Neutral Citation Number: [2024] EAT 6

Case No: EA-2021-001181-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 February 2024

Before :

HER HONOUR JUDGE KATHERINE TUCKER

- -

Between :

MRS CARMEN CHEVALIER-FIRESCU **Appellant**

- and -

HSBC BANK PLC **Respondent**

- -
- -

ELAINE BANTON (instructed by **Kilgannon Partners LLP**) for the **Appellant**
MS DIYA SEN GUPTA KC (instructed by **Allen & Overy LLP**) for the **Respondent**

Hearing date: 27 June 2023

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JUDGMENT

SUMMARY
PRACTICE AND PROCEDURE

An Employment Judge struck out two claims at an Open Preliminary Hearing (OPH). The claims were ones of discrimination and victimisation. The Judge determined that, for part of the time covered by the Claimant's claims, she had not been an applicant for employment within the meaning of s.39 of the Equality Act 2010. There was no outstanding appeal in respect of that determination. Further, he considered that the Claimant's claims in respect of the period of time when she had been within the scope of s. 39 of the EqA 2010, were out of time and that it was not just and equitable to extend time. He heard evidence from the Claimant, from a witness with experience of recruitment within the relevant sector (banking) and an HR Manager. He did not hear any evidence from any of the individuals within the Respondent the Claimant alleged had been guilty of discriminatory or victimising actions against her.

There were two claims before the Tribunal. The OPH had been listed only in respect of the first of the two claims and there was, at best, confusion about whether the second claim was to be considered at the OPH and, if so, how.

The EAT upheld the appeal. It found that, in the circumstances of the case, to proceed to strike out the second claim at the OPH was a serious procedural irregularity and an error. Further, notwithstanding the breadth of the discretion afforded by s.123 of the EqA 2010 the Judge erred in his approach to the determination of the issues relevant to time limits because he failed to consider relevant matters and strayed into, impermissibly, a mini trial of the wider issues within the case. Consideration of the approach required when determining potentially determinative issues at an OPH, at an early stage of proceedings, the benefits and risks of such an approach and how any risk may be mitigated by appropriate case management and a careful, structured approach.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This appeal arises out of the decision of Employment Judge Burgher sitting in East London Employment Tribunal at an Open Preliminary Hearing (OPH). The hearing took place on 22 June 2021 and 7 September 2021. The Judgment and Reasons were sent to the parties on 25th of October 2021. The decision appealed against was one to strike out the Claimant's claims made following an Open Preliminary Hearing (OPH).

2. The Appellant to this appeal was the Claimant before the Tribunal. I shall refer to the Appellant and Respondent as Claimant and Respondent respectively, as they were before the Tribunal.

Procedural background to the litigation before the Tribunal

3. By the time of the OPH, the Claimant had issued two claims before the Employment Tribunal. The first was claim number 3213181/2020, ("the First Claim"). That claim was issued on 1 November 2020. In it, the Claimant alleged that she had been subjected to race and sex discrimination and victimisation by the Respondent and one of its managers, a Mr Remi Bourrette. The alleged acts of discrimination concerned her potential recruitment in 2018 and Mr Bourrette's alleged intervention in that recruitment process. She alleged that Mr Bourrette's intervention, and negative feedback about her, was based upon information which he had obtained from her former boss at Barclays, against whom she had issued Tribunal proceedings. She also alleged that the Respondent had failed to disclose key information to her relating to her primary allegation of sex discrimination regarding her recruitment in 2018. The

Claimant also made a claim of race discrimination. She stated that she met with another of the Respondent's manager on 29th September 2020 (the recruiting manager, Mr Dutruit) who not only stated that the reason she was not recruited was because of feedback from "her old boss at Barclays" received from Mr Bourrette but also that, when speaking about her future employment, that this may be more difficult because of connections between senior managers in the Equity Derivatives teams within the Respondent who knew her old boss and who, like her old boss, were of Lebanese origin.

4. The second was claim number 3202890/2021, ("the Second Claim"). The Second Claim was issued on 14th May 2021, just over a month before the OPH took place on 22nd June 2021. The Respondent first received notice of it on 3rd June 2021. In that Second Claim, the Claimant asserted that she had continued to seek employment with the Respondent and that, because of ongoing acts of sex discrimination and victimisation, she was not recruited, had been 'blacklisted', and that the Respondent had given poor, unfavourable, informal references about her within the City.

5. On 19th January 2021 the Tribunal gave notice of an OPH to be heard in respect of the First Claim (the Second Claim not having been issued) to take place on 22 June 2021. On 3 June 2021, the Tribunal gave notice of an Open Preliminary Hearing to take place in respect of the Second Claim on 25 November 2021. By further correspondence issued on that day (3rd June 2021) the Tribunal also informed the Respondent of the existence of the Second Claim and asked the parties about the possibility of the two claims being heard together. The Claimant stated that she considered that the cases should be consolidated as *"the second claim is effectively a*

continuation of the same alleged course of continuing conduct alleged in the first claim." The Respondent stated that it considered that the question of consolidation should be considered at the OPH on 22nd June 2021.

6. On 17th June the Respondent lodged its ET3s and Grounds of Resistance in respect of the Second Claim. In it, the Respondent asserted that the claim had no reasonable prospect of success and should be struck out.

7. On 24 May 2021 the Claimant made an application for specific disclosure to the Tribunal. The letter of 24 May 2021 from the Claimant's solicitors record that disclosure lists were exchanged on 18 May 2021 but that the Respondent had refused requests for disclosure which the Claimant considered were necessary in order to prepare for the OPH. The letter described the Respondents' disclosure as 'materially deficient'. The Respondents objected to the disclosure sought. By a letter of 2 June 2021 the Tribunal (EJ Lewis) refused the application for specific disclosure stating that it was, "premature and went beyond the issues to be determined at the OPH".

8. That is the procedural background against which the OPH began on 22nd June 2021. The OPH was heard by a Judge sitting alone, Employment Judge Burgher. The Claimant was represented by counsel at the hearing on that date. The Respondents had applied for removal of Mr Bourrette as a respondent as he was not an employer for the purposes of s.39 of the Equality Act 2010. The Claimant withdrew her claims against Mr Bourrette and the Tribunal dismissed the claims against him. In oral submissions before the EAT the Claimant's counsel stated that that this was because the Claimant had understood that the Respondent did not rely upon the statutory

defence set out in s.109(4) of the Equality Act 2010 ("EqA2010"). The hearing was not completed on 22nd June 2021; it was adjourned part heard. It resumed on 7 September 2021.On that date the Claimant represented herself. The Claimant also submitted written closing submissions.

9. On 26th October 2021 the Tribunal sent the Reserved Judgment and Reasons to the parties. The Judge dismissed all of the Claimant's claims, both those made in the First and the Second Claims. The Tribunal's Judgment was as follows:

"JUDGMENT

1. **The Claimant was being considered for a specific GCB3 vacancy at the Respondent between May to July 2018. The Claimant was not appointed to this vacancy. The Claimant's claim in this regard has been presented out of time.**
2. **This specific GCB3 role was not part of a continuing act of alleged continued recruitment arrangements and non-appointment of the Claimant. It is not just and equitable to extend time. The Tribunal therefore does not have jurisdiction to consider the claim pursuant to s.123 of the Equality Act 2010.**
3. **The Claimant's claims in respect of alleged actions, events, comments, discussions, lunches, meetings, texts, emails and correspondence with or by specified employees of the Respondent between February 2019 to March 2021:**
    - **3.1 Were not arrangements for deciding who to offer employment; and**
    - **3.2 Were not refusals to offer employment to the Claimant.**
4. **Specifically, for the purposes of section 39 of the Equality Act 2010, in respect of the allegations the Claimant makes between February 2019 to March 2021:**
    - **4.1 There was no authorised employment or opportunity to offer for arrangements to attach to; and**
    - **4.2 There was no authorised employment or opportunity to offer.**
5. **The Employment Tribunal therefore has no jurisdiction to adjudicate on what the Respondent's individual employees are alleged to have done or failed to do between February 2019 and March 2021. Consequently, the Claimant's claims in this regard have no reasonable prospects of success and are struck out pursuant to rule 37 of the Employment Tribunal Rules.**
6. **All of the Claimant's claims are therefore dismissed."**

Summary of the parties' positions before the Tribunal

10. The Claimant asserted that she sought to apply for work with the Respondent over a significant period of time which ran from April 2018 until around the time she lodged her Second Claim. Her case, advanced in the two separate claims before the Tribunal,

was that, whilst she discovered, indirectly, in September 2018, that she had been unsuccessful in respect of one particular role (the GCB3 vacancy) she actively sought employment with the Respondent for a further period of time but was not successful. She asserted that her lack of success was attributable to information gained by the Respondent from her former employer, Barclays, against whom she had made a claim of discrimination, which served, effectively, to 'block' her recruitment. She asserted that her knowledge of what had occurred was affected by piecemeal and late provision of information to her by the Respondent. In addition, she asserted that several other factors arising out of the Covid pandemic, her pregnancy and a family bereavement, had impacted upon her and were relevant to the time at which she issued proceedings.

11. It was common ground between the parties that the Respondent had been considering recruiting the Claimant in April – July 2018. The Claimant asserted that sometime after she discovered that she had not been successful in respect of that possible role, (which was in or around late August 2018) she only discovered at a significantly later date, that a manager with significant influence within the Respondent in respect of her possible recruitment, Mr Bourrette, had intervened in that process. Broadly, she asserted that that took place in late August 2020; that Mr Bourrette told her that he had become aware of her relevant protected act (i.e., the claim against her former employer, Barclays) and that he had intervened in the recruitment process because of a bad/victimising reference he had received from her former boss at Barclays, informally, about her. She further asserted that relevant information about that which Mr Bourrette had said and done was deliberately concealed from her by the Respondent.

12. On the other hand, the Respondent asserted that whilst the Claimant was indeed considered for the specific GCB3 role in the spring/summer of 2018 (between April - mid-July 2018), she was unsuccessful in that application. It asserted that, thereafter, rather than genuinely seeking to apply for a role with the Respondent, the Claimant engineered situations whereby she met with senior managers from the Respondent, in order to extract information from them to support litigation she was intent on pursuing against the Respondent. It asserted that, after mid-July 2018, there were no roles for her to be considered for, and that, consequently, she was not an 'applicant for employment' within the meaning of s.39 of the Equality Act 2010 (EqA 2010).

13. At the OPH the Judge found in favour of the Respondent in respect of that latter issue (whether the Claimant was an applicant for employment within the meaning of s.39 of the EqA 2010). Although the Claimant sought to appeal against the determination of that important issue at the preliminary hearing, that ground of appeal was not permitted to proceed to a full hearing, for reasons set out by Eady P. at a hearing pursuant to r.3(10) of the EAT Rules 1993 on 20th April 2023.

14. However, the following grounds of appeal were allowed to proceed:

    a. Ground 1: The Tribunal erred by acting perversely, or, misdirecting itself in law in striking out the claims under the Second Claim, because that Claim was not before the Tribunal at the OPH.
    b. Ground 2: The Tribunal erred and/or misdirected itself in law in its approach to the exercise of discretion to extend time on a just and equitable basis.
    c. Ground 4: The Tribunal erred by acting perversely and/or misdirecting itself in law because it failed to separately adjudicate upon the race discrimination claim,

which was brought in time, and/or conflated knowledge in respect of the claim of victimisation and the claim of race discrimination.

d. Recast Ground 6(1): The Tribunal erred or was perverse by finding that the Claimant brought a claim against Barclays in June 2018 in respect of her non-appointment to the Respondent in July 2018.

