EMPLOYMENT TRIBUNALS

Claimant: **R Jadhav**

Respondent: **Herbalife Europe Limited**

Heard at: **Bury St Edmunds by Video**

On: **14 June 2023**

Before: **Employment Judge Murphy**

Representation
Claimant: In person
Respondent: Ms S Berry of counsel

RESERVED JUDGMENT

1. The following complaints contained in paragraph 90 of the Particulars of Claim (PC), brought under section 26 of the Equality Act 2010 ("EA") (harassment related to race), are struck out on the ground that the claimant has no reasonable prospect of establishing the Tribunal has jurisdiction to hear those complaints, having regard to the applicable time limits in section 123 of the EA.

   90.
   a) *On 13 January 2020 the claimant was subjected to comments by the office manager at the time about the respondent's policy not to eat "smelly" foods at his desk such as "curry";*
   b) *In or around April 2020 the claimant was subjected to comments from his line manager Shaun Wynne-Jones, about being "too bullish" to survive in the Respondent's business and he needed to change;*
   c) *On 22 April 2020, Shaun Wynne Jones sent the Claimant a personality test to complete which was not approved by HR or sent to anyone else;*
   ….
   f) *In July 2021, the Claimant was forced to implement a social media content policy which was intentionally excluding topics to do with race, gender and sexual orientation amongst other topics which he did not agree with;*

g) In or around March 2022, and during his end of year review, the Claimant was subjected to criticism by Chris Stirk that he appeared "too angry" in Teams calls;

…..

i) On 22 April 2022, the Claimant was subjected to comments by Chris Stirk criticising persons with beards;

2. The following complaints contained in paragraph 89 of the PC, brought under section 27 of the EA (victimisation), are struck out (subject to the exceptions indicated) on the ground that the claimant has no reasonable prospect of establishing the Tribunal has jurisdiction to hear those complaints, having regard to the applicable time limits in section 123 of the EA.

89. …

a) None of the claimant's Protected Disclosures [also alleged to be protected acts] *set out above (Protected Disclosures 1*-6*) were ever properly investigated as they remained unresolved, which meant the claimant was continued to be subject to bullying and harassment and ultimately dismissed*".

[This alleged act of victimisation is struck out subject to the following exceptions: the alleged failure to investigate Protected Disclosure 6 (said to have been made on 30 June 2022) is not struck out and the alleged failure to investigate Protected Disclosure 5 (said to have been made on 10 December 2021) is not struck out in so far as it relates to the alleged failure to investigate the allegation that Andrew Trouce and Violetta Zlatareva openly disliked the use of Black models in marketing materials.]

e) On 15 June 2021, the claimant was forced to move teams despite not wanting to for fear of racial harassment;

f) On 2 September 2021, the claimant's line manager at the time, Julian Cacchioli, lied to the claimant about the true reason behind the discriminatory unwritten social media policy set out above which the claimant was being forced to implement to try to avoid the claimant making another protected disclosure given knowledge of his previous protected disclosures;

3. The remaining complaints of harassment set out in paragraph 90 and of victimisation set out in paragraph 89 of the PC have not been struck out. Any question of time bar in relation to those extant complaints will be reserved to be determined substantively at the final hearing.

REASONS

Background

1. The claimant complains, among other matters, of harassment related to race and victimisation because of six separate alleged protected acts, contrary to sections 26 and 27 of the EA. At a preliminary hearing (PH) on case management on 24 April 2023, it was determined that a preliminary hearing would take place on 14 June 2023 to determine the following issues:

    (i) Whether any or all of the claimant's claims are out of time pursuant to section 123 of the EA and, if so, whether it is just and equitable to extend time to validate those claims. The claims in question and the limitation points to be determined are set out at paragraphs 3-7 inclusive of the respondent's Grounds of Resistance attached to their ET3; and

    (ii) That after the determination of the limitation points above, the Judge will deal with such further case management issues before that part of the claimant's claims that survive, as is appropriate.

2. A final hearing has been listed for 31 May and 3-7 June 2024 to hear the claimant's extant complaints.

3. ACAS Early Conciliation commenced on 30 September 2022. The Early Conciliation Certificate was issued on 2 November 2022. The ET1 was presented on 2 December 2022. Any acts or omissions that took place before 1 July 2022 are potentially out of time.

Clarification of the Issue

4. We had a preliminary discussion to clarify the precise issue to be determined at today's preliminary hearing. With respect to the limitation issues, the respondent asserts at paragraphs 3-6, with reference to relevant paragraphs of the Particulars of Claim, that a variety of the claims which have been brought have been brought outside the time limit and it would not be just and equitable for the time limit to be extended. The claimant maintains that all acts relied upon formed part of conduct extending over a period for the purposes of section 123(3)(a) which began with a complaint about an alleged act of harassment by the office manager on 13 January 2020 and ended with a victimisation complaint about his dismissal on 19 August 2022. EJ Palmer issued a Case Management Order (CMO) on 24 May 2023 following the PH which recorded at paragraph 13 that the claimant had advanced this position at the PH on 24 April '23.

5. On the averments in this case, if the claimant establishes that all acts complained of formed part of conduct extending over a period ending with his dismissal, then none of the complaints is late and there is no limitation issue. An alternative outcome is that for particular acts, the margin of 'lateness' could vary significantly. If some acts formed part of conduct extending over a period, the last of which was – for example – in April 2022, then all of those acts would be treated as outside the normal time limit but all by around two months as opposed to potentially over two years. If, on the other hand, none of them formed part of conduct extending over a period, then the alleged acts before 1 July 2022 would all be outside the normal 3-month time limit and the

earliest acts would be treated as presented well over two years after those acts occurred. Should acts be found to be out of time, the extent of their 'deemed' lateness could be relevant to arguments about whether an extension of time is just and equitable.

6. If the issue for determination were the substantive one of whether the harassment and victimisation complaints, or large parts of them, were time barred, I would require to determine the antecedent question of whether there was conduct extending over a period in order to identify whether the particular complaint was brought (a) within the time limit; or (b) within such period as I consider just and equitable for the purposes of section 123(1)(b). There is insufficient time and insufficient evidence available to me today to make such a determination in a manner that ensures a fair hearing. This would require wide-ranging findings of fact and the evidence required would be substantial. A positive final determination that there has been conduct extending over a period for section 123(3) would require decisions about which, if any, of the matters complained of, amounted to prohibited conduct, to then decide whether it was part of a course of prohibited conduct. Those findings would be definitive and could not be revisited at a final hearing. Many of the matters complained about are disputed. In the interest of dealing with the case fairly and justly, I would expect the respondent to lead evidence about such disputed matters. The respondent was not in a position to lead evidence at the preliminary hearing on 14 June.

7. Such wide-ranging factual enquiry could not be completed in the one-day preliminary hearing allocated and would risk serious prejudice to the respondent who had no witnesses available. For this substantial reason, I refined the issue for determination with respect to limitation regarding the harassment and victimisation complaints to proceed on the basis of a strike out question. This seems to me to accord with EJ Palmer's implicit intention in ordering that only the claimant provide a witness statement and in listing the hearing for one day. I identified the issue for determination as follows:

    (i) Should the Tribunal strike out all or part of the claimant's harassment and victimisation complaints claim under Rule 37(1)(a) on the grounds that there is no reasonable prospect of the Tribunal finding that all or parts of that claim were presented within such period as the Tribunal considers just and equitable for the purposes of section 123(1)(b) of the Equality Act 2010? The Tribunal will assess:

        1. Does the claimant have reasonable prospects of establishing that some or all of the acts before 1 July 2022 formed part of conduct extending over a period which ended after that date?

        2. If not, does the claimant have reasonable prospects of establishing that any claims not brought in the 'normal' 3-month time limit or forming part of conduct extending over a period which ended after the expiry of that time limit were brought within a further period that the Tribunal will consider is just and equitable?

8. The claimant agreed with this characterisation of the issue. Ms Berry took no issue with framing the issue as a question of strike out under R37(1)(a) of the

ET Rules 2013, but indicated her understanding was that the hearing would also consider limitation in relation to the claimant's whistleblowing detriment complaint.

9. I referred to EJ Palmer's CMO which does not, at least explicitly, specify that the Tribunal will consider limitation issues which may arise in relation to the claimant's whistleblowing detriment claims. The CMO refers specifically and only to section 123 of the EA 2010. The time limitation provisions for whistleblowing claims is contained in section 48(3) of the Employment Rights Act 1996 ("ERA"), which is not mentioned in the Order, and which has substantive differences. Ms Berry helpfully drew to my attention that the Order does refer to paragraphs 3-7 of the respondent's Grounds of Resistance. Paragraph 7, she pointed out, mentions the whistleblowing claims and asserts they are outside the time limits. The paragraph goes on to state that "the respondent contends it would not be just and equitable for the time limit to be extended to allow these claims to proceed". Ms Berry acknowledged that this may be apt to confuse as the formulation relates to the Equality Act time limitation provisions and not to the applicable test in ERA which centres on reasonable practicability.

10. Ms Berry further explained that the whistleblowing claims were discussed at the previous PH when the respondent sought a preliminary hearing on time bar in respect of these claims as well as the claimant's prohibited conduct claims under the EA. She indicated that paragraph 10 of EJ Palmer's Note records this. She submitted that there was a large degree of factual overlap between the claimant's victimisation complaint and whistleblowing detriment, so that it made sense that the limitation question in respect of both be considered together. It would be problematic, said Ms Berry, to divorce the two for these purposes. Ms Berry also clarified that she appeared at the April PH but had not been sent a copy of the CMO until recently and had not seen the wording of the Order which she noted was not as she expected and which, she acknowledged, had the potential to confuse.

