Neutral Citation Number: [2023] EAT 168

Case No: EA-2022-000870-LA

EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 January 2024

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY
(Sitting alone)

Between:

Mr J Holbrook

Appellant

and

(1) Tom Cosgrove KC
(2) Philip Coppel KC
(3) James Findlay QC
(4) Ranjit Bhose QC
(5) Harriet Townsend
(6) Ryan Kohli
(7) Robin Green
(8) Wayne Beglan
(9) Rob Williams
(10) Ashley Bowes

Respondents

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Jon Holbrook the **Appellant in person**
James Laddie KC and **Roisin Swords-Kieley** for the **Respondents**

Hearing date: 19 October 2023

- -

JUDGMENT

SUMMARY

PRACTICE & PROCEDURE

RELIGION OR BELIEF DISCRIMINATION

The Claimant, a practising Barrister, was expelled from his Chambers after sending a tweet which was considered by his colleagues to be discriminatory and offensive. He considered that his treatment was because of his belief in social conservatism. Although his expulsion took effect from 1 February 2021, the Claimant did not present his claim of belief discrimination to the Tribunal until 30 September 2021, precisely five months out of time. The Claimant sought an extension of time claiming that his failure to lodge the claim in time was because the decision of the Employment Tribunal in *Forstater v Centre for Global Development* [2019] UKET 2200909 (18 December 2019) that a person's gender critical belief did not qualify for protection under s.10 of the Equality Act 2010 meant that his claim of belief discrimination also stood very little chance of success. The decision of the ET in *Forstater* was overturned by the EAT on appeal on 10 June 2021 (*Forstater v Centre for Global Development* [2022] ICR 1). However, the Claimant did not read that judgment until 23 August 2021. The Claimant said that was because he was preoccupied with Bar Standards Board proceedings against him in relation to his twitter activity. As soon as he did read the EAT judgment, he realised he might have a claim; he sought advice and presented his claim within a short time thereafter. The Claimant contended that, in these circumstances, he had not acted unreasonably in failing to present his claim in time. In rejecting that contention, the Tribunal held, amongst other matters, that his belief that his claim would not succeed, was not reasonably held; that the BSB proceedings were not a good reason for him not to read the EAT's judgment in *Forstater* and to consider and pursue a potential claim; and that the balance of prejudice pointed to the refusal of an extension of time. The Claimant appealed.

Held, dismissing the appeal, that the Claimant's prospects of establishing social conservatism as a protected belief were no poorer than for a host of beliefs, political, religious or otherwise, in respect of which there had been no adverse, binding ruling by any court or tribunal. The ET's decision in *Forstater* was a first instance decision on a different belief and was far from directly analogous. The fact that the Claimant's understanding of the legal position was shared by some academics and legal commentators did not mean that his misapprehension as to the legal position was reasonable. The Tribunal was entitled to reject the Claimant's case that he was so preoccupied with the BSB proceedings that nothing else crossed his mind. Indeed, given the factual background of this case, any other conclusion would have been surprising. As to the balance of prejudice, there was no error of law or principle in the Tribunal's approach to the exercise of its broad discretion in relation to whether it would be just and equitable to extend time. Accordingly, the appeal would be dismissed.

MR JUSTICE CHOUDHURY:

1. I shall refer to the parties as "the Claimant" and "the Respondents" as they were below. The Claimant appeals against the decision of Employment Judge Brown ("**the Judge**") sitting in the London Central Employment Tribunal ("**the Tribunal**") that it would not be just or equitable to extend time for the presentation of the Claimant's discrimination claim against the Respondents. It is not in dispute that the Claimant's claim was presented exactly 5 months out of time.

Background

2. The Claimant was called to the Bar in 1991 and has practised as a Barrister for over 30 years. As at the beginning of 2021, the Claimant was a tenant in the Respondents' Chambers ("**Cornerstone**"). Members of Cornerstone are required to adhere to its policies, including its Social Media Policy.

3. The Claimant summarises his beliefs as follows:

> "The Claimant is a social conservative in the manner of the late Sir Roger Scruton and in particular he is a critic of identity politics. Accordingly, he believes in the importance of nation, community and family and on finding ideas that members of society can share, whereas emphasising one's race, sex, sexuality and gender draws attention to characteristics that are exclusive rather than inclusive."

4. I refer to this as "the Claimant's belief".

5. Prior to January 2021, the Claimant had a regular presence on social media in his capacity as a barrister and would express views on Twitter that reflected his belief in social conservatism.

6. On 17 January 2021, the Claimant sent a tweet in response to a tweet by the Equalities and Human Rights Commission publicising a settlement achieved in a case involving a Black schoolgirl excluded from school for wearing an afro hairstyle. The tweet stated, "The Equality Act undermines school discipline by empowering the stroppy teenager of colour". This tweet itself attracted media attention as it was said to be offensive. Some of that attention was critical of the Claimant and, by association, Cornerstone. On 22 January 2021, Cornerstone asked the Claimant to delete the tweet. The Claimant refused. On 23 January 2021, Cornerstone alleged that the Claimant was in breach of Chambers' Social Media Policy and asked him once again to remove his tweet "immediately and permanently". By a letter dated 26 January 2021, Cornerstone informed the Claimant that it regarded the tweet as "denigrating and/or insulting" and containing a "personal and offensive allegation… designed to demean or insult". It was also stated that the tweet undermined public confidence in the Bar and was "in fact racist". The Claimant was requested once again to remove the tweet and to apologise for the offence it had caused both on Twitter and in writing to the family of the schoolgirl who was the subject of the Tweet.

7. Cornerstone further informed the Claimant that Chambers' Management Board considered it necessary for the Cornerstone membership to consider his expulsion. The Claimant had already sought to tender his resignation from Chambers at this stage, but this was rejected.

8. At a Chambers Meeting held on Sunday 31 January 2021, Cornerstone passed a resolution to expel the Claimant with effect from 1 February 2021. The Claimant voted in favour of that resolution.

9. The Claimant considers his treatment, and in particular his expulsion from Chambers, to amount to less favourable treatment by reason of his belief. By s.123 of the *Equality Act 2010* ("**EqA**"), any such claim must be brought within three months of the date of the act complained of "or such other period as the Employment Tribunal thinks just and equitable". As such, the time limit for bringing his complaint expired on 30 April 2021. However, his claim was not presented to the Tribunal until 30 September 2021, precisely five months out of time.

10. The Claimant was aware at the time he sent the impugned tweet, and at the time of his expulsion, of the decision of the Employment Tribunal in *Forstater v Centre for Global Development* [2019] UKET 2200909 (18 December 2019) ("**Forstater – ET**"), in which it had been held that Ms Forstater's "gender critical" belief did not amount to protected belief within the meaning of s.10, EqA. He believed that Forstater-ET reflected settled law that as Ms Forstater's "gender critical" belief was in direct contradiction with the human rights and fundamental freedoms of transgender people established under the European Convention on Human Rights ("**ECHR**") it was not "worthy of respect in a democratic society". The phrase "worthy of respect in a democratic society" derives from the judgment of Burton J in *Grainger plc v Nicholson* [2010] ICR 360 ("**Grainger**"), in which the EAT considered the criteria (derived from existing authority) that are to be applied in determining whether a belief amounts to a "philosophical belief" for the purposes of the then relevant provisions contained in the *Employment Equality (Religion or Belief) Regulations 2003* ("**the 2003 Regulations**"). (See further below).

11. The Claimant believed that his own belief in social conservatism was not likely to be found to be "worthy of respect in a democratic society" because that belief conflicted with the protections given to people in respect of their race, sex and gender.