The facts

15. I have largely taken the following facts from the Tribunal's Judgment and Reasons.

16. The Claimant previously worked for Barclays Bank ("Barclays"). The Claimant issued discrimination claims against Barclays in respect of her employment. Her first claim against Barclays was issued in December 2017. Initial litigation against Barclays was settled. An agreement was reached in January 2019. The EAT was informed, in submissions, that the settlement encompassed a "seven figure settlement, a clean reference, and a non-derogatory clause", although I consider little, if anything, turns on the level of any sums agreed as part of that settlement in this appeal.

17. The Claimant looked for alternative work and approached, amongst others, the Respondent. The Claimant's case was that she was unsuccessful in securing new work, at least in part, because Barclays had been providing informal, negative and victimising references to prospective new employers. In addition to the claim issued against Barclays referred to above, the Claimant issued further proceedings against Barclays in June 2018, November 2018 and April 2020. Within her claims against

Barclays, the Claimant brought a claim for post-termination victimisation in respect of the references Barclays were alleged to have given.

18. None of the pleadings, Claim Form, Responses, or the settlement agreements in respect of the Barclays litigation were before the EAT. It also appears that those documents were not before the Employment Tribunal during the OPH.

19. The Claimant is an experienced investment banker with particular skills in sales and structuring. The Respondent is a trading entity within a corporate group which is a global banking and financial services organisation.

20. The Judge found that the Respondent has a number of internal business divisions, including its Global Banking and Markets business (GBM), which in turn includes the Respondent's Global Equities business. It operates nine Global Career Band levels (GCB levels), from GCB8 (most junior) to GCB0 (most senior). The Respondent is regulated by the Financial Conduct Authority. Since 2016 it has been subject to the Senior Managers Certification Regime (SMCR) and has been committed to certifying that relevant employees within GBM are 'fit and proper' persons. The Tribunal found that, as a result, the Respondent has enhanced its recruitment processes to seek compliance with SMCR and ensure that new appointees are fit and proper to undertake their roles and meet the regulatory requirements and commitments to which the Respondent is subject. The Tribunal found that from mid-2018 (about the time the Claimant was being considered for employment) a recruitment process within GBM was used which involved six steps consisting of:

    a. Pre-approval to start the recruitment process;

b. Internal and external advertisement;

c. Formal interviews;

d. Value assessment (Hogan Test);

e. Final approval to hire (GCAS); and

f. Formal offer.

Thereafter, once interviews and assessments had been completed, feedback and outcomes for all candidates were to be reviewed before a decision would be made for final approval to progress an offer and an offer would be made through the relevant member of the recruitment team and the Performance and Reward team. See generally the Tribunal's decision at [30-36]. The Judge also found that:

> **"36. During 2018, the final approval process for recruitment was done through the Respondent's Global Compensation Approval System (GCAS) (called My Compensation Approval from 2019). GCAS was used to obtain final approval for the role, for the particular candidate (based on the business case or rationale given), their specific compensation offer, and their GCB level."**

21. The Judge found that in January 2018, the Respondent sought to recruit a director to lead its institutional flow sales team, reporting to Mr Eric Dutruit. This was a GCB3-level role. Mr Dutruit was the hiring manager. In addition, in the period leading up to April 2018, Mr Dutruit had also been keen to hire someone in the Equity Derivatives Sales team with experience in risk recycling. There was, however, no confirmed, additional vacancy advertised.

22. On 18 April 2018 the Claimant speculatively sent her CV to a friend who was a director working within the Respondent. The friend forwarded the CV to the Global Head of Equities, Mr Hossein Zaimi. Mr Zaimi then emailed Mr Dutruit, asking the latter to interview the Claimant. That interview took place on 11 May 2018. After it,

Mr Dutruit emailed Mr Zaimi and stated: *"we need to hire [the Claimant]*." The next day, 15 May 2018, Mr Zaimi responded "*Find space and do it*". On 18 May 2018 Mr Dutruit met for coffee with the Claimant and he informed the Claimant that he would like to progress with hiring her. During that meeting/interaction, the Claimant explained that she was, "*in a dispute with her former employer, Barclays.*"

23. As part of the recruitment process, the Respondent, through Mr Dutruit, sought feedback on the Claimant from her clients and former colleagues. The information disclosed to the Claimant was that that feedback was generally positive, although an email dated 12th of June 2018 also recorded that some very negative feedback was received. It stated: "*Off that's [sic] [if the Claimant is the] best candidate happy to support but we know that some of the feedback has been very negative too."* The Claimant did not see that email. However, she was made aware that some negative feedback had been received at that time.

24. To address that, on 5 July 2018 the Claimant provided further positive references to address the negative feedback or observations that she was aware had been provided about her during May/June 2018. The Judge noted that it was clear that, despite the negative feedback, Mr Dutruit was still actively progressing the Claimant's candidacy.

25. On 13 June 2018 the Claimant was asked to take the Hogan test, a test used by the Respondent as part of the recruitment process to assess candidates' values and leadership capabilities. (By reference to the recruitment process set out in paragraph 20 above, this was stage (d), i.e., the fourth of the six stages in the process).

26. On 15 June 2018, one of the Respondent's managers who had interviewed the Claimant (Mr Lacour, the Respondent's Global Head of Equities Trading) sent an internal email in which he identified the Claimant, and another one or two (the redactions meant this was not entirely clear, at least initially), as strong candidates. He noted that it was necessary to make a decision and that:

> *"I look like both Andre von Riekhoff an[d] …*
> *They would seriously upgrade our Vol trading capability.*
> *They are credible alternative to [the Claimant]*
>
> *[The Claimant] is certainly more technical and therefore independent on that side.*
> *Both … and Andre have more experience with European client base.*
> *They are both join/lea*
>
> *Andre would give you firepower in flow business.*
> *We need to decide quickly what to do as the window is closing.*
> *common GCAS is being processed as per Hoss [Mr Hossein's] request. Should we do the same for these two while we decide on who and how many?"*

27. Significantly (on the Claimant's case) this email was not disclosed to the Claimant until August 2020.

28. There was a dispute of fact before the Tribunal at the OPH as to whether GCAS (Global Compensation Approval System) for the Claimant had been signed off in June 2018. Again, by reference to the process set out at paragraph 20 above, this was stage (e), i.e, the fifth stage out of a total of six. The Judge found that it had not been:

> **"Given Ms Collett's evidence, and the inability to agree a GCB4 with the Claimant I did not conclude that the Claimant had GCAS signed off and as such Mr Lacour was mistaken in his email, which must have represented his expectation not his knowledge."**

29. I consider that it is important to note that the Judge did not hear evidence from Mr Lacour at the OPH. Nor did there appear to be written witness evidence from him

before the Judge. The Judge referred to Ms Collett's evidence who had analysed the Respondent's recruitment records and gave evidence, accepted by the Judge, that there was no record on the computerised system showing that GCAS had taken place.

30. The Claimant had been employed at the level of a Vice-President (VP) at Barclays, not Director level. One of the Respondent's Recruitment Managers, Ms Andersson, met with the Claimant on 18 June 2018 (three days after Mr Lacour's email above) and set out, in a subsequent email of the same date, that her impression was that the Claimant was looking to be recruited above that level. Again, at the OPH, there was a dispute of fact about some of the Respondent's recruitment policy. The Tribunal found as a fact that the Respondent operated a 'no promotion on hire' policy. The Judge found (at paragraph 50) that the Claimant, who had not worked at Director level in Barclays, would have had to be recruited at a GCB4 level to secure employment with the Respondent. Ms Andersson recorded in an email that she did not think that the Claimant would come to the Respondent for a VP or Assistant Director role. The Judge accepted this was the case. The Judge stated:

> **"However, the initial interest in the Claimant was such that consideration was being paid to offering her the vacancy at GCB4 level with a view to converting it to a GCB3 role in future."**

Email correspondence took place between the Claimant and Mr Dutruit on 29th and 30th June 2018. Mr Dutruit spoke to the Claimant on 29 June 2018 and indicated that the Respondent would look at creating a hybrid risk recycling/hedge fund role at GCB4 level. The Claimant was clear that, *"being a director is a must".* Mr Dutruit explained that HR would not allow that promotion on hire and offered an alternative route to becoming a director.

31. The Judge found that the process in respect of the Claimant's potential recruitment ceased in or around mid-July 2018.

32. The Claimant learnt, in or around August/September 2018 that Andre van Rieckoff had been offered a role with the Respondent. On 20th September 2018 she sent a WhatsApp message to Mr Dutruit which stated, *"I just heard Andre von Rieckoff is coming to HSBC. I believe congratulations are in order. This also makes me believe that it is official now that I will not be joining you. It would have been a great pleasure. All the best."* On 17 August 2018 the Respondent had announced that the GCB3 role had been filled by the hire of Mr Andre von Rieckoff. He was another of the strong candidates referred to in Mr Lacour's email of 15 June 2018.

33. Various contacts took place between the Claimant and managers within the Respondent between 20 September 2018 and August/November 2020, at the initiation of the Claimant. In addition to the meetings referred to below at paragraphs 34-38, the meetings the Claimant had with the Respondent during this time were as follows:

    (i) On 8 February 2019 the Claimant messaged Mr Dutruit and suggested meeting for a coffee. Mr Dutruit responded positively but no meeting took place.
    (ii) On 8 March 2019 the Claimant met with Mr Assaf, the Respondent's Chief Executive of Global Banking and Markets. The Claimant asserted that he stated he believed the Respondent would have work for her but that as she was pregnant with her second child, which would delay recruitment, she should not seek work until after giving birth in 2020.
    (iii) On 9 May 2019 and 22 August 2019, the Claimant met with the Respondent's Global Head of Structuring, Mr Lemmel.
    (iv) On 18 November 2019 the Claimant sent another WhatsApp message to Mr Dutruit and suggested they meet for a coffee. That meeting took place on 25 November 2019. Mr Larrue, the Respondent's Head of QIS

and Equity Structuring, also attended the meeting. The Judge found that this meeting was "a preparatory meeting for managers to consider whether to try and "create space" to employ the Claimant. However, no bid was subsequently made to increase headcount and no job offer was made to the Claimant, nor were any follow-up meetings scheduled despite the Claimant attempting to arrange meetings from January 2020".

(v) On 28 January 2020 the Claimant met Mr Lemmel in Paris.

(vi) On 15 July 2020 the Claimant made contact with Mr Dutruit, again by WhatsApp, suggesting a further meeting. She made contact again on 4 August 2020 and 3 September 2020. They met on 29 September 2020. The Claimant recorded that meeting.

