EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. W Waithaka	AND	Barclays Execution Services Ltd

HEARD AT: **Watford Tribunal** (via CVP) **ON:** 4 July 2023

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: Mr. Johnson, Counsel

For Respondent: Ms Dobbie, Counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. **The claims for pre-termination race discrimination, pursuant to section 13 of the Equality Act 2010, were brought out of time and it is not just and equitable to extend time;**
2. **The claim for pre-termination harassment related to race, pursuant to section 26 of the Equality Act 2010, was brought out of time and it is not just and equitable to extend time;**
3. **The claims for pre-termination victimisation, pursuant to section 27 of the Equality Act 2010, were brought out of time and it is not just and equitable to extend time;**
4. **The Tribunal does not have jurisdiction to hear these claims, and they are therefore dismissed.**

REASONS

Background

1. This case was scheduled for a preliminary hearing to determine the following:
    1.1. Whether the claimant's contention that the pre-termination acts of discrimination formed part of a continuing act with the post-termination acts of discrimination has no reasonable prospects of success and should be struck out (rule 37(1)(a) Employment Tribunal Rules of Procedure 2013.)
    1.2. Whether, in the alternative, the claimant's contention that the pre-termination acts of discrimination formed part of a continuing act with the post-termination acts of discrimination has little reasonable prospect of success and should be made the subject of a deposit order (rule 39 Employment Tribunal Rules of Procedure 2013.)

2. In advance I was provided with:
    2.1. An electronic bundle of 239 pages – documents within this included:
        2.1.1. The Claimant's 17-page witness statement [184-2-1];
        2.1.2. His particulars of claim [17-35];
        2.1.3. His grievance dated 31 October 2021 [89-99]

    2.2. A table of allegations produced by the Respondent

3. In relation to the table of allegations, item 26 had no date. Having identified that this was said it have taken place in March 2019, this was relocated to 'minus 1' on the table, so the allegations were correct chronologically.
4. I heard oral submissions from both representatives in relation to the issue of continuing acts and delivered an oral judgment on that aspect. In that regard, reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision. However, I will set out a summary of the decisions below as far as they are relevant to the second stage of determining whether it is just and equitable to extend time.

5. With reference to the table of allegations provided by the Respondent, I determined the following:
    5.1. Allegations minus 1 to 12 – there are no reasonable prospects of success of establishing that these are part of a continuing act as they pre-date the Claimant's first complaint (his case is presented as being
    5.2. Allegations 14 to 16, 18 to 21, 27 & 28 - there are no reasonable prospects of success of establishing that these are part of a continuing act as they are individual events that flow from protected acts (as set out in the Claimant's ET1 and particulars of claim)
    5.3. Allegation 17 - there are no reasonable prospects of success of establishing that this is part of a continuing act as it is isolated in nature and the individual involved
    5.4. Allegation 22 to 25 - there are no reasonable prospects of success of establishing that these are part of a continuing act as the last act by this alleged discriminator is May 2021, and neither they, nor the nature of the complaints are said to continue beyond that point
    5.5. Allegation 13 - Allegation 17 - there are no reasonable prospects of success of establishing that this is part of a continuing act as it is isolated in nature and the individual involved

6. Having determined that the Claimant's contention that his pre-termination claims formed part of a continuing act with the post-termination claims had no reasonable prospects of success, those complaints were therefore prima facie out of time and potentially fell to be struck out. Whether time should be extended in relation to those complaints remained outstanding.
7. I heard oral evidence from the Claimant, who was cross-examined by Ms Dobbie. There was insufficient time to deal with that matter in the allocated hearing time, so parties made written submissions on whether it was just and equitable to extend time. The submissions I received are discussed below.

Facts

Timeline

8. The first pre-termination allegation relied on by the Claimant is said to have happened in 2019. The last pre-termination allegation is said to have taken place in October 2021, with the EDT being 31 October 2021.
9. The Claimant took the following steps internally:
    9.1. On 11 October 2021, sent an email raising concerns of racial exclusion (which was passed to the Raising Concerns Team (RCT));
    9.2. On 31 October 2021, responded to the RCT (the grievance)

9.3. Responded to the RCT on 14 December 2021 [100], referring to ACAS guidance on time limits for investigations, and the possibility of victimisation.