11. The claimant opposed the determination of any time bar issue in relation to the whistleblowing detriment complaint at the hearing. He advised his impression of the subject matter of the hearing was in relation to the EA claims.

12. I had some sympathy with the respondent's position and did not doubt that Ms Berry's belief, before seeing the CMO, had been that the PH was to deal with limitation in relation to the whistleblowing detriment complaint in tandem. However, I equally did not doubt that the claimant, a litigant in person, had, based on the terms of the Order, understood that the focus would be on the Equality Act claims and had prepared on that basis. I was concerned that there was a real risk of prejudice to the claimant if the whistleblowing detriment complaint limitation point were also considered at the hearing, and on that basis, declined to do so.

The hearing

13. The PH took place on 14 June 2023 by CVP. Evidence in chief was taken from the claimant by a written witness statement. It was agreed that the relevant part of the statement was limited to paragraphs 1-65 and paragraph 90 onwards, and that my reading would be confined to these parts of the statement, along with the pleadings. (Paragraphs 66 to 89 of the witness

statement discussed the redundancy consultation process and dismissal in respect of which no time limitation issue arises). There were some areas of enquiry relevant to time bar which the witness statement did not address and his statement was, therefore, supplemented by some oral evidence in chief. The respondent did not lead evidence. A joint bundle was produced running to 214 pages which included a number of evidential documents. I agreed with parties I would confine my reading to those documents cross referenced in the relevant paragraphs of the claimant's witness statement.

14. I am grateful both to the claimant and Ms Berry for their assistance and constructive approach to the hearing. Some hearing time was lost at the PH due to connection problems (around 25 – 30 minutes) and in order to try to complete the evidence and hear submissions, we sat for an extended period without breaking for lunch. Both parties willingly did so. Nevertheless, there was insufficient time to deliberate and provide an oral decision. Nor did time permit a case management discussion and the provision of directions for the final hearing. I have listed a further private preliminary hearing to take place by CVP on 11 September 2023 at 10 am (after promulgation of this judgment) for this purpose.

15. Ms Berry provided a written submission to which she also spoke. The claimant gave an oral submission.

Findings of Fact

16. With regard to the alleged acts of prohibited conduct, my findings of fact are generally limited to findings regarding the position the claimant takes as opposed to substantive findings. I have, however, made some substantive findings regarding certain information which is not understood to be disputed and regarding the action (or inaction) by the claimant with respect to his complaints and his reasons for this. I make the following findings of fact on the balance of probabilities.

17. The claimant was employed by the respondent from 13 January 2020 and remained so until his dismissal on 19 August 2022. He was employed as a Senior Social Media Manager for Europe, the Middle East and Africa. The respondent is a multi-level marketing company which specialises in the manufacture and sale of nutritional products and meal replacements. It operates by reaching customers through a network of 'members'. Customers have the option of becoming 'Distributors' of the respondent's products.

18. The claimant was unhappy about a number of matters arising during his employment and raised concerns at different times. On 9 June 2020, the claimant wrote an email to Everton Harris (VP of HR), Steven Berold (Snr Director of HR) and John Agwunobi (CEO), reporting that he had experienced racism in the respondent's London Office and from its EMEA markets. On 6 August 2020, he contacted Jane Marsden, the respondent's Head of Legal, regarding complaints he wished to make. The claimant also says he raised concerns with Ashling Weedon (HR) in around December 2020 and again in December 2021. He says he complained to Julian Cacchhioli who was, for a period, the claimant's line manager, in around July and September 2021.

19. The claimant felt disappointed with the respondent's response in relation to the matters. The claimant did not consider presenting a complaint to an Employment Tribunal about the matters throughout this time. He was aware

generally of the right to complain to a Tribunal about matters of discrimination but did not have an understanding of the different types of claim. He did not seek legal or other professional advice in this period about a possible Tribunal complaint. He was hopeful that his internal complaints would lead to a satisfactory resolution. However, he was not satisfied with the respondent's response.

20. The claimant remained unhappy with work matters through the early part of 2022. At times throughout the employment the claimant experienced exacerbations in symptoms from his PTSD which he attributes to his work situation. He was not incapacitated for work in this time.

21. In around July 2022, when the respondent initiated a redundancy consultation, the claimant decided to take legal advice. He did not discuss Employment Tribunal time limits with his solicitor. He was prompted to approach a solicitor by the redundancy consultation and the focus of his discussions with his adviser was on the possibility of an unfair dismissal complaint. The claimant was generally aware of a three-month time limit for Tribunal claims but was not aware of, and had not enquired into, the technicalities of how this operated in the context of discrimination complaints arising from events he alleges took place earlier in his employment.

22. The claimant's employment terminated on 19 August 2022. Approximately one month later, in or around September 2022, he engaged a different firm of lawyers. He had more involved discussions with his new solicitors which he described as a 'deep dive' into his employment history. He initiated Early Conciliation through ACAS on 30 September 2022. The Early Conciliation process concluded and a certificate was issued on 2 November 2022. He instructed the new firm to prepare an ET1 and present a claim to the Tribunal on his behalf. The claimant did not, until November 2022, when his particulars of claim were being prepared, consider or develop an understanding of the applicable time limits to the types of complaint he seeks to advance.

23. The claim was presented to the Tribunal on 2 December 2022. Among other matters, the claimant complains about harassment related to race and victimisation. He alleges the acts of victimisation were because of some or all of six separate protected acts.

24. In his witness statement, the claimant makes an assertion that he believes the respondent's discrimination issues stem from sentiments set by the Leadership, namely the Lead Distributors (ESG) and the Regional Vice Presidents (RVPs) who, he says, would dictate all business movements based on their needs. He asserts that behaviours and expectations "trickled down through the RVPs, Country managers, Directors and then into Teams, creating a toxic and discriminative work culture." He alleges he experienced this in instances that filtered down from specific senior colleagues. He asserts that some of his claims were continual and never resolved and that, overall, the behaviour was continual from his first day. The assertion regarding the RVPs does not appear in such explicit terms in the claimant's Particulars of Claim. His pleadings do contain averments that "*There was a general context of Xenophobia implicit through the respondent's working culture and its marketing campaigns*" (para 69a)) and that he "*regularly challenged the respondent's discriminatory culture and policies* " (para 11(d)).

25. The claimant describes his colour and ethnic origin in his Particulars of Claim as British Asian and in his witness statement described himself as an Indian man. The acts and omissions about which the claimant complains were contrary to section 26 of EA (harassment related to race) are set out in the particulars of claim at paragraph 90, as follows:

    a) *On 13 January 2020 the claimant was subjected to comments by the office manager at the time about the respondent's policy not to eat "smelly" foods at his desk such as "curry";*
    b) *In or around April 2020 the claimant was subjected to comments from his line manager Shaun Wynne-Jones, about being "too bullish" to survive in the Respondent's business and he needed to change;*
    c) *On 22 April 2020, Shaun Wynne Jones sent the Claimant a personality test to complete which was not approved by HR or sent to anyone else;*
    d) *On or around May 2020 the Claimant was instructed by the Romanian Marketing team to remove models from marketing materials who were of Black and Asian ethnicity sometimes for no reason;*
    e) *On or around July 2020, the claimant was subjected to comments by Julie Faucher, who opposed featuring darker coloured skinned models (Black and Indian Asian) for marketing materials but approved an Oriental Asian model with lighter coloured skin, stating that they 'blended in' with the other White Caucasian models which was better;*
    f) *In July 2021, the Claimant was forced to implement a social media content policy which was intentionally excluding topics to do with race, gender and sexual orientation amongst other topics which he did not agree with;*
    g) *In or around March 2022, and during his end of year review, the Claimant was subjected to criticism by Chris Stirk that he appeared "too angry" in team calls;*
    h) *On 9 March 2022 Chris Stirk referred to ethnic minorities as "ugly" in a creative discussion with the claimant; and*
    i) *On 22 April 2022 the Claimant was subjected to comments by Chris Stirk criticising persons with beards.*

26. The claimant acknowledged in his evidence, in relation to para **25(a)** above - the first alleged act of harassment on 13 January 2020 - that he did not know the full name of the office manager. He believed her first name was Gail. Nor did he know the office manager's line management structure . He acknowledged he had no evidence that she worked closely with RVPs or Lead Distributors but suggested her behaviour symptomized a cultural problem which was not relevant to the RVPs specifically.

27. In relation to para **25(d)** above - the alleged act of harassment around May 2020 - the claimant could not name the individuals within the Romanian marketing team who he alleges instructed him to remove models of Black and Asian ethnicity. He believed one of them may have been called Daina, though he did not know her surname. He acknowledged that as a local

marketing team, they would report into the Country Manager for Romania who would in turn report into an RVP. In the claimant's witness statement, he alleges that a colleague, James Sutton told him the RVPs said the same thing as the Romanian marketing team (about models). He also alleges in his witness statement that the Romanian Country Manager told him that Asian and Black models should not be used going forward and that this was specific feedback from one of their Lead Distributors, Rodica Macadrai.