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

13. By a judgment published on 10 June 2021, the Employment Appeal Tribunal overturned the decision in Forstater – ET: *Forstater v Centre for Global Development* [2022] ICR 1 ("**Forstater – EAT**"). The EAT held that Ms Forstater's gender critical belief was a protected belief under s.10, EqA.

14. The Claimant did not read the judgment in Forstater-EAT when it was published. However, on 24 June 2021, he did tweet an article written by Lord Sumption in The Times stating, "Former Supreme Court Judge, Jonathan Sumption on the Forstater judgment, which strikes an important blow for free speech". It would have been evident from that article that Ms Forstater's appeal against Forstater-ET had succeeded.

15. The Claimant claims not to have read Forstater-EAT at that stage because he was focused on the BSB proceedings. On 5 July 2021, the BSB informed him that his case would be considered on 2 August 2021. The BSB's decision was sent to the Claimant on 9 August 2021. Save in respect of one tweet, which the

BSB concluded would cause offence and could promote hostility towards Muslims as a group, the Claimant's tweets were not found to amount to a breach of the BSB Handbook. For the offending tweet, the Claimant was issued with a warning and a fine of £500.

16. The Claimant did not read Forstater-EAT until 23 August 2021. Having done so, he believed he might have a legal remedy against Cornerstone. He sought advice, and a letter before action was submitted on 27 August 2021. On 29 September 2021, the Claimant consulted a barrister specialising in employment and discrimination law. He issued his claim against the Respondents the next day. The Claimant wishes to resume full-time work at the Bar and claims more than £3m in compensation.

The Tribunal's decision

17. A preliminary hearing was held on 22 June 2022 to determine whether time should be extended. The Claimant submitted that prior to Forstater-EAT he had a reasonable belief that any claim issued under the EqA against the Respondents would fail. He further submitted that it was reasonable for him not to have read Forstater-EAT between 10 June and 23 August 2021 because he was reasonably preoccupied with the BSB Proceedings and did not want to delay the outcome of those proceedings by making further submissions based on that case and the EqA. The Tribunal held as follows:

> **"49. I decided that, on the facts, the Claimant made a considered decision, during and immediately after the events in question, not to bring a claim of discrimination against the Respondents.**
>
> **50. He was in possession of the facts of the alleged detriments when they occurred but made a judgment that his claim would not succeed on the law. The relevant law he relied on in coming to that judgment, particularly, was the first instance Forstater decision. The Claimant had**

read that case for himself and had formed his own opinion on it. He knew, nevertheless, that that was not binding authority. It was also clear that the Forstater case concerned a different set of philosophical beliefs to the Claimant's. Accordingly, at the time the Claimant made a decision not to bring a discrimination claim based on his philosophical belief, there was no binding authority on conflicts of rights case and certainly no binding authority on the Claimant's particular belief.

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

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

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

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

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

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

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

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

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

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

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

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

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

iii) The Tweet, insofar as it manifested a belief, did not manifest the Claimant's social conservatism but something narrower (and not capable of protection under the Grainger criteria): a criticism of the effect of the EqA on school uniform policy.

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

The Grounds of Appeal.

18. The Claimant's Notice of Appeal, lodged on 13 September 2022 (and amended on 23 February 2023), contained three grounds of appeal.

i) Ground 1: The Tribunal failed to determine the reasonableness of, and/or applied the wrong test to, the change in the Claimant's assessment of his rights before and after Forstater-EAT.

ii) Ground 2: The Tribunal failed to consider and/or give adequate reasons for rejecting the Claimant's reasons for not reading Forstater-EAT between 10 June and 23 August 2021.

iii) Ground 3: The Tribunal failed to consider the particular prejudice to the Claimant in the balance and/or wrongly treated the reasons for the delay as the decisive factor.

19. At a Rule 3(10) hearing before HHJ Auerbach on 3 March 2023, Grounds 1 and 2 were considered to be unarguable and permission to appeal on those grounds was refused. As to Ground 3, HHJ Auerbach considered that

> **"39 … This to my mind falls into two parts. The first is that the tribunal has failed to consider the particular prejudice to the claimant, over and above the fact that, as is always true, if time were not extended, then he would not be able to pursue his claim. The second is that the judge erred by discounting the prejudice to him entirely on the basis that it was caused by a delay which was entirely, in the judge's view, his fault.**

20. The first part was considered unarguable. However, HHJ Auerbach was "just persuaded" that the second strand of Ground 3 "passes the threshold of arguability". Accordingly, permission to appeal was granted in respect of that second strand of Ground 3 only.

21. Undeterred, the Claimant appealed to the Court of Appeal against the refusal of permission in respect of Grounds 1 and 2. By an order of Bean LJ dated 8 August 2023, permission was granted in respect of Grounds 1 and 2. Bean LJ noted that "it may be an uphill task" for the Claimant to overturn the exercise

of the Tribunal's discretion but concluded "after some hesitation" that Grounds 1 and 2 were sufficiently arguable to proceed.

22. I should note that Grounds 1 and 2 were formulated differently for the Court of Appeal than they were before the EAT. The three grounds of appeal as they now stand, taking account of these fresh formulations of Grounds 1 and 2 and HHJ Auerbach's narrowing of Ground 3, are therefore as follows:

    i) Ground 1: The Judge failed to appreciate or misdirected herself as to the significance of the conflict of rights test in Grainger (v) both pre and post Forstater-EAT.

    ii) Ground 2: The Judge failed to appreciate or misdirected herself as to the qualitative nature of the Claimant's reasons for awaiting the outcome of the BSB Investigation.

    iii) Ground 3: The Judge erred by discounting the prejudice to the Claimant entirely on the basis that it was caused by a delay which was entirely, in the Judge's view, his fault.

23. I shall deal with each of these grounds in turn.

Ground 1: Failure to appreciate or misdirection as to the significance of the conflict of rights test in Grainger (v) both pre- and post-Forstater-EAT.

Submissions

24. The Claimant appeared on his own behalf. I am grateful to him for his clear and helpful submissions. The Claimant commenced with a general submission that, in the exercise of its discretion, the Tribunal must engage with the reasons put

forward for delay, the touchstone being, at all times, whether the delay was reasonable in the circumstances. It is not enough for the Tribunal to say that the Claimant "should have known better" if it fails to consider the case being advanced for an extension of time. The Claimant submits that the Judge erred in her approach in that instead of considering the reasonableness of the Claimant's position, she focused on "fault" and "responsibility".

25. As to Ground 1 specifically, the Claimant submits that it was his belief in social conservatism that gained expression in the impugned tweet about the schoolgirl, and which resulted in his expulsion. That belief would therefore need to satisfy the "conflict of rights test in Grainger (v) if [it] were to be protected under EqA". He submits that the "essential error of law made by the Judge was her failure to understand and/or address how the EAT Grainger rule on conflict of rights cases operated until it was reformulated by the EAT in [Forstater-EAT] on 10 June 2021". Whereas under *Grainger*, the threshold for excluding a belief from protection by reason of Grainger (v) was very low, after Forstater-EAT, that threshold was much higher. The Claimant submits that his understanding of the legal position pre-Forstater-EAT was one that was widely held by lawyers and academics and was reasonably held. Section 123, EqA does not operate under the legal fiction that everyone knows the law, and a "wholly understandable misapprehension as to the law" is a relevant factor to be taken into account. The Judge is criticised for not referring to or addressing the Grainger (v) rule on conflict of rights and is said to have been quite wrong to state that there was "no binding authority" in this regard. That failure meant that the Judge focused unduly on Forstater-ET and the fact (irrelevant according to the Claimant) that it was a first instance decision that was not binding on the Claimant. The

Claimant submits that Forstater-EAT was a "game-changer" (as supported by various commentators, practitioners and subsequent judgments) such that a belief that previously would have been unlikely to qualify for protection, would now almost certainly qualify. Had the Judge focused, as she ought to have done, on the reasonableness of the delay and the Claimant's perception of the law, rather than whether or not there was a "legal impediment" to bringing a claim, she would have been bound to conclude that the delay was not unreasonable.