9.4. Attended grievance investigation meetings on:

9.4.1. 28 January 2022;

9.4.2. 9 February 2022;

9.4.3. 16 February 2022

9.4.4. 23 February 2022

9.5. Agreed minutes of the meetings by the end of March 2022.

9.6. Communicated with the investigator and HR support [27 – 28 & 196], including to provide additional documents.

9.6.1. The Claimant says that *"on 28th April 2022, the investigating manager advised that they still had some outstanding interviews scheduled for the next couple of weeks"* - that communication is not in the bundle provide to me or referenced in the chronology within the Respondent's grievance outcome letter [170].

9.6.2. In May 2022, the nature of the Claimant's emails were in relation to delay, and chasing a reponse

9.7. Appealed the grievance outcome on 9 December 2022

10. The Claimant took the following steps in relation to litigation

10.1. Got legal advice in May 2022;

10.2. Entered early conciliation with Barclays and subsidiaries on 9 June 2022, with a certificate issued on 18 July 2022

10.3. Got new representation in August 2022

10.4. Entered into ACAS conciliation in relation to the Respondent on 12 August 2022, with a certificate issued on 5 September 2022

10.5. Presented his claim to the Tribunal on 5 September 2022.

11. Outside of the internal grievance and external litigation, the Claimant started a new job on 2 November 2021. He told the Tribunal that his new manager deferred him taking on responsibilities until January 2022, so that in November and December 2021 he was simply meeting the team and getting to know the people and job.

Just and equitable extension

12. The primary reason relied on by the Claimant for the delay in presenting his claims is his health at the time. It is submitted on his behalf that *"on the evidence available to the Tribunal, the reason for the delay was primarily attributable to C's*

poor mental health and, as a result of the same, his prioritisation of the internal grievance process (which he indicated that he initially had faith would result in the proper investigation of his concerns)". The evidence before the Tribunal in relation to this was:

12.1. Occupational Health (OH) report dated 25 October 2021;

12.2. Claimant's witness statement, dated 26 June 2023 (primarily paragraphs 40 – 43);

12.3. Claimant's oral evidence

13. I note that in his witness statement the Claimant refers to the OH report as being a psychiatric report, and a psychiatric evaluation having been carried out [199]. The report itself refers to the Claimant being *"absent from the workplace due to psychological illness"* and reporting that *"his psychological health has been declining"* [86], and it was prepared by an Occupational Health Adviser who was an RGN (Registered General Nurse) [88], not a psychiatrist, psychologist, or similar specialist.

14. The OH report records:

14.1. "The employee tells me that his psychological health has been declining over the last 15 months and he attributes this solely to significant concerns and stress in relation to work."

14.2. "The employee reports impairment to his mood, emotional tolerance, sleep, concentration, motivation, energy levels and social functioning. He suggests managing basic day to day activities, provided they do not require prolonged concentration or stamina. He relayed little inclination to participate in exercise or enjoyable activities and he has not felt like socialising for some time now."

15. It concludes that *"this employee is currently medically unfit to return to work, due to the reported level of psychological symptoms and impairment to functional capability".*

16. At the time of the report, the Claimant had been *"absent from the workplace since the 10th of September 2021"* [85].

17. In his witness statement [192], the Claimant:

17.1. Describes his engagement with the Employee Relations team and investigating manager between December 2021 and April 2022 [paragraph 25].

17.2. Says *"this was a challenging period for me because it meant to having to revisit traumatic events as part of these meetings. Reviewing the meeting minutes, which required significant editing to capture details that I had provided at the meetings but had been omitted, made this even more draining. It required considerable periods of adjustment to recover my mood and emotional balance. This was an enduring effect of the*

*substantial and long-term mental health impairment suffered due to the campaign of racial discrimination I suffered while employed at Barclays" [*paragraph 26].

17.3. States that *"having to go through this legal process, to prepare the grievance appeal, prepare and participate in the appeal meetings and process meant having to revisit these traumatic events multiple times. This required and continues to require considerable time for recovery"* and *"my mental health continued to be impaired after I left employment" [*paragraph 34].