28. For his victimisation complaint (s.27 EA), the claimant relies on 6 alleged protected acts in the PC. These are summarised for brevity, not reproduced verbatim:

    1. On 9 June 2020, the claimant's pleaded case is that he wrote an email to Everton Harris (VP of HR), Steven Berold (Sr Director of HR) and John Agwunobiin (CEO). He avers that in the email, he complained about six counts of microaggressions and discriminatory behaviour and that he disclosed the respondent had an inherently xenophobic culture. The claimant produced the email in his evidence at the PH. In fact, the most relevant part of the email states: "*Since my short time at herbalife (6 months) I have personally experienced 4 separate occasions of racism here in our London office and from our EMEA markets. These were not situations I flagged to senior Management at the time being relatively new*…"

    2. The claimant's pleaded case in the PC is that on 6 August 2020, he raised a formal grievance to Jane Marsden (Head of legal) about "the acts described above". Again, the claimant produced the email in question in the PH bundle. The most relevant part of the email states: "*I spoke to Julian earlier today regarding a situation I wanted to flag to you which has raised some concerns amongst the team in regards to agency vendor selection, payment processes and set up, budget and bid waiver forms. I've reviewed the whistleblowing policy but still a bit unclear on how the situation falls. Could we drop in some time potentially Friday or Monday afternoon to tentatively discuss?*" His position in his witness statement is that he thereafter decided to formalise complaints against Julie Faucher and to merge concerns about discrimination and procurement breaches. His position, as I understand it, is that he did this verbally at the meeting with Ms Marsden which he had proposed in his 6th August email, and which he says took place between 6 and 11 August 2020.

    3. On 1 December 2020, the claimant's pleaded case is that at a meeting with Ashling Weedon, the claimant disclosed (in summary) that he was being victimised and harassed by Julie Faucher after disclosures he'd made about her; that he said he'd informed his line manager, Julian Cacchioli, but nothing had been done; and that he had a PTSD diagnosis and his symptoms had been exacerbated by his treatment. In his witness statement he asserts he disclosed the "*RVP racism, the campaign diversity issue, Julie's racism, bullying and now her retaliation and victimisation*.."

4. In around July 2021, the claimant's pleaded case is that the respondent implemented a new unwritten social media policy prohibiting media content on religious holidays, gender, nationality, country of origin, race, sexual orientation and politics. He avers that he complained to senior members of staff and J Cacchioli that this was a reductive and discriminatory policy which was silencing and erasing minorities. He says he complained the policy had resulted from a homophobic backlash to a Gay Pride post the respondent had previously put out on social media and said the respondent should have made efforts to correct the Distributors. In his witness statement, the claimant alleges he "*flagged* [his] *dismay of this to Julian in* [his] *121s*".

5. The claimant's pleaded case is that on 10 December 2021, he made certain complaints at his end of year review. At the PH he clarified his pleadings contained an error. He explained that, in fact, he made those complaints not at an end of year review but to Ashling Weedon at an interview with her. He said his end of year review took place later, in early 2022. He avers in his PC that he complained about homophobic and racially discriminatory behaviour by Violetta Zlatareva (Marketing), Andrew Trouce (Marketing) and Chris Stirk. He alleges he complained about open dislike of the use of Black models by the former two individuals. He avers that he reported he was fearful of being directly line managed within this marketing team and asserted that he believed employees would be dismissed for angering Mr Trouce or Distributors.

6. On 30 June 2022, the claimant's pleaded case is that he completed a feedback survey on the respondent which he says he had been given to believe was anonymous. He avers he reported a failure to implement diversity and inclusion training, a xenophobic culture and a failure to take reasonable steps to eradicate bullying, harassment and discrimination or to hold their Distributors to account for discriminatory views.

29. At para 89 of his Particulars of claim, the Claimants set out the alleged acts of victimisation said by him to have been visited upon him because he had done the foregoing protected act or acts:

    a. *None of the Claimant's Protected Disclosures ….were ever properly investigated as they remained unresolved, which meant the Claimant was continued to be subjected to bullying and harassment and ultimately dismissed;*
    b. *Julie Faucher displayed hostile behaviours towards the claimant following his protected disclosures to make his work life purposively difficult, including excluding and removing the Claimant from meetings, telling the team to not add the Claimant to meetings despite the fact that his expertise was required, refusing to speak to the Claimant, communicating with him only through the Microsoft Teams message function, arguing loudly with the Claimant, arguing with the Claimant over email after having the team relay messages to her and deliberately acting against the Claimant's suggestions;*

c. *In around October to November 2020, as a result of Julie Faucher's treatment, the claimant suffered a deterioration in his health and his symptoms of PTSD were exacerbated in that the claimant experienced extreme anxiety, feelings of dread, reoccurring nightmares, which in turn impacted his sleep and lead [sic] the claimant to suffer heavily from styes around his eyes. The claimant was mentally and physically exhausted throughout the process, and he visited his doctor for support. The claimant disclosed his health issues to HR in December 2021;*
d. *By November 2020, the claimant was excluded from all pitch meetings and removed from wider team invitations by Julie Faucher who also told the claimant's colleagues not to re-add him which made it much harder for him to do his job properly as he was being kept out of work meetings relevant to his duties;*
e. *On 15 June 2021, the claimant was forced to move teams despite not wanting to for fear of racial harassment;*
f. *On 2 September 2021, the claimant's line manager at the time, Julian Cacchioli, lied to the claimant about the true reason behind the discriminatory unwritten social media policy set out above which the claimant was being forced to implement to try to avoid the claimant making another protected disclosure given knowledge of his previous protected disclosures*; [In his witness statement, the claimant explains his evidence will be that Julian Cacchioli asserted it was due to vaccine content but that the claimant asserts he later learned from a senior colleague that it was for other reasons].
g. *On 9 March 2022, the claimant was criticised for being "too woke" by his then line manager Chris Stirk. This criticism directly related to the claimant's protected disclosures which had nothing to do with his performance or capability to do his job;*
h. *On 30 June 2022, the respondent invited the claimant to submit company feedback which he was told was anonymous. The claimant completed the feedback, making protected disclosures, however, it turned out that the respondent had lied about the feedback and it was not, in fact, anonymous. The claimant avers this was intentional to 'catch him out' and engineer his dismissal to his detriment;*
i. *On 19 July 2022, the respondent put the claimant's job role at risk of redundancy;*
j. *On 19 august 2022, the respondent dismissed the claimant. The claimant contends that the principal reason for his dismissal was because he made protected disclosures … and not because his role was truly redundant, or in the alternative, despite any redundancy situation.*

30. So far as the claimant is aware, Julie Faucher went on sick leave in or around March 2021 then left the respondent's employment. The exact date her employment terminated is unknown by the claimant, but she was no longer in attendance at the workplace at the time of a proposed mediation session which the claimant asserts was scheduled for 2 March 2021. That

her employment had ended was, according to the claimant's evidence, confirmed to him some months later.

31. In the time of his employment, the claimant was managed at different times by Shaun Wynne-Jones and Julian Cacchioli. Latterly, he was managed by Chris Stirk and by Jasdeep Deol from around May 2022.

Relevant Law

32. Under Rule 37(1)(a) of the 2013 Rules, a Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success. In determining such applications, the claimant's case must ordinarily be taken at its highest and, if the question of whether it has reasonable prospect of success turns on disputed factual issues, it is unlikely that strike out will be appropriate (**Cox v Adecco** UKEAT/0339/19).

33. Section 26 of the Equality Act 2010 ("EA") is concerned with harassment and provides as follows:

> *"**26 Harassment***
> *(1) A person A harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *(2) …*
> *(3) …*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account –*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*
> …

34. Section 27 EA is concerned with victimisation and is in the following terms:

> ***27 Victimisation***
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual."

35. For a disadvantage to qualify as a detriment, it must be found that a reasonable worker would or might take the view that he had thereby been disadvantaged. The test must be applied by considering the issue from the point of view of the victim. An unjustified sense of grievance about an allegedly discriminatory decision cannot constitute a detriment but a justified and reasonable sense of grievance may well do so (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL11).

36. Section 123 of the EA deals with time limits for bringing complaints about prohibited conduct under Part 5 of the Act (work) and provides:

"s.123 ***Time limits***

(1) subject to section 140B proceedings on a complaint within section 120 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…

(3) for the purposes of this section -

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

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

37. Also relevant is section 140B of EA which is as follows.

140B Extension of time limits to facilitate conciliation before institution of proceedings

(1)This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

(2)In this section—

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

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

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

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

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

38. S.140B of EA provides for an extension to the three-month time limit in certain circumstances. In effect, s.140B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'Day A' and 'Day B' as defined in the legislation.

39. There is no general rule that time doesn't start to run until the employee becomes aware of the act or becomes aware that it might be discriminatory. Time runs from the date of the act complained of or, in the case, of conduct extending over a period, from the end of the relevant period.

40. In the case of **E v X, L and Z** UKEAT/0079/20 *(*10 December 2020, unreported*)*, the Employment Appeal Tribunal provides at para 50 useful guidance on the principles as derived from the caselaw on the approach when considering time limitation issues in relation to complaints under the EA 2010 where conduct extending over a period is asserted. The following authorities were reviewed by the EAT: **Sougrin v Haringey Health Authority** [1992] IRLR 416*,* CA*;* **Robinson v Royal Surrey County Hospital NHS Foundation Trust** UKEAT/0311/14 (30 July 2015, unreported)***;*** **Sridhar v Kingston Hospital NHS Foundation Trust** UKEAT/0066/20 (21 July 2020, unreported)*;* **Caterham School Ltd v Rose** UKEAT/0149/19 (22 August 2019, unreported)*;* **Lyfar v Brighton & Sussex University Hospitals NHS Trust** [2006] EWCA Civ 1548*;* and **Aziz**

v FDA [2010] EWCA Civ 304. The guidance provided by Ellenbogen J at para 50 of the decision is reproduced below:

1. In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: *Sougrin*.

2. It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: *Robinson*.

3. Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: *Sridhar*.