34. On 17 June 2020 the Respondent sent the Claimant personal data in response to a data subject access request (DSAR) she had made some time previously in 2018. In the email which accompanied the information, it was stated on behalf of the Respondent, *"Please accept our apologies that some of the emails attached were not located in your original search which was carried out in 2018."* Included within that disclosure (pages 1-7 of the Supplementary Bundle) were:

a. A number of emails between Mr Renaud Delloye and Mr Bourrette dated 18th July 2018 in which Mr Bourrette stated that he needed to speak to Delloye about the Claimant and her recruitment, and that he knew her former boss at Barclays.

b. Emails and messages between Mr Hossein and Mr Dutruit June 2018 including those referred to above.

c. Messages from Mr Lacour to Mr Dutruit and Mr Delloye regarding the Claimant, dated June 2018.

d. Messages from Mr Bourrette to Mr Delloye in July 2018 in which Mr Bourrette stated "We need to talk about it. I know her a little, I also know her former boss at Barclays"

In the context of the allegations being made in this case, the content of those emails, particularly when read as they appear in the documents, were clearly of potential significance.

35. During the meeting on 29 September 2020 between the Claimant and Mr Detruit, which the Claimant covertly recorded, Mr Dutruit is alleged to have made a comment about Lebanese connections. Those comments were, on the Claimant's case, relevant to the Claimant's claim of race discrimination. The race discrimination claim is made in the First Claim.

36. Following receipt of the personal data the Respondent sent to the Claimant on 17 June 2020, the Claimant made contact with Mr Bourrette and met with him on 26 August 2020 to discuss the feedback he had provided in July 2018. The Claimant covertly recorded the conversation.

37. At their meeting on 26th August 2020, the Claimant was informed by Mr Bourrette that he had talked to Eric Dutruit and Renauld Delloye about negative feedback which he had received from a friend of his, who was one of the Claimant's bosses at Barclays. The Respondent has not yet identified the name of the relevant individual at Barclays. (The identity of that individual was one of the matters the Claimant sought specific disclosure of in her application of 24 May 2021 (see paragraph 7 above) together with disclosure of communications between the former boss at Barclays and Mr Bourrette.) However, Mr Bourrette set out information about his meeting with the Claimant on 26th August 2020 in an email dated 27 August 2020 which was sent from Mr Bourrette to an individual in the Respondent:

> **"She got access to internal email exchanges and her application file. That is how she became aware that I talked to Renaud Delloye and Eric Dutruit of the negative feedback I received about her from a friend of mine who was one of her bosses at Barclays. He talked to me about her because he knew we were alumni of the same school. I then left it Renaud and Eric to continue their process and do their checks.**
>
> **The highlights of her email are as follows …. I talked to her for an hour yesterday after I received the email, noting really new came out in my view.**
>
> **I contacted you in June 2018 because I was about to start a new job at HSBC.**
>
> **I was surprised and disappointed that you reached out to the hiring manager to provide unsolicited and very negative feedback on me coming from your friend who was a manager at Barclays, without talking to me and hearing my version of the story."**

38. This email, and hand written notes of a meeting with Mr Bourrette dated 29th September 2020 which, again, appears relevant to the issues in the Claimant's claim, were disclosed to the Claimant by an email dated 16 October 2020.

39. The Respondent's HR department subsequently investigated the Claimant's complaints regarding Mr Bourrette's feedback. On 7 October 2020 the Respondent informed the Claimant that they had investigated her complaint and found no breaches of process.

The Tribunal's decision

40. At the outset of the Reasons, the Judge identified the purpose of the OPH and the issues to be determined at the OPH. (See paragraphs 1-2.2 of the Tribunal's Judgment, set out at paragraph 9 above). These were whether the Tribunal should strike out the Claimant's claims on the basis that they had no reasonable prospect of success; or, alternatively, because they had been presented out of time. In setting out those issues, the Judge made no distinction between the First or the Second Claims. No reference

is made to consolidation of the two Claims. No reference is made to the fact that notice of the OPH for the Second Claim had been set for a date in November 2021.

41. The Judge recorded that the Respondent made two submissions. First, that in respect of allegations concerning events after mid-July 2018, the Respondent asserted that the Claimant was not a job applicant, and did not, therefore, fall within the scope of s.39(1) or s.39(3) of the EqA 2010. The Tribunal found that that was the case. As noted above, there is no appeal before me in respect of that aspect of the Judge's decision. Secondly, in respect of complaints which concerned matters which occurred prior to mid-July 2018, the Respondent asserted that those claims were out of time, and that it would not be just and equitable to extend time. No distinction was made between the allegations within the First Claim or the Second Claim. The Judge referred to the second draft agreed list of issues dated 4 June 2021 attached to the Judgment. It appears relatively clear, given the timeline of events, that that list of issues was prepared in respect of the First Claim only (the Respondent only knew of the Second Claim on 3rd June 2021).

42. The Tribunal heard oral evidence from three witnesses: the Claimant, Mr Longmore, an expert witness who gave evidence about recruitment within investment banking, and Ms Collett who was the Respondent's Leader Recruitment for GBM and Private Bank, UK and Europe. None of the managers with whom the Claimant had met in the meetings set out above, or who were involved in, or discussed her possible recruitment, gave evidence.

43. At times, the language used by the Tribunal to describe the Claimant appears to be particularly critical. For example, at [7] the Judge stated:

> **"7. The Claimant prepared a lengthy witness statement permeated with arguments, her opinions and her conclusions drawn from documents that she had reviewed following her numerous Data Subject Access Requests (DSAR) and the snippets of the covert telephone recordings she had made with unwitting individuals."**

The Judge described the meetings the Claimant had during 2019 and 2020 as having taken place "following her 'pushy' and indefatigable requests to meet to see if she could be employed by the Respondent". Although the Judge had heard evidence about some aspects of the claim, and was entitled to reach conclusions relevant to those issues, it was important to recall that he had heard limited evidence, in respect of limited issues only. Caution about expressing views on issues, assessment of credibility, which went beyond that required to determine those issues within the remit of the OPH was, in my judgment, the appropriate approach to adopt.

44. The Judge also recorded that the Claimant was "deeply suspicious" that the Respondent had withheld relevant documents, specifically relating to the Respondent's GCAS and her concern that that disclosure may have helped her to establish the basis for her claims that she was being considered for other roles. The Judge was satisfied that, at the time of the hearing, there was no GCAS documentation which had not been disclosed. In context, however, the Claimant's concerns were not without, at least, some foundation. The Respondent had, belatedly (in 2020 rather than 2018) provided information which was directly relevant to her claims and the allegations she made. The Respondent accepted that some of the material emails had not been sent initially after the Claimant had made a DSAR request and were only

sent later in 2020. In addition, given the early stage of the Second Claim, formal disclosure had not taken place at all.

45. The Judge made a number of factual determinations regarding recruitment within the relevant sector, namely the recruitment of senior executives within the financial sector, and, within the Respondent. The Judge found that Mr Longmore's evidence was credible as "a generic overview of the head-hunting process" in the relevant sector, but that that individual did not have experience or knowledge specifically regarding recruitment within the Respondent. The Judge found that the 'generic' evidence established that,:

a. Hiring processes vary. However,
    i. There may be 'informational gathering', with no serious hiring intentions, which may extend to a coffee meeting (with a potential recruit), or possibly two. Meetings/steps beyond that would be considered to be a hiring process.
    ii. The significance of a meeting may depend on how long the coffee meeting was, how senior the manager who attends was, and what was discussed.
    iii. A senior manager at MD level or above, will not 'take' a coffee meeting, or suggest that a role is available, or ask for a CV from someone, without an interest in hiring.
b. Once a 'desired candidate' is identified, broad terms and conditions will be outlined, and, for a 'meaningful role, a hiring manager would then typically seek approval for those terms. Once more political and nuanced elements are

resolved, an offer is made, and the arrangements handed over to HR for final steps.

c. Recruitment may take a long time, particularly, for example, if the candidate works for a competitor or the recruitment of the individual may have implications for existing teams.

46. The Judge accepted that:

> "**… hiring managers could seek to use any influence they had to try and create a role whether by submitting business cases seeking to lobby for an increase budget to increase headcount or seek to dismiss poor performing employees to create a vacancy." [10]**

47. Within the Respondent organisation the Judge found that:

a. To be authorised, appointments had to be compliant with the Respondent's recruitment process;

b. There was flexibility within the Respondent's recruitment process so that once headcount had been agreed, a hiring manager could deploy an individual to maximise their skills and experience, and to that extent, grading for a role (rather than a job title) was an operative consideration.

c. The Judge found that, notwithstanding that flexibility, a role had to be available for recruitment to take place and that an interest in a particular candidate was not sufficient in and of itself.

48. In respect of time limits, the Judge stated that the Claimant had 'extensive experience of Employment Tribunal litigation', in light of the previous claims she had issued against Barclays. In evidence, the Claimant accepted that she knew about Employment

Tribunal time limits and had access to legal representation. The Judge recorded that the Claimant had made 8 separate DSAR requests to the Respondent which the Respondent responded to. It was, however, common ground that some emails which should have been disclosed earlier, were only disclosed in 2020, as to which see paragraphs 34- 39 above.

49. The Claimant produced, before the Tribunal, a witness statement from the Barclays litigation, dated December 2018. The Judge referred to specific paragraphs and statements within it in which the Claimant had stated that there had been a series of positive interviews and meetings with managers from the Respondent. The statement continued:

> "**However all that positiveness was brutally and suddenly stopped by unofficial feedback from Barclays.** I have been told by Eric Dutruit that (in breach of policy) unofficial feedback was provided to new employers stating that I am 'a total disaster'; for example, a comment passed to the Global Head of HSBC Equities Hossein Zaimi. This was a comment attributed to my 'ex-boss' i.e. Makram. **It was this specific feedback that halted my recruitment after numerous successful interviews at HSBC**." [Bold typing in original Reasons].

In respect of this passage the Judge stated as follows:

> **"28. I emphasise the text in bold as it is clearly relevant in assessing what the Claimant was alleging at the time in respect of the progression of the recruitment process with the Respondent. Contrary to the position outlined in that statement, the position that the Claimant now maintains is that her recruitment with HSBC was continuous from April 2018 until Mr Dutruit sent her an email response to her query on 15 February 2021 stating:**
>
> > **"*The position hasn't changed since we met for coffee in November 2019. There is no headcount as the business continues to downsize.***
> >
> > ***Sorry this isn't the news you want and it is very unlikely that the situation will chart the change in the near term. As mentioned in November 2019, the market position is simply not was discussed the role in spring 2018.***
>
> **Following this email, the Claimant sought to meet with other individuals within the Respondent without success. The Claimant claims that her blacklisting [with] the Respondent continues. "**

50. The Judge considered that the Claimant's position outlined in that statement was inconsistent with the position adopted by her in the present proceedings, that she was

being considered for recruitment with the Respondent continuously from April 2018 until 15 February 2021. As set out above, the Judge concluded that this was not the case.

51. Further, as noted above at paragraphs 23-24, the Judge held that the Claimant was aware in 2018 that the Respondent had received some negative feedback in June 2018. She was able to address that by providing further positive feedback. However, a significant part of the Claimant's case in relation to time limits, was that she did not have knowledge about key matters involving Mr Bourrette's intervention and that he had been provided with additional negative feedback from her former boss at Barclays until the Respondent (belatedly) disclosed that information to her in June and October 2020. In paragraph 70 the Judge made reference to this fact:

> **"The Claimant received DSAR response to her third and fourth responses on 17 June 2020. The Claimant criticizes the Respondent for withholding documentation that should have been sent to her following her first DSAR in October 2018."**

52. Earlier in the Judgment the Judge stated however:

> **"44. Whilst the Claimant discovered some of the detail of the feedback that was being sought on her when she received the DSAR response in 2020, the content of the feedback was not inconsistent with her knowledge and understanding she had at the relevant time when her appointment was not progressed in 2018."**

53. The Judge concluded that the Respondent operated a "no promotion on hire" policy and set out the factual matters set out above. For reasons which are set out in the Reasons at paragraphs 50-51, he concluded that there was not another role which the Claimant could be recruited to.

54. Against the factual background determined by the Judge, and for the reasons set out at paragraphs 78-90 of the Reasons, the Judge determined that the Claimant was not an applicant for employment within the meaning of s.39 of the EqA 2010. That addressed the first basis upon which the Respondent sought an order striking out the Claimant's claims as set out in paragraph 1 and paragraph 2.2 of the Reasons.

55. The Judge then considered the issues in respect of time limits. In the Reasons, the Judge recorded that:

> **"72. At times during 2020 the Claimant had difficult personal circumstances, dealing with COVID lockdown travel restrictions, having to look after two young children, organising her maternal grandmother's health care arrangements and subsequent funeral outside the UK; and flooding at her house discovered on her return."**

The Judge also dealt with the time limit issue substantively in the Judgment. The Judgment stated:

> **"1. The Claimant was being considered for a specific GCB3 vacancy at the Respondent between May to July 2018. The Claimant was not appointed to this vacancy. The Claimant's claim in this regard has been presented out of time.**
> **2. The specific role GCB3 was not part of a continuing act of alleged continued recruitment arrangements and non-appointment of the Claimant. It is not just and equitable to extend time. The Tribunal therefore does not have jurisdiction to consider this claim pursuant to section123 of the EqA 2010. (Emphasis added)**

56. The Judge set out s.123 of the EqA 2010 and referred to decisions in *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 168 CA, *Lyfar v. Brighton and Sussex University Hospital Trust* [2006] EWCA Civ 1548 and *Aziz v FDA* [2010] EWCA Civ 304; *Robertson v Bexley Community Centre* [2003] EWCA Civ 576; *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 and *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021]

EWCA Civ 23. He noted that the extension of time is an exception rather than the rule (paragraph 95) and stated at paragraph 99:

> **"When considering whether it would be just and equitable to extend time, I therefore considered the balance of prejudice which each party would suffer as the result of the decision to be made having regard to all the circumstances of the case."**

57. As regards strike out, the Judge set out paragraphs from the judgment of Simler J. in *Zeb v Xerox (UK) Ltd* UKEAT 0091/15, extracts from *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126.

58. The Judge's further analysis in respect of time limits appears at paragraphs 111-134 of the Judgment:

> **111. The burden of proof to show that a claim was brought within time falls on the Claimant.**
> **112. The Claimant was a job applicant for employment up (sic) July 2018 only. I do not conclude that matters following July 2018 formed part of conduct extending over a period of the alleged continued non-appointment of the Claimant to an available role or opportunity.**
> **113. Unlike Hendricks the Claimant had no ongoing relationship with the Respondent once her candidacy for the role in June 2018 ended. There was no further authorised vacancy opportunity and the Claimant was not, as she alleged, in a continuing recruitment or opportunity. I apply Tyagi and conclude that the Claimant cannot be protected against a policy of *"continuing discrimination"* extending beyond July 2018, where the relevant job was no longer on offer. The extensive allegations the Claimant makes after the recruitment process had ended (including the Claimant's second claim) do not come within the scope of section 39 of the EqA, and such a policy alleged does not amount to a 'continuing act'.**
> **114. The tribunal has jurisdiction to consider the Claimant's claim relating to events predating August 2018. In these circumstances, the Claimant ought to have contacted ACAS in respect of her claims by the end of October 2018 and brought her claim within the prescribed period thereafter. However, the Claimant submitted her complaint on 1 November 2020. Her complaint in this regard is therefore out of time.**
>
> **Just and equitable extension**
> **115. The Claimant asserts, as she did in earlier Barclays claims, that the EqA 3 months time limit is onerous and as such the just and equitable extension should be exercised liberally, the purpose of the EqA being to challenge discrimination and not to allow wrongdoing Respondents to escape liability on technical time points.**
> **116. I accept that I have a wide discretion must be judiciously exercised. I therefore considered the balance of prejudice which each party would suffer as the result of the decision to be made having regard to all the circumstances of the case.**
> **117. The Claimant advanced claims against Barclays timeously and these were subsequently settled. The Claimant has also presented further claims against Barclays that are subject to separate proceedings.**

118. The Claimant was fully aware of the employment tribunal time limits and their importance. She has access to specialist employment lawyers and previous experience of Tribunal litigation.
119. The Claimant submitted DSAR's to the Respondent on 10 October 2018 and Employment Tribunal claims against Barclays in June and November 2018 in respect of her nonappointment to the Respondent in July 2018.
120. The Claimant relies on the flagrant alleged breach by the Respondent of the EHRC code in respect of references which would form the basis for inference of unlawful discrimination.
121. The Claimant contends that her claims against HSBC only crystalised after 26th August 2020 or by 16 October 2020 when the Claimant received the outcome of the HR investigation and the following DSAR reply which included the handwritten HR notes from the investigation. I do not accept this, the Claimant's contemporaneous expressions and actions wholly undermine her contentions in this regard. The Claimant was fully aware of the elements of her claim for nonappointment to a role in July 2018, due to bad reference from Barclays, at the time. She proceeded with claims against Barclays but strategically opted not to pursue a claim against the Respondent in the hope of securing employment with them if another opportunity arose in future.
122. The Claimant contends that the delay in bringing her claims has been caused/or contributed by the deliberate concealment and misleading tactics and concealing relevant documentation. I do not accept this. The basis for the Claimant's claim was apparent from an early stage and the Claimant chose not to bring a complaint against the Respondent at the time. *(Emphasis added)*
123. The Claimant criticises the Respondent's piecemeal disclosure of documentation under the DSAR, that she refers to as having received on 17 June 2020. The Claimant relies on her late knowledge of the true facts and the fact that her delayed knowledge was caused by the deliberate obfuscation and misrepresentation by the Respondent and refers to the case of *Southwark London Borough v Afolabi* [2003] IRLR 220 for just and equitable extension. However, I conclude that the late disclosure did not change what the Claimant was already aware of in 2018, namely that negative references had been given which she sought to address in her email of 5 July 2018.
124. The Claimant's GCAS suspicions were founded by the latter disclosure of Mr Lacour's email dated 15 June 2018 which suggested that the Claimant had been submitted to GCAS. However, the Claimant was fully aware that she had not been sanctioned for GCB3, which was the grade of the role, and in these circumstances no GCAS could have been concluded.
125. Finally, in this context, I conclude that there was no ongoing relationship between the Claimant and Respondent for the Afolabi reasoning to apply for late knowledge as she contends.
126. The Claimant refers to her very difficult personal circumstances including being outside of the country in June 2020 with COVID travel restrictions; looking after her grandmother then grieving and managing the funeral; and having a flooded house at her return to England. However, all these difficulties occurred nearly 2 years after the acts complained of.
127. I am unimpressed with the Claimant's reasons for not bringing her claim against the Respondent sooner. Much time has elapsed, there has not been a contemporaneous grievance or review with the complaints referred to and a number relevant witnesses no longer work for the Respondent. The cogency of evidence will inevitably be adversely affected.
128. The Claimant has, at all material times, had the resources and capacity to secure legal advice to bring a claim but did not do so timeously.
129. The Claimant has brought, and settled claims, against Barclays arising from the same facts and there is the potential for reopening of matters that Barclays witnesses have reasonably expected to have been closed. This is undesirable.
130. The Claimant's claims are very serious and public policy dictates that such matters are heard. However, a cursory review of the evidence does not indicate that the reason for her non appointment was necessarily the negative references, whatever the content of the references may have been. The emails I have been referred to illustrate that the Claimant was being objectively assessed against Andre von Riekhoff, the successful candidate in 2018 in spite of the references. *(Emphasis added)*
131. Further, it is evident that the Claimant seeks to advance her claim based on piecemeal responses to DSAR requests and covert recordings made with unwitting individuals discussing matters out of context. The Claimant has also been consistent in her wide-ranging, onerous specific disclosure application seeking to expand the scope of the claim.
132. Having considered all of the circumstances and submissions I conclude that the balance of prejudice favours the Respondent in refusing to exercise my discretion to extend time. The Claimant has not convinced me that it is just and equitable to extend time."

The Law

59. The grounds of appeal in this case arise in the context of a Tribunal's decisions to determine a number of preliminary issues at an OPH, and the determination of an application to strike out the Claimant's claims on the grounds that they had no reasonable prospect of success, alternatively were out of time and in circumstances when it was not just and equitable to extend time.

Relevant procedural rules

60. Rule 37 of the ET (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provides as follows:

> ***37. Striking out***
>
> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success**
>
> **…**

61. As set out below, it is well established that caution must be exercised when considering applications to strike out at preliminary stages of proceedings in discrimination claims on the grounds that the claim(s) have no reasonable prospect of success.

62. Rule 53 of the ET Rules of Procedure 2013 sets out the Tribunal's power to conduct

Preliminary Hearings. It provides as follows:

> ***53. Scope of preliminary hearings***
> **(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following –**
> **(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);**
> **(b) determine any preliminary issue;**
> **(c) consider whether a claim or response, or any part, should be struck out under rule 37;**
> **(d) make a deposit order under rule 39;**
> **(e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).**
> **(2) There may be more than one preliminary hearing in any case.**
> **(3) "Preliminary issue" means as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).**
>
> ***54. Fixing of preliminary hearings***
> **A preliminary hearing may be directed by the Tribunal on its own initiative at any time or as the result of an application by a party. The Tribunal shall give the parties reasonable notice of the date of the hearing and in the case of a hearing involving any preliminary issues at least 14 days' notice shall be given and the notice shall specify the preliminary issues that are to be, or may be, decided at the hearing."**

63. The directions set out in r.54 regarding the procedural steps and requirements to be taken prior to a preliminary hearing taking place are mandatory. Whilst the Tribunal has a general discretion to make orders or directions of its own initiative, the specific rule set out in r.54 about the prior notice which must be given in respect of preliminary hearings is mandatory. In addition, in ***Caterham Schoool Ltd v Rose*** (UKEAT/0149/RN, the EAT (HHJ Auerbach)) emphasized the importance of ensuring that there is clarity as to the purpose of a preliminary hearing and what is to be considered. In ***Cox Adecco Group*** **[2021] ICR 1307** HHJ Tayler made the same point:

> "**it is important, wherever possible, to have properly identified the issues in a case before considering strike out. Things often go wrong at preliminary hearings when considering strike out, deposit orders, where there has been insufficient consideration of the issues"**

I agree. If key, and sometimes, wholly determinative issues, are to be decided at a preliminary hearing, it is an essential tenant of a fair process that the parties have reasonable (fair/adequate) notice of which claims are being considered, which issues

or allegations are being considered, and what applications will be determined so as to be able to properly prepare to address those matters.

Strike out in discrimination cases: the need for caution and why that is

64. In addition to the points made in the preceding paragraph, I add encouragement to Tribunals and parties and representatives to consider carefully whether a particular issue can be fairly determined at a PH and whether it should be. There may be obvious financial and resource advantages to doing so. However, Employment Judges should be alive to the possibility that what happens at that hearing (which may well take place at an early stage of litigation), may lead to the determination of a key issue before a full hearing on the merits; prior to full disclosure having taken place and with evidence (relevant to one point) being heard and tested in a vacuum, not within the context of all of the evidence. It is self-evident that determining pivotal issues at that point *may* lead to injustice. It is, therefore, essential not to lose sight of the well stated principles: there are compelling public interest reasons that discrimination cases are determined after full consideration of all relevant evidence; allegations of discrimination are highly fact sensitive; it is not uncommon that a large proportion, or even, most of the probative (documentary) evidence is in the hands of one party. It is for all these reasons that the principles have been stated, time and again, that only in the clearest of cases should a discrimination case be struck out without full consideration of the merits.

65. In **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 Maurice Kay LJ set out this oft quoted passage:

> **"29. It seems to me that on any basis there is a core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having *no* reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the Claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.**
> **30. There is another aspect of this type of case that calls for comment. Whistleblowing cases have much in common with discrimination cases, involving as they do investigation into *why* an employer took a particular step…**
> **31. The claimant will often run up against the same or similar difficulties to those facing a discrimination claimant. There is a similar but not the same public interest consideration. In *Anyanwu v South Bank Student Union (Commission of Racial Equality intervening) [2001] ICR 391, para 24,* Lord Steyn said:**
>
> > **"for my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."**

Lord Hope of Craighead added, at para 37:

> **"I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of the facts rather than on assumptions as to what the vlaimant may be able to establish if given an opportunity to lead evidence."**

66. It is also appropriate to record that at para.39, Lord Hope added:

> **"Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [sic] taken up by having to hear evidence in cases that are bound to fail."**

67. In **Chandhok v Tirkey (EHRC intervening)** [2015] ICR 527 EAT, Langstaff P. set out in more detail why caution should be exercised in respect of applications to strike out discrimination claims before all evidence is heard. He noted that a claim of discrimination will centrally require an evaluation of why an employer acted as they did:

> **"19. … That will usually require an evaluation of the reasons which the relevant decision maker or alleged discriminators had for acting as they did. Such an evaluation depends, often critically, on what may be inferred as well as proved directly from all of the surrounding circumstances, including evidence of the behavior (whether by word deed or inaction) of such individuals not only to contemporaneously to the events complained of but also in the past and, sometimes, even since the events on which the claim was founded; and it may include an assessment, in the light of the evidence that was called, of whether the failure to call other evidence was of significance. These can often be challenging assessments, all the more so where there are complications of language and culture."**

68. Langstaff P noted that the passages in *Anyanwu* stopped short of a blanket ban on strike-out applications succeeding in discrimination claims. He continued:

> "**20. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or, where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic …**
> **Or claims may have been brought so repetitively concerning the same essential circumstances that any further claim is an abuse. There may well be other examples too but the general approach remains that the exercise of a discretion to strike out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless the tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."**

69. See also similar expressions of caution in ***Mbuisa v Cygnet Healthcare Ltd*** UKEAT/0119/18; ***Hassan v Tesco Stores Ltd*** UKEAT/0098/16.

70. In ***Mechkarov v Citibank*** [2016] ICR 1121, Mitting J warned against not conducting mini trials of oral evidence to resolve core disputed facts.

71. In ***Cox v Adecco Group UK & Ireland*** [2021] ICR 1307, HHJ Tayler added his voice:

> **"From [the] cases a number of general propositions emerge…:**
>
> (1) **No-one gains by truly hopeless cases being pursued to a hearing;**
> (2) **Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;**
> (3) **If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;**
> (4) **The Claimant's case must ordinarily be taken at its highest;**

> (5) **It is necessary to consider, in reasonable detail, what the claims and issues are.**
> **….**

Other comments in that case regarding the participation of litigants in person are less relevant in this case given that the Claimant did have some legal representation at the first part of the OPH hearing.

Time limits

72. Section 123 of the EqA 2010 provides (so far as relevant) as follows:

> "**123 Time limits**
>
> (1) … proceedings on a complaint *[to an employment tribunal relating to a contravention of Part 5 (work)]* may not be brought after the end of
> a. The period of 3 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;"

73. Section 123(1) of the EqA 2010 sets out the primary time limit within which claims in respect of discrimination must be brought before an employment tribunal (three months starting with the date of the act to which the complaint relates) or, such other period as the employment tribunal thinks is just and equitable.

74. Section 123(3)(a) provides that for the purposes of section 123, "conduct extending over a period is to be treated as done at the end of the period." In **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530 CA, the Court of Appeal refocused attention, in s.123(3), back onto the words of the statute, and away from concepts of "policy, rule, practice, scheme or regime". At that time, those words had become widely used as an indicia of whether an individual could avail themselves of the provisions of s.123(3), the question often being whether there had been a 'one off

act, albeit with continuing consequences,' or, rather the application of a police, rule etc. The Court of Appeal stated that concepts such as a 'policy', 'rule' etc. should not be treated as defining, themselves, whether there was an 'act extending over a period'. Such an approach led to a focus on a side issue, for example, whether a 'policy' could be discerned, rather than the substance of the complaint. The focus should be on the statutory language and whether the facts and evidence support the assertion that such a continuing discriminatory state of affairs exists, or existed, at the relevant time.

75. However, Parliament has also determined that Tribunals should have a discretion to hear and determine discrimination claims within "such other period as the employment tribunal thinks just and equitable." Those words confer upon Tribunals a broad discretion; "the widest possible discretion" to accept claims within a different time frame, which is 'broad and unfettered' (See **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194, at 1201 B-C and 1203A-B.)

Determination of time issues as preliminary issues in discrimination cases

76. Some caution also applies to consideration of limitation issues in discrimination cases as a preliminary issue. Again, there is no ban on doing so. In some cases, determination of that issue as a preliminary issue may be wholly appropriate and a good application of the principles in the overriding objective. See for example, **Southwark London Borough Council v Afolabi** [2003] ICR 800 CA. In the present context, the following passage is particularly relevant:

> **"55. An employment tribunal presented with a time issue at the start of any but a short case has to estimate what will be the best use of its time. If the question is simply whether an application is in time or not, it is a true preliminary issue and can be disposed of as such. If the application is admitted or held to be out of time and the applicant seeks an enlargement of time, the tribunal commonly has a problem: should this too be dealt with as a preliminary issue, or as a discrete first issue at the hearing, or should it await a full exploration of the evidence in order to see where the balance of justice and equity lies in relation to the lapse of time? There is no single or even preferred answer. To take the first course may deny the tribunal information capable of having influenced its decision; but it will mightily shorten the hearing if it goes in the Respondent's favour. To take the second course, if it results in a refusal to extend time, may mean that days have been wasted; but it may also mean that the decision on the enlargement of time is a better informed one. Between these two courses may lie a third: the possibility of giving an initial decision on time but, if it goes in the applicant's favour, exceeding to any appropriate application to review it in the light of the subsequent evidence.**
> **56. So long as tribunals are alive to the options and their implications, it will not be for appellate courts to second- guess their choice, even where hindsight shows it to have been inappropriate."**

Later in the Judgment Rix LJ observed that one of the critical findings which influenced the Tribunal in that case to extend time was that the Claimant had not been aware that he had an arguable case until he inspected his personal file for the first time, having not had any reason to do so before. He noted that those facts were highly unusual and continued:

> **"they mean that the delay was in no sense the fault of [the Claimant]. in such circumstances it hardly makes sense to speak of "delay". where there is delay which can be placed at the door of an applicant, the position is very different."**

Rix LJ also considered the importance of evidence regarding prejudice to either party due to the passage of time, noting that in the **Afolabi** case, evidence had not been called on that issue, simply relying upon submissions.

77. In practice, it is often difficult to disentangle time points from the merits of the claims themselves: for example, when considering the time limit in s.123(1)(b) EqA 2010 where s.123(3)(a) EqA 2010 applies, it may not be possible to determine whether an act extended over a period, unless a decision is made about whether separate incidents amounted to unlawful discrimination. One consequence of this is that in many such

cases, there may be no appreciable saving of time in seeking to determine those issues at a PH, because determination of whether complaint was in time, and if not, whether to extend time, may well require an analysis of some of the underlying merits.

78. As the Judge in this case rightly identified in this case, the broad discretion in s.123(1)(b) of the EqA 2010 must be exercised judicially, taking into account relevant matters, and disregarding those which are irrelevant. There is no justification for reading into the statutory language any requirement that the tribunal had to be satisfied that there was a 'good' reason for the delay, nor indeed, is there any mandate that time could not be extended in the absence of any explanation or apparent reason for the delay. At most, *"whether there is any explanation or apparent reason for the delay and nature of any such reason are relevant matters to which the tribunal ought to have regard."* (See **Abertawe** 1203 C-D). The best approach for a Tribunal in considering the exercise of the discretion under s.123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for the delay.

79. In this case, the Claimant's primary case was that her claims were not out of time. She asserted that the conduct about which she complained constituted an act which extended over a period, broadly because she asserted that, following receipt of the informal, bad, victimising reference, and the intervention by Mr Bourrette in her recruitment in June/July 2018 (something she only discovered in 2020) the Respondent effectively blacklisted her.

80. Important guidance about the approach to be taken to considering whether an act or

conduct extends over a period within the meaning of s.123(3)(a) of the EqA 2010 in *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530: the focus should be on the substance of the complaint, rather than distinctions between, on the one hand, for example, the application of policies or rules, as opposed to 'one off' acts which may have continuing consequences.

81. In **E v XLZ** UKEAT/0079/20/RN Mrs Justice Ellenbogen carried out a detailed review of appellate authorities regarding cases where Tribunals have considered strike out at a preliminary hearing in cases where the Claimant asserted that the relevant act(s) of discrimination was one which extended over a period. In particular, she stated:

> "47. … In my judgment, whilst, in any given case, it may be possible and appropriate to determine a strike-out application by reference to the pleaded case alone, it cannot be said that that approach should be adopted on every occasion. That is not to say that the tribunal is to consider the assertions made by the Claimant uncritically, or to disregard any implausible aspects of the Claimant's case, taken at its highest. Save, possibly, to highlight any factual basis for asserted implausibility (which is not synonymous with the mere running of an alternative case), one would not expect evidence to be called by a Respondent in relation to the existence, or otherwise, of a prima facie case (see, for example, paragraph 36 of Hendricks; and paragraphs 23 and 35 of Aziz).
>
> 50. With the qualification to which I have referred at paragraph 47 above, from the above authorities the following principles may be derived:
>
> 1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: **Scourging**;
>
> 2) It is appropriate to consider the way in which a Claimant puts his or her 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 been 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 (as qualified at paragraph 47 above);

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** and paragraph 47 above;

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 make 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 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**.

82. This case was not cited by either party at the hearing. I subsequently drew the parties' attention to the Judgment and invited further submissions in respect of it. Each

contended that the authority supported the case which they advanced in the present case.

Victimisation

83. Section 27 of the EqA 2010 prohibits acts of victimisation: it provides that 'A' victimises 'B' if A subjects B to a detriment 'because' B 'does a protected act', A believes B has or that B will do so. (Section 27(1)). Making an allegation of discrimination, or, bringing proceedings in respect of such an allegation is a protected act. (Section 27(2)).

84. It is well established that to succeed in a claim of victimisation, the Claimant must establish that there is a causative link between the act complained of and the relevant protected act. See for example **Aziz v Trinity Taxis Ltd** [1988] ICR 534 (CA); **Nagarajan v London Regional Transport** [1999] IRLR 572 (HL). Whilst conscious motivation is not required to be proved (see **Nagarajan**) the question to be answered is *why* the alleged discriminator acted as they did: *"What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*" *(*Per Lord Nicholls in **Chief Constable of West Yorkshire Police v Khan** [2001] 1 WLR 1497 at page 1954). In this context it is to be noted that the causative link is different to that which appears in other legal contexts, such as the 'but for' test. In **Nagarajan** Lord Steyn stated that the concept of victimisation:

> **"contemplates that the discriminator had knowledge of the protected act that such knowledge caused or influenced the discriminator to treat the victimized person less favourably than he would treat other persons … But … it does not require the tribunal to distinguish between conscious and subconscious"**

The role of an appellate Court

85. Finally, but very importantly, I refer to a number of cases regarding the role of an appellate tribunal such as the EAT on appeal.

86. First, as set out in the authorities, given the width of the discretion set out in s.123(1)(b) of the EqA 2010, the scope of an appellate court to intervene after it has been exercised by a judge is limited. See **Abertawe**, particularly at paragraph 20.

87. More generally, see **DPP Law v Greenberg** [2021] EWCA Civ 672 (CA) (particularly at paragraphs 57-58) where the Court of Appeal set out clearly the need for caution to be exercised by an appellate tribunal when approaching a challenge to the detailed reasoning and findings of fact by a specialist tribunal such as employment tribunals:

> **"57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:**
>
> **(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In Brent v Fuller [2011] ICR 806, Mummery LJ said at p. 813: "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid". This reflects a similar approach to a arbitration awards under challenge: see the cases summarised by Teare J in Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE") [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oftcited dictum of Bingham J in Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration." This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.**
>
> **(2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its**

> **reasoning in any greater degree of detail than that necessary to be Meek compliant (Meek v Birmingham City Council [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In Meek, Bingham LJ quoted with approval what Donaldson LJ had said in UCATT v. Brain [1981] I.C.R. 542 at 551: "Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."**
>
> **(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in RSPB v Croucher [1984] ICR 604 at 609-610: "We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been wellestablished by the decisions of the Court of Appeal in Retarded Children's Aid Society Ltd. v. Day [1978] I.C.R. 437 and in the recent decision in Varndell v. Kearney & Trecker Marwin Ltd [1983] I.C.R. 683."**
>
> **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."**

88. Those passages were considered by Mr Justice Griffiths in **Oxford Said Business School and White v Heslop** UKEATPA/0110/21/VP, particularly at paragraphs 44-48:

> **" 45. … the long line of authority quoted … demonstrate how important it is not to take such cases as a licence to nit-pick and hypercriticise the reasoning of other Employment Tribunals, so long as they state the law correctly, and demonstrate that they have embarked on a careful and conscientious examination of the evidence, in order to reach decisions on what are, for the most part, questions of fact.**

> **46. They are difficult questions of fact, no doubt, as questions of motive and causation often are. They are made when it is rare for direct, compelling evidence to be available of why things happened as they did, by reference to allegations of unlawful discrimination or whistleblowing. They are questions of fact, nevertheless, and appeals lie only on questions of law.**
>
> **47. It is inappropriate as well as inconvenient for the EAT or the Court of Appeal to be asked to conduct a minute examination of ET decisions with a view to overturning findings of fact except in a relatively clear case. Even in a high-value case, or a case in which the reputational issues are acutely felt (both of which are not untypical of discrimination and whistleblowing claims), the winners should usually be left to retain the fruits of their victory without an expensive, time consuming and exhausting war of attrition in courts of appeal. An appellate court is not well placed to decide or even review questions of fact. It has not heard the evidence; which no written decision, however detailed, can ever fully convey.**
>
> **48. The working assumption must be that an Employment Tribunal, which has made no clear error of law, has reached no impermissible conclusion of fact. This working assumption should not easily be displaced by hypercriticism of reasoning, or lack of reasoning, or of the way in which a decision is either structured or expressed. Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an ex post facto attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error. If it passes that test, the facts (including inferences of fact, and findings of secondary fact) should remain where the independent (and, in the case of Employment Tribunals, specialist) tribunal of fact has left them."**

Paragraph 48 is, in my judgment, particularly important in the present context.

Submissions

89. Before setting out each party's submissions in respect of the individual grounds of appeal, I found it helpful to set out the 'overview' of the appeal set out by the Respondent's counsel in oral submission. The Respondent, in its submissions, drew attention to two periods of time, rather than the two separate claims before the Tribunal. It was submitted that it was important not to lose sight of the fact that:

> (1) In respect of 'Period 1', namely May and July 2018, the Claimant's claims were out of time; and
>
> (2) In respect of 'Period 2', namely February 2019 to March 2021, the Judge concluded that the Claimant was not a job applicant within the meaning of s.39 of the EqA 2010; there is no ongoing appeal in respect of either of the conclusions set out in (1) or (2) above; and

(3) It was an inevitable consequence of the Tribunal's conclusions as to the scope of s.39 of the EqA 2010 that the Second Claim should be struck out.

With care and skill, it was submitted that, in those circumstances, the Tribunal was fully entitled to strike out the claims and that the striking out of the Second Claim was an inevitable consequence of the Judge's conclusions regarding s.39 of the EqA 2010, an issue which is not subject to an appeal. In my judgment these were powerful and attractive arguments which required careful consideration on appeal, particularly when placed against the cases cited in paragraphs 83 and 88 above.

90. In addition, it was submitted that the Claimant's actions in contacting senior individuals within the Respondent after she had discovered that she had not been successful for the one available role, was contrived so as to create a 'continuing act' and/or to construct the Second Claim; that the Second Claim was *" cynically formulated set of allegations and a contrived attempt by the Claimant to extend time for earlier allegations which were themselves substantially out of time"*. It was submitted that the Tribunal saw through 'that cynical' attempt by the Claimant. In those circumstances it was again submitted that this Tribunal should be cautious to interfere: the Judge at first instance heard evidence and reached factual determinations which, in line with the authorities above, the EAT should be slow to, or not interfere with. Again, these submissions required careful consideration.

91. I now turn to the more detailed submissions regarding the individual grounds of appeal.

Ground 1: The Tribunal erred by acting perversely, or, misdirecting itself in law in striking out the claims under the Second Claim, because that Claim was not before the Tribunal at the PH.

92. In respect of Ground 1, the Claimant submitted that the Second Claim was clearly not before the Tribunal at the OPH; whilst the Tribunal had suggested consolidating both claims, that had not occurred and was, at best, to be considered at the OPH. The requisite notice had not been given to the Claimant that an application to strike out her claim would be considered at the OPH. In fact, the Respondent's Response had only been accepted a matter of days prior to the OPH. Preparation for the OPH clearly related only to the First Claim; the list of issues referred only to the First Claim; witness statements for the OPH had been exchanged prior to lodging of the Respondent's Response in the Second Claim and therefore the Claimant's witness statement could not address any matters set out in that document; documents referred only to the First Claim Number; the dismissal of the claim against Mr Bourrette only referred to the First Claim Number.

93. Further, it was submitted that no disclosure had taken place in respect of the Second Claim, and that which had taken place was in respect of the First Claim was limited, it being described as "premature" as the OPH was not a final hearing on liability. It was submitted that the approach taken by the Judge was inconsistent with authorities and was flawed. It was submitted that irrelevant matters may have operated in the mind of the Judge, resulting in a flawed approach, one such example being the contents of paragraph 129 of the Judgment set out above.

94. The Respondent submitted that, under r.37 of the ET Rules of Procedure 2013, the Tribunal had the power to strike out the Second *Claim 'at any stage of the proceedings'* (r.37(1)), provided it had given the Claimant *"a reasonable opportunity to make representations"* (r.37(2)). In this case, the OPH was heard over an extended period of time (2 days) with time for reflection and further preparation between the first two days and the last (22 June 2021 and 7 September 2021) and thereafter the Claimant lodged 49 pages of written closing submissions. That, it was submitted, was more than a reasonable opportunity to make representations. Further, it was submitted that the reality was that the Second Claim was before the Tribunal, both parties having referred to its existence, the Claimant had asked for the two claims to be consolidated and, in the Response lodged by the Respondent dated 17 June 2021, the Respondent had applied for the Second Claim to be struck out and to consider this at the PH if time allowed.

95. The strike out of the Second Claim was squarely open to the Judge, particularly in light of the decision regarding s.39 of the EqA 2010. To do other than the Judge did was to act contrary to the overriding objective, particularly having regard to **Ahir v British Airways plc** [2017] EWCA Civ 1392 CA, particularly paragraph 16.

96. In all the circumstances, it was submitted that strike out of the Second Claim was in accordance with the overriding objective, and that a further listing to consider the issue would have been disproportionate and not in accordance with that principle.

Ground 2: The Tribunal erred and/or misdirected itself in law in its approach to the exercise of discretion to extend time on a just and equitable basis.

97. On behalf of the Claimant, it was submitted that a victimisation claim may only be brought if a Claimant knows both, that the Respondent knew of her protected act, and, importantly, that the Respondent's relevant conduct (in this case not to appoint the Claimant to a role) was done because of the relevant protected act. The Claimant needed to be aware of something, at least, relevant to the issue of causation. See in particular **Aziz** at page 546, e-g; **Nagarajan** para.18. In this case, whilst the Claimant was aware that Barclays had provided some negative references to Mr Zaimi in June 2018, at that point in time, she had no reason to believe that the Respondent itself had done anything other than to act in good faith on the basis of that which it had been told by Barclays. It was submitted that, crucially, it was only when she received further documentation from the Respondent in August and October 2020 (some of which should have been disclosed following her DSAR in 2018) that she became aware that Mr Bourrette knew about her previous discrimination proceedings through the informal route of her old boss (rather than, as she had explained the position, that she was simply in a dispute with Barclays as she described to him) and that that had played a part in the decision not to progress her candidacy. Prior to disclosure of those documents, the Claimant had no knowledge of victimizing conduct on the part of Mr Bourrette or the Respondent. In addition, it was only at that point in time that she discovered, through the belated release of information, that she had in fact been a very strong candidate. All of the information she obtained in 2020 was within the gift of the Respondent.

98. It was submitted that the Tribunal had misunderstood the factual context and/or made inconsistent determinations about it: for example, at paragraph 45 the Tribunal found

that the Claimant had undertaken the Hogan test, and not processed through GCAS. Some of the documentary evidence, however, showed that the Claimant's application had been processed through GCAS. The Judge erroneously failed to take the Claimant's case at its highest, contrary to **Chandhok** (particularly paragraph 12), particularly in a case which was so fact sensitive. The Judge also strayed into determining issues which were not identified.

99. The Judge failed to have sufficient regard to the fact that the Claimant was, in truth, a litigant who was acting for herself at different points, albeit with lawyers in the background, someone for whom English was her third language and, was disadvantaged by the Judge striking out the Second Claim without that having been properly identified as a matter before the Tribunal. At best, the position regarding that claim was ambiguous.

100. It was submitted that the manner in which the Respondent provided information (described as 'the piecemeal drip feed of disclosure') operated to delay the Claimant from obtaining knowledge about important evidence and salient facts. It was submitted that, in error, the Tribunal erroneously found that the DSARs were responded to within 6 weeks of requests (para 25 of the Reasons); and that the Judge, in error, failed to take account of the Respondent's fault in the delay in proceedings being issued. It was submitted that even Mr Bourrette had appreciated that it was only in August 2020 that the Claimant had some relevant information. It was submitted that it was important to identify delay attributable to the Respondent, and distinguish it from delay attributable to the Claimant. In addition, in that context it was necessary to consider carefully **Afolabi** and the observations of Rix LJ.

101. In addition, it was submitted that the Respondent has never disclosed the name of the individual who spoke to Mr Bourrette, simply referring to that individual as "one of her bosses at Barclays" and has not disclosed the conversation between that individual and Mr Bourrette on one of the latter's personal devices. (See C187).

102. It was submitted that the Tribunal wrongly and perversely confused and conflated constructive knowledge of the refusal/delay to appoint the Claimant with the Claimant's knowledge about whether the decision maker/victimiser knew of her protected act and acted against her to refuse the role. Further, that the Tribunal wrongly conflated post-termination victimisation against Barclays with information relevant to bring proceedings against the Respondent.

103. In that context, it was submitted that the Tribunal's conclusion that the belated disclosure in August 2020, "did not change" that which the Claimant was already aware of in 2018 (paragraph 123 of the Reasons), was perverse. That, it was submitted, was also evidenced by the findings at paragraph 121.

104. It was submitted that the Judge erred in concluding (at paragraph 127) that a number of relevant witnesses no longer work for the Respondent. In fact, Mr Dutruit, Mr Bourrette, Mr Leroux, Mr Delloye, Patrick George, Samir Assaf, Mark Lemmel, Hanna Assayag, Andre von Riekoff were still employed at the time of the strike out application.

105. It was submitted that, where the Judge only heard limited evidence, in a complex discrimination claim, a cautious approach should have been adopted in accordance with **Chandhok v Tirkey**. Having regard to the late disclosure, it was submitted that (applying **Commissioner of Police of the Metropolis v Hendricks** [2002] EWCA Civ 168 [2003] 1 AllER 654, and **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, [2018] ICR 1194, the Claimant had advanced a cogent reason for an extension under s.123 of the EqA 2010.

106. On behalf of the Respondent, it was submitted that it was simply wrong to suggest that both knowledge of the protected act and that the Claimant was not appointed because of that act was required before a claim could be issued. In any event, the evidence was that the Claimant knew that the Respondent was aware of her protected act because she herself informed Mr Dutruit that she was in dispute with her former employer; that the Respondent has received negative feedback from Barclays; and that she was not appointed. The EAT's attention was drawn to the findings as to the reasons for that non appointment. It was submitted that, as of the summer 2018 the Claimant had sufficient knowledge to be able to issue a claim of victimisation against the Respondent regarding her non-appointment and that her DSARs revealed that she knew that there had been communications between Barclays and the Respondent. The Claimant withdrew her claim against Mr Bourrette and so, any knowledge about that which he did, was not material.

107. It was submitted that the Tribunal set out correctly the relevant legal principles and cases and considered relevant factual issues. Correctly applying the principles set out above, the EAT should not interfere with the Judge's conclusions. In particular, at

paragraph 44 of the Judgment, it found that the content of the information the Claimant discovered in 2020 was not inconsistent with her knowledge and understanding in 2018: the Tribunal was entitled to conclude that the Claimant was aware of the necessary elements of her claim in July 2018 and could have brought her claim in 2018. Further, and in any event, the evidence was that the Claimant's candidacy was being progressed, despite the negative feedback.

108. Not only was the Judge entitled to conclude that it was not just and equitable to extend time, that was a conclusion the Judge was bound to reach on the basis of the facts before him. There is no authority in support of the proposition that a party must know both of the protected act and that is why particular conduct occurred before issuing proceedings. Most cases are determined on inference. In this case, the Claimant knew enough by the time she submitted her witness statement in 2018 to know that there had been communication between Barclays and the Respondent, and to know that there had been negative feedback, and could, and should have issued then. It was submitted that this case was not an **Afolabi** type of case, and that that authority should be distinguished.

109. The Judge's approach was careful and set out through reasons for his approach and conclusions.

Ground 4: The Tribunal acted perversely and/or misdirected itself in law in failing to separately adjudicate the race discrimination claim which was brought within time

110. The Claimant's case was that on 29 September 2020 Mr Dutruit met with the Claimant and, for the first time, explained why she had not been appointed to the role with the

Respondent. At that meeting he also made reference to the fact that senior managers (all Lebanese male managers) at the Respondent (including Mr Patrick George and Mr Assaf and Mr Fares) had a Lebanese connection with her former boss, who was also a Lebanese male manager, operating so as to make it more difficult to recruit the Claimant in the future. It was submitted that that feedback suggested that the Claimant had been blacklisted.

111. It was submitted that as the date of that meeting was 29 September 2020 and the claim was lodged on 1 November 2020, that claim was in time, alternatively, this was a wholly reasonable argument for extending time. It was submitted that the principles espoused in *Anyanwu* should have been applied.

112. On behalf of the Respondent, it was submitted that the Judge's conclusion that the Claimant was not an applicant for employment within the meaning of s.39 EqA 2010 after the summer of 2018, applied to both the claim of victimisation and the race discrimination claim, and was fatal to the claim of race discrimination. Further, it was submitted that the Judge was entitled to conclude that the race discrimination claim was contrived and contrary to the Claimant's contemporaneous expressions as set out at paragraphs 106 and 108 of the Judgment. It should also be noted that the Claimant had further knowledge in August and September 2020, but still, did not issue until November 2020.

Ground 6(1) The Tribunal erred, or was perverse by finding that the Claimant brought a claim against Barclays in June 2018 in respect of her non-appointment to the Respondent in July 2018

113. It was submitted that it was perverse of the Tribunal to find at paragraph 119 of the Reasons that the Claimant had submitted a claim in June 2018 against Barclays that was in respect of her non appointment by the Respondent. In particular, the non-appointment did not take place, or was not confirmed until July 2018. The June 2018 claim was not before the Tribunal.

114. On behalf of the Respondent it was submitted that the Claimant's submissions required a mis-reading of paragraph 119 of the Reasons: that an insertion of the word 'in' before *November 2018* lead to a more accurate reflection of the Tribunal's Reasons; further, that the purpose of this paragraph, when reading the Judgment and Reasons fairly and as a whole, was to expand the point that the Judge made at paragraph 119, that the Claimant was aware of relevant time limits and had access to legal advice. Perversity is a high hurdle to reach. It was submitted that the Claimant had simply not made out the contention in this case.

Discussion and conclusions

115. In this case, a Judge sitting alone, determined preliminary issues in a discrimination claim. Two points need to be made:

(1) There is nothing wrong, of itself, in such an approach: there can, in some cases, be compelling reasons to do so. Further, pursuant to s.37 of the ET Rules of Procedure 2013, a strike out application may be considered at, "any stage of the proceedings".

It may well be in accordance with the overriding objective to consider an application to strike out at an early stage of proceedings so as to save expense and to deal with the issues without delay.

(2) The Tribunal did not make an impermissible decision, in respect of the First Claim to decide to proceed to hear evidence at the OPH and to determine the identified issues (those set out in paragraphs 1 and 2 of the Reasons) in respect of that claim. Notwithstanding the inherent risks in making decisions about matters which could be determinative of a discrimination claim at an OPH on the basis of limited (partial) evidence it is not impermissible to adopt that course: the rules of procedure make provision for it and there may be good reasons for doing so.

116. That said, in order to approach those tasks, and determine issues at an OPH, in a manner which it is consistent with the overriding objective, it is imperative that Tribunals and Judges actively consider the risks of adopting that course and ensure that they take steps to avoid those risks occurring. The obvious, and greatest risk is that, by adopting this procedure, the Tribunal reaches an unjust result. That is because of the danger that the limited evidence, whilst revealing a convincing detail of one particular aspect of the overall canvas of the issues in dispute within the case, is only a partial fragment of the full picture. When viewed in context of the whole canvas of the evidence, that limited evidence may take on a different significance. Equally, other evidence may lead to a different interpretation of that partial fragment. Part of the Tribunal's (difficult) task in managing and determining the case in accordance with the overriding objective, is to find the balance between, on the one hand, managing cases efficiently so that non meritorious cases do not use disproportionate time and expense, and, on the other, ensuring that such an injustice does not occur. In that

context, it must be recalled that the requirement of the overriding objective is to "hear cases fairly and justly". Saving expense, avoiding delay and the others matters listed in paragraph 1(a) to (e) are part of that requirement, but ultimately, the mandatory requirement to be achieved is one of fairness and justice.

117. It is for that reason that when determinative issues are decided upon as a preliminary issue, or where a Tribunal considers a strike out application in a discrimination claim at a relatively early stage of the litigation, it must, so as to ensure that the case is heard fairly and justly, maintain oversight of the whole picture of the litigation, thereby, achieving the purpose of the overriding objective. Another way of putting this is that the Tribunal must ensure that it does not become so focused on the relevant preliminary issue, that it loses sight of the larger picture of the litigation and disputed issues. That is most likely to be achieved by a clear and structured approach to the relevant procedural rules, clear identification of the preliminary issue(s) to be determined, consideration and identification of their consequence for the claims before the Tribunal, and then, having done that, carrying out a check that there has been a fair opportunity for the parties to make focused submissions once those matters have been expressly identified.

118. In the Second Claim, the OPH took place at a very early stage of the proceedings: the Claim and Response had been served. Disclosure had not taken place. Similarly, in the First Claim, there were outstanding issues regarding disclosure: applications for disclosure made by the Claimant in respect of the First Claim were determined to be 'premature' because the OPH was not the final hearing, notwithstanding the fact that, potentially, it had determinative results. In addition, although evidence was heard

about one discrete point, the Judge had not heard all the evidence about all the claims and issues, including, importantly, key evidence from the Claimant and, on behalf the Respondent, Mr Bourrette. As the Judge properly acknowledged, in discrimination claims, where there is a material dispute of fact, real care must be taken in dismissing claims without having heard relevant evidence. The reasons for that are clearly set out in the following much quoted passage from Lord Steyn's judgment in **Anyanwu** as set out above.

Ground 1

119. Applying those principles, and those discussed above at paragraphs 59-88, I consider that it was an error for the Judge to consider the Second Claim in this case. Although there had been some correspondence about whether the Claims should be considered together, that issue had not been resolved. Further, the notice of the OPH related to the First Claim only, the preliminary hearing in respect of the Second Claim having been listed for a date in November later in the same year. As a result, there was not clarity about the scope of the issues to be determined by the Judge.