18. The Claimant's evidence also suggested that his wife's poor mental health, and the associated effect of this on their family life and his responsibilities, had a further impact on his ability to present his claims in time. He says, at paragraph 33 of his witness statement, that *"around this time, my wife unfortunately was diagnosed as having become severely depressed",* and that this led to additional caring responsibilities for her and their children. This is mentioned in relation to the period when ACAS issued the first certificate on 18 July 2022, and securing new representation in August 2022.
19. A Doctor's letter dated 11 July 2022 [101] records :"*Although it is unquestionable that your mood has improved, I still do not feel that you are fully recovered"* and advises *"to carry on taking sertraline 50mgs"*. The Claimant's assertion that his wife was diagnosed around the July/August period cannot be correct, when the July 2022 letter refers to an *improvement* in her condition. The diagnosis, and the most severe part of her ill health, must have been at an earlier point, but no supporting evidence regarding this, or the effects, has been provided by the Claimant. In any event, the Claimant's wife's health does not form part of the written submissions made on his behalf.
20. Alongside his (and his wife's) health, the Claimant refers to a reliance on the internal grievance resolving his issues as a reason for delay. He says:

20.1. *"In October 2021, after failing to receive a reasonable response or hearing from my line manager and the HR team after I contested the unlawful redundancy, I reached out to Kathryn for assistance. Kathryn escalated the matter to the Raising Concerns team (RCT). The formal logging of the issues by the RCT as RC458872, gave me a level of confidence that finally, they would be properly and transparently assessed and investigated."* [191: WS24]

20.2. *"I appreciated that the Respondent would need adequate time to investigate thoroughly, and I wanted to give it this opportunity, as opposed to just commencing litigation. What I had not appreciated at the time, however, was that it would take around 18 months to conclude the investigation. I had blindly placed my trust in the Respondent to provide me*

outcomes that were fair and which acknowledged the discriminatory treatment I had suffered" [191: WS25]

20.3. "Having not heard from the investigations team during May 2022, I reached out for an update on 25th May 2022. Their response provided on 30th May 2022, caused me, for the first time, to doubt the commitment of the Respondent to progress the investigation in a timely manner" [191: WS28]

20.4. "Until this point, I had been very hopeful and had confidence that the Respondent would follow through with the investigation of a concern logged by the Raising Concerns team (RCT)" [191: WS29]

21. In oral evidence, the Claimant confirmed:
    21.1. All the allegations within his ET claim were contained within his 31 October 2021 grievance;
    21.2. He was aware of his rights when he sent an email on 14 December 2021 [100] referring to ACAS guidance on time limits for investigations, and the possibility of victimisation.
    21.3. When he got legal advice in May 2022, he was given guidance about time limits, including that an ongoing internal grievance had no effect on those;
    21.4. Before May 2022 he was relying on the Respondent wanting to resolve the issues through the grievance and had confidence in this process.
22. The Claimant disagreed with Ms Dobbie's suggestion that his faith in the grievance process was inconsistent with his position that all the alleged acts against him were part of an institutional failure by the Respondent to deal with complaints of race discrimination. He said that the contact from RCT in October 2021 was the first time his issues had been captured in a way that could be tracked, and that he thought it was unlikely that the Respondent would fail again.
23. The Claimant conceded that he didn't need legal help to present his claim but said that he didn't think he would have been able to because of where he was mentally at the time.
24. In relation to his health, although he provided no evidence related to the period after the OH report, the Claimant says that he was still suffering the symptoms detailed in that report. He said his GP recommended anti-depressants but the Claimant preferred not to take them and confirmed that he had not had any counselling.

The law

25. Section 123 Equality Act 2010 provides:

"Time limits

(1) ...a complaint within section 120 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."

