Case Number: 2500852/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr N Kumrai		**(1) Mr J Aitken** **(2) Mr H Howard** **(3) Ministry of Justice**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 29 June 2020**
(in chambers)

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms N Chavda**
Mrs C Ihnatowicz

On reading the parties' written representations, the Tribunal unanimously adjudges that the Respondents' application for costs is refused.

REASONS

Introduction

1 On 10 January this year following a final hearing held on 10-18 December 2019 the Tribunal issued a reserved judgment dismissing Mr Kumrai's complaints of race-related harassment, direct race discrimination and victimisation against all three Respondents.

2 On 7 February the Tribunal received a detailed application by the Respondents for costs, which was opposed Mr Kumrai, by then acting in person, opposed in a document dated 2 March running to 18 pages and 88 paragraphs.

3 At a preliminary hearing for case management held by telephone before Employment Judge Snelson sitting alone, directions were given for the exchange of further written representations, each limited to 1,500 words, and the preparation of a costs bundle. At that hearing the judge decided, despite submissions to the contrary from Mr Kumrai, that it would not be proportionate to list a costs hearing and that it would be in keeping with the overriding objective to determine the application on paper.

4 We considered the application in a private meeting held by video conference call on 29 June this year.

The law

5 The power to make costs awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013, the material part of which is the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> **(b) any claim or response had no reasonable prospect of success.**

As the authorities explain, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised.

6 We are mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. We recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons, particularly those of modest means, in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes declined to exercise their right to bring (or contest) proceedings as a result of unfair economic pressure. On the other hand, we also bear in mind that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to us that these innovations, preserved in subsequent revisions of the rules, indicate a policy on the part of the legislature to encourage Tribunals to exercise their costs powers more freely than they did in the past, where unmeritorious cases are pursued or where the manner in which litigation is conducted is improper or unreasonable.

Reasons for the judgment on liability

7 In our reasons we introduced the dispute in these terms:

> **1. The Claimant and the First and Second Respondents are judges. …**
>
> **2. The Claimant, Mr Nawal Kumrai, describes himself as 'non-white' and of Indian ethnic origin. He practised as a solicitor from 1988 until 2011, when he took up a salaried appointment as a District Judge on the South Eastern Circuit, based at Willesden County Court. He also holds two fee-paid judicial appointments as a Tribunal Judge of the First-tier Tribunal, one, since 2000, in the Asylum & Immigration Chamber and the other, since 2011, in the Social Entitlement Chamber ('SEC').**

3. The First Respondent, Mr John Aitken, is the President of the SEC, a position which he has held since 2014. …

4. The Second Respondent, Mr Hugh Howard, is and at all material times was the Regional Tribunal Judge for the SEC's South-East Region …

5. The Third Respondent, the Ministry of Justice, is the Department through which the Courts and Tribunals Service is run.

6. The circumstances which led to this dispute will be explained in some detail in our narrative below but for present purposes this brief sketch will suffice. On 24 April 2015 Mr Kumrai, sitting with a medical member, heard an appeal against a decision of the Department for Work and Pensions (DWP) to refuse a claim for a particular social security benefit. The Tribunal allowed the appeal but, notwithstanding the successful outcome, the appellant made a complaint about the way in which Mr Kumrai had conducted the hearing, which was supported and/or corroborated by others who had been present, including the medical member. An investigation followed, conducted by Mr Howard pursuant to authority delegated to him by Mr Aitken. The case was ultimately referred by Mr Aitken to the Judicial Conduct Investigations Office (JCIO). That statutory body advised the Lord Chancellor and the Senior President of Tribunals that the complaint related to a judicial decision and/or case management and did not fall within the scope of the legislation governing complaints of judicial misconduct, and that accordingly it should be dismissed and Mr Kumrai given informal advice about the proper way to deal with vulnerable appellants. The Lord Chancellor and the Senior President of Tribunals took a different course. They decided, in light of procedural shortcomings in the course of the investigation (to which the JCIO had drawn attention), to refer the matter to Judge Peter Lane (as he then was), President of the General Regulatory Chamber of the First-tier Tribunal, for fresh consideration. In July [2016], Judge Lane issued a decision dismissing the complaint, essentially adopting the reasoning of the JCIO. At the same time he advised Mr Kumrai informally of the benefits to be gained from certain training courses which offer assistance on handling difficult situations in court.