26. Mr Laddie KC, who appears for the Respondents with Ms Swords-Kieley (as he did below), submits that there was no error at all and that the Judge decided the case that the Claimant put before her. Contrary to what is said now that case did not rely on *Grainger* – it was not referred to at all in the skeleton argument below or included in the 23 authorities presented to the Judge by the Claimant – and was raised for the first time with the emphasis now being placed on it in the appeal to the Court of Appeal against the refusal of permission. Mr Laddie submits that this newly invented criticism of the Judge's approach is reason enough on its own to dismiss the appeal. In any event, says Mr Laddie, *Grainger* was not a "game-changer" and does not bear the weight that the Claimant seeks to place upon it. *Grainger* was not a conflict of rights case, and the passage on which the Claimant relies as establishing a low threshold for the exclusion of beliefs did not even form part of the *ratio* of that decision. The high threshold for excluding beliefs has long been established since the authorities on which *Grainger* itself and subsequently Forstater-EAT were decided. The Judge was clearly entitled to consider the case presented to her, namely that Forstater-ET meant that his claim was unlikely to succeed, and to reject that contention as unreasonable for the reasons she gives, including that Forstater-ET was (as the

Claimant accepted) not binding on him, and dealt with a different belief than the one to which he subscribes.

Ground 1 – Discussion

27. The Claimant's case under this ground is based principally on the contention that the Judge failed to understand and/or address how the "*Grainger* rule on conflicts of rights cases" operated until it was reformulated by the EAT in Forstater-EAT on 10 June 2021. In other words, had the Judge properly understood the import of *Grainger*, she would have been bound to conclude that the Claimant's view that his claim was likely to fail was reasonably held. The principal difficulty with that contention is that *Grainger* was not the focus of the Claimant's case before the Tribunal.

28. The Claimant criticises the Judgment for failing to mention Grainger at all (except for a single reference in [60] of the judgment when quoting from the Respondents' skeleton below) and for unduly focusing on Forstater-ET and its non-binding nature. However, the focus on Forstater-ET was the result of the way in which the case was put below. I have been shown a copy of the Claimant's skeleton argument below. It makes no mention of the *Grainger* case at all, let alone the specific Grainger V criterion on which the Claimant places much reliance. Moreover, I am told (and the Claimant does not dispute) that *Grainger* did not appear in the list of 23 authorities presented by him to the Tribunal (albeit that it was before the Tribunal in the Respondents' bundle).

29. Ground 1 as formulated in the Claimant's original Notice of Appeal (and his Amended Notice of Appeal) made no reference to *Grainger*. Instead, it refers only to the decision in Forstater-ET and the change in the Claimant's assessment

of his rights in light of the decision in Forstater-EAT. It was only in the Notice of Appeal as formulated for the Court of Appeal that it was suggested that the Judge failed to deal with *Grainger*.

30. In the Claimant's skeleton argument for this appeal, the focus, by contrast, is very much on *Grainger*, Forstater-ET being somewhat relegated and described as merely providing an "illustration" of the principle established in *Grainger*.

31. These are far more than pleading-points: they demonstrate quite clearly that the principal error alleged, namely that the Judge failed to consider the case presented to her, lacks any foundation whatsoever. The Judge in fact considered precisely the case that was presented to her, namely that it was the Claimant's understanding, based on Forstater-ET, that his claim was unlikely to succeed and that that was a reasonable view for him to hold prior to Forstater-EAT. The Judge considered that case and rejected it for the reasons she set out. The burden was on the Claimant to explain the reason for failing to present the claim on time. Having set out and relied upon one reason it is not open to the Claimant now to seek to undermine the judgment on the basis that the Judge failed to consider a different reason that was not in fact relied upon below.

32. That conclusion would of itself be dispositive of Ground 1. However, I go on to consider the Claimant's current case based on *Grainger*.

33. In *Grainger*, the EAT (Burton J) considered an appeal from a decision of the tribunal below that a belief that everyone was under a moral duty to live their lives so as to mitigate the effects of anthropogenic climate change was a philosophical belief for the purposes of the then relevant provisions contained in the 2003 Regulations. At [24] of its judgment, the EAT considered the criteria

that are to be applied in determining whether a belief amounts to a "philosophical belief":

> **"24 I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the 2003 Regulations, but before I turn to consider Mr Bowers's suggested such limitations, I shall endeavour to set out the limitations, or criteria, which are to be implied or introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in McClintock v Department of Constitutional Affairs [2008] IRLR 29, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 36 of Campbell v United Kingdom 4 EHRR 293 and para 23 of Williamson's case [2005] 2AC 246)." (Emphasis added).**

34. It is clear from the first highlighted sentence that these criteria are based on existing jurisprudence. The fifth criterion referred to therein, namely that a belief must be worthy of respect in democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others, has been referred to in subsequent caselaw as "Grainger V". Grainger V is expressly stated to derive from the passages at para 36 of *Campbell v United Kingdom* 4 EHRR 293 and para 23 of *R v Secretary of State for Education ex p. Williamson* [2005] 2AC 246.

35. At [27] of his judgment in *Grainger*, Burton J held that it is not a bar to being a protected belief that it is a one-off belief, in the sense of not governing all aspects of a person's life or is uniquely held by that person. At [28], Burton J stated that a belief in the political philosophies of Socialism, Marxism, Communism or free-market Capitalism might qualify, and that the appellant's belief in anthropogenic climate change is, if established, likely to be characterised as a political belief. Burton J went on to say:

> **"28…It seemed to me that the real concern that [Counsel] had, and one which the court would naturally share, would be the fear that reliance could be placed upon an alleged philosophical belief based on a political philosophy which could be characterised as objectionable: a racist or homophobic political philosophy for example. In my judgment, the way to deal with that would be to conclude that it offended against the requirement set out in para 36 of Campbell and Cosans v United Kingdom 4EHRR 283, that the belief relied on must be "worthy of respect in a democratic society and not incompatible with human dignity or, in accordance with para 23 of Williamson [2005] 2 AC 246, a belief "consistent with basic standards of human dignity or integrity". Paragraph 36 in Campbell expressly refers, as the source of this requirement/caveat, to article 17 of the Convention, which deals with "Prohibition of abuse of rights"."**

36. It is this passage upon which the Claimant relies as establishing a "principle" in respect of "conflict of rights cases" of which Forstater-ET was said to be merely an illustration. The Claimant says this at [21] to [24] of his skeleton argument:

> **"21) The Grainger rule on the conflict of rights test is significant because it applies Article 17 of the ECHR by establishing a low threshold for not protecting beliefs in conflict of rights cases. In particular, the belief will be excluded if it 'could be characterised as objectionable' such as if it 'could be characterised as racist', which was precisely how my tweet was characterised by some of my detractors, including Cornerstone (although this mistake was not made by the BSB when taking no action against me for this tweet). Moreover, this Grainger (v) rule was drawn from high authority namely Campbell (ECtHR) and Williamson (House of Lords).**
>
> **22) Forstater at first instance did not establish a legal barrier to me issuing my claim, it illustrated the Grainger rule on conflict of rights case, as it was then widely understood and applied by employment tribunals**
>
> **….**
>
> **24) In her judgment the Judge did not refer to or address the Grainger (v) rule on conflict of rights. And by overlooking it she was able to state the highly misleading claim that 'there was no binding authority on conflicts of rights' {50}. But there was EAT authority, which was binding on lower tribunals, in the form of Grainger. It was a material authority which the Judge impermissibly overlooked or disregarded."**

37. These submissions contain, as it appears to me, a number of flaws:

i) In the first place, the comments made by Burton J cannot be said to establish any "rule" at all, let alone in respect of "conflicts of rights cases" generally. As the Claimant accepted in the course of oral submissions, the discussion in [28] of *Grainger* was entirely *obiter* and

formed no part of the *ratio* of the judgment. What was said in that paragraph could not have any binding effect on the Tribunal. The Judge was therefore entirely correct to state, as she did at [50] of the judgment, that "there was no binding authority on conflicts of rights". That is so not only because of the *obiter* nature of [28] of *Grainger* but also because *Grainger* was not concerned with any conflict of rights at all; but with whether or not a belief in anthropogenic climate change could be a philosophical belief within the meaning of the 2003 Regulations.

ii) Burton J, in referring to beliefs that "*could be* characterised as objectionable" (the Claimant's emphasis) was doing no more than identifying the types of philosophies that might be considered objectionable; he was not thereby stipulating any threshold, criteria or "test" by which to assess whether a particular philosophy should in fact be regarded as such. That is clear from the concluding words of the relevant sentence, "for example".

iii) The Claimant conflates his belief in social conservatism with his tweet, which could be no more than a manifestation of that belief. The view that a third party takes of the tweet, does not necessarily reflect how the person would view the underlying belief. In any event, there was no finding by the Judge that the Claimant's belief as stated was or was viewed by anyone as racist. As the Claimant was at pains to point out, he considers that "most people can see that [his belief] merely draws on the Martin Luther King approach of seeking to judge people by the content of their character rather than by the colour of their skin…".

38. In Forstater-ET, the Tribunal considered whether the claimant's "gender critical" belief that sex is biologically immutable and that a trans woman is not in reality a woman, fell within the terms of s.10, EqA. The Tribunal concluded as follows:

> **"90. I conclude from this, and the totality of the evidence, that the claimant is absolutist in her view of sex, and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society."**

39. Accordingly, it was held that the belief in that case did not satisfy Grainger V and the preliminary issue was determined against the claimant. The Tribunal in Forstater-ET did not refer to paragraph 28 of *Grainger*.

40. The Claimant submits that as at that stage (prior to the overruling of Forstater-ET) it was reasonable to hold the view that his claim was likely to fail on the basis that his belief would also be regarded as not worthy of respect in a democratic society.

41. Ms Forstater's appeal against the Tribunal's decision was upheld in Forstater-EAT. At [79] of Forstater-EAT, the EAT said as follows:

> **"79 In our judgment, it is important that in applying Grainger V, tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection."**

42. That view was reached on the basis of authorities including those that the EAT had considered in *Grainger*, i.e. *Campbell and Cosans v United Kingdom* 4EHRR 283, *Williamson* [2005] 2 AC 246 and Art 17 of the ECHR. The Claimant states that the effect of Forstater-EAT was to "promulgate… a

significantly different rule on the conflict of rights test in that there was now a much higher threshold for excluding beliefs in conflicts of rights cases." Of course, this submission is based on the premise that *Grainger* itself promulgated some sort of rule in respect of conflicts of rights cases which the EAT in Forstater-EAT purported to change substantially (hence the Claimant's submission that Forstater-EAT was a game-changer). In my judgment, the submission is misconceived for a number of reasons:

i) As stated above, the passage on which the Claimant relies as establishing a rule – namely that in paragraph 28 of *Grainger* – does no such thing.

ii) *Grainger* was not a conflict of rights case. The five criteria which Grainger derived from established authority were to be applied in determining whether a belief fell within (what is now) s.10, EqA.

iii) The position, therefore, was that any person seeking to understand whether they had a reasonable prospect of establishing that their belief was protected had a ready set of criteria against which that belief could be assessed.

iv) Grainger V, in particular, was derived from existing authority. The decision in Forstater-EAT, far from being a "game-changer" as the Claimant submits, did no more than restate long-established principles relating to freedom of speech and apply them to the specific context of the gender-critical views relied upon in that case.

43. In short, the Claimant's prospects of establishing social conservatism as a protected belief were no poorer than for a host of beliefs, political, religious or

otherwise, in respect of which there had been no adverse ruling by any court or tribunal. Forstater-ET was a first-instance decision on a different belief. It said nothing about social conservatism and was far from directly analogous. The Tribunal in Forstater-ET considered (wrongly as it transpired) that "a core component of [the claimant's] belief [was] that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating hostile, degrading, humiliating or offensive environment". It was that approach that was held to be not worthy of respect in a democratic society and therefore in breach of Grainger V. The Claimant's stated belief in social conservatism does not ostensibly involve violating the dignity of others. Thus, even if Forstater-ET had been considered to be a correct application of established principles on freedom of expression, it could not reasonably have been regarded as closing the door on the Claimant's belief.

44. The Claimant submits that his understanding of the legal position was reasonable and was one that was widely held by lawyers and academics at the time. In his statement prepared for the Tribunal, he said that respected academics had tended to treat the belief provisions as applying only to religious belief. However, *Grainger*, which the Claimant says he considered even before his expulsion, was itself concerned with a non-religious belief. It is one of several examples in the authorities. At paragraph [35] of the same statement he said he now appreciates that the courts in cases such as *Grainger* (decided by the EAT in late 2009) "had paved the way for some secular beliefs to be protected. I was not conscious of this, prior to December 2019". Given that secular beliefs had been protected in a number of cases decided over the

previous decade, the Claimant's prior lack of awareness in this regard cannot be regarded as reasonable.

45. The Claimant highlighted a number of articles and reviews in his evidence that tended to the view that Forstater-ET had been correctly decided. However, there was far from a consensus to that effect as articles relied upon by the Respondent before the Tribunal demonstrated. It was public knowledge by February 2020 (i.e. for almost a year prior to his expulsion) that Forstater-ET was being appealed.

46. In any case, the existence of divergent academic and professional opinion as to the status or appealability of a particular first instance decision would rarely be a relevant or favourable consideration in determining whether a putative litigant acted reasonably in delaying the presentation of a claim. *In Foster v South Glamorgan Heath Authority* [1988] ICR 526, the EAT allowed an appeal against a refusal to grant an extension of time to a claimant in circumstances where the decision of the ECJ in *Marshall v Southampton and South West Hampshire Health Authority (Case 152/84)* [1986] ICR 335 (promulgated shortly after the claimant's enforced retirement at the age of 60) meant that she had gone from having no claim of sex discrimination to having one that was likely to succeed. However, the *Marshall* decision, establishing the direct effect of EU law, represented far more than the settling of a previously debated interpretation of a particular case; it represented a tectonic shift in the legal landscape.