26. ***Robertson v Bexley Community Centre [2003] IRLR 434*** The burden of proof is on the claimant to establish that it is just and equitable to extend time. The Court of Appeal said, at para 25: *"When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*
27. This does not, however, mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The only requirement is that the extension of time should be just and equitable.
28. In ***British Coal Corporation v Keeble [1997] IRLR 336*** the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised, such as:
    (a) the length of and reasons for the delay;
    (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
    (c) the extent to which the party sued had cooperated with requests for information;
    (d) the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and
    (e) the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.
29. In ***London Borough of Southwark v Afolabi [2003] IRLR 220*** the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly.
30. ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 15 640***, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment

Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

30.1. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23***, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37, Underhill LJ confirmed, that *'rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion under section 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". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.'*

31. In ***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** a litigant in person presented complaints out of time. In reaching its decision not to extend time, the Tribunal weighed in the balance its view that the merits of the complaints appeared to be weak (although not so weak that they had no reasonable prospect of success). The EAT dismissed the claimant's appeal. The EAT noted: *"It is permissible, in an appropriate case, [for a Tribunal] to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn into a complex analysis which it is not equipped to perform."*

32. The Tribunal also considered the following cases referred to on behalf of the Claimant:

32.1. ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298*** - Whether or not to grant an extension is *"a question of fact and judgment, to be answered by the tribunal of first instance which is empowered to answer it"*

32.2. ***Robinson v Post Office [2000] IRLR 804, EAT*** - Missing a primary time limit because there is an ongoing internal grievance will not normally be a good reason *"of itself and without more"* to exercise the just and equitable discretion to extend time.

32.3. ***Wells Cathedral School Ltd v Souter EA-2020-000801*** *(previously UKEAT/0836/20)* - the EAT pointed out that Robinson had not established any rule of law and that each case would turn on its facts regarding reliance on an internal process as the reason a claim was late. Thus, consideration would be required of the extent of the lateness and the prejudice, if any, caused to a respondent.

32.4. ***Miller v Ministry of Justice UKEAT/0003/15*** *(15 March 2016, unreported)* - Laing J identified two types of prejudice which a respondent may suffer if the limitation period is extended. The first is the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence; the second is the "forensic prejudice" caused by such things as fading memories, loss of documents and losing touch with witnesses. The former will necessarily arise in every case; the later, where it exists, will be "crucially relevant" and may well be decisive. However, the converse plainly does not follow: the mere absence of forensic prejudice to the respondent is not decisive in favour of an extension.

33. The Tribunal also considered the following cases referred to on behalf of the Respondent:

33.1. ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945***, - May LJ noted (in the context of the not reasonably practicable extension) that the potentially relevant factors to be considered are many and various, and cannot be exhaustively described, but will depend on the circumstances of each case. He nonetheless listed a number of considerations, collated from the authorities, including:

(a) whether the employer's conciliatory appeals machinery had been used;

(b) the substantial cause of the claimant's failure to comply with the time limit;

(c) whether there was any physical impediment preventing compliance, such as illness, or a postal strike;

(d) whether, and if so when, the claimant knew of their rights;

(e) whether the employer had misrepresented any relevant matter to the employee;

(f) whether the claimant had been advised by anyone, and the nature of any advice given; and

(g) whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.

33.2. ***Mechkarov v Citibank NA [2016] ICR 1121*** - the EAT stated that when considering whether it is just and equitable to extend time, Tribunals must weigh up the relative prejudice that extending time would cause.

33.3. ***A v Choice Support (formerly MCCH Ltd) 2022 EAT 145*** - Prejudice can include the fact that key persons (including alleged discriminators) have left the respondent (see for example).

33.4. ***Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT*** - The strength of the claim may be a relevant factor when deciding whether to extend time. The EAT noted that Tribunals may, if they think it necessary, consider the merits of the claim, but if they do so they should invite the parties to make submissions. However, even if the claimant is deemed to have a strong case, the Tribunal may legitimately refuse to extend time.

33.5. ***Ahmed v Ministry of Justice EAT 0390/14*** - Even though a Tribunal found the Claimant had been treated less favourably because of race, they considered that it was not just and equitable to extend time to allow the claim given that he had given no satisfactory explanation for why the claim was not presented in time and given the difficulty some witnesses had in recollecting what had happened. The EAT upheld the Tribunal's decision.

33.6. ***Apelogun-Gabriels v Lambeth London Borough Council and anor 2002 ICR 713, CA*** The fact that a complainant has awaited the outcome of an internal grievance procedure before making a complaint is just one matter to be considered by a Tribunal.