7. By his claim form presented on 15 June 2016 Mr Kumrai claimed under the Equality Act 2010 that Mr Aitken and Mr Howard had racially discriminated against him, subjected him to race-related harassment and victimised him in the way in which the complaint about the hearing of 24 April 2015 was handled. The claim against the Ministry of Justice was put on the basis that Mr Aitken and Mr Howard were at all relevant times acting as its agents.

8. In their joint response form the Respondents pleaded jurisdictional defences to the effect that the investigation into the complaint was covered by judicial immunity and that parts of the case were out of time, and, in any event, denied all allegations of unlawful treatment on their merits.

9. The long delay in bringing the matter to a final hearing is largely explained by the fact that the proceedings were stayed pending determination of points on judicial immunity in *P v Commissioner of Police for the Metropolis.* The Supreme Court gave judgment in that case in November 2017[1] and as a result the judicial immunity defence was abandoned.

8 Having summarised the applicable law and set out our findings of fact, we began by considering whether, regardless of any link to race, the Respondents' conduct had been capable of amounting to harassment as defined in the Equality Act 2010 ('the 2010 Act'), s26. Our conclusion was that it had not (reasons, para 102).

[1] [2017] UKSC 65

9 We next addressed the question whether arguable detriments (for the purposes of the direct discrimination and victimisation claims) were made out. This stage of our analysis resulted in further parts of the case falling away.

10 We then arrived at the key issue: whether any of the surviving matters of complaint had arisen 'because of' Mr Kumrai's race (the 2020 Act, s13) and/or because of the undisputed fact that he had done a 'protected act' (s27). It is convenient to reproduce the remaining paragraphs of our reasons addressing liability in full.

> ***'Because of race' or 'related to race'?***
>
> **118 It may assist if, before turning to the critical question, we recapitulate. The claims which raise arguable allegations of detrimental treatment rest on the following matters:**
>
> **(1) Initiation of the investigation as an allegation of judicial misconduct;**
> **(2) Upholding the complaint;**
> **(3) Defects in the investigation, specifically:**
> **(i) premature conclusions in the letter of 31 July and not allowing Mr Kumrai sight of key evidence first;**
> **(ii) including irrelevant material in the report and/or failing to specify the limits of its relevance;**
> **(iii) omitting relevant documents (attachments);**
> **(4) Acceptance of the report.**
>
> **Items (1) and (3) stand against Mr Howard only; item (4) stands against Mr Aitken only; item (2) stands against Mr Howard and Mr Aitken.**
>
> **119 In addition, although these do not found legal claims, we have noted four further procedural flaws relied on by Mr Kumrai as evidential support:**
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> **(iv) Mr Howard's erroneous reading of rule 32;**
> **(v) Mr Howard's delay in supplying Dr D's statement to Mr Kumrai;**
> **(vi) Mr Howard's failure to show Mr Kumrai documents which he had considered but not mentioned in his report;**
> **(vii) Mr Aitken's erroneous reference to rule 115.**
>
> **120 We are mindful of the observations of Lord Hope in the *Hewage* case (cited above). This is in the normal run of cases and we are able to reach our findings on the evidence. The burden of proof provisions have nothing to offer. Was the detrimental treatment 'because of' Mr Kumrai's race? In other words, were the actions of Mr Howard and/or Mr Aitken materially influenced by the fact that he was of Asian descent? Mr Jupp [counsel for the Claimant] argued that, as Mr Howard and, we think, Mr Aitken agreed, it was evident from the name that the judge under consideration was of Asian origin, that the flaws in the process were such that there must be an explanation other than simple error and that the only sensible explanation was that race had been a factor. Mr Jupp based his case firmly on the proposition that the discrimination at work here was subconscious. Moreover, he did not develop an argument, or put a case, based on the notion that Mr Howard and/or Mr Aitken were influenced by stereotypical assumptions (which may be conscious or subconscious) about people (or judges) of Asian descent, or anything of the sort. No evidence was presented to us of any pattern of behaviour by Mr Howard or Mr Aitken in comparable cases involving other judges. Sensibly, no doubt, Mr Jupp did not seek to make anything of the fact that Mr Howard had upheld a complaint against one other judge with an ethnic minority background.**

121 Nor was there any wider, more general evidence suggestive of any form of racial bias on the part of Mr Howard or Mr Aitken in the performance of their duties or in the operation of any of the functions of the SEC locally or nationally. (We have noted the statistic cited in the Bindmans letter of 10 February 2016 appearing to show within the SEC a somewhat lower percentage of BAME judges than in the Tribunals system as a whole. That information plainly does not offer any help in this case and Mr Jupp rightly did not pray it in aid.)

122 Stepping back and reviewing all the evidence before us we are unable to identify anything suggestive of any element of racial bias underlying the behaviour of Mr Howard or Mr Aitken. There is nothing pointing to their treatment of Mr Kumrai having been different to the treatment that would have been accorded to any other judge of different race in like circumstances.

123 Faced with the difficulty of identifying anything that pointed to a racial motivation on the part of Mr Howard or Mr Aitken, Mr Jupp was driven to arguing that race *must* be the explanation, or at least a material part of it, because the procedural flaws and the unfairness to Mr Kumrai were so exceptional and egregious that no other inference can sensibly be drawn. The submission was persuasively presented but we cannot accept it. Coldly analysed, it simply embodies the commonplace error, identified in *Zafar* (cited above) and many other authorities, of equating unreasonableness with discrimination. We would go further: in our judgment it is plain that, in any other case on the same facts, Mr Howard and Mr Aitken would have proceeded as they did here, making the same mistakes as they made here.

124 Taking Mr Howard first, we are satisfied that, in a comparable case of a judge with a name suggesting a white Caucasian heritage, he would have proceeded exactly as he did in Mr Kumrai's case. It is plain to us that he genuinely judged that TS's complaint was a complaint of judicial misconduct. Mr Jupp did his best to persuade us that that view was untenable and, if genuinely held, must have been tainted by discrimination, but the argument was over-ambitious and we unhesitatingly reject it. On any view, there was, to put the matter at its lowest, a respectable basis for Mr Howard's assessment which, as we have stated, was shared by the Senior President of Tribunals. The fact that another senior member of the judiciary, Judge Lane, saw the matter differently only goes to show that the case was not straightforward and two quite different outcomes were possible. In the imaginary comparator's case, Mr Howard would have initiated the investigation just as he did in Mr Kumrai's case and he would not at any point have dismissed the complaint under rule 34(b). He would have called for the judge's file and that of the medical member. On reading the judge's file he would have formed the view that the individual concerned appeared resistant to authority and inclined to be difficult. He would have looked to an informal solution based on discussion and advice and, when that was met with recalcitrance, sought to pass the problem upward to the Chamber President. Met with guidance from the President that if a case of judicial misconduct was disclosed it must be followed through, he would have taken precisely the path actually taken. He would not have formed a different view from that which he formed about the complaint against Mr Kumrai. He would have judged, exactly as he did in Mr Kumrai's case, that a case of judicial misconduct was made out, because the powerful evidence of those present appeared to establish that he had engaged in sustained, repetitious, needless and humiliating questioning of a conspicuously vulnerable appellant on a deeply sensitive subject and had thereby gratuitously subjected her to a most distressing experience. He would not have been swayed by the argument advanced at length and in detail in Mr Kumrai's pleaded case and in his evidence before us, that the judge's questions were made necessary by the fact that the medical member had failed to focus on the relevant condition at the time of the DWP's decision. As we have pointed out, that argument was not made, or if it was, not sufficiently clearly made, in Mr Kumrai's correspondence in answer to the complaint and would not have been made, or would have been no better made, in the

case of his imaginary comparator.[2] In all the circumstances, we are satisfied that Mr Howard would have taken the course actually taken of preparing a report upholding the complaint. There is no evidential basis for any other conclusion.

125 In our view, the core logic of Mr Kumrai's case on discrimination does not withstand scrutiny. The central thesis that Mr Howard wanted in some way to punish Mr Kumrai (and race was something to do with that motivation) is belied by the narrative above. If so determined, why, we wonder rhetorically, was he consistent in seeking to avoid unpleasantness and formality and deal with the case quietly and informally? And why did he dismiss TLW's complaint on a technical ground (instead of, for example, pressing for a reply to his correspondence)? And why did he (with Mr Aitken) explore the possibility of referring the case (prematurely) to the JCIO in September 2015? And why, when all else had failed, did he try to persuade Mr Aitken to take it on, on the ground that Mr Kumrai would perhaps engage with him rather than brushing him aside? We cannot reconcile these facts with the theory of a motivation (conscious or subconscious) to subject Mr Kumrai to a disciplinary process.

126 The contemporary emails written by Mr Howard, from which we have quoted above, strongly reinforce our view that the theory at the heart of Mr Kumrai's case is misplaced. What shines out from his correspondence is that he was worried about Mr Kumrai and wished to find a means, through informal measures of advice and support, to engender in him improved self-awareness and greater skill and empathy in dealing with vulnerable litigants. Having formed an early view from perusal of the personnel file that he was dealing with someone who was inclined to be difficult and resistant to authority, he clearly judged that formal action would be unlikely to improve Mr Kumrai's judicial behaviour.[3] We would be surprised if Mr Howard did not also reflect that formal action would be likely to result in problematical relations between Mr Kumrai and those above him in the judicial hierarchy, namely Mr Newman and him.

127 For all of these reasons we are satisfied to a high standard that this is not a story of a zealous pursuit of disciplinary action by Mr Howard. Quite the contrary.

128 If our reasoning thus far is right, or at least open to us, where does the logic of Mr Kumrai's case tend from here? Presumably, it argues that, even if not bent on a disciplinary outcome until all other possibilities had been eliminated, Mr Howard nonetheless subjected Mr Kumrai to discriminatory treatment in relation to the detriments listed under item (3) of the schedule of complaints.

129 As to items (1) and (2), we have already explained our view that, in any comparable case involving a judge of different race, Mr Howard would have acted as he did. Turning to item (3), we are likewise satisfied that Mr Howard would have made the same errors in the course of his hypothetical investigation as he made in Mr Kumrai's case. We see nothing in those errors that points to a different conclusion. In part they were neutral or even leaned in Mr Kumrai's favour, such as the suggestion, obviously the product of error rather than artifice, that rule 32 permitted an informal advice-based solution (which, had he accepted it, would, no doubt, have been followed through to the advantage of all concerned). To the extent that errors caused prejudice to Mr Kumrai, we are satisfied that they are explained by ignorance and inexperience of the Rules. The explanation of simple error is, in the circumstances of this case, plausible and, we find, true. Mr Howard had no training in, and little or no relevant experience of, the Rules and in so far as he got guidance from Mr Aitken, he was not helped by it. He did regard it as relevant to have regard to Mr Kumrai's personnel file (and, as we have noted, he also had regard to that of Dr D). We can understand why he thought it was appropriate to do so (although we regret

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[2] As we have noted, the 2010 Act, s23(1) requires a 'like-for-like' comparison between the circumstances of the claimant and his or her hypothetical comparator.

[3] See, for example, his comment quoted above about "water off a duck's back" in his email to Mr Aitken of 9 October 2015.

that he lost sight of the need to have regard to principles of natural justice in making use of the information so gathered). The errors do not reflect well on Mr Howard (or Mr Aitken) but, viewed together, they do not point to a malign purpose. Our conclusion on the central planks of Mr Kumrai's case (items (1) and (2)) undermines his arguments on the procedural points. A finding that the key detriments were not motivated by any adverse *animus* (let alone discrimination) but that Mr Howard was so motivated in some aspects of the process followed (and not others) would make little sense.

130 In any event, we are satisfied that the flaws relied on under item (3) were not to any extent influenced by the fact of Mr Kumrai being of Asian descent. There is no evidence supporting any such link and strong evidence which argues to the contrary. Mr Jupp did not challenge Mr Howard's evidence of his long record of working to combat discrimination but based his case on the theory that, despite his commitment to diversity, he nonetheless fell prey on this occasion to subconscious bias. It is sufficient to say that we think it unlikely that that theory is soundly based.

131 As we have explained, the only race-based complaints against Mr Aitken which has survived our reasoning to date are the claims for direct discrimination relating to the decision to accept Mr Howard's report and the later decision to uphold the complaint. We find no substance in these claims. Although the report was flawed in several respects, the decision to accept it rested on the fundamental fact that, as we find, Mr Aitken agreed with Mr Howard that TS's complaint raised at least an arguable allegation of judicial misconduct. The decision to uphold the complaint, which we treat as taken on 2 March 2016 (when the report and recommendation were sent to the JCIO) was based, we find, on Mr Aitken's genuine view that the complaint was made out. There was nothing odd or unsatisfactory about either decision. We think it unlikely that Mr Aitken would have given thought to whether the report betrayed flaws or errors in its preparation and/or presentation. He is a very busy senior judge with numerous responsibilities. In any event, the key question for him was whether the report should be accepted, and, certainly in Mr Aitken's eyes, that did not depend on whether there were imperfections in it but on whether he agreed with its substance.

132 As in the case of Mr Howard, we see nothing in the history to suggest an *animus* on the part of Mr Aitken against Mr Kumrai.

133 In any event, there is simply nothing pointing to race having played any part in Mr Aitken's unremarkable decision to accept the report and, absent any response under rule 70, uphold the complaint.

134 The considerations summarised above have led us to the clear conclusion that race played no part in the conduct of Mr Howard and Mr Aitken.

135 It follows that, had we found treatment by Mr Howard or Mr Aitken capable of constituting harassment, any complaint based on it would have failed on the ground that the act or omission was not 'related to race'.

136 Had we applied the burden of proof provisions, we would have reached the same result. In our view Mr Jupp fails to make out a *prima facie* case. He makes telling criticisms of the procedural errors but he does not get a complaint of race-based less favourable treatment off the ground. As the authorities show, even where less favourable treatment *and* a difference in status are demonstrated that by itself is not enough to shift the burden. Here there is no difference in status because no comparison is set up except a theoretical comparison based on an imaginary comparator. There is no wider evidence whatsoever to support a theory of race discrimination on the part of either of the two actors.

137 Even if we had found that the burden was upon the Respondents the claim would have failed. We would have held that the weight of the evidence marshalled

before us, the most important parts of which we have mentioned above, argues against discrimination having played a part in any of the detriments complained of.

138 The harassment claims have already fallen away but, had they not, they would have failed on the ground that no act relied upon was 'related to' Mr Kumrai's (or anyone's) race. Our reasoning in relation to discrimination is repeated.

Victimisation

139 The victimisation claim is directed against Mr Aitken and the Ministry of Justice, but not Mr Howard. The protected act is the Bindmans letter of 10 February 2016 ('the Bindmans letter'), which is agreed to fall within the 2010 Act, s27(2)(c).

140 It is right to say that in his closing address to us, Mr Jupp said little or nothing on the subject of victimisation. But since no part of the victimisation claim was withdrawn, we must deal with it.

141 The only detriments relied on under this head of claim which survive our analysis above are the (separate) decisions to accept Mr Howard's report and to uphold the complaint. The claim based on the first is obviously untenable since the acceptance of the report predated the Bindmans letter. The claim based on the second is, we find, unsubstantiated. In our view Mr Aitken's direction of travel well before 10 February 2016 was towards accepting the content and conclusions of the report. He had approved the document on 2 November 2015. We see no possible basis for supposing that receipt of the Bindmans letter influenced in any way his consistent and unremarkable decision to uphold the complaint.

142 For completeness, we should add that in any event the matters relied on as items (5) and (6) of the schedule of complaints were not influenced at all by the protected act.

Result on the substantive merits

143 For the reasons given, all claims fail on their merits.

Time

144 Mr Kirk submitted that items (1), (3) and (4) in the schedule of complaints were out of time and should fail on that jurisdictional grounds (see his closing submissions, paras 24-25). We agree. Further, we are satisfied that the same reasoning must apply to item (2) in so far as it stands as an allegation against Mr Howard: he 'upheld' the complaint, at the latest, on 26 October 2015, when he completed his report and submitted it to Mr Aitken. By contrast, as we have stated, we treat Mr Aitken as having upheld the complaint on 2 March 2016, when he referred the case to the JCIO and recommended a formal warning. In circumstances where, as we have found, there was no unlawful treatment, no question of relevant 'conduct extending over a period' (under the 2010 Act, s123(3)(a)) can arise. Nor will the Tribunal consider exercising its discretion to substitute a longer time limit than the standard three months, since it would be idle to do so in circumstances where the claims in question have been found to be without merit. Accordingly, we dismiss these elements of the case on the further ground that the Tribunal has no jurisdiction to entertain them.

The costs application

11 The application is based on two grounds: first, that Mr Kumrai acted unreasonably in bringing, or persisting with, his claims; and secondly, that his claims had no reasonable prospect of success.

12 The first ground (unreasonable conduct) divides into three separate elements. First, it is said that Mr Kumrai brought claims which he knew, or ought to have known, had no substance. Second, the Respondents complain that he unreasonably failed to heed the costs warning contained in a letter of 28 November 2018 and repeated in subsequent correspondence. The third argument is that Mr Kumrai unreasonably pursued claims which were manifestly out of time.

13 The Respondents put their costs of defending the proceedings at over £60,000 but limited the application to £20,000, the largest sum awardable without a detailed assessment.

14 Mr Kumrai's many points resisting the application can be summarised in two short propositions: he did not act unreasonably and his claims, although unsuccessful, were not misconceived or so weak as to have no reasonable prospect of success.

Analysis and conclusions

15 We start with the unreasonable conduct ground. Here, the first submission was that Mr Kumrai acted unreasonably in bringing a claim which he knew, or ought to have known, was misconceived. We cannot accept that Mr Kumrai knew or believed, or ought to known or believed, that the claims were misconceived. We have found that, in a surprising number of significant respects, the procedural handling of the complaints against him was deficient and he was subjected to unfair treatment by which he was justifiably aggrieved. The defects were not acknowledged or explained in the pre-litigation correspondence. In all the circumstances, it was not, we think, unreasonable for him to suspect that some personal characteristic of his might, at least to some material extent, explain the treatment of which he complained.

16 Nor are we persuaded by the second contention under the first ground. In our judgment it was not unreasonable for Mr Kumrai to persist with his claim after receiving the letter of 28 November 2018. That letter argued that discrimination would not be established, but it added nothing of substance to what was pleaded in the grounds of resistance (in which discrimination was denied but, again, the defective procedure was not acknowledged,[4] much less explained). Nor was it unreasonable to ignore the Respondents' 'drop hands' offer very shortly before the trial. If, as we hold, it was permissible for Mr Kumrai to go to law in the first place, it was equally permissible for him to pass up a late offer of the chance to abandon the claim. (For completeness, we pause here to mention a disagreement about the admissibility of an email on behalf of Mr Kumrai dated 14 January 2019. This struck us as a non-issue. The message briefly rejected the invitation in the letter of 28 November 2018 to withdraw the claim. Whether or not the message was covered by without-prejudice privilege is beside the point: what is not, and cannot be, disputed is that the *Calderbank* 'offer' in the letter of 28 November 2018 was not accepted. The Respondents relied on that rejection, as they were entitled to do, but we have found that it was not unreasonable. The precise terms in which the rejection was couched are simply irrelevant.)

[4] See the grounds of resistance, para 22, in which all Mr Kumrai's allegations of procedural shortcomings were explicitly 'not admitted'.

17 The third limb of the first ground fares no better that the first two. The complaint was about a process which began with the complaint against Mr Kumrai in May 2015 and ended with the decision of Judge Lane 14 months later. It was not unreasonable for Mr Kumrai, who at all relevant times acted on the advice of reputable solicitors, to treat the series of acts or omissions on which he relied as 'conduct extending over a period' for the purposes of the 2010 Act, s123(3)(a). Claims before us failed on time grounds but that was only because they had failed on the merits. If we had taken a favourable view on the merits, we might well have found for Mr Kumrai on the 'conduct extending over a period' question which would then have arisen. Moreover, it was plainly reasonable for Mr Kumrai to base his case on jurisdiction on s123(3)(a) and not to invoke the 'just and equitable' discretion under s123(1)(b).

18 The second ground, that the claims were misconceived, is also rejected. In our judgment the claims were arguable. The fact that, after a full trial and careful analysis in chambers, we have reached the clear view that discrimination is not made out does not warrant the assertion that they were misconceived. The Respondents did not seek to have them struck out on that ground and any such application would surely have failed.

Outcome

19 For the reasons given the application for costs fails. We are not persuaded that any ground for making a costs order is established. And even if we did have the power to make an order, we would not regard this as a proper case in which to exercise it. The Respondents were entitled to make the application, but we regret that they chose to do so. They would have done better to reflect on the inherent difficulties which beset costs applications based largely on hindsight. The point was perhaps most memorably made in *ET Marler Ltd v Robertson* [1974] ICR 72 NIRC (Sir Hugh Griffiths and members):

> **Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they first took up arms.**

_____

EMPLOYMENT JUDGE - Snelson
29/06/2020

Reasons entered in the Register and copies sent to the parties on - 08/07/20

For Office of the Tribunals