47. In *British Coal v Keeble* [1997] IRLR 336, the EAT held that the Tribunal had been entitled to find that it was "just and equitable" to extend time to bring sex

discrimination claims arising out of unequal voluntary redundancy terms, notwithstanding the fact that the claims were brought some 22 months after dismissal in late 1989. The claimants had decided against bringing proceedings initially because they had been advised there was no claim. That advice was not surprising as such would have been the generally held view of the law at the time. It was only after the publication in June 1990 of the decision of the ECJ in *Barber v Guardian Royal Exchange Assurance Group* (C-262/88) that redundancy benefits were to be treated as "pay" within the meaning of the EEC Treaty that it was considered that the claimants might have a claim under the *Sex Discrimination Act 1975*. The EAT held:

> **"It seems to us that if the only reason for a long delay is a wholly understandable misapprehension of the law, that must have been a matter which Parliament intended the tribunal to take into account when considering 'all the circumstances of the case'.**

48. It is of course correct that a person's misapprehension as to the legal position is something that may be taken into account by the Tribunal. The exercise of discretion in deciding whether time should be extended is not conducted on the basis of the "legal fiction that everyone is deemed to know the law": see *Director of Public Prosecutions v Marshall* [1998] ICR 518. However, the misapprehension as to the law in *British Coal v Keeble* did not stem from a particular view taken of a first instance decision (or even of a debateable interpretation of an appellate case), but on an understanding of the law that, pre-*Barber*, would have been generally held, namely that redundancy benefits could not be considered 'pay' for the purposes of the 1975 Act. As in the *Foster* case, the change in the legal landscape introduced by the *Barber* decision was seismic and altered a clear and generally accepted consensus as to the previous state of

the law. It is in that sense that the misapprehension of the law was wholly understandable or, to put it more accurately, reasonable in all the circumstances:

> **"In this legislation, the Sex Discrimination Act 1975, the court's power to extend time is on the basis of what is just and equitable. These words could not be wider or more general. The question is whether it would be just or equitable to deny a person the right to bring proceedings when they were reasonably unaware of the fact that they had the right to bring A them until shortly before the complaint was filed. That unawareness might stem from a failure by the lawyers to appreciate that such a claim lay, or because the law "changed" or was differently perceived after a particular decision of another court. The answer is that in some cases it will be fair to extend time and in others it will not. The industrial tribunal must balance all the factors which are relevant, including, importantly and perhaps crucially, whether it is now possible to have a fair trial of the issues raised by the complaint. Reasonable awareness of the right to sue is but one factor." (*DPP v Marshall* at 527H to 528B)**

49. Whilst that sets a relatively high bar for those seeking to rely on a particular understanding of the law to justify their reticence in issuing proceedings, it seems to me that a high bar is in the interests of legal certainty. Were it not so, then any putative claimant could rely on an academic article, an arguably adverse first instance decision or the outcome of a forthcoming appellate decision before deciding to lodge a complaint. That would open the door to a somewhat lax approach to the time limit, extensive argument before the tribunal about the state of the law and nuanced differences of interpretation arising from academic debate. It would be likely to impose an intolerable burden on tribunals exercising a broad discretion on a preliminary issue of jurisdiction. That is not to say that a particular understanding of the law could never be said to be reasonable in the absence of a general consensus as to that understanding; as stated in *DPP v Marshall*, there will be some cases where unawareness of the law might render it fair to extend time, but in others it would not.

50. In the present case, there was, in my view, no real uncertainty as to the legal position. Forstater-ET was a first instance decision that could not reasonably

have been regarded as an insurmountable obstacle to the establishment of social conservatism as a protected belief. Even if, as the Claimant contends, there was some uncertainty arising out of academic debate as to the effect of Forstater-ET or a flawed interpretation of an obiter remark in *Grainger*, that would fall far short of being a reasonable misapprehension as to the law as it was prior to some seismic shift in the legal landscape. Forstater-EAT, far from representing a seismic shift, was an application of well-established principles. Even if some academic and legal writers considered Forstater-EAT to amount to a significant development, it was no greater a development than many appellate decisions which seek to correct a misapplication of the law at first instance and/or provide guidance as to future application. However, the fact that an appellate decision might have that effect does not automatically justify any delay in bringing a claim pending such decision.

51. The reason for the delay in the present case (as submitted to the Tribunal below) in the period from 30 April 2021 (the expiration of the primary time limit) to 10 June 2021 (the date of promulgation of Forstater-EAT) was the Claimant's view that Forstater-ET meant that his belief in social conservatism was unlikely to be accepted as a protected belief. As such, the question for the Judge was, as the Claimant avers, whether that view was reasonable in the circumstances.

52. There can be no doubt that the Judge had the correct question in mind: she refers to it expressly at [40] in setting out the legal framework, at [44] in setting out the Claimant's case and once again at the beginning of [53], where she commences her analysis of the second period of delay by stating;

> **"Even if the Claimant had a reasonable belief that he would not succeed in a claim based on his understanding of the law as set out in the first instance Forstater decision…"**

53. The Claimant sought to persuade me that, notwithstanding those express and unambiguous references to the correct test in law, the Judge in fact applied a different test, not based on reasonableness, but one based on whether there was any "legal impediment" to bringing a claim[1]. That submission appears to ignore the recent decision of the Court of Appeal in *DPP Law Ltd v Greenberg* [2021] IRLR 1016 re-stating well established principles governing the approach of an appellate tribunal to the reasons given by the employment tribunal. These include the principle that the decision of the tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation and without being hypercritical. The Court of Appeal went on to say:

> **"58 Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day-to-day judicial workload."**

54. The Judge in the present case, having expressly referred to the question as being whether the Claimant's view as to the legal position was reasonable, can be expected to have considered that question in reaching her conclusion unless the contrary is clear from the language of the decision. In concluding that there was

[1] Although the Tribunal is criticised for using the term "no legal impediment", it is noteworthy that the Claimant, at [31] of his skeleton also (and perhaps somewhat contradictorily) criticises the Tribunal for not stating whether the Claimant had relied "on the pre Forstater-appeal impediment" for not bringing a claim.

"no legal impediment" to issuing proceedings, the Judge was not thereby eschewing the reasonableness question, but was merely taking account of a factor relevant to the determination of that question. In reaching her decision, the Judge took account of the following matters amongst others:

i) The Claimant made a considered decision during and immediately after the events in question not to bring a claim of discrimination against the Respondents;

ii) The Claimant made a judgment that he would not succeed on the law, that law being the first instance decision in Forstater-ET;

iii) He knew Forstater-ET was not binding authority and that it concerned a different philosophical belief;

iv) He had not relied on advice from others in reaching his own considered decision;

v) He was an experienced barrister.

55. It was in the light of those matters that the Judge stated that there was no legal impediment to bringing a claim at the time.

56. In context, and reading the judgment fairly and as a whole, what the Judge meant was that the legal position at the time was not such that it was reasonable to conclude that his claim would not succeed. That is confirmed by the first sentence of [53] which clearly implies that the Judge's conclusion was that the Claimant's view that he would not succeed was not reasonable in the circumstances.

57. Accordingly, the Judge did not err. She considered precisely the case put to her on delay, she applied the correct test, and she reached a decision that was clearly open to her to reach. It is pertinent to bear in mind that the Judge's decision was the result of the exercise of a broad discretion, in respect of which the scope for interference by the appellate tribunal is very limited:

> **"20 The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle, for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant, or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434, para 24": per Leggatt LJ (as he then was) in *Abertawe Bro Morgannwg Health Board v Morgan* [2018] ICR 1194.**

58. There was no error of principle here and nor can it be said that the Judge's decision fell outside the very wide ambit within which different views may reasonably be taken about what is just and equitable. In those circumstances, the challenge to this judgment is unfounded and there is no basis for disturbing it.