Submissions

34. Each representative provided written submissions as ordered.
35. It is submitted on behalf of the **Claimant** that:

Length and reason for delay

36. It is acknowledged that the claims were presented substantially out of time:
    36.1. Even if all of the pre-termination allegations formed part of conduct extending over a period culminating in dismissal, the primary limitation would have expired on 30 January 2022. The Claimant started early conciliation in relation to Barclays plc and its subsidiaries over 4 months after that date (on 9 June 2022), and in respect of the Respondent 6.5 months after (on 12 August 2022)
37. It is also acknowledged that, during the course of his oral evidence at the preliminary hearing, the Claimant made certain concessions that might have a material bearing upon the Tribunal's determination about the appropriateness of extending time on just and equitable grounds:

37.1. Notwithstanding the mental health issues described in his witness statement, he had been able to undertake work in his new employment from one week after his EDT, albeit that he indicated that this was a remote role and his manager had been able to defer him taking on additional responsibilities until 1 January 2022;

37.2. He had been able to participate in a number of grievance invesgation meetings from the later part of January 2022 onwards;

37.3. He had been on the ACAS website in or around December 2021 and had possibly conducted some research in relation to his legal rights (e.g. in relation to victimisation) prior to sending the email on 14 December 2021

37.4. He had consulted employment solicitors in May 2022 and had learned then of the time limits which are applicable in respect of Employment Tribunal claims.

38. The 15-month decline in the Claimant's mental health, referenced in the OH report, correlates very directly with the pretermination allegations
39. The exacerbation of his mental ill health related specifically to revisiting what had happened to him during his employment with the Respondent, so his ability to hold down a different job from November 2021 was not relevant to that.
40. Once the Claimant realised his faith in the internal process was misplaced, he explored bringing legal proceedings.
41. Between getting initial legal advice in May 2022 and presenting the claim on 5 September 2022, the Claimant was actively engaged in seeking to pursue his claim. His claim complex, so his desire to have his case presented to a Tribunal by experienced employment lawyers is entirely understandable.
42. Whilst he may have decided after May 2022 that the internal process was not going to address his concerns satisfactorily, that cannot be equated with there no longer being any impact upon his mental health in having to revisit his treatment during the later part of his employment with the Respondent.

Prejudice

43. The Claimant will be significantly disadvantaged if the merits of his pre-termination complaint aren't determined by the Tribunal, as they form the relevant background to the post-termination allegations.
44. The Respondent wouldn't suffer any significant forensic prejudice. They were aware of the substance of the pre-termination allegations before termination as they were raised as part of the grievance, and they have been investigated, including collation of evidence and interviewing witnesses.

45. It is submitted on behalf of the **Respondent** that:

Length of delay

46. The delay is lengthy – item -1 is 3 years 2 months out of time, through to items 27 and 28 which are out of time by 7 months.

Effect of delay/prejudice

47. Many main protagonists have left the Respondent's employment, including Mr. Davis who is implicated in item 17 - the only claim with an alleged link to race. He left in February 2021, and Ms McLelland left in or around April 2022. Their involvement won't be the same as if they were employees.
48. The cogency of the evidence (including the Claimant's) is likely to have been affected due to witness memory fading as witnesses will have to recall facts and events from March 2019. Similarly, retention of documents is also likely to have been prejudiced by the delay.
49. The prejudice suffered by the Claimant if his claims are struck out is reduced by the fact that he will still have live claims for direct race discrimination and victimisation (arising from the grievance process).

Extent to which Claimant knew facts

50. The Claimant was aware of the matters at the time they occurred – this is not a case of later discovery.

Awareness of the right to claim

51. The Claimant accepted during cross-examination that he was always aware that there is a right to bring claims for acts of race discrimination at work. He hasn't suggested that his failure to progress the matters was due to ignorance of the right to claim.

Promptness of acting

52. Despite the Claimant knowing facts and being aware of his rights, he didn't start ACAS conciliation against the Respondent until 12 August 2022. The fact that he did not advance his legal claims until September 2022 has no adequate explanation.