4. It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue: *Caterham*.

5. When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: *Lyfar*.

6. An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: *Aziz; Sridhar*.

7. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: *Aziz*

8. In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading: *Caterham*.

9. A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: *Robinson*.

10. If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: *Caterham*.

11. Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: *Caterham*.

12. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: *Caterham*.

13. If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: *Caterham*."

41. In considering whether there is conduct extending over a period, the fact that alleged acts are pleaded as different species of prohibited conduct will not necessarily preclude the possibility that they might be aggregated to form conduct extending over a period. In **Robinson v Royal Surrey County**

Hospital NHS Foundation Trust UKEAT/0311/14MC, the EAT did not determine definitively the point, but opined (*obiter*) that it might be appropriate to consider that conduct comprised of acts that, taken individually, fall under different headings. The EAT emphasised that such an assessment will inevitably be fact- and case-specific. The example was provided of a claimant complaining that putting her on particular shifts was a continuing act of direct discrimination and then, as the other side of that particular coin, that failing to put her on different shifts was a failure to make reasonable adjustments. In such circumstances, it was opined that there was no reason the claimant could not say that those matters should be considered together as constituting conduct extending over a period (Para 65).

42. Where a complaint is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (**Roberson v Bexley Community Centre** [2003] IRLR 434). Parliament has chosen to give the Tribunal wide discretion in determining whether it is just and equitable to extend time, having regard to the language of the provisions (**Adeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23.)

Submissions

43. Ms Berry provided a written submission to which she spoke. Her submissions are summarised for brevity, not reproduced in full. With regard to the alleged acts of harassment, she observed that even the last of these was out of time, and asserted section 123(3) of EA doesn't allow a claimant to amalgamate two separate types of complaint under the EA. There was discussion about the **Robinson** case mentioned in para **41** above**.** Ms Berry's submissions on the relevance of that authority are discussed in the 'Discussion and decision' section below. With regard to a just and equitable extension, she reminded the Tribunal that the onus lies with the claimant to satisfy the Tribunal that the normal three-month time limit should be disapplied. The allegations were historic and the evidence on the reasons for the delay in presenting a claim was slim to non-existent in Ms Berry's submission. In the office manager's case, she pointed out it was not suggested any grievance had been raised about the act at the time, and the incident was not referred to in the claimant's witness statement for the PH.

44. Ms Berry also referred to the significance of the prejudice to the respondent. Mr S Wynne-Jones and Ms J Faucher have both since left the respondent's employment and were not available to the respondent as the Tribunal complaint wasn't brought at the time in 2020. No particularly good reason had been advanced for this, said Ms Berry. She referred to the claimant's inability to name the office manager or the Romanian team members about whom he complains.

45. Ms Berry pointed out that all those named by the claimant as involved in the harassment complaints, other than the Romanian marketing team, were based in the respondent's London office. She said the Romanian marketing team and had a different line management structure, with a different Country Manager between them and the RVPs. With regard to the Office Manager, there was a lack of pleadings or evidence that she was working with the RVPs and Lead Distributors who the claimant asserts were the root cause

of the discriminatory environment. She pointed up what she said was a lack of evidence that the four individuals named as perpetrating acts of harassment were linked back to a common cause.

46. In J Faucher's case, Ms Berry acknowledged a complaint had been raised internally, but she pointed to an absence of action by the claimant after Ms Faucher went off sick in early 2021 and the failure to consult a lawyer or otherwise make enquiries regarding a Tribunal complaint. It was not, she said, just and equitable to extend time in relation to the complaint about Ms Faucher's alleged conduct dating back to July 2020.

47. Ms Berry pointed out a significant time gap between July 2020 and July 2021 when the next alleged act of harassment is said to have occurred. She referred to differences in the nature of the alleged acts of harassment. She also noted a further significant gap between the alleged act in July 21 and the next alleged instance of harassment in March 2022. She said that despite knowing about earlier complaints by the claimant related to Ms Faucher, Mr Stirk had wanted the claimant to join his team. In Ms Berry's submission, the alleged harassing comments by Mr Stirk in spring 2022 were not on their face connected with the claimant's race.

48. She contended that the range of different alleged perpetrators was relevant though not determinative. There was, she said, a lack of common thread. Regarding the alleged acts involving C Stirk in March and April 2022, she pointed out there was no averment the claimant raised an internal grievance at the time.

49. Ms Berry cited the case of **Secretary of State for Justice v Johnson** [2022] EAT1 as authority for the proposition that it is the entire period of delay that is relevant to the question of whether it is just and equitable to extend time.

50. Regarding the victimisation complaints, Ms Berry acknowledged that the two final alleged acts were complained of within the three month time limit. She referred to **Lyfar v Brighton and Sussex UHT** [2006] EWCA Civ 1548. She noted the Tribunal was upheld in its decision which classified inter-related incidents by reference to the nature of the act, treating acts of a different character as separate. On this basis, she noted the appellate courts did not interfere with the Tribunal's decision that, for example, a disciplinary investigation and treatment at a disciplinary hearing were not part of a continuing act.

51. Ms Berry submitted that all the alleged acts of victimisation which appear in paragraphs (a) to (h) of paragraph 89 in the PC were different in nature and were not connected to the two final alleged acts (i) and (j) (the initiation of a redundancy process and the claimant's dismissal). She founded on gaps in time, differences in the nature of the acts and differences in the alleged actors.

52. Ms Berry pointed out there were six asserted protected acts and contended that it would be particularly difficult for the claimant to establish a common thread given that , for example, Ms Faucher had left the organization before the final three protected acts are said to have occurred. The claimant would not, said Ms Berry, surmount the hurdle of showing a continuing act involving the alleged acts of Ms Faucher and later allegations against the respondent. With respect to any just and equitable extension of the time limit for the

victimization complaints, Ms Berry argued this would not be granted because of the length of delay and prejudice to the respondent.

53. The claimant submitted that he had gone about things to the best of his ability at the time and pursued internal processes. He explained he felt beaten down and exhausted but did the best he could to flag what he saw as a continual thing. He reiterated his position that the problems were cultural and systematic, and that the leadership approach to his concerns was to continually ignore his complaints. At times with his mental health issues, he felt he was barely keeping his head above water. He pointed to a link between his complaints about J Faucher and C Stirk which was that it related to the same issue regarding the use of Black and Asian models. He said that given his experience when he challenged Ms Faucher and given Mr Stirk's seniority, he felt trapped in a corner with the business not taking him seriously. With regard to the alleged act of harassment on 13 January 2020, regarding the Office Manager, he acknowledged that the RVPs could not be held accountable for an office manager's racism. His greater focus was on his other harassment and victimisation and whistleblowing claims. Regarding the names he couldn't recall, he explained he dealt with a lot of people but said he still suffered the detriments at the time.

Discussion and Decision

Reasonable prospects of amalgamating different species of prohibited conduct to form 'conduct extending over a period as a matter of principle'?

54. The claimant's harassment case founds on 9 separate alleged acts as set out in paragraph **25** above. On the face of it, the claim was presented outside the normal 3-month time limit in section 123(1)(a) of EA since the last of the acts is said to have taken place on 22 April 2022. The claimant's position is that the alleged acts of harassment can be knitted together with alleged acts of victimisation which occurred after 1 July 2022, forming conduct extending over a period which should be treated as done at the end of that period.

55. Ms Berry submitted that the anatomy of section 123 and, in particular s.123(3) (a) of EA does not allow a claimant to amalgamate two separate complaints under the Equality Act 2010. She suggested that as there had been no amendment to permit the claimant to introduce any alleged more recent act of harassment which was said to form part of the same conduct extending over a period, the harassment complaint had not been brought within the normal 3-month time limit and the claimant would require time to be extended on the basis that it was just and equitable.

56. I invited parties to comment on the **Robinson** case and provided a brief adjournment for this purpose. Before the adjournment, Ms Berry submitted that **Robinson** referred to different species of discrimination and did not suggest amalgamation was possible with a complaint like victimisation which was not tied causally back to the same protected characteristic in the way different varieties of discrimination claims may be. She returned to the question after she had the opportunity of reviewing the case and submitted, with reference to paragraph 65 of the EAT decision, that the example given by the EAT in that paragraph which related to a potential direct disability discrimination complaint and a reasonable adjustment complaint arising from the broadly the same or similar facts. The present case was different, said Ms Berry. One set of acts were said to be harassment related to race

and the other set were detriments alleged to have stemmed from protected acts over a period of time. She argued that this case, therefore, did not fall within the territory envisaged by the EAT in its comments in **Robinson**.

57. The question for me is whether there is no reasonable prospect that the claimant might persuade a Tribunal otherwise. The issue of whether or not different types of prohibited conduct could be aggregated to form conduct extending over a period was not a determinative issue in **Robinson.** The EAT's comments in the case, while helpful, should, strictly, be viewed as *obiter*. That said, given those comments, it would be surprising for me to hold that, as a matter of statutory construction, the claimant has no reasonable prospects of persuading a Tribunal that, it is possible for different types of prohibited conduct under the EA (including victimisation) to potentially be aggregated with other types to form conduct extending over a period.

58. As Ms Berry acknowledged, any assessment would have to be fact and case specific. It is true that the facts of the present case are far removed from the disability discrimination example mentioned by the EAT in paragraph 65 of its judgment. That said, I was not persuaded the claimant has no reasonable prospects of persuading a Tribunal of *the principle* that an act pleaded as victimisation might have sufficient linkage with an act pleaded as harassment so as to form aspects of the same continuing conduct. I note Ms Berry's point that, by its nature, an act of victimisation must be done because of a protected act, whereas an act of harassment must (in this case) relate to the protected characteristic of race. That is so, but I would allow that a Tribunal could be persuaded, depending on the facts, that conduct founding each of these types of complaint could in a given case be sufficiently similar or connected so as to permit their aggregation for the purposes of section 123(3)(a).