120. The procedural rules set out a structure through which Claims and Responses are accepted and through which applications may be heard and considered. Applying those principles, the Claimant should have received 14 days' notice of the application to strike out the Second Claim. Whilst clear notice of that application had been given in the First Claim, such a notice had not been given in respect of the Second Claim. Although there is strength in the Respondent's submission that, under s.37, a strike out may be considered at, "any stage of the proceedings" and, that, over the Preliminary Hearing and through submissions, the Claimant was given a 'reasonable'

opportunity to make submissions about the identified issues, there did not appear to be, at any stage, express identification of the fact that the application was to strike out both claims, (because the determination of the issue under s.39 was, on one analysis, determinative of both) and for parties to then make submissions on the consequences of the decisions made upon the Second Claim.

121. There was no identification within the Reasons of some of the matters which were relevant for the Judge to consider prior to striking out the claim: issues had not been identified; witness evidence had not been exchanged; disclosure had not taken place. It does not, of course, follow that had the Judge considered these matters, and the parties specifically addressed them, he would not have still determined that the Second Claim should be struck out. He was, however, in my judgment required to consider these points, together with any others that may have been raised had the Second Claim been before the Tribunal in a manner which was in accordance with the ET Rules of Procedure 2013.

122. I consider that it was an error, a serious one, to proceed to strike out the Second Claim without giving notice of that strike out application in the rules and allowing a reasonable opportunity for the Claimant to consider that application (based as it was on the consequence of the s.39 point). I therefore allow the appeal in respect of Ground 1.

Ground 2

123. Even allowing for the breadth of the Tribunal's discretion in s.123(3) of the EqA 2010, I consider that the Judge erred in determining this issue in this case. In reaching that

decision, and mindful of the important principles set out above regarding the role of an appellate Tribunal, I recognise that the Judge considered the Claimant's knowledge of how and when to issue discrimination claims (paragraphs 115-119); 129; her access to resources and legal advice (paragraph 128); the Claimant's knowledge of relevant events and her allegations that relevant information had been withheld from her or disclosed late (paragraphs 121 -125; 131). This Tribunal must be, and has been, cautious in not overstepping the remit of its function.

124. However, reading the decision fairly, and as a whole, in this case I consider that the Judge erred because he failed to consider matters which were relevant to the exercise of the discretion. Further, I consider that he erred because he appeared to have been influenced by matters which could not, or should not, have been relevant to the exercise of that discretion and at this relatively early stage of the proceedings:

a. First, whilst the Judge stated (at least three times, paras. 116, 132, 99) that he considered the prejudice each party would suffer if he granted or refused an extension of time, he does not identify what that prejudice would be (particularly for the Claimant) save to identify that some of the Respondent's employees who would be relevant witnesses had left the Respondent's employment (paragraph 109) and, at paragraph 127 that delay meant that "[t]he cogency of evidence will inevitably be adversely affected" (paragraph 127). He did not identify, or appear to consider, the significant prejudice that the Claimant may suffer: that refusing to extend time may lead to the Claimant being unable to litigate meritorious claims.

b. Closely linked to (a) above, paragraph 130 of the Reasons is particularly troubling in this context. The Judge expressly stated that the Claimant's allegations are very serious and recognised that "public policy dictates that such matters are heard". He then set out that, despite those important principles,

"however, a cursory review of the evidence" did not indicate that the negative (potentially victimising reference(s) from Barclays) was the reason for her non-appointment. This paragraph, together with the Judge's conclusion that GCAS was not being processed (contrary to some of the written evidence before him that it was, or could have been) and that that written evidence came about because of a mistake made by a witness (Mr Lacour, from whom he did not hear evidence) leads me to conclude that, in error, the Judge had impermissibly strayed into conducting a mini-trial of one of the primary issues in the case: the reason for the Claimant's non appointment. In addition:

i. The Judge's analysis of the written evidence from Mr Lacour (the email of 15 June 2018) does not refer to the fact that the Judge did not hear evidence from Mr Lacour. As set out below, in my judgment, the issue of whether GCAS had been or was being progressed required much closer scrutiny and analysis in order to be determined and heard fairly and justly;

ii. There was no recognition that disclosure had not taken place in the Second Claim and that that which had in respect of the First Claim was limited; that an application had been refused on the grounds that it was premature and went beyond the scope of the issues to be determined;

iii. Whilst the Judge referred to the authorities which emphasise the fact sensitive nature of discrimination claims, he did not apply those principles.

c. Thirdly, and, again, closely linked to my first point, is the fact that the Judge failed to identify or evaluate the risk in determining the question of whether to extend time in this case without having heard all of the evidence. In this case, that was not merely a theoretical omission, i.e., a failure to set out a correct self-direction. Had he made that direction and then worked through its effect in this case, the difficulties set out in the preceding paragraph are likely to have become apparent.

d. Fourthly, I consider that the Judge failed to take proper account of the fact that it was only in August, September and October 2020, following late disclosure/release of information by the Respondent she had requested through

a DSAR, that the Claimant knew that, she had been considered to be a very strong candidate; that Mr Bourrette had known about her previous discrimination proceedings (rather than she was simply in a dispute with Barclays as she described to him); and that that had played a part in the decision not to progress her candidacy. In my judgment, the Judge's conclusion that belated disclosure/release of information pursuant to her DSAR in August 2020, "did not change" that which the Claimant was already aware of in 2018 was properly described as perverse. In the summer of 2018 she knew that a negative reference had been received. She provided further references to counter it. By the date of her December 2018 witness statement she knew that Barclays had provided informal references about her. She did not, however, appear to have any information about Mr Bourrette's role within the Respondent as revealed by the documents she saw in June 2020, nor that he had passed on potentially victimising information about her to relevant recruiting manager. On her case, she received significant information on 29 September 2020 about race being a factor. It is evident that the information the Claimant was provided with in 2020 changed the Claimant's knowledge about potential unlawful action within the Respondent, as opposed to action taken by Barclays, and which was directly relevant to her claims against the Respondent. Further, knowledge of the refusal to appoint the Claimant is self-evidently different to knowledge about why that decision was taken whether the decision maker/victimiser knew of her protected act and acted in such a way to influence the decision not to appoint her.

e. Fifthly, at its highest, the Judge's conclusions about the witnesses who no longer worked for the Respondent (paragraph 127) were not entirely accurate as reflected in the submissions above.

f. Sixthly, the Judge did not appear to take into consideration the fact that, contrary to his statement that the DSARs were responded to in a timely manner, significant and relevant information was missing from the data disclosed, was only disclosed in June 2020 and, still, some information has not been provided. The Judge did not appear to consider the manner in which the Respondent had disclosed information, either in terms of its impact upon the Claimant's ability to bring her claim earlier, or indeed, to consider whether the Respondent was

continuing to withhold information which had made it more difficult for her to receive and consider information relevant to her potential claim. See for example the email dated 29 September 2020, redacted, regarding disclosure of information relating to a conversation between the Claimant's former boss at Barclays and Mr Bourette which are on the latter's personal devices. (See C187).)

g. The Judge did not consider the point made in **Afolabi** and the impact of the Claimant's knowledge of the further information which had not previously been sent to her, upon the time limit within s.123 EqA 2010.

h. The Judge did not engage with how and when the Claimant's personal circumstances (referred to in paragraph 126) impacted upon her and, particularly, upon her after she had obtained the additional information she was provided with in June, August and 16 October 2020 [SB13 and following].

125. As noted above, the Tribunal made a determination about whether the Claimant had undertaken the Hogan test and not processed through GCAS in circumstances which merited much greater caution. As noted above, the Judge had not heard evidence from Mr Lacour, but imputed to him an error. In addition, the findings made were inconsistent with documentary evidence in the form of an email from him of 15 June 2018.

Ground 4: adjudication in respect of the claim of race discrimination

126. For some of the same reasons set out above in respect of Grounds 1 and 2, I consider that the Tribunal erred in not separately adjudicating upon the race discrimination claim. The importance of the points made in paragraphs 116 and 117 above also apply to the analysis of this ground of appeal, as they did to Grounds 1 and 2. Specifically,

the Claimant's First Claim was issued on 1 November 2020, therefore, within 3 months of the meeting on 29th September 2020 when she asserted she was given information relevant to that claim in her meeting with Mr Dutruit about the potential involvement of racial issues. There is no identification of that important point within the Reasons. That is a significant omission. That fact was a highly relevant one to whether time should be extended for the race case, particularly having regard to **Afolabi**. and one, in my judgment, which has come about because of a failure to adopt an approach such as that set out in paragraph 117 above so as to avoid the type of risks identified in paragraph 116.

127. Finally, by Ground Recast 6(1), it was contended that it was perverse of the Tribunal to find, at paragraph 119 of the Reasons, that the Claimant had submitted a claim in June 2018 against Barclays that was in respect of her non appointment by the Respondent.

Recast Ground 6(1)

128. In my judgment, paragraph 119 of the Reasons does not read well and its meaning is not completely clear. However, on balance, and having regard to the decision as a whole, I accept the Claimant's submissions in respect of this ground of appeal. I consider that the Judge erred in conflating the claims the Claimant against Barclays regarding post-termination victimisation with information relevant to the bringing of proceedings against the Respondent in respect of its own actions. There was no evidence about the specific content of the claims made against Barclays before the Tribunal (save for the witness statement the Claimant disclosed). In addition, and importantly, chronologically, the Claimant issued proceedings in June 2018 against Barclays, prior to the time when the decision not to appoint her was taken by the

Respondent, and certainly well before the evidence suggested that she became aware of that decision.

Disposal

129. As to disposal, I have considered written submissions from both parties, in addition to further correspondence from them about the other party's submissions.

130. Both parties submitted that I should remit the case. I agree. For example, I consider that more than one outcome is possible in respect of grounds 1, 2 and 4. The consequences of the decision regarding s.39 of the EqA 2010 will need to be carefully considered in respect of the separate claims. How, and when that is done is a matter for the Tribunal to determine. The Tribunal will also need to consider how and when the issues relating to time limits and applications for strike out are determined.

131. The Respondent submitted that the claims should be remitted to the same Tribunal. The Claimant submitted that the case should be remitted to a different Tribunal and invited me to direct that it should be remitted to a different region. In addition, the Claimant invited me to direct that the claims should be remitted for a final hearing.

132. Having regard to the principles set out in **Jafri v Lincoln College** [2014] ICR 920 and **Sinclair, Roche & Temperley v Heard** [2024] IRLR 764, I consider that the appropriate disposal is to remit all four ground of appeal to a differently constituted Tribunal. As the Claimant submits, perversity has been established. In addition, I consider that the Judge, through a mini trial of issues, expressed a clear view as to the merits of the Claimant's claim and, on the Respondent's case, and appeared to have accepted the Respondent's case, advanced in accordance with the tenor of the submissions summarised in paragraph 90. A 'rethink' of those matters would be

difficult and, even if it could take place, may not retain the confidence of both parties. I consider that the case should be remitted to a differently constituted Tribunal. However, it is not the role of the EAT to go further than that direction. How the Tribunal complies with it is a matter for the Tribunal. Finally, I have apologised to the parties for the time taken to provide this Judgment to them.