Steps taken to get advice

53. The Claimant was aware of ACAS and had researched legal concepts as early as December 2021, 8 months before commencing ACAS EC against the Respondent.
54. He could afford legal advice (given his salary) and did so in May 2022, when he was given accurate advice about time limits. This information was also easily identifiable on-line.

Reasons for delay

55. Health of Claimant and wife:
    55.1. Medical records don't support the extent / severity of illness that the Claimant asserts. The letters are snapshots in time as to their medical conditions and don't detail the symptoms suffered.
    55.2. The Claimant says he started suffering the effects of stress approximately 15 months before the Occupational Health (OH) report produced in October 2021 (i.e. in July 2020), but didn't need any time off from work until September 2021, so doesn't excuse his failure to litigate the matters at some earlier time, from March 2019 onwards.
    55.3. The Claimant started a new senior role the week after his employment with the Respondent ended. He was able to do so without the need for any medication or counselling.
    55.4. He brought a detailed grievance from 31 October 2021. Even if he was impaired by stress, he was functioning well enough to advance claims during this time and failed to do so.

56. Use of internal processes:
    56.1. The Claimant's position that he trusted the process to resolve his concerns, is untenable because:
        56.1.1. His continuing act argument was predicated on the basis that the Respondent repeatedly overlooking complaints rather than dealing with them;
        56.1.2. By 14 December 2021 (6 weeks after the EDT), when he got the response to his grievance and learned of legal concepts on the ACAS website, he can't have fully trusted the internal process. Even if he did retain some trust, he must have thought it would take some time to resolve so would/should have known it would prejudice time limits;
        56.1.3. The Claimant accepts that from May 2022, he did not fully trust the internal process, therefore there is no good explanation for his continuing delay beyond this date.

Merits of claims

57. Only item 17 has any link to race. The Claimant hasn't advanced any facts from which inferences could be drawn that the other matters were in any way due to race.

58. The Claimant must either show that all of the alleged discriminators acted together and "conspired", or that this number of people coincidentally all independently acted because of racial prejudice. His claims are therefore inherently weak.

Conclusions

Reasons for delay

59. I accept that the Claimant's belief in the internal process was genuine when he was contacted by the RCT in October 2021. It is surprising that he wasn't concerned by the delay receiving a response after his email of 31 October 2021, but there was no evidence before me that he raised any issues about the time it was taking until 14 December 2021.
60. After that, he was engaged with the investigator across four meetings in January and February 2022, then agreed the minutes up until the end of March 2022. It is therefore not unreasonable that he maintained faith in the process during that time, and for a short period following this.
61. However, he was aware of his rights and the ACAS website as early as December 2021. Whether through ignorance of the need to claim regardless of an internal process, or an active choice not to claim, this is not a good reason *"of itself and without more".*
62. The 'more' relied on by the Claimant is his mental health. This was the only explanation for not acting sooner *after* May 2022, once faith in the internal process was damaged.
63. The supporting evidence provided by the Claimant relates solely to the position in October 2021, with reference to a decline over the preceding 15 months (from around July 2020). Allegations minus 1 to ten pre-date these issues. The allegations that follow occurred, on the Claimant's own account, over a period when his mental health deteriorated. As the Claimant attributed his symptoms *"solely to significant concerns and stress in relation to work"*, but he continued to work, even if the symptoms worsened over that period, the significant tipping point must only have been reached when he was too ill to attend work from 10 September 2021. The allegation prior to being signed off relates to 26 August 2021, almost 3 weeks before. Just one allegation - having the termination of his employment treated as a redundancy rather than an agreed exit – is said to have occurred after the point he was deemed too unwell to work. That is on 31 October 2021 – the same date he was able to submit a lengthy grievance email to RCT.
64. He has provided no supporting evidence about the specific effects of his mental ill health between May and September 2022. He must have been sufficiently well to hold down his new job – he has not suggested any time off sick, or any performance issues. He was not engaged in any therapy or treatment.