Is it reasonably arguable that all / any of the allegations are linked to form 'conduct extending over a period'?

59. With regard to the harassment complaints, it is, therefore, appropriate to consider whether the claimant has reasonable prospects of establishing that all or any of the alleged acts of harassment have a sufficient connection to any of the latter acts of victimisation, such that they may be said, together, to form conduct extending over a period.

60. To facilitate this exercise, I have amalgamated the two lists into one chronological list of acts which are founded on as prohibited conduct, irrespective of whether they are pleaded as harassment or victimisation. I do not suggest, in doing so, that it is irrelevant which species of prohibited conduct has been averred in each case. In order for any of the acts to be part of a course of prohibited conduct extending over a period, they would require to have reasonable prospects of being found to be contrary to the relevant section of the EA (i.e. s.26 or s.27, as applicable. However, for the initial analysis, it is helpful to consider the chronology of alleged contraventions without the legal labels ascribed to the individual acts in the claimant's pleadings.

    (i) *None of the Claimant's Protected Disclosures ….were ever properly investigated as they remained unresolved, which*

meant the Claimant was continued to be subjected to bullying and harassment and ultimately dismissed;

(ii) *On 13 January 2020 the claimant was subjected to comments by the office manager at the time about the respondent's policy not to eat "smelly" foods at his desk such as "curry";*

(iii) *In or around April 2020 the claimant was subjected to comments from his line manager Shaun Wynne-Jones, about being "too bullish" to survive in the Respondent's business and he needed to change;*

(iv) *On 22 April 2020, Shaun Wynne Jones sent the Claimant a personality test to complete which was not approved by HR or sent to anyone else;*

(v) *On or around May 2020 the Claimant was instructed by the Romanian Marketing team to remove models from marketing materials who were of Black and Asian ethnicity sometimes for no reason;*

(vi) *On or around July 2020, the claimant was subjected to comments by Julie Faucher, who opposed featuring darker coloured skinned models (Black and Indian Asian) for marketing materials but approved an Oriental Asian model with lighter coloured skin, stating that they 'blended in' with the other White Caucasian models which was better;*

(vii) *Julie Faucher displayed hostile behaviours towards the claimant following his protected disclosures to make his work live purposively difficult, including excluding and removing the Claimant from meetings, telling the team to not add the Claimant to meetings despite the fact that his expertise was required, refusing to speak to the Claimant, communicating with him only through the Microsoft Teams message function, arguing loudly with the Claimant, arguing with the Claimant over email after having the team relay messages to her and deliberately acting against the Claimant's suggestions;*

(viii) *In around October to November 2020, as a result of Julie Faucher's treatment, the claimant suffered a deterioration in his health and his symptoms of PTSD were exacerbated in that the claimant experienced extreme anxiety, feelings of dread, reoccurring nightmares, which in turn impacted his sleep and lead [sic] the claimant to suffer heavily from styes around his eyes. The claimant was mentally and physically exhausted throughout the process, and he visited his doctor for support. The claimant disclosed his health issues to HR in December 2021;*

(ix) *By November 2020, the claimant was excluded from all pitch meetings and removed from wider team invitations by Julie Faucher who also told the claimant's colleagues not to re-add him which made it much harder for him to do his job properly as he was being kept out of work meetings relevant to his duties;*

(x) *On 15 June 2021, the claimant was forced to move teams despite not wanting to for fear of racial harassment;*

(xi) *In July 2021, the Claimant was forced to implement a social media content policy which was intentionally excluding topics to do with race, gender and sexual orientation amongst other topics which he did not agree with;*

(xii) *On 2 September 2021, the claimant's line manager at the time, Julian Cacchioli, lied to the claimant about the true reason behind the discriminatory unwritten social media policy set out above which the claimant was being forced to implement to try to avoid the claimant making another protected disclosure given knowledge of his previous protected disclosures*; [In his witness statement, the claimant explains his evidence will be that Julian Cacchioli asserted it was due to vaccine content but that the claimant asserts he later learned from a senior colleague that it was for other reasons].

(xiii) *In or around March 2022, and during his end of year review, the Claimant was subjected to criticism by Chris Stirk that he appeared "too angry" in team calls;*

(xiv) *On 9 March 2022 Chris Stirk referred to ethnic minorities as "ugly" in a creative discussion with the claimant; and*

(xv) *On 9 March 2022, the claimant was criticised for being "too woke" by his then line manager Chris Stirk. This criticism directly related to the claimant's protected disclosures which had nothing to do with his performance or capability to do his job;*

(xvi) *On 22 April 2022 the Claimant was subjected to comments by Chris Stirk criticising persons with beards.*

(xvii) *On 30 June 2022, the respondent invited the claimant to submit company feedback which he was told was anonymous. The claimant completed the feedback, making protected disclosures, however, it turned out that the respondent had lied about the feedback and it was not, in fact, anonymous. The claimant avers this was intentional to 'catch him out' and engineer his dismissal to his detriment;*

(xviii) *On 19 July 2022, the respondent put the claimant's job role at risk of redundancy;*

(xix) *On 19 august 2022, the respondent dismissed the claimant. The claimant contends that the principal reason for his dismissal was because he made protected disclosures … and not because his role was truly redundant, or in the alternative, despite any redundancy situation.*

61. I remind myself of all of the guidance in **E v X, L and Z.** In particular, I remind myself that it is appropriate to consider the way in which a claimant puts their case in the claim form and whether there is said to be a link between the acts but that it is not essential to have a positive assertion in the claim form that they are complaining of a continuing discriminatory state of affairs. It is permissible for such a contention to become apparent from evidence or submissions made, once a time point is taken against the claimant. In that regard, I am not persuaded that the absence of pleadings to a common thread is fatal.

62. In considering whether the claimant has reasonable prospects of establishing that all or any of the acts amount to conduct extending over a period, I take his case at its highest. The question is whether he has a reasonably arguable basis for a contention that the various acts are so linked

as to be continuing acts, or to constitute an on-going state of affairs. I consider this issue first.

63. In relation to those where I am not satisfied the claimant has reasonable prospects of establishing conduct extending over a period, I go on to consider in a later section whether he has reasonable prospects of obtaining an extension on just and equitable grounds.

Item (i) No protected disclosures properly investigated (Dates of alleged PAs: 9 June, 6 August, 1 December 2020, July 2021, 10 December 2021, 30 June 2022)

64. Item (i) is pleaded as an act of victimisation. The various alleged protected disclosures are also said to be protected acts under EA. They are complaints raised by the claimant at various times in his employment to various individuals. It is the failure to properly investigate these complaints which is said to be the act (or acts) of victimisation for the purposes of item (i). Under section 123 EA, failure to do something is to be treated as occurring when the person in question decided on it or does an inconsistent act or, alternatively, in the absence of an inconsistent act, at the end of the period when the person might reasonably have been expected to do it.

65. On 9 June 2020, the claimant's case is he emailed Everton Harris (VP of HR), Steven Berold (Sr Director of HR) and John Agwunobiin (CEO). The email in the PH bundle says: "*Since my short time at herbalife (6 months) I have personally experienced 4 separate occasions of racism here in our London office and from our EMEA markets."* His case is that he then had a Zoom call with SB where he explained the scenarios to which he was referring. He then alleges that after experiencing further concerns particularly about J Faucher, he complained to Jane Marsden (Legal) about Ms Faucher and other concerns between 6 and 11 August 2020. His position is that he was told on 25 August that Ms Marsden was investigating. On 22 September 2020 his evidence is that he contacted Ms Marsden again to say things were escalating in terms of J Faucher's conduct towards him. On 9 November 2020, his position is that he chased Ms Marsden for a grievance report. At that stage, he alleges Ms Marsden told him that his complaints about procurement issues fell in her remit but that the other issues (including the alleged racial matters) were for Ashling Weedon in HR to investigate. It is the claimant's evidence that Ashling Weedon had a chat with him on 24 November 2020 to try to resolve things informally. It is not disputed Ms Weedon suggested mediation. On 1 December 2020, the claimant says he met with A Weedon and complained he was being victimised and harassed by Julie Faucher after disclosures he'd made about her, that he said he'd informed his line manager, Julian Cacchioli but that nothing was done. This was the third protected act upon which the claimant relies for his victimisation complaint and which, according to his pleaded case, was not properly investigated.

66. The claimant's case is that in 2021, mediation with J Faucher was scheduled by Ms Weedon initially for 25 February 21 and then for 2 March. In the event it did not proceed because Ms Faucher went off work and left the respondent's employment.

67. In July 2021, the claimant's pleaded case is that the respondent implemented an unwritten social media policy prohibiting media content on religious holidays, gender, nationality, country of origin, race, sexual orientation and politics. He avers his next protected act was a complaint to senior members of staff and J Cacchioli that this was a discriminatory policy. He avers he was told by J Cacchioli in September 2021 that this policy was due to social media content on the Covid vaccine, though the claimant's position is that he later discovered this to be false.

68. On 10 December 2021, the claimant's pleaded case is that he did a fifth protected act. He asserts he complained to Ashling Weedon at an interview He avers his complaint concerned homophobic and racially discriminatory behaviour by Violetta Zlatareva (Marketing), Andrew Trouce (Marketing) and Chris Stirk. He alleges he complained about open dislike of the use of Black models by the former two individuals and avers that he reported he was fearful of being directly line managed within this marketing team.

69. The final protected act which he says went uninvestigated and unresolved was on 30 June 2022, when he claims he completed a feedback in which he reported a failure to implement diversity and inclusion training, a xenophobic culture and a failure to take reasonable steps to eradicate bullying, harassment and discrimination or to hold Distributors to account for discriminatory views.

70. I begin by considering whether it is reasonably arguable that these various alleged omissions to properly investigate might be linked as between themselves to form conduct extending over a period that continued after 30 June 2022.

71. Taking the claimant's case at its highest, the first three protected acts appear to link together and have a common thread in terms of the subject matter of the complaints. The actors charged with dealing with the issues raised were primarily Ms Marsden and Ms Weedon and threaded through the complaints was the claimant's concern primarily about the conduct of Ms Faucher. I would allow that there is a reasonable prospect that a Tribunal may be willing to identify a commonality between the three 2020 alleged protected acts and the claimant's complaints about the way in which they were handled (or not handled).

72. On the claimant's own pleadings, however, the issues weren't completely ignored. There was a proposed mediation which, in the event, did not happen because of Ms Faucher's absence and exit. The claimant doesn't aver that he expected or continued to press for a formal outcome in relation to the J Faucher allegations after her departure from the respondent's employment.

73. I am not satisfied that there is a reasonable prospect of establishing that any commonality among the 2020 alleged investigation failures went on to extend beyond events in Spring 2021. I do not hold that it is reasonably arguable that there is sufficient linkage between the failings said to have occurred with regard to the 2020 complaints and concerns about the handling of subsequent alleged protected acts so as to establish conduct extending over a lengthier period. I, therefore, turn to whether there are reasonable prospects of linking the alleged failures to properly investigate

the 2020 complaints with other alleged acts of victimisation or harassment (beyond the alleged later investigation failures). Other than to suggest a discriminatory culture and an ongoing state of affairs, the claimant has not in his pleadings or witness statement addressed how such a link might be made. Construing his claim generously, I am not persuaded that there is reasonable prospect of him doing so at trial.

74. Appropriately or otherwise, it appears that when Ms Faucher departed in Spring 2021, Ms Weedon decided to take no further formal action in relation to the claimant's complaints about Ms Faucher. I do not consier there is any reasonable prospect that a Tribunal would treat the 2020 investigation failures as having been done any later than Spring or early summer in 2021 in light of Ms Faucher's undisputed departure. There is no reasonable prospect a Tribunal would hold that one might reasonably have expected Ms Weedon to have investigated and provided an outcome later than that date if she was going to do so, notwithstanding the alleged perpetrator's departure.

75. The next asserted protected act in July 2021 relates to the claimant's expressed concerns that he was unhappy with a ban on the respondent's social media content about certain topics. He alleges he expressed these concerns to his then manager, Mr Cacchioli and to others in senior managers. Taking the claimant's case at its highest, he does not suggest that he raised a formal or informal grievance in July 2021 in relation to which he might reasonably have expected investigation and a formal outcome. I am not persuaded the claimant has reasonable prospects of linking the respondent's response to his criticisms of the policy to the later alleged failures of investigation which he asserts in relation to later complaints. The alleged failing sits with Mr Cacchioli, a different manager to that charged with resolving both prior and subsequent complaints. The subject matter of the complaint was different. The manner in which the complaint was raised also differed in that the claimant does not aver that he initiated a grievance process. I am similarly unpersuaded that the claimant has reasonable prospects of linking this alleged failure with other later alleged acts of discrimination or victimisation beyond the other alleged investigation failures. The claimant has not identified specifically in his pleadings or statement how such a connection might be established beyond the generality of an alleged discriminatory culture.

76. The fifth protected act alleged to have taken place in December 2021 with Ashling Weedon is not discussed in the claimant's witness statement. Nor is the alleged failure to investigate or resolve that complaint. My consideration of this matter is therefore confined to the claimant's pleaded case. To the extent that the alleged failure was a failure by Ms Weedon to deal with the claimant's averred complaint about the open dislike of the use of Black models by Ms Violetta Zlatareva (Marketing) and Andrew Trouce (Marketing), I consider there are reasonable prospects of the claimant establishing that this linked with the other alleged acts of harassment and victimisation listed as items (v), (vi), (vii), (viii), (ix), (xiv), (xviii) and (xix) of paragraph **60**. There is the discussion of these allegations below at paragraphs **80** to **85**. I apply similar reasoning to this alleged failure of investigation to that set out in paragraphs **84** and **85.** It is reasonably arguable that the alleged failure to investigate or resolve the alleged complaint to A Weedon in December 2021 about the Black models issue

could constitute part of a course of conduct which extended beyond the date of this alleged complaint to link with later acts including, potentially, those which have been raised within the normal time limit.

77. The final protected act which is said to have gone uninvestigated is alleged to have taken place on 30 June 2022. It follows that the alleged failure of investigation occurred after that date so that this failure is not on the face of it, out of time.

Item (ii) Office Manager : No 'smelly foods' at desk 'such as curry' 13 Jan 2020

78. Item (ii) relates to an alleged act of harassment on 13 January 2020, involving the Office Manager, possibly called Gail. She is not the alleged perpetrator of any of the other acts. The claimant acknowledged he has no evidence and does not contend that her comments about smelly food or the food at the desk policy was under the instruction of the RVPs or Lead Distributors from whom the claimant asserts in his statement many discriminatory issues and practices stem. Nor does there appear to be a similarity in the nature of the alleged act with the later alleged acts of harassment and victimisation. On this basis, I am persuaded that the claimant has no reasonable prospects of establishing at trial that this alleged act formed part of conduct extending over a period which ended on or after 1 July 2022 or, indeed, any later than the date of the act itself in January 2020.

Items (iii) and (iv): Shaun Wynn-Jones 'Too bullish' / Personality test April 2020

79. Items (iii) and (iv) of paragraph **60** are both alleged acts of harassment involving the claimant's line manager at the time, Shaun Wynne-Jones said to have occurred in April 2020. The allegations are that he called the claimant 'too bullish' and that he sent him a personality test not sanctioned by HR. In his witness statement, he asserts this was because he had challenged Mr Wynne-Jones on incidents he deemed racists. That alleged causation did not form part of his pleaded case. The claimant has provided no evidence or specific contention that Mr Wynne-Jones' comments or actions were under the instruction of the RVPs or Lead Distributors from whom the claimant asserts in his statement many discriminatory practices stem. There is no apparent similarity in the nature of the alleged acts involving Wynne-Jones with the later alleged acts of harassment and victimisation. Mr WJ does not feature as the alleged perpetrator of any of the later acts. Taking these factors into account, I am not satisfied that it is reasonably arguable that these alleged acts formed part of a conduct extending over a period which ended after 1 July 2022 or, indeed, later than the date of the acts themselves in April 2020.

Items (v), (vi), (vii), (viii), (ix), (xiv), (xviii) an (xix): Alleged Policy regarding Black and Asian Models allegations spanning May -2020 to 19 August 2022

80. Item (v) of paragraph 60 is an allegation of harassment that in May 2020, the Romanian marketing team instructed the claimant to remove Black and

Asian models from marketing materials. In his statement, the claimant alleges the RVPs say the same thing because Lead Distributors kick up a fuss when the respondent features ethnic minorities in the creative. Item (vi) is a harassment allegation that, in July 2020, J Faucher made comments opposing featuring darker skinned models but approving a lighter skinned Asian model, saying they 'blended in' with the other (white) models. Item (vii) is an allegation of victimisation by Ms Faucher following the claimant allegedly complaining on 9 June and 6 August 2020 about Ms Faucher's conduct including her resistance to darker skinned models. In his witness statement the claimant also alleges he challenged Ms Faucher's comments at the time of the discussion in July 2020, causing her to become defensive. The alleged victimisation in item (vii) includes various alleged examples of hostile behaviour by Ms Faucher in the ensuing period including excluding him from meetings, restricting communications with him and being argumentative with him. It is not a pleaded act of harassment, but the claimant gives evidence in his witness statement by way of background that on, 9 Septemer 2020, Ms Faucher told him and others in a Teams chat "*not to use the black guy as the RVPs think he looks angry*."

81. Item (viii) describes the impact on the claimant's health of Ms Faucher's alleged continuing treatment of him. Item (ix) is a further victimisation complaint concerning Ms Faucher in November 2020 when he alleges she excluded him from all pitch meetings and wider team invitations, making it difficult for him to perform his role. A further allegation relating to the respondent's attitude to ethnic minority models appears in item (xiv). This is an allegation of harassment by Chris Stirk in March 2022 who is alleged to have referred to ethnic minorities as "ugly" in a creative discussion with the claimant. On the same date, the claimant alleges at item (xv) that Mr Stirk victimised him by calling him 'too woke' in circumstances where the claimant says Mr Stirk was aware of his previous complaints. These included his complaints about the attitude shown by the Ms Faucher and the Romanian Marketing team to the use of darker skinned models. In his witness statement, he alleges this came on the back of remarks by Mr Stirk calling Black M&S staff members in a TiK Tok "ugly". His evidence in his statement is that following that, Mr Stirk said "all you need is a lefty work person in your marketing team to create a campaign disaster".

82. The claimant alleges at item (xvii) that he was victimised by the respondent reading a purportedly confidential survey in which he says he raised complaints in order to 'catch him out'. In items (xviii) and (xix), the claimant alleges he was placed at risk of redundancy and dismissed as acts of victimisation because of protected acts said to include complaints about the issue of darker-skinned models and about his treatment for challenging it. Again, it is not one of the pleaded acts of harassment or victimisation but the claimant gives evidence at paragraph 65 of his statement about an alleged incident on 20 July 2022 when he alleges several markets disputed the use of ethnic models during a sub regional team meeting with markets and that this came from the Country Director of Poland, CZ and Slovakia.

