EMPLOYMENT TRIBUNALS

Claimant		Respondents
Mr J Holbrook	**v**	**(1) TOM COSGROVE QC** **(2) PHILIP COPPEL QC** **(3) JAMES FINDLAY QC** **(4) RANJIT BHOSE QC** **(5) HARRIET TOWNSEND** **(6) RYAN KOHLI** **(7) ROBIN GREEN** **(8) WAYNE BEGLAN** **(9) ROB WILLIAMS** **(10) ASHLEY BOWES**

OPEN PRELIMINARY HEARING

Heard at: **London Central (By CVP remote videolink)**

On: **22 June 2022**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **In Person**
For the Respondents: **Mr J Laddie QC**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. The Claimant's claim was brought out of time. It is not just and equitable to extend time for it. The Tribunal does not have jurisdiction to hear it and it is dismissed.

REASONS

1. This Open Preliminary Hearing ("PH") was listed to determine a number of matters. However, at the start of the hearing, the parties agreed that just one matter was to

be decided: "For any allegation where the claim was brought out of time, is it just and equitable to extend time?"

2. It was agreed that all the Claimant's allegations in the claim were, prima facie, presented out of time.

3. I was given a number of documents to read. There were skeleton arguments from each party. I read the witness statement of the Claimant dated 24.5.22. There was a long bundle and a "T bundle". There were 2 authorities bundles, .one from the Claimant and one from the Respondent.

4. The Tribunal's reading time, the Claimant's evidence and the parties' submissions occupied the whole of the 1 day hearing time allocated to the case. I reserved my decision.

5. At the end of the hearing, the Respondent referred me to the case of *John Noel Croke v Secretary of State for Communities and Local Government* [2019] EWCA Civ 54. The Respondent sent that case to me. Both parties then sent written submissions on that case, and the Claimant also made written submissions in reply.

Background

6. The Claimant is qualified as a barrister and was a tenant at the Respondents' Chambers ("Cornerstone") at the time of the events in question in this claim. He brings complaints of direct belief discrimination, harassment related to belief and victimisation against the Respondents.

7. In his amended grounds of complaint paragraph [12], he summarises his beliefs as follows: "The Claimant is a social conservative in the manner of the late Professor Sir Roger Scruton and in particular he is a critic of identity politics. Accordingly, he believes in the importance of nation, community and family and on finding ideas that members of society can share, whereas emphasising one's race, sex, sexuality and gender draws attention to characteristics that are exclusive, rather than inclusive."

8. His claim arises out of a "tweet" he made on 17 January 2021 saying, "The Equality Act undermines school discipline by empowering the stroppy teenager of colour". He says that, following the tweet, the Respondents victimised, harassed and discriminated against him in the following ways, all done in January 2021 (amended Grounds of Complaint):

"Over a period of ten days and subsequently the Respondents engaged in eight acts of unlawful discrimination and harassment in that each act treated the Claimant less favourably than they would have treated a member with mainstream political views or a member who did not espouse conservative beliefs such as ones that challenged identity politics, multiculturalism and 'woke' ideas.

i) 22 Jan, 8.45pm, Friday evening phone conversation

51. The 2nd Respondent asked the Claimant to take down the tweet and this was less favourable treatment.

ii) 23 Jan, 9:43am, Saturday morning email

52. In an email the 1st and 2nd Respondents treated the Claimant less favourably by:

a) Claiming he had breached section 3 of Cornerstone's Social Media Policy - but by failing to state any way in which it had been breached. (The Claimant denied this in his Monday memo of 25 January.)

b) Asking him to remove his 'tweet immediately and permanently'.

iii) 23 Jan, 4:36pm, Saturday's public statement

55. Cornerstone made a public statement on Twitter (and on LinkedIn), which was repeated on Cornerstone's website on Monday 25 January. This statement constituted less favourable treatment because:

a) It expressly challenged the merit and worth of the Claimant's political belief.

b) It implied that 'the views of Cornerstone Barristers' were better than the Claimant's, whose views were impliedly disreputable.

c) It implied that unless the Claimant deleted the tweet he would be subject to a detriment.

iv) 26 Jan, Tuesday memo

56. The 1st and 2nd Respondents, with the authority of the Management Board, wrote to the Claimant on 26 January and subjected him to less favourable treatment in that they:

a) Mischaracterised the school uniform tweet as 'denigrating and/or insulting', making 'a personal and offensive allegation' and as being 'designed to demean or insult' so as to undermine public confidence in the bar, and as being 'in fact racist'.