59. The Claimant's skeleton argument also sought to suggest under this ground that there was a failure to give reasons. The Claimant did not pursue that point in oral submissions. He was correct not to do so as it has no merit. The first respect in which it is said the Judge failed to give reasons relates to the purported "legal rule" derived from *Grainger*. As discussed above, *Grainger* was not relied upon before the Judge in the way it is now. There was, in any event, no such "rule". The other points raised go the Judge's conclusion as to the reasonableness or otherwise of the Claimant's view that his claim was not likely to succeed. As

already discussed, the Judge's reasoning was clear, and any fair reading of the whole judgment would have left the Claimant in no doubt as to the reasons his claim failed.

60. Ground 1 of the Appeal fails and is dismissed.

Ground 2 – Failure to appreciate or misdirection as to the qualitative nature of the Claimant's reasons for awaiting the outcome of the BSB investigation.

61. The Claimant's failure under Ground 1 diminishes the significance of Ground 2: even if he were to establish that the Tribunal erred in its treatment of his delay in the period after the publication of Forstater-EAT, that would not overcome the fact that the delay up to that point was correctly considered to be unreasonable such that it would not be just or equitable to extend time.

62. The Claimant's case under Ground 2 has, rather like his case under Ground 1, evolved quite significantly from the way it was put below. The Judge summarised the Claimant's case in respect of the period after the publication of Forstater-EAT as follows:

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

63. The Claimant accepts that that was a correct summary. His preoccupation with the BSB proceedings was also described in his witness statement in the following terms:

> **"70 I did not read [Forstater-EAT] because by June I was <u>focussed</u> on the BSB investigation and recognised that my intended return to the bar (or at least the amount of work I could expect to receive) hinged on being exonerated by the BSB process.**

> …
>
> **72 By 10 June I realised that the BSB could disbar me or fine me £50,000 (as I explained in my Response [551, §1]). I viewed this extremely seriously because of the grave threat that it posed to my future. After 4 May I was so focussed on the BSB issue that it did not cross my mind that the Forstater appeal could open up a right of redress against Cornerstone. [s239 §72]**
>
> …
>
> **91(b) …throughout this period of 10 weeks [10 June to 23 August] I was solely focussed on the forthcoming BSB decision to the extent that I was not thinking about any potential claim against Cornerstone." (Emphasis added)**

64. It can be seen that the case put before the Tribunal was on the basis that he was so "preoccupied" with the BSB proceedings that that became his "sole focus" during the period such that the possibility of Forstater-EAT opening up a right of redress, "did not cross his mind".

65. The Claimant's skeleton argument on appeal, however, goes further and suggests that the BSB proceedings had imposed on him a "mental impediment in that [those proceedings] had been the sole focus" of his attention. In his oral submissions before me, the Claimant went further still, suggesting that he was under a "mental constraint" that meant he was solely focused on the BSB proceedings. Whilst it might be said that the language of "mental constraint" or "impediment" is no more than adversarial flourish to emphasise the narrow focus of his attention at the time, the difference is, in my view, significant. It is one thing to say that BSB proceedings were the main or sole focus of your thoughts at a particular time; it is quite another to suggest that there was a mental constraint, which might imply that the BSB proceedings had to some extent rendered him mentally incapable of thinking about anything else. The latter suggests a degree of involuntariness in the steps taken (or not taken), which clearly would have been relevant to a determination of the question whether the

failure to take certain steps was reasonable. The Claimant's oral submissions, and the implied lack of voluntariness, are not only contrary to the way the case was put below, they are also at odds with what he said before HHJ Auerbach at the Rule 3(10) hearing:

> **"37… As he has confirmed to me today, he was not saying to the tribunal that he was so preoccupied with the potential threat of the BSB outcome to his career, that he was somehow mentally incapacitated from reading the decision; and, as he has also told me, the tribunal correctly found there was nothing actually happening in those proceedings during that period other than him awaiting the outcome."**

66. I therefore approach the appeal on the basis of what was actually relied upon before the Tribunal. On that basis, the question is whether the Judge erred in considering whether it was reasonable, because of his preoccupation with the BSB proceedings, for the Claimant not to have read Forstater-EAT in the 10-week period between 10 June and 23 August 2021.

Ground 2 - Submissions

67. The Claimant submits that the Judge failed to consider the Claimant's actual reason for not reading Forstater-EAT and instead simply found that the Claimant had decided not to investigate a further avenue of legal argument. Had the Judge appreciated the effect that the potentially career-ending proceedings were having on him – becoming the sole focus of his mental energy at the time – then she would not have found that the Claimant was "significantly at fault" in not reading Forstater-EAT. He suggests that such a finding of "fault" could only follow from a finding that the Claimant was lying or had acted unreasonably, and the Judge found neither. Insofar as the Judge was entitled to find that the Claimant was "at fault", such fault was reasonable in that the BSB investigation was "inextricably linked to both the prospects of success and the

financial worth of any belief discrimination claim that [he] may have brought against Cornerstone".

68. Mr Laddie KC submits that the Judge addressed the case presented to her and that the stated concerns about being fined or disbarred cannot have been the Claimant's thinking at the time because the Claimant had by that stage deregistered as a Barrister. Even though it is accepted that he intended to return to the Bar, the outcome of the BSB proceedings could neither bind the Tribunal nor result in anything more serious at this stage than a referral to the Disciplinary Tribunal.

Ground 2 - Discussion

69. The Claimant has, once again, based a ground of appeal on a somewhat narrow and unfair reading of the judgment. By focusing on the use of the words "fault" and "responsibility", the Claimant seeks to ignore or divert attention away from the fact that the Judge clearly had the correct test in mind and made a number of findings (albeit using the language of 'fault' and 'responsibility') that supported her conclusion that the Claimant had not acted reasonably in not reading Forstater-EAT in the 10 weeks after its publication.

70. It is evident from the way in which the Judge summarised the Claimant's case on this point (a summary with which the Claimant does not disagree) that she had properly directed herself as to the question to be considered, namely whether it was "reasonable" for him not to have read Forstater-EAT in the relevant period. In the light of that, the EAT would be slow to conclude that there was a failure to apply that question to the findings of fact.

71. The relevant findings of the Judge are at [53] of her judgment:

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

72. The Claimant submits that the finding that he was "significantly at fault" could only follow from a finding that he was lying or had acted unreasonably and that there was no finding of either. There was of course no finding of deceit. However, it is playing with semantics to suggest that a finding of "fault" in this context was not synonymous with a conclusion that the conduct was unreasonable. It was at the very least implicit in a finding of "fault" that the Claimant had acted unreasonably.

73. The Judge goes on to explain her conclusion from the third sentence of [53] onwards. She notes that the Claimant was acutely interested in the Forstater proceedings and their significance for society. She then makes a finding that the Claimant had "tweeted about its importance on 24 June 2021". This is a reference to the following tweet about an article written by Lord Sumption in The Times:

> **"Former Supreme Court Judge Jonathan Sumption on the Forstater judgment, which strikes an important blow for free speech."**

74. The Claimant seeks to downplay the significance of this tweet by referring to it as a *"two sentence tweet that I posted on 24 June 2021, after reading a Jonathan Sumption article [that] rather points to my pre-occupation with other*

matters at this particular time." In my judgment, the Judge was correct to regard this tweet as significant in assessing whether the Claimant had acted reasonably:

i) The tweet demonstrates that far from the BSB proceedings being his "sole focus" during this time, the Claimant took the time to read The Times and in particular the article by Lord Sumption about a case which he had been following and in which he was interested (and which, it is claimed, deterred him from making a claim).

ii) Having read the article, he tweeted about it thereby urging his followers on Twitter to read it;

iii) By stating that the judgment in Forstater-EAT "strikes an important blow for free speech", he can be taken to have realised: (a) that the appeal against Forstater-ET – the decision relied upon before the Tribunal as causing him to consider he had no claim - had been overturned; and (b) that whatever its precise reasoning, it was considered by Lord Sumption as confirming the reach of free speech principles, which some, including the Claimant, thought that Forstater-ET had limited.

iv) That realisation would have alerted him to the fact that, contrary to what he had hitherto (unreasonably) believed, he might now have a case against Cornerstone.