83. I am not persuaded that the claimant has no reasonable prospects of proving at trial that the above mentioned allegations (namely, items (v), (vi), (vii), (viii), (ix), (xiv), (xv), (xvii), (xviii) and (xix) amount to conduct extending over a period. I recognise that different actors are alleged to have been involved

in these acts and that some are pleaded as acts of victimisation and others as acts of harassment. They are also temporally disparate.

84. Nevertheless, I cannot allow that there is no reasonable prospects of the claimant establishing a sufficient linkage between these allegations to permit their aggregation for the purposes of section 123(3)(a). That linkage might be broadly characterised as a state of affairs involving hostility towards the use of Black and Asian models in marketing materials and hostility towards those who challenged this approach. In identifying a reasonably arguable contention that these acts could amount to conduct extending over a period, I take the claimant's case at its highest. I am mindful that discrimination and victimisation cases are fact sensitive. I am further mindful that, without having heard the evidence, a too fragmented approach can have the effect of 'diminishing any eloquence that the cumulative effect of the primary facts might have' (Anya **v University of Oxford** [2001] IRLT 377, CA). I have taken into account the claimant's contention that the RVPs and/or Lead Distributors (or some of them) endorsed or even instructed the approach about which the themselves claimant complains. I make no finding, of course, that these acts amount to prohibited conduct or that they amount to prohibited conduct extending over a period. I find only that such a case may be reasonably arguable.

85. Having determined that that there is a reasonably arguable case, it follows that there is a reasonable prospect of establishing that none of them is to be treated as brought outside the normal three-month time limit. I therefore refuse the respondent's application to strike out the acts alleged in paragraph 60 (v), (vi), (vii), (viii), (ix), (xiv), (xv), (xvii), (xviii) and (xix). I likewise refuse the application to strike out the allegation of a failure properly to investigate the claimant's complaint in December 2021 about an open dislike by A Trouce and V Zlatareva of the use of Black models which forms part of the allegation at item 60 (i). This does not mean that I have found these complaints to have been brought in time. That question will be determined at the final hearing next May / June after evidence has been heard from both parties.

Item (x): Team Move 15 June 2021

86. A number of alleged acts remain to be considered. Of those that remain, the earliest chronologically is item (x). This is pleaded as an allegation of victimisation. *On 15 June 2021, the claimant was forced to move teams despite not wanting to for fear of racial harassment.* The claimant's case is that he moved at this time to the marketing team. In his witness statement the claimant describes concerns about a move to the team because of previous negative interactions with them. It was, according to the claimant's evidence, initially presented as an optional choice but a couple of months later the claimant says Mr Stirk said to him it was great that he was joining the team. Though this is pleaded as an act of victimisation, it is difficult to identify from the pleadings and the claimant's witness statement how or why this is said to be causally linked to any of the alleged protected acts or how or why it is suggested to link with any of the other alleged acts of victimisation or discrimination. The claimant said he never formally agreed to the move but was sent there anyway. He acknowledges in his statement

that he didn't challenge it when it happened though he had mentioned reservations beforehand when it was first mooted. There is no suggestion of or evidence of any instruction from senior management (the RVPs or Lead Distributors) that the move should take place for sinister reasons. It appears to be the claimant's case that it was pushed by Mr Stirk. Taking the claimant's case at its highest, I do not consider there is a realistic prospect of the claimant establishing the necessary connection with any later allegations to enable it to be viewed as a constituent part of conduct extending over a period.

Items (xi) and (xii): Social Media Policy restriction on topics July- Sep 21

87. The next two items as yet not considered are items (xi) and (xii). Item (xi) is an allegation of harassment in July 2021, involving the claimant's new line manager, Julian Cacchioli. The claimant alleges he was forced to implement a social media policy which was intentionally excluding topics to do with race, gender and sexual orientation. In his statement he says he flagged his dismay about this to J Cacchioli in his one to ones. Item (xii) also involves Mr Cacchioli and the social media policy prohibiting certain topics. The claimant alleges he was victimised on 2 September 2021 when Mr Cacchioli allegedly lied to him about the reason for the ban. The claimant says this was to avoid him making further disclosures because JC knew about his previous ones. In his witness statement, the claimant explains his evidence will be that Julian Cacchioli falsely asserted at that time that the ban on certain topics was due to vaccine content. Taking the claimant's case at its highest, I would allow that it is reasonably arguable that these two allegations could link to form alleged conduct extending over a period.

88. The difficulty for the claimant is that this doesn't take him much further because that period still ended on 2 September 2021, over a year before he initiated Early Conciliation. I have considered whether there is reasonable prospect of his linking these allegations with any later acts to form a longer course of conduct extending after 30 June 2022. I conclude there is no reasonable prospect of the claimant successfully doing so. I have reviewed all the later allegations and these two appear quite disparate. There is a temporal gap between them and the next alleged acts which begin again in March 2022. Those later allegations involve different alleged actors (mainly Chris Stirk). They are different in nature and do not concern the restrictions on the social media topics. Taking the claimant's case at its highest, I allow that he may prove the policy restrictions were imposed at high level of management, possibly by or at the behest of Lead Distributors. Even if that were established, I do not consider that of itself would provide a sufficient degree of connection with other later complaints such as would allow them to be knitted together as conduct extending over a period.

Item (xiii): March 2022 – Chris Stirk: Claimant 'too angry in Teams calls'

89. The claimant alleges in his witness statement that this comment was made during an end of year review on 25 February 2022. The relationship with the

protected characteristic of race is not apparent on the face of the allegation. It is not clear from the claimant's pleadings or witness statement how or why the allegation might be said to link with later acts complained of. I am not persuaded that there is a reasonably arguable case that this allegation may link to subsequent acts which have been complained of within the normal time limit of three months, or indeed any subsequent alleged acts of prohibited conduct.

Item (xvi) 22 April 2022 Chris Stirk criticising persons with beards.

90. The claimant alleges in his witness statement that this in fact occurred on 21 April 2022 during a one to one with Mr Stirk. He described how the comment was prompted by Mr Stirk berating Gen Z for their "ridiculous ways and wanting to be too cool for school with their DJ Decks and ridiculous beards". The claimant alleges he then stopped himself and aid "no offence as you have a beard." The claimant's evidence is that Mr Stirk then apologised after the call. On the evidence which the claimant has supplied, the relationship with the characteristic of race is again not clear from the context as described. Likewise, it is not clear from the claimant's pleadings or witness statement how or why the allegation might be said to link with later acts complained of (principally the initiation of a redundancy process and dismissal). I am not persuaded that there is a reasonably arguable case that this allegation linked to subsequent acts which have been complained of within the normal time limit of three months.

Reasonable prospect of a just and equitable extension?

Broad overview of factors likely to be considered by a Tribunal in exercising its discretion in this case

91. I have considered all relevant factors to determine whether there are reasonable prospects of a Tribunal holding that it would be just and equitable to extend time to allow the claims to proceed. There are some different considerations relating to different alleged acts of harassment and victimisation. Some are more historic than others. Some were the subject of formalised internal grievances where others were not. Such specific differences are considered below. However, I have set out broadly below, the factors which a Tribunal may find could weigh in favour of and against the granting of an extension. I have considered these to the extent applicable in relation to each allegation to assess whether there is a reasonable prospect of a Tribunal extending time to permit claims brought outside the normal time limit. In the interests of concision, I do not repeat them all in the discussion of each individual allegation. Nonetheless, they have been considered in relation to each.

92. Those factors which a Tribunal may find could weigh in favour of an extension include:-

    (i) that the claimant at times struggled with his mental health, including in particular in the period of autumn 2020, when he experienced particular exacerbations of his symptoms of anxiety and PTSD.

(ii) that the claimant raised an internal grievance or formally complained to HR about certain matters and complained to his line manager and other senior managers about others. His preferred resolution was an internal one ;

(iii) that the claimant was ignorant of the time limit when the normal time limit expired;

(iv) that the claimant did not have professional legal representation at the time when the normal time limit expired for the acts which fall outside the normal time limit;

(v) that the disadvantage to the claimant if the extension is refused is substantial in that he will be deprived of the opportunity to litigate the complaints about the older acts and to have these judicially determined;

(vi) that a final hearing will proceed in any event to determine the claimant's extant victimisation and harassment claims and his unfair dismissal and whistleblowing claims so that the respondent will, in any event, incur at least some of the expense of preparing for and attending a hearing that would be involved if all allegations were ventilated.

93. A Tribunal may give weight to the following factors which may militate against the granting of an extension of time on the basis that it is not just and equitable:

(i) The claimant was fully aware of the relevant facts for the claims at the time the alleged harassment or victimisation is said to have occurred.
(ii) That although the claimant suffered with poor mental health at times, it was not such as to incapacitate him for work or to prevent him being able to raise matters internally.
(iii) Although the claimant raised formal complaints or grievances about certain matters, he did not in relation to others. A Tribunal may find that where he did not, the reason given for not raising Tribunal proceedings regarding the pursuit of internal procedures is weakened.
(iv) The claimant did not act promptly with regard to Tribunal proceedings once he was aware of matters and once he was aware an internal resolution which he considered satisfactory was unlikely to be forthcoming.
(v) The claimant did not make any effort to do his own online or other research on Tribunal procedure and time limits. He did not contact solicitors or seek out sources of free advice such as the CAB in the period prior to July 2022. When he did engage a solicitor around that time, there was a lack of engagement with the rules on time bar and a lack of enquiry about prospective claims about historic matters. Although the claimant was ignorant of the time limit, a Tribunal may find that ignorance was, to a significant degree, wilful.
(vi) The delay in lodging the complaint was not a matter of a few days or even weeks, but for many allegations, several months or one or two years.