b) Asked the Claimant to 'remove the tweet and to make a proper apology for the offence it has caused both on Twitter and in writing to the Williams family'.

c) Informed the Claimant that the Board considered it necessary for the Cornerstone membership to consider his expulsion.

d) Generally denigrated the Claimant's right to express his political beliefs.

v) Rejection of the Claimant's resignation

57. Cornerstone declined to accept the Claimant's constructive resignation as it wanted to expel him so as to satiate the appetites of those who wanted revenge for the Claimant's expression of non-woke beliefs.

vi) 31 Jan, Sunday Chambers' Meeting

58. Cornerstone held a Chambers' Meeting on Sunday 31 January that passed a resolution to expel the Claimant at 00.01 hours on Monday 1 February 2021.

vii) 31 Jan, Sunday statement

59. Cornerstone made a public statement (including on: Twitter, LinkedIn, its own website and to the Guardian and other media via its consultants, Kysen PR) which treated the Claimant less favourably by challenging the merit and worth of the Claimant's:

a) political belief by mischaracterising the tweet so as to describe it as 'particularly offensive' and as having unspecified insinuations that needed to be 'unequivocally condemned'

b) social media 'statements' (plural). (The Claimant had not been asked by the Board about any other statements during this ten day period.)

9. The Claimant presented his claim on 30 September 2021.

Findings of Fact Relevant to Time Limits and Extension of Time

10. Until the Claimant left the Respondents' Cornerstone Chambers in January 2021, he had been a full-time self-employed barrister for 30 years, having been called to the bar in 1991. He specialized in housing and public law. The Claimant had undertaken some employment law cases as a pupil for the Free Representation Unit. He dealt with public sector equality duty issues under the Equality Act 2010 in his practice.

11. He left the Respondents' Chambers in the aftermath of his "tweet" on 17 January 2021. (The aftermath is broadly what is in dispute in this case).

12. The Claimant holds what he describes as conservative beliefs and is critical of "identity politics". He contends that his tweet was an "expression of the conservative belief that it is important to emphasise what people can share, whereas the modern-day left, particularly on the issue of race and culture, tend to celebrate what makes people different".

13. He describes himself as a political journalist as well as a barrister. He has written articles expressing his criticisms of what he describes as "woke" culture.

14. At the time he made his 17 January 2021 tweet, the Claimant was aware of the December 2019 decision of EJ Tayler at Central London Employment Tribunal in *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) that gender critical beliefs did not amount to a philosophical belief protected under the Equality Act 2010.

15. He had read the *Forstater* ET decision and had written about the political significance of it in an article published by "Spiked" on 23 December 2019, "Maya Forstater: a champion of democracy", p92. The Claimant had also written about 6 other articles on discrimination law and had read caselaw, including the *Essop v Home Office* case [2017] UKSC 27.

16. The Claimant had read commentary by Paul Johnson, Professor of Sociology, on the first instance *Forstater* case, which appeared to suggest that the first instance decision would be upheld on any appeal, p870.

17. The Claimant believed that the *Forstater* case reflected settled law that Ms Forstater's 'gender critical' belief was in direct contradiction with the human rights and fundamental freedoms of transgender people established under the ECHR and was therefore not "worthy of respect in a democratic society.

18. He believed that his own views were not likely to be held to be "worthy of respect in a democratic society", because his beliefs conflicted with the protections given to people in respect of their race, sex and gender.

19. The Claimant sought legal advice in relation to his potential dispute with his Chambers, arising from his tweet and Cornerstone's reaction to it, on 26 January 2021. In particular, he sought advice from barrister, Nicholas Leviseur in relation to: defamation; likely action of the Bar Standards Board; and any issues arising from Chambers' constitution. He also asked about "any other legal remedy". Mr Leviseur did not advise the Claimant about a potential claim against Cornerstone to an employment tribunal.

20. The Claimant also spoke to barrister Paul Diamond, on the basis that Mr Diamond had 'had disputes with his former chambers' on 'matters of belief' p388. The Claimant did not discuss a potential claim against his Cornerstone with Mr Diamond.

21. The Claimant spoke to various other acquaintances with some legal knowledge around the time, including journalists at "the Conservative woman" and a neighbour who was an employment law solicitor. None advised him to bring a discrimination claim against the Respondents.