65. I accept that it can't have been easy for the Claimant to deal with everything that the investigation entailed, going over the alleged events multiple times. However, that points more strongly to it being *easier* for him to have completed the initial Tribunal process at the same time. Using the documentation created and provided for the internal proceedings as the basis for the Tribunal claim would have ensured he did not have to go over it *again*. He could even have done this in May 2022, after the legal advice.
66. Similarly, in relation to the practicalities of prioritising the internal grievance process, it seems to me that there was little added burden to replicating what was provided for that.
67. The bulk of the Claimant's involvement with the internal process had concluded by March 2022, when the minutes of the investigation meetings had been agreed. After this, his involvement with the process was confined to correspondence with the investigator and HR support.
68. At the latest, he was aware of his rights in May 2022, and whilst he began early conciliation on 9 June 2022 (in relation to Barclays plc and its subsidiaries), he could have simply asked for an early conciliation certificate to be issued so that he could present his claim.
69. When a Claimant informs ACAS of their intention to claim, they are asked if they want early conciliation or just want a certificate. The Claimant should also have been aware of this, having had legal advice. There was no need to engage in conciliation and wait for the certificate to be issued on 18 July 2022. This was a period of unnecessary delay.
70. This was further exacerbated by the need to then obtain a certificate for the Respondent, which only happened on 5 September 2022. When he approached ACAS on 12 August 2022, in full knowledge of the lateness of his claims, again he would have been prompted to simply ask for an early conciliation certificate to expedite matters. This was a period of unnecessary delay.
71. The Claimant's reasons for delay are therefore weak in all the circumstances.

Length of delay

72. The final pre-termination allegation was the Claimant having the termination of his employment treated as a redundancy rather than an agreed exit, on 31 October 2021. The primary limitation period would therefore have expired on 30 January 2022 – the claim was presented just over seven months later. This is not a reasonable period in all the circumstances, where the Claimant's reasons for delay are not strong.
73. If the Claimant had submitted the claim in May 2022, after legal advice, although it would still have been out of time, the delay for this allegation would have been halved.

74. Having found that seven months is an unreasonable length of delay, the Claimant's position weakens for the older allegations.
75. The oldest allegation from March 2019 occurred over three years after the primary limitation period expired. This, and all allegations up to number ten, also pre-date the Claimant's mental ill health beginning around July 2020. The gap between the primary limitation period and date of claim for these allegations is around two years. This period of delay is completely unreasonable in all the circumstances, where the Claimant's reasons for delay are not strong.
76. Having occurred over a period of declining mental health, but not significant illness, the delay of one to two years in presenting allegations 11 – 27 is also unreasonable.

Knowledge of facts

77. The Claimant was aware of all the facts when he submitted his grievance on 31 October 2021. This is not a situation where, for example, the details of the alleged discrimination were only revealed to him during the course of the grievance process.

Awareness of rights

78. The Claimant was aware of ACAS as early as December 2021. As he was able to locate information about time limits for investigation, he would have easily been able to find details of Tribunal time limits and the need to claim regardless of the status of an internal process.
79. At the latest, he was definitely aware of his rights in May 2022, when he received legal advice on time limits.
80. When he began early conciliation on 9 June 2022 (in relation to Barclays plc and its subsidiaries), ACAS would have prompted the Claimant to indicate if he wanted early conciliation or just wanted a certificate. Having received legal advice, and been aware that he was already out of time, he could (and should) have elected to receive a certificate.
81. When he began early conciliation in relation to the Respondent on 12 August 2022 , ACAS would have prompted the Claimant to indicate if he wanted early conciliation or just wanted a certificate. Having received additional legal advice, and been aware that he was already out of time, he could (and should) have elected to receive a certificate.

Advice

82. As referred to above, the Claimant sought and received legal advice in May 2022, when he was specifically told of the strict time limits in the ET, and that the internal process didn't stop these time limits.

Promptness in acting

83. The Claimant seemingly acted promptly in relation to approaching ACAS after receiving legal advice in May and August 2022, but not with regard to getting a certificate.
84. In any event, is promptness in acting after being *aware of facts* that is relevant. He knew of all the facts at the time of his grievance on 31 October 2021 and had compiled them all into one place at that point. The claim was presented nearly a year later. Having determined that the Claimant's reasons for delay are weak, he plainly did not act at all promptly in the circumstances.