75. It was in the light of these matters that the Judge "did not accept that the BSB proceedings were good reason for him not to consider and pursue any potential claim against these Respondents." In other words, the Judge rejected the Claimant's case that he was so preoccupied with the BSB proceeding that

nothing else crossed his mind. That was a conclusion that the Judge was entitled to reach. The Claimant suggests that it was not the "proceedings that were the issue; it was the potential career ending consequence that was operative on my mind". That appears to be a distinction without substance. A concern about the proceedings would be synonymous with or would at the very least include a concern about the outcome of those proceedings. In any case, the Judge referred expressly at [23] of the Judgment to the Claimant's concern that "this regulatory investigation could result in a substantial fine or disbarment, either of which he believed would have ended his legal career." On a fair reading of the whole judgment, it cannot be said that the Judge did not have these potential consequences, as the Claimant saw them, in mind.

76. The Claimant also criticises the Judge's reference to the fact that there were no procedural steps or BSB hearings between 10 June 2021 and 9 August 2021. However, it was highly relevant to note that for the entirety of the period in question, the Claimant was not required to do anything in relation to the BSB proceedings. His 33-page response to the BSB's investigation was completed on 4 May 2021. It is extraordinary to suggest that an experienced professional, no doubt used to juggling a number of challenging matters at a time, should be unable to consider anything for a period of almost three months thereafter other than the BSB ruling that he was awaiting. The reality is perhaps evident from what the Claimant said in his skeleton argument before the Tribunal:

> **"22. As explained in my witness statement (§§69-74), when the Forstater appeal decision was given, I was awaiting the BSB decision on its investigation. The <u>desirability</u> of waiting for this decision was obvious: if the BSB had found that I was guilty of professional misconduct Cornerstone would inevitably had argued that this justified their treatment of me, or alternatively that any compensation that I claimed would be reduced to nil on grounds of contributory fault or some other intervening event. Also, since I could not discount the possibility that I**

> **would be fined, suspended or disbarred the BSB decision could have had a profound impact on both the liability and quantum of any claim." (Emphasis added)**

77. At [72] of his statement he said this:

> **"…Although I realised after 10 June that the Forstater appeal decision might have given me an additional argument against the BSB I did not want to raise it with a supplementary submission because: (a) I was satisfied that the human rights argument was sufficiently compelling, and (b) if the BSB had entertained it, it would have almost certainly delayed the resolution of this issue…"**

78. The Judge reflected this evidence in her findings of fact at [27] of the judgment:

> **"27. While the Claimant was aware of the Forstater appeal judgment, he did not read it until 23 August 2021. He did not want to delay the BSB proceedings outcome further by making further submissions based on the Equality Act."**

79. Thus, after 10 June 2021, and by no later than his tweet on 24 June 2021, the Claimant was not only aware of the Forstater-EAT judgment, but he had also realised that it might provide a further argument in support of his position in the BSB proceedings. However, the Claimant appears to have made a conscious choice not to raise the argument because of a desire not to delay the proceedings. In these circumstances, the Judge was entirely correct to conclude that the Claimant had "simply decided not to investigate a further avenue of legal argument" that might have been available to him in respect of a potential claim against Cornerstone. Insofar as the Claimant claims that was because he was focused solely on the BSB proceedings, that would appear to be a choice he made to prioritise that matter over all else. However, in the face of existing time limits, of which the Claimant was aware, a voluntary decision to give potential tribunal proceedings lower priority than other matters will not generally amount to a good reason for missing those limits.

80. The Claimant seeks to rely on the following authorities in support of Ground 2:

81. *Chohan v Derby Law Centre* [2004] IRLR 685: In that case the EAT, in allowing an appeal against a refusal to extend the time limit, held:

> **"17 In our judgment the tribunal erred in leaving out of account the applicant's contention demonstrated in her witness statement that she was relying upon the notification by the Law Society of its decision. It was an issue to be decided in the case which the tribunal has not visited. Generally speaking, waiting for an internal procedure to be exhausted is not sufficient grounds for postponing the date for the filing of a claim: *Palmer v Southend Borough Council* [1984] IRLR 119 CA. However, in the regulated regime of solicitors' contracts, the situation may well be different."**

82. In *Chohan*, the tribunal had not taken into account the external investigation at all in deciding whether it would be just and equitable to extend time. In the present case, by stark contrast, the BSB proceedings were expressly "visited" by the Judge and were found not to furnish the Claimant with a good reason for not considering and pursuing a claim against Cornerstone. There is nothing in *Chohan* to suggest that waiting for the outcome of regulatory proceedings should in fact lead to a different exercise of the discretion. Whether or not it does in a particular case will depend on the facts. The Judge in the present case did not take account of any purported "mental constraint" resulting from the BSB proceedings because that was never raised.

83. *Department of Constitutional Affairs v Jones* [2008] IRLR 128: In that case, the claimant, who had been diagnosed with severe depression and severe anxiety, had delayed in bringing a disability discrimination claim because he had not wanted to accept that he was disabled. The tribunal extended time by some 5 weeks, considering that the fourth factor in *Keeble* - namely whether the claimant had acted promptly once he or she had known of the facts giving rise to the cause of action – was not pertinent. The appeal against that decision was dismissed. The Claimant seeks to draw a comparison between that case and his

circumstances, and relies in particular on the following passages in the judgment of the Court of Appeal in *DCA*:

> **"49 As to factor four, in a sense the whole case is about that because it is concerned with the promptness with which the claim has been brought. But in my judgment once the chairman analysed the situation with the care which he analysed it and once he formed the conclusion, having already stated in paragraphs 40, he had taken the Keeble considerations into account, he was entitled to conclude that factor four was not a pertinent one. The paradigm case where factor four is important is where there is a plain disability, and an applicant fails to take any action knowing of the disability. Here the entire issue was as to the state of mind of the respondent. The chairman reached his central conclusion that the respondent was not able to admit to himself or to others that he was a disabled person within the meaning of the Act. On that analysis of the situation, it was not pertinent to consider factor four as a separate factor in the case."**
>
> **…**
> **56 … [T]he chairman was entitled to have in mind the series of misfortunes which the respondent suffered. Of course, I make no judgment as to the merits of his treatment by the appellants. But from the police raid to the broken ankle, to the knowledge that disciplinary proceedings were being conducted in an absence of his supported by the appellants' own doctor, factors were operating on his mind which make it more likely to be just and equitable that a modest extension of time should be granted."**

84. The Claimant submits that, similarly, there were factors "operating on his mind" which explain why he did not read Forstater-EAT when it was published. In my judgment, the analogy is false. The only factor said to have been operating on the Claimant's mind is the BSB proceedings and its consequences. There was nothing comparable to the series of misfortunes suffered by Mr Jones in the DCA case, and nor was there, as in Mr Jones' case, any mental impairment. The Claimant's case as to his state of mind – namely that he was "preoccupied" with the BSB proceedings which became his "sole focus" – was expressly considered by the Judge and rejected.