(vii) A Tribunal may assess a real risk that the cogency of the evidence would be affected by these delays. In relation to certain allegations, there is scant specification which could mean the respondent lacks fair notice, where, for example, the alleged harassers have been inadequately identified.

(viii) In a number of cases the alleged managers have left the respondent's employment and may not be available to the respondent in the way they would have been had the claims been brought within the normal time limit.

(ix) Time limits are designed to ensure compliance with the principle of legal certainty.

(x) The onus lies with the claimant to show it is just and equitable to allow the claim to be received late.

94. With these factors in mind, I turn to the question of whether there are reasonable prospects of a Tribunal extending time to allow the late allegations to be heard.

2020 Allegations: Reasonable prospect of just and equitable extension?

95. I deal firstly with the allegations which occurred in 2020 for which I have identified no reasonable prospect that they will be found to form part of conduct extending over a period which ended later. These are: the alleged failure to investigate or resolve the three alleged protected acts in 2020; the January 2020 allegation concerning the office manager's remarks about 'smelly foods' at the desk 'such as curry', and the allegations concerning Shaun Wynne-Jones describing the claimant as 'too bullish' and sending him a personality test.

96. In relation to these allegations, I agree with Ms Berry's assertion that there is no reasonable prospect of the Tribunal extending time to permit these to be heard. I hesitate to reach such a conclusion, bearing in mind the margin of discretion which would be afforded to a Tribunal determining this issue on a substantive basis. I acknowledge that in relation to the alleged failings in the investigation, they may, taking the case at its highest be treated as having been done in the spring or early summer of 2021. Nevertheless, the length of the delay will inevitably weigh heavily in a Tribunal's deliberations. The time lag is significant here, giving rise to a serious risk that it would affect the cogency of the evidence. In relation to the January 2020 allegation, there has been inadequate notice of the identity of the individual concerned and there was no internal complaint about the matter at the time. Mr Wynne-Jones has left the respondent's employment and, again, there is no averment or evidence that the acts involving him were the subject of any internal grievance or complaint. A Tribunal would also require to consider the 'thinness' of the reasons given by the claimant for his omission to raise these matters earlier or to explore the time limits for doing so.

97. Having so found, I strike out the following allegations of harassment, said to have taken place in 2020 on the ground that there is no reasonable prospect of success, having regard to the applicable time limit in section 123 of EA:

90. …

a) On 13 January 2020 the claimant was subjected to comments by the office manager at the time about the respondent's policy not to eat "smelly" foods at his desk such as "curry";
b) In or around April 2020 the claimant was subjected to comments from his line manager Shaun Wynne-Jones, about being "too bullish" to survive in the Respondent's business and he needed to change;
c) On 22 April 2020, Shaun Wynne Jones sent the Claimant a personality test to complete which was not approved by HR or sent to anyone else;

98. I similarly strike out the allegation of victimisation at paragraph 89 (a) of the Particulars of Claim that none of the claimant's protected disclosures (also alleged to be protected acts) were properly investigated and remained unresolved. *in so far as that allegation relates to the protected acts said to have taken place in 2020*. Again, I do so on the ground that it has no reasonable prospect of success, having regard to the applicable time limit in section 123 of EA.

2021 Allegations: Reasonable prospect of just and equitable extension?

99. I turn next to the allegations said to have occurred in 2021 in relation to which I have found there is no reasonable prospect of establishing conduct extending over a period that ended later. These are: that the claimant was forced to move teams on 15 June 2021; that he was forced to implement a social media content policy in July 2021 banning certain diversity related topics; that in September 2021, J Cacchioli lied to the claimant about the reason for this content ban; the alleged failure to investigate or resolve the complaints the claimant says he made to senior members of staff and J Cacchioli in July 2021 about the social media content restrictions; and the allegation that the claimant's complaint to A Weedon on 10 December 2021 was not properly investigated and was left unresolved.

100. In relation to the 10 December '21 complaint, the part that relates to the claimant's complaint about dislike for the use of Black models and the failure to investigate this has been permitted to proceed to trial where time limitation issues will be substantively determined (see paragraph **85** above).The consideration of whether there are reasonable prospects of a just and equitable extension, therefore, only applies to the alleged failure to investigate the other parts of the December 2021 complaint, namely Mr Trouce's comments about men wearing pink and the claimant's expressed fear of joining the marketing team because of a bullying and racist approach.

101. I am not satisfied either that there are reasonable prospects of the claimant persuading a Tribunal that it would be just and equitable to extend the time limit to allow any of the 2021 allegations to be heard. The incidents are said to have happened around a year before the cut off point for timeous complaints (i.e. events occurring after 30 June 2022).

102. The claimant's team move was not challenged by the claimant internally at the time it took place, though he raised concerns when it was mooted. It was not the subject of a grievance in respect of which the claimant was reasonably awaiting an outcome. Likewise, the events in July and

September 2021 concerning the social media content ban are not said to have been the subject matter of any formal or informal grievance process initiated at the time. I take the claimant's case at its highest that he voiced various criticisms to J Cacchioli and others but it is not pleaded to have been done in a context where there was clear cause to expect an individual outcome. There is also a lack of specification of the identity of the other 'senior managers' to whom his objections are said to have been raised.

103. With respect to the December 2021 alleged complaints to A Weedon, the complaint about Mr Trouce's comments on men wearing pink shirts does not, on the face of it, have a connection to the protected characteristic of race. Again, although these matters are said to have been discussed with HR in December 2021, it is not understood this was in the context of a formal grievance. I acknowledge once more the margin of discretion available to the Tribunal, but I am not satisfied the claimant has reasonable prospects of persuading it to exercise that discretion in favour of an extension, taking all relevant factors into account.

104. Having so found, I strike out the following allegation of harassment, said to have taken place in 2021:

> *90. …*
> *f) In July 2021 the claimant was forced to implement a social media content policy which was intentionally excluding topics to do with race, gender and sexual orientation amongst other topics which he did not agree with.*

105. I similarly strike out the allegation of victimisation at paragraph 89 (a) of the Particulars of Claim that none of the claimant's protected disclosures (also alleged to be protected acts) were properly investigated and went *unresolved in so far as these disclosures are said to have taken place in 2021.* This is subject to the exception noted above regarding the part of 89 (a) that relates to the claimant's complaint in December 21 about Zlareta and Trouce's dislike for the use of Black models and the alleged failure to investigate his complaint about this.

106. I also strike out the following allegations of victimisation at paragraph 89, said to have taken place in 2021:

> *e) On 15 June 2021, the claimant was forced to move teams despite not wanting to for fear of racial harassment;*
>
> *f) On 2 September 2021, the claimant's line manager at the time, Julian Cacchioli, lied to the claimant about the true reason behind the discriminatory unwritten social media policy set out above which the claimant was being forced to implement to try to avoid the claimant making another protected disclosure given knowledge of his previous protected disclosures*;

2022 Allegations: Reasonable prospect of just and equitable extension?

107. Finally, I turn to those allegations said to have occurred in 2022 in relation to which I have found there is no reasonable prospect of establishing conduct extending over a period that ended after the cut off point for the normal time limit. These are: In March 2022, the claimant's complaint that Chris Stirk harassed him by saying he appeared 'too angry' in Teams calls and that he did so again on 21 or 22 April 2022 by criticising persons with beards.

108. Again, I am not satisfied either that there are reasonable prospects of the claimant persuading a Tribunal that it would be just and equitable to extend the time limit to allow these complaints to be heard. Though these allegations are more recent, they remain out of time by a matter of months rather than weeks or days. They are not alleged to have been the subject of any internal grievance procedure in respect of which they claimant might suggest an outcome was reasonably expected or awaited. It seems the claimant took some legal advice in July 2022 (when there was still some prospect that these two complaints could have been presented in time) but he did not discuss these relatively fresh matters with the lawyer he engaged at that time or seek any advice on time limits. Ms Berry has also pointed out that, on the face of the complaints in March and April 2022, their relationship to the protected characteristic of race is not clear. It seems from the claimant's witness statement that the remark about beards was part of a criticism of the Gen Z hipster as opposed to being aimed at a particular racial group. Taking into account all relevant factors, I am not satisfied that the claimant has reasonable prospects of persuading a Tribunal to exercise its discretion in favour of an extension in relation to these allegations.

109. Having so found, I strike out the following allegations of harassment, said to have taken place in 2022 on the ground that they have no reasonable prospect of success, having regard to the time limit provisions in section 123 of EA:

> *90. …*
> *g) In or around March 2022, and during his end of year review, the Claimant was subjected to criticism by Chris Stirk that he appeared "too angry" in team calls;*
> *….*
> *i)On 22 April 2022 the Claimant was subjected to comments by Chris Stirk criticising persons with beards.*

110. All allegations which have not been specifically identified as having been struck out shall proceed to be considered at a final hearing. I have not made any substantive finding that such extant complaints have been brought in time, but merely, declined to strike them out on the basis that the claimant may have a reasonable prospect of aggregating them to rely on conduct extending over a period. That question will be substantively determined at the final hearing next year.

L Murphy

Employment Judge Murphy (Scotland), acting as an Employment Judge (England and Wales)

Date 30 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 July 2023

GDJ
FOR EMPLOYMENT TRIBUNALS