Merits

85. Item 17 is the only allegation that contains a specific reference to race. Of course, not every claim of discrimination will be able to identify and rely on an inherently discriminatory act, so the absence of this in the Claimant's complaints does not automatically make them weak. In the less obvious cases, it is necessary to explore the mental processes of the alleged discriminator to discover what facts operated on his or her mind.
86. The full extent of the evidence was not before me at the preliminary hearing, but I have the Claimant's original particulars of claim and his grievance. There is no specific reference to race in any of the pleaded claims (aside from item 17 above), although I note that there are some references within the grievance. For example, item 11 is presented as *"...in or about July 2020, unfairly criticising the Claimant for the manner in which he had raised the issue of a proposed handover of the PRA 110 project to the funding assessment team" [29]*, which appears to reflect 'f)' in the grievance which states *"...he seemed to find fault with my assertiveness on the call. Though he did not say this, I walked away from the call feeling like I had been told to stop being 'an angry black man.'" [92].*
87. The Claimant's complaints are therefore about subjectively discriminatory acts, and he will need to present facts that although the Tribunal to infer that any behaviour was because of his race. I note that the alleged discriminator in item 17 does not appear in any other allegations to allow the Claimant to use the alleged statement as evidence that other acts were because of race.
88. The final paragraph of the Claimant's witness statement says" *"The Respondent's investigation into my concerns culminating in my final appeal outcome on 28th April 2023 was tainted by institutional racism".* There is no similar allegation of

institutional racism in relation to the allegations that led to the grievance and investigation. As such, it is the motivation of the individual alleged discriminators that the Tribunal would need to consider. On what the Claimant has presented, the prospects of those claims succeeding are low.

Prejudice

89. In all cases where claims fall to be dismissed, the Claimant suffers the prejudice of his complaints not being brought before the Tribunal. In this case, the number of complaints is significant – 28 separate allegations relating to pre-termination acts.
90. In comparison, there are only six post-termination allegations. These all relate to the Respondent's alleged failure to handle the Claimant's grievance appropriately. On that basis, the factual background to the grievance will have at least some relevance to the determinations the Tribunal will need to make. The details of the Claimant's complaints would therefore be ventilated, even if they didn't form distinct allegations of race discrimination.
91. In relation to the prejudice claimed on behalf of the Respondent, because Mr. Davis left before the grievance was made, and Ms McLelland just after the minutes of the meetings with the Claimant had been agreed, it is correct that their engagement with any final hearing is not certain. Additionally, because of the timing of the internal grievance there are no formal written accounts from these witnesses. However, I note that Mr Davis is implicated in one allegation (item 17), and Ms McLelland only specifically referenced in one also (item 14). Having said this, I recognise that the Claimant's particulars of claim, witness statement and grievance include more detail in relation to Ms McLelland, and that item 14 relates to another alleged discriminators response to the preceding items that the Claimant raised with Ms McLelland, so her involvement is potentially greater than the table would suggest.
92. In addition to prejudicing the Respondent, the Claimant will also be negatively affected by incomplete witness evidence from the Respondent's side as he must establish facts from which the Tribunal can decide that an unlawful act of discrimination has taken place, before the burden can shift.

Summary

93. Taking account of all the relevant factors, the Claimant has failed to satisfy the burden of persuading the Tribunal that it is just and equitable to extend the time

for presentation of the claim from expiration of the primary limitation period until 5 September 2022, in relation to each of his pre-termination complaints.

94. Therefore, the Tribunal does not have jurisdiction to consider those claims, and they are struck out.

Case management

95. Case management orders to progress the remaining claims to a full merits hearing will be sent separately.
96. Finally, I am aware that the Regional Employment Judge has written to the parties in general terms about the delay in this judgment being completed. I would like to take this opportunity to apologise to the parties and their representatives for the time that this has taken. I am grateful for the patience of all involved. The delay has been caused by my ill health, and I have finalised and promulgated the judgment as soon practicable.

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Employment Judge Douse

Date: 2 October 2024

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JUDGMENT SENT TO THE PARTIES ON

7 October 2024

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AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL