a long time the act complained of and thus inevitably impacting the cogency of the evidence [para 32]:

> *…that does not make the investigation of stale issues any the less undesirable in principle. … a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago.*

39. As to the appropriate approach for an ET to take when considering whether to extend time, the CA eschewed a mechanistic adherence to a checklist and that [para 37]:

> *The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular…"the length of, and the reasons for, the delay".*

40. That accords with the approach taken previously by the CA in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050, in which the CA explained that the ET's discretion is a wide one [para 18] which

is broad and unfettered [para 25] and that the factors which are almost always relevant are the length and reasons for the delay and whether it prejudices the Respondent [para 19]. However, whilst whether there is an explanation or apparent reason for the delay is relevant to the decision whether or not to extend time, that does not restrict the ET from extending time in the absence of an explanation from a claimant for the delay [para 25].

41. In Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132, the EAT considered that a Tribunal can consider the weakness of a claim's merits when considering whether to extend time at a preliminary stage, and that the merits need not fall below the strike out threshold for that to be the case [paras 57-58, 61-63]. If considering the merits in this context, the ET must do so with appropriate care and must identify sound particular reasons or features that properly support the assessment, based on the material before it.

My finding and conclusions

42. I have made the following findings and conclusions on the balance of probabilities having heard the evidence, considered the documents, and listened to both parties' submissions. In these reasons I have not recorded every piece of evidence heard. I have recorded matters which are relevant to the issues I am to determine and necessary to explain the decision reached.

43. My starting point was to consider in detail the Claimant's GP records which he supplied and see how they corroborated or not, the evidence the Claimant gave in his disability impact statement and orally to me today. I was mindful that the case of Morris referred to above gave guidance *"where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance".* The absence of expert assistance does not necessarily mean that I could not find that the Claimant was disabled. However, it is an important factor to examine. The burden of proof is on the Claimant to prove he is disabled as defined by the Equality Act 2010.

44. I noted that there was no specific diagnosis of OCD anywhere in the medical records. There was only one reference which the Claimant accepted in cross examination, was a record of what the Claimant said to the GP rather than a diagnosis made by the GP. I compared the medical records with what the Claimant said in his disability impact statement and in evidence to me during the hearing. The disability impact statement says:

> *OCD - this came about growing up I found it very difficult to remain clean all the time as I found my thoughts and the voices in my head get the best of me. Eventually my family and friends noticed that it was getting progressively worse and therefore told me to research or find help. At some point in my teenage years, I went to my GP explaining my situation, recently I've had help from a psychologist and also my religion has been my therapy. I would clean excessively which would cause a lot of inconvenience to my family mentally, physically and financially.*

45. There is no reference in the medical records of any such discussion with the Claimant's GP. There is a psychological referral in the bundle from October 2022 in which there is a section with a heading "*past mental history*". The GP has

put in other matters and the only reference to anything to do with mental health is something that happened in 2012. As this is a public document I am not providing details save to say that it does not relate to OCD. There are no other mental health issues noted here. It would be expected that if there had been a diagnosis of OCD then it would be referred to here as it would be clearly relevant to the referral being made. This section refers to 2000 when the Claimant was nine years old.

46. In his evidence the Claimant said that he was diagnosed with OCD as a child. There is no mention of this in his medical notes. Maybe there are in earlier records however the Claimant chose to limit disclosure of his medical records to ten years, so I do not have those records to consider. In oral evidence he said that he must have been diagnosed as his parents told him about it. In contradiction to this, the Claimant also said that as far as his family were concerned mental health issues and OCD did not exist.

47. Whilst the Claimant has given descriptions of him having to change his clothes three times a day, and constantly cleaning things, this is not reflected in his GP records. It is not something noted by his colleagues.

48. In relation to anxiety, there is reference in the medical notes to anxiety. However, this is shown to be reactive to life events. By any standards the Claimant has experienced adverse life events including being in two car accidents, being estranged from his family, marriage, divorce, and bereavement. Each entry in his medical notes which relate to anxiety of which there were very few, related directly to the context of reacting to life events. He was diagnosed with reactive anxiety.

49. In his evidence the Claimant attempted to downplay the life events and say he was not reacting to them. I did not find this to be convincing or probable. From what he said about his life events it is inevitable that they would have a profound effect on him. These events were in 2012.

50. In October 2022 the Claimant spoke to his GP about anxiety and took time off work sick. This was in the context of him being on suspension since February 2022 whilst investigations were carried out into allegations of gross misconduct and about the time that the disciplinary hearing was to take place. Again, anyone in this situation would feel anxious as a reaction to the situation that they found themselves in. This is a natural and usual reaction.

51. There is perhaps not surprisingly given the lack of any record of OCD that there were not any medical records to show a combined effect of the anxiety and OCD. The Claimant says in evidence that anxiety triggers his OCD and OCD triggers his anxiety. However, there is no evidence to substantiate this.

52. In his disability impact statement, the Claimant refers to receiving psychological treatment and being helped by his Imman. However, there is no reference to any psychological treatment in his medical notes, save for a discharge letter when the Claimant did not attend his appointment in 2023 after his employment was terminated and outside the relevant period I am considering. There is no evidence from his Imman.

53. The Claimant refers in his disability impact statement to having 'mind blocks' and having a lack of concentration and motivation. It was difficult to ascertain from his statement when he says these things happened. He accepted that some things he referred to related to how he is now, and not at the relevant time. The Respondent submitted that if the Claimant had experienced such matters it is surprising that there is no mention of them in the GP records. I concur.

54. The Claimant worked for the Respondent for five years and in that time, save for October 2022 during the disciplinary process, he had no sick leave. He described with justifiable pride how quickly he progressed with the Respondent and that he was the youngest person promoted and the quickest to be promoted. He should be proud of this.

55. There are more contradictions in the Claimant's evidence given today, compared with his disability impact statement and the GP records, for example issues relating to his laptop and travelling. I do not intend to go into every contradiction as this is not proportionate or necessary.

56. Taking all of this into account I can not be satisfied with the Claimant's evidence alone. I am not satisfied that it accurately reflects reality. The medical records do not accord with what he is saying, and his own evidence is contradictory and unsatisfactory.

57. The two incidents of anxiety are in my conclusions, isolated incidents which are reactive to the difficult situations the Claimant found himself in. In the absence of any medical information, I can not find that they amount to a long-term condition. There is no medical evidence of any continuing impairment or that the anxiety has developed into an impairment, or that there is a likelihood that the effects may recur. The Claimant's evidence about OCD is not sufficient for me to say that he has OCD, as there is no formal diagnosis or any expert evidence for me to consider.

58. I am satisfied that the Claimant reacted as one would expect to the various life events which occurred. I am sorry for the situation he found himself in. However, I can not find that the Clamant had a mental impairment (both OCD and anxiety) which had a substantial adverse impact on his ability to carry out normal day to day activities. I am mindful of paragraph 5A of Schedule 1 to the Equality Act 2010 which makes it clear that the reference to a person's ability to carry out normal day-to-day activities includes a reference '*to the person's ability to participate fully and effectively in working life on an equal basis with other workers*'. The Claimant was very successful at work as he accepts. He was promoted to Area Manager (albeit two previous applications were not successful). He successfully managed a team and attended work events.

59. In all the circumstances I do not find that the Claimant is a disabled person as defined in s6 Equality Act 2010. His claims of discrimination on the protected characteristics of disability are dismissed.

Time issues

60. The relevant dates to consider are:

    a. Claim form presented on 11 May 2023
    b. ACAS early conciliation from 23 March 2023 – 11 April 2023
    c. Events prior to 24 December 2022 are out of time.

61. The matters the Claimant claims which the Respondent submits are out of time are:

    a. Two unsuccessful applications for Area Manager positions in October 2019 and on 4 June 2020.

    b. Comment said to have been made in relation to the Cambridge Area Manager role June 2020

    c. Mr Foster asking the Claimant to accompany him to a meeting with an Asian family he had previously met with

    d. Comments relating to the Claimant's car between 28 January 2022 and 1 February 2022

    e. Notification of sick pay being withheld on 16 September 2022.

62. I have started by considering these claims individually and making findings on whether they are in or out of time, and whether I should exercise my discretion to extend time on the basis that it is just and equitable to do so. I then considered them together to see if there was a continuing act of discrimination which may make them be in time.

<u>Area Manager interviews October 2019 and June 2020</u>

63. The Claimant was interviewed for area manager positions in October 2019 and in June 2020. He was not successful. He was successful subsequently and was appointed Area Manager on 1 October 2021. His case is that he was the only applicant of colour.

64. The Claimant did not complain about not being appointed to these two roles at the time. Although he raised these matters in his grievance submitted on 11 September 2022, he did not say he was unsuccessful because of his race or religion.

65. To defend the claim the Respondent will need to recall events happening many years previously. Whilst there may be records of the interview, the Respondent will be required to recall in some detail the facts and nuances of the interviews and the reasons why the Claimant was not appointed to the role. The Respondent submits that this is prejudicial and I agree. One reason for the short time limits in the Employment Tribunals is so that matters can be recalled. This is especially important in situations where a written document (if there is one) may not provide all the evidence required as here. Had the Claimant complained at the time, and it was investigated then my decision may have been different on this point, as there would be written records. The Claimant did not do this.

66. I have also considered the potential merits of this claim. The only thing the Claimant says in his claim form is that he was the only person of colour applying. This is not

sufficient to prove a claim of discrimination. There must be more. I take on board the Respondent's submission that the Claimant was successful in 2021. The Claimant's race was no barrier to his appointment to this position, so it is unlikely to have been a barrier to his earlier applications.

67. For these reasons I find these allegations are out of time and it is not just and equitable to extend time.

Comment said to have been made in relation to the Cambridge Area Manager role June 2020

68. The allegation is that a comment was made that the Cambridge team would not accept an Asian manager. As with the promotion issues, the Claimant did not complain at the time. He did not refer to it in his grievance submitted in September 2022, even when referring to him not being appointed as the Cambridge Area Manager.

69. This then refers to a comment made some three years before the claim was presented. I find that it would be unrealistic to expect the Respondent witnesses to recall such a comment without any documentary evidence. There is great prejudice to the Respondent.

70. For these reasons I find this allegation is out of time and it is not just and equitable to extend time.

Mr Foster asking the Claimant to accompany him to a meeting with an Asian family he had previously met with.

71. The relevant date is 7 January 2022 when Mr Foster asked the Claimant to accompany him to this meeting. Again, the Claimant did not complain at the time, and it seems that he went to the meeting. He raised this during his disciplinary hearing on November 2022 and the Respondent considered this at that time.

72. The Respondent referred me to the disciplinary hearing outcome letter where this was dealt with by the Respondent. The relevant part says:

> *"You also said that Martin Forster had said to you that it was important that you attend a meeting because there were Asian clients and you subsequently sent me the text message Martin had sent to you and feel this is a racial remark. In the text message Martin has said to you that he met with an Asian family, and they want to meet you. In the message Martin has also written that he was told by the man he met that he wouldn't normally meet with people like you (referring to Martin) and that the customers preference was to engage with a person from a similar ethnic background. I do not find that the text message Martin has sent you is racist."*

73. Clearly this allegation is out of time. Although there is the text, so the words used is not in doubt, I need to consider the merits of the claim when deciding if it is just and equitable to extend time. I do not see how the Claimant says that this was less favourable treatment. In his appeal against dismissal, the Clamant accepted that the client asked to meet with him. Just because is race is mentioned, does not mean that the comment was discriminatory or constituted any less favourable treatment. I find the merits to be weak and therefore do not consider I can exercise my discretion to extend time to present this part of the Claimant's claim.

Comments relating to the Claimant's car between 28 January 2022 and 1 February 2022

74. I have considered the email exchange to which this allegation relates. The claim was presented some 15 months after this event. There is no mention of race or religion within the emails. I accept that given that these comments were part of a private email exchange between managers, that the Claimant would not have known about them at the time. He became aware after a subject access request provided documents in October 2022. He did not present his claim until 11 May 2023.

75. He therefore waited some eight months before presenting a claim. There is nothing on the face of the email exchanges that relates to the Claimant's race or religion. The Respondent witnesses would be prejudiced in having to recall matters occurring over a year before the claim was presented. The Claimant could and should have presented the claim more promptly after receipt of the emails. Had he done so then it may be that my decision would have been different, however as with the request to attend a meeting I do not think that the claim has much merit as pleaded and will not be exercising my discretion to extend time on the basis it is just and equitable to do so.

Notification of sick pay being withheld on 16 September 2022

76. The Claimant went on sick leave just before his disciplinary hearing and towards the end of his period of suspension. He was notified on 16 September that company sick pay would not be paid, only statutory sick pay. His period of absence on sick leave finished on 11 October 2022. The time starts to run on the date the decision about sick pay was notified, namely 16 September 2022. His claim is therefore some eight months out of time. Even had time started to run from the end of his sick leave, it would still be substantially out of time.

77. The Claimant says that this is discrimination on the protected characteristics of race and religion. The Respondent's policy is that sick pay may not be paid where the period of sickness is during a period of suspension or disciplinary process. The Respondents case is that at about the same time a white employee also had sick pay withheld for these reasons.

78. I find this allegation to be out of time. As with other complaints now made the Claimant did not complain at the time and only complained within his claim to the tribunal. This I find surprising if he truly believed it to be an act of discrimination, especially as by that time, he was facing very serious disciplinary matters which ultimately resulted in the termination of his employment.

79. I do not find it is just and equitable to extend time for presentation of this complaint. I conclude that the merits of this part of the Claimant's claim are not good and there was no good reason why time should be extended.

<u>Continuing acts of discrimination?</u>

80. Having concluded that individually each of the matters set out above are out of time, I then stood back to consider whether collectively they amount to a continuing act of discrimination so could be in time if the last act of discrimination pleaded was in time.

81. For there to be a continuing act of discrimination there must be some commonality between the events and some consistency in treatment. I need to see if the acts are a succession of unconnected or isolated acts or conduct continuing over a period.

82. The burden is on the Claimant to prove a prima facie case that the events under consideration were acts extending over a period of time. In order to consider this I have considered the wider claims as set out in the Claimant's claim form. I can see that the acts which I am considering now, do not relate to the wider claim in terms of the factual matrix. I also note that the personnel involved are different. I have also noted the time between each of the acts under consideration.

83. I do not find that there is a continuing act of discrimination such as to bring these matters within time. The allegations here, are historic, some being about 4 years before the claim was presented.

84. In all the circumstances, the allegations set out in paragraph 61 are dismissed as being out of time, and it is not just and equitable to extend time.

Employment Judge Martin

Date: 07 February 2024