85. Finally, the Claimant referred to *Dowokpor v Ministry of Justice*, UKEAT/0156/17/LA in which the tribunal had refused an extension of time to

a retired part-time judge on the grounds that his delay came "with no story to tell". In allowing an appeal against that decision, Slade J said as follows:

> **"60 The EJ held at paragraph 8 that the Claimant was about four years out of time "with no story to tell" when his instructions were rejected by Browne Jacobson in September 2011. The statement by the EJ that the Claimant had "no story to tell" for the four-year delay was not just "infelicitous", the description used by Mr Bourne QC. It was wrong. The reason for the delay was that the Claimant did not know that he could bring a claim as a fee-paid part-timer for less favourable treatment than a full-time pensionable Judge."**

86. The Claimant submits that he too had "a story to tell" based on his state of mind and the materiality of the BSB investigation, and that the Judge disregarded that story. However, as already discussed above, the Judge did consider the case presented to her, that case involving no suggestion of any mental impediment or mental constraint. Rather, the "story" here was the altogether less remarkable one of a litigant deciding to prioritise one set of proceedings over another (because he considered it undesirable to do otherwise) and of deciding not to pursue a particular legal argument even when aware that it might assist. That does not provide a firm foundation for an argument that delay or failure to act was reasonable.

87. In the circumstances, there was no error on the part of the Judge. She reached a conclusion that she was entitled, in the exercise of her broad discretion, to reach. Indeed, given the factual background of this case, any other conclusion would have been surprising.

88. The Claimant here too raises a *Meek*-challenge as to the adequacy of the reasons. As with Ground 1, this was not pursued in oral submissions. It is also without merit, and I need say no more about it.

Ground 3 – Prejudice to Claimant unlawfully discounted.

89. This ground of appeal arises from the following passage in the Judge's reasoning:

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

90. The Claimant submits that the highlighted sentence shows that the Judge, having decided to take account of the prejudice to both parties, wrongly discounted the entirety of that prejudice on the basis that he was responsible for it.

91. I do not accept that that is a reasonable interpretation of the Judgment when read as a whole. The Judge expressly acknowledged in the first sentence of [56] that there would be prejudice to the Claimant in not being able to pursue his discrimination claim against the Respondent. The Judge also made express findings of fact as to the Claimant's desire to resume his career at the Bar, his claim for more than £3m in compensation and his contention that his claim is of "broader importance in that it involves rights of freedom of expression". The Claimant had also contended that there was no prejudice to the Respondents. However, the Judge plainly rejected that contention concluding instead (at [55]), that the "…the Respondents would indeed be considerably prejudiced by an extension of time." There was a careful analysis by the Judge of the forensic prejudice to the Respondents in having to recall the motivations and thought processes of the individual Respondents and members of Cornerstone so long after the event. There is no challenge to that finding. Having made these findings, the Judge concluded at [57] that, "The balance of prejudice pointed to the refusal of an extension of time." That was not the end of the Judge's analysis:

she went on to state that she was not "persuaded that the nature of the Claimant's claim, relating to important rights of freedom of expression, should override the other factors relevant to the exercise of my discretion" or that it was "more important and weighty than other discrimination complaints." Finally, the Judge took account of the respective merits of the case as she saw them.

92. Thus, not only did the Judge refer to each and every one of the factors relied upon by the Claimant (and the Respondents) as relevant to the question of prejudice, but she also expressly adverted to the balancing exercise that it was incumbent on her to perform.

93. To find that there is an error of principle in that approach would be to focus on one sentence in [56] to the exclusion of much else in the Judgment. That approach would be wrong for a number of reasons:

i) First, it would be to take the sort of hypercritical approach to the Judgment deprecated by the Court of Appeal in *DPP v Greenberg*.

ii) Second, it assumes that the Judge's analysis of the balance begins and ends at [56] and [57]. However, it is clear from [55] and the Judge's further analysis of the claimed importance of the nature of the claim and the respective merits of the case in [59] and [60], that the conclusion at [57] as to the balance of prejudice pointing to the refusal of an extension was considered by the Judge to be further supported by other factors referred to in other paragraphs.

iii) Third, in its proper context, the second sentence in [56], far from discounting the entirety of the Claimant's case on prejudice, merely

> expresses the view that one element of that case, namely his claim that he had acted reasonably in not presenting his claim sooner, carried little or no weight in the balance at all. The weight to be attached to a particular factor is very much a matter for the Tribunal and no error of law or principle may be discerned from that conclusion.

94. The Claimant's second main submission under this ground is that the Judge's assessment of the merits of the Respondents' case at [60] was flawed and does not withstand scrutiny in the light of the judgment of the EAT in *Higgs v Farmor School* [2023] EAT 89. The Claimant contends that the argument that his prejudice was wrongly discounted "is now bolstered with the additional fact that the prejudice that was discounted was far greater than the Judge realised". That contention falls away in the light of my conclusion that the Judge did not "discount" the Claimant's case on prejudice as he suggests. That is sufficient in itself to dispose of this aspect of Ground 3.

95. In any case, the Judge was entitled to consider the underlying merits of the case at a fairly generalised level. The merits are not something that the Judge would be obliged to consider in all cases. A case that is obviously strong might stand a greater chance of overcoming a short delay in presentation than one where the merits are weak. The Judge did not accept that the merits of the Claimant's claim were "obviously strong, so that they should be taken into account in exercising [her] discretion in favour of an extension of time". The Claimant submits that this implies that the underlying merits of his case were "good". I reject that submission. By stating that the claim was not "obviously strong", the Judge was merely indicating that the merits of the case did not cross the threshold that

might, in some circumstances, have warranted a favourable exercise of the discretion. That much is clear from the latter part of the sentence. There is nothing to support the contention that the Judge considered the merits of the claim to be "good" or "strong". Indeed, the overall tenor of the judgment, including the final conclusion that there is "very little reason to extend time", tends to suggest the opposite.

96. As for the Judge's assessment that the Respondents' arguments appeared "weighty", there is no discernible error of law or principle in the Judge's approach. This was necessarily a "broad-brush" assessment of the merits at a preliminary stage, where a detailed assessment of the merits would be impractical and inappropriate.

97. The Claimant's purported reliance on *Higgs* is misplaced. He has, as he accepts, been refused permission by both the EAT and the Court of Appeal to raise *Higgs* as a discrete ground of appeal. The suggestion that *Higgs* somehow bolsters his argument on prejudice, would appear to be an attempt to circumvent that clear refusal. In any case, the decision in *Higgs* (like that of the EAT in Forstater-EAT) was an application of established principles set out in authorities such as *Page v NHS Trust Development Authority* [2021] ICR 941, amongst others: see *Higgs* at [82]. It would not, even if available to the Judge, have fundamentally altered her necessarily broad-brush assessment of the merits.

98. The thread running through much of the Claimant's case under this ground is that the prejudice in his case was "immense" as compared to other discrimination claimants. He relies on the value of his claim (£3m) and its general importance in the context of free speech. However, the absolute value

of a claim does not increase the relative prejudice to a particular claimant of not being able to pursue it. A manual worker who loses his modest salary as a result of a discriminatory termination is no less prejudiced by losing the right to bring a claim than the highly paid professional. As to the claimed importance of the case, it would be difficult to improve upon the Judge's pithy conclusion that, "The Claimant's claims are not in a special category requiring more favourable consideration in the exercise of discretion."

99. For these reasons, Ground 3 also fails and is dismissed.

Conclusion

100. For these reasons, this appeal fails.