22. A solicitor, Robin Tilbrook, tweeted to the Claimant on 25 January 2021 saying that he "suspects that [he is] a victim of illegal discrimination of philosophical beliefs…" and advising him to remember the "6 month" time limit. The Claimant asserts that he has "no recollection of reading" the tweet, but later, in August 2021, he consulted Mr Tilbrook in relation to a potential claim against the Respondents.

23. The Bar Standards Board "BSB" wrote to the Claimant on 12 April 2021, informing him that it was formally investigating 18 of his tweets, p534. The Claimant devoted considerable time to the resulting BSB proceedings. He produced a 33-page response to the investigation dated 4 May, p551. He was concerned that this regulatory investigation could result in a substantial fine or disbarment, either of which, he believed, would have ended his legal career.

24. The *Forstater* EAT decision was handed down on 10 June 2021, *Maya Forstater v CGD Europe and Others: UKEAT/0105/20/JOJ*. The EAT decided that Ms Forstater's "gender critical" beliefs amounted to a protected belief under *s10 Equality Act 2010*.

25. On 24 June 2021 the Claimant tweeted an article written by Lord Sumption on the *Forstater* case in The Times, saying, "Former Supreme Court judge Jonathan Sumption on the Forstater judgment, which strikes an important blow for free speech." P584.

26. The Claimant was expecting the BSB's decision in its proceedings against him at that time. On 5 July 2021 the BSB informed the Claimant that it would consider his case on 2 August 2021. The BSB decision was sent to the Claimant on 9 August 2021, p987- 589.

27. While the Claimant was aware of the *Forstater* appeal judgment, he did not read it until 23 August 2021. He did not want to delay the BSB proceedings outcome further by making further submissions based on the Equality Act. When he did read the EAT decision in *Forstater*, he did so in order to prepare his appeal against the BSB's administrative sanction. Having done so, he believed that he might have a legal remedy against Cornerstone.

28. On 23 August 2021 the Claimant approached a solicitor, Robin Tilbrook, for advice in relation to a claim against his former Chambers. He believed Mr Tilbrook was

an expert in employment law, because Mr Tilbrook had given employment advice to the "Workers of England" Union. Mr Tilbrook's website suggested that he was a generalist high street solicitor, p951. Mr Tilbrook considered the Claimant's potential claim against his Chambers should be brought in the County Court, p595. He advised him to serve a letter before action, which he did on 27 August 2021, p613.

29. On 25 August 2021 the Claimant asked Mr Tilbrook to arrange a conference with leading counsel, p601. He continued to press him to do so on 4 and 6 September 2021, pp 644 – 643. On 17 September 2021 Mr Tilbrook advised the Claimant that time did not run while ACAS was considering the matter. The Claimant contacted ACAS on 17 September 2021, p676. The Claimant consulted an employment / discrimination law specialist barrister on 29 September, p694, and issued this claim the next day, p710.

30. The Claimant knew of the existence of time limits in Employment Tribunals from his FRU experience. He knew of the 3 month time limit for presenting unfair dismissal claims. He believed that the time limits for discrimination claims were longer.

31. The Claimant has made DSAR requests of his Chambers and received considerable documentation as a result.

32. The Claimant wishes to resume full time work at the Bar. He claims more than £3M in compensation in this claim.

Time Limits

33. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

    a) the period of three 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.

34. The Court of Appeal made clear in *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, CA at [23]: "If the claim is out of time, there is no jurisdiction to consider it unless the Tribunal considers that it is just and equitable in the circumstances to do so".

35. The power to extend time for the consideration of a complaint have been held to give Tribunals 'a wide discretion to do what it thinks is just and equitable in the circumstances ... they entitle the [employment] tribunal to take into account anything which it judges to be relevant', *Hutchison v Westward Television Ltd* [1977] IRLR 69, [1977] ICR 279, EAT. The discretion is broader than that given to tribunals under the 'not reasonably practicable' formula: *British Coal Corpn v Keeble* [1997] IRLR 336; *DPP v Marshall* [1998] ICR 518, EAT. Factors which can be taken into account include the prejudice each party would suffer as a result of the decision reached and all the circumstances of the case, including the length of and reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information, the promptness with which the Claimant once he knew of the facts giving rise to the cause of action and the steps taken by the

Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

36. However, notwithstanding the breadth of the discretion, there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion. The onus is always on the Claimant to convince the tribunal that it is just and equitable to extend time, *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434, at para 25, per Auld LJ.

37. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 11943 the Court of Appeal considered that: "…factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

38. "There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time..." per HHJ Auerbach in *Wells Cathedral School Ltd v Souter*, EA-2020-000801-JOJ at [32].

39. Regarding prejudice to the Respondent, prejudice faced by a Respondent, in *Miller and Others v The Ministry of Justice and Others* UKEAT/0003/15/LA at §§12-13 Laing J said:

"12. … There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses...

13. … DCA v Jones also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET..." .

40. Where the reason for delay is said to be the Claimant's alleged ignorance of their rights/ time limits, that ignorance must be reasonable, Lady Smith in Perth and *Kinross Council v Townsley* UKEATS/0010/10/BI at [39]-[41]. In *Hunwicks v Royal Mail Group Plc* UKEAT/0003/07 the EAT said at [9]: "The fact that a claimant may have been unaware of relevant time limits does not necessarily make it just and equitable to extend them, particularly where, as here, the claimant is a person of some intelligence and some education with access to legal advice. It will frequently

be fair to hold claimants bound by time limits which they could, had they taken reasonable steps, have discovered."

41. The Tribunal may form the view that a Claimant should not be disadvantaged because of the fault of their advisers, see *Chohan v Derby Law Centre* [2004] IRLR 685, EAT.

42. In *John Noel Croke v Secretary of State for Communities and Local Government* [2019] EWCA Civ 54 the Court of Appeal considered the compatibility of a 6-week time limit in respect of certain planning appeals with Art 6 ECHR. The Court of Appeal said that the discretion to extend a time limit on human rights grounds was one of 'limited scope' [31] in 'exceptional circumstances' [40]. At [43]-[45], the Court held: "It is not suggested that the right to a fair trial under Article 6 is impaired by the statutory provisions themselves, including the provision for the making of an application under section 288 within the specified time limit. The statutory context here is very different from that in Mucelli, or in Pomiechowski, or in Adesina. In each context, Parliament has provided the requisite time limit for issuing proceedings, having regard to the need for fairness, finality and certainty. In some statutory schemes the time limit is necessarily short, in others much longer. It is not, I think, a useful exercise to compare one with another. Even where statutory time limits are very short, it may generally be assumed, as Lord Mance said in Pomiechowski (at paragraph 39), that Parliament has intended that the period allowed "would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time."…

45. … Parliament might have provided a longer time limit, but it did not. It imposed a relatively generous but finite period within which a challenge can be brought… It has been held, rightly in my view, that the time limit is compatible with article 6... To adopt the words used by the European Court of Human Rights in Tolstoy Miloslavsky, it does not "restrict or reduce" the applicant's access to the court "in such a way or to such an extent that the very essence of the right is impaired". It respects and protects that right…".

Discussion and Decision

43. The Claimant contends that his claim is of broader importance, in that it involves rights of freedom of expression. He contends that the just and equitable discretion available in this case should be exercised to give effect to Article 6 of the ECHR.

44. He contends that, before the EAT decision in *Forstater*, he had a reasonable belief that any claim he issued under the Equality Act against the Respondents would fail because his beliefs would not be held to be worthy of respect in a democratic society.

45. In submissions, the Claimant said that he accepted that the first instance *Forstater* decision was not binding authority.

46. He contends that it was reasonable for him not to have read the *Forstater* appeal decision between 10 June and 23 August because he was reasonably preoccupied with the BSB proceedings and did not want to delay the BSB proceedings outcome further by making further submissions based on the Equality Act and *Forstater.*

47. He also contends that his reliance on solicitors' advice to send a letter before action in August 2021, rather than to contact ACAS or issue proceedings in the tribunal

was reasonable because Mr Tilbrook held himself out as a discrimination law specialist.

48. He contends that there would be no prejudice caused to Cornerstone by extending time, as what occurred was very well documented, as demonstrated by the large amount of documentation disclosed on his DSAR application.

49. I decided that, on the facts, the Claimant made a considered decision, during and immediately after the events in question, not to bring a claim of discrimination against the Respondents.

50. He was in possession of the facts of the alleged detriments when they occurred, but made a judgment that his claim would not succeed on the law. The relevant law he relied on in coming to that judgment, particularly, was the first instance *Forstater* decision. The Claimant had read that case for himself and had formed his own opinion on it. He knew, nevertheless, that that was not binding authority. It was also clear that the *Forstater* case concerned a different set of philosophical beliefs to the Claimant's. Accordingly, at the time the Claimant made a decision not to bring a discrimination claim based on his philosophical belief, there was no binding authority on conflicts of rights case and certainly no binding authority on the Claimant's particular belief.

51. On the facts, his failure to bring his claim in the 3 month limitation period was his own considered decision. He did not rely on advice from others. I did not accept that there was any legal impediment, at the time, to him bringing a discrimination claim against these Respondents.

52. Insofar as the Claimant relies on his lack of knowledge of relevant time limits, I considered that his lack of knowledge was not reasonable. He did not conduct any research into discrimination law time limits. He was well aware of the 3 month time limit for bringing claims to employment tribunals, particularly in relation to unfair dismissal claims. He is a barrister of longstanding call. He could easily have conducted his own research and established the time limits for his discrimination claim.

53. Even if the Claimant had a reasonable belief that he would not succeed in a claim based on his understanding of the law as set out in the first instance *Forstater* decision, I considered that he was significantly at fault in not reading the EAT decision in *Forstater* when it was handed down in early June 2021. He had written articles on *Forstater* and was acutely interested in it and its significance for society. He tweeted about its importance on 24 June 2021. I did not accept that the BSB proceedings were good reason for him not to consider and pursue any potential claim against these Respondents. There were no BSB hearings or procedural steps between 10 June 2021 and 9 August 2021 in which the Claimant was engaged. I found that the Claimant simply decided not to investigate further an avenue of legal argument based on the EAT decision in *Forsater* further between 10 June and 23 August 2021.

54. The Claimant may have acted relatively promptly after 23 August 2021 in seeking legal advice and he may have been misled by his solicitor, at that point, about time limits and the appropriate forum for his claim. Nevertheless, the delays up to 23 August 2021 were wholly the Claimant's responsibility, for which there was no good reason.

55. Taking account of the prejudice caused to the parties by the granting or refusal of an extension of time, I considered that the Respondents would indeed be considerably prejudiced by an extension of time. The delay in bringing the claim was lengthy – 5 months, a period substantially greater than the original time limit. The most obvious hardship to the Respondent is the disadvantage of having to meet a claim which was otherwise out of time. However, I also agreed with the Respondents' submission that the relevant decisions would have been made by numerous members of Chambers, whose thought processes, in a snapshot of time in January 2021, would need to be examined. The passage of time is inherently likely to have interfered with the ability of those individuals to recall their motivations and thought processes.

56. I acknowledged that the Claimant would be prejudiced in that he would not be able to pursue his discrimination claim against the Respondents. However, I concluded that he was entirely responsible for that. He made a considered decision not to bring a claim because he thought it would not succeed, despite the absence of relevant precedent.

57. The balance of prejudice pointed to the refusal of an extension of time.

58. I rejected the argument that I ought to exercise my discretion to extend time for the Claimant's complaints to give effect to his Article 6 rights under the ECHR. The 3 month time limit for bringing discrimination claims, combined with a just and equitable extension, adequately safeguard the Claimant's Article 6 rights. I refer to the Court of Appeal's comments in *Croke* in relation to a much shorter time limit.

59. Nor was I persuaded that the nature of the Claimant's claim, relating to important rights of freedom of expression, should override the other factors relevant to the exercise of my discretion. I was not persuaded that the Claimant's complaints of discrimination were more important or weighty than many other discrimination complaints, based on other characteristics, brought to the Tribunal. The Claimant's complaints are not in a special category requiring more favourable consideration in the exercise of discretion.

60. I did not accept that the merits of the Claimant's claim were obviously strong, so that they should be taken into account in exercising my discretion in favour of an extension of time. I noted the Respondents' arguments following arguments, which also appeared weighty:

    a) The Respondents' actions were not related to the Claimants' stated belief of "social conservatism" because:

        i) The catalyst for action was not the Claimant's "socially conservative" views, which he had been expressing in publications and social media for many years, but a single tweet, apparently insulting a mixed race girl by reference to her colour and insinuating that she was (i) stroppy, and (ii) should not be – as a person of colour – empowered.

        ii) The Respondents acted as they did because of the Tweet (and in particular because it was offensive and regarded as discriminatory), and not because of the Claimant's "social conservatism".

        iii) The Tweet, insofar as it manifested a belief, did not manifest the Claimant's social conservatism but something narrower (and not capable of

protection under the *Grainger* criteria): a criticism of the effect of the EqA on school uniform policy.

61. On all the facts, there was very little reason to extend time. The Claimant has not shown that time should be extended. His claim was presented out of time. The Tribunal has no jurisdiction to consider it. It is dismissed.

EMPLOYMENT JUDGE BROWN
On: 2 August 2022

SENT TO THE PARTIES ON 02/08/2022

FOR SECRETARY OF THE TRIBUNALS