Case Number: 6005897/2024

EMPLOYMENT TRIBUNALS

Claimant: **Dr Mohamad Hassan**

Respondent: **ABC International Bank Plc**

Heard at: London Central **On: 6 June 2025**

Before: **Judge Miller-Varey**

Representation
Claimant: In person
Respondent: Mr L Davidson (Counsel)

PRELIMINARY HEARING RESERVED JUDGMENT WITH REASONS

1. The complaints relying upon alleged failure to explain appeal procedures and of intentional prolongation of investigations are struck out pursuant to Employment Tribunal Rule 38(1)(a) since they have no reasonable prospect of success (whether as complaints of discrimination, whistleblowing detriment, or otherwise).

2. The complaint described in these reasons as the bare belief complaint is struck out pursuant to Tribunal Rule 38(1)(a) since it has no reasonable prospect of success.

3. The complaints of whistleblowing detriment contrary to s.47(b)(1) ERA 1996 were not presented within the applicable time limit. It was reasonably practicable to do so. Those complaints are accordingly dismissed.

4. The complaint of automatically unfair dismissal contrary to s.103A ERA 1996 was not presented within the applicable time limit. It was reasonably practicable to do so. That complaint is accordingly dismissed.

5. The complaint of direct race discrimination relying, for less favourable treatment, on having been immediately escorted from the Respondent's premises when the Claimant's employment was terminated and not being given 3-months' gardening leave, was not presented within the applicable time limit. It is nonetheless just and equitable to extend the time limit.

6. The Claimant's applications to amend his claim are dismissed.

7. The Respondent's application for a deposit order is refused.

REASONS

1. Unless otherwise indicated references in these Reasons to page numbers are the correspondingly numbered pages of the preliminary hearing bundle.

2. The claim was presented to the Employment Tribunal on 16 July 2024. It arises out of the Claimant's employment as a Credit Risk Analytics Manager for the Respondent, a subsidiary of an international bank.

3. The Claimant's employment lasted between 11 October 2023 and 14 March 2024 when his employment was terminated by means of a payment in lieu of notice (PILON) during an extended contractual probationary period.

Scope of the hearing before me

4. The matter came before me on Friday 6 June 2025 for a one-day public preliminary hearing. EJ Hodgson dealt with the earlier case management hearing and provided that the issues for me to determine may include:

"3.2.1 whether any claims have been struck out pursuant to any unless order;

3.2.2 any application to amend;

3.2.3 identify those claims which are pleaded and are proceeding;

3.2.4 to consider whether any claims should be struck out on any of the grounds contained within rule 38 Employment Tribunal Procedure Rules 2024, including that they have no reasonable prospect of success;

3.2.5 whether all or any of the claims are out of time, and if so whether time should be extended;

3.2.6 to consider whether the length of the final hearing as appropriate; and

3.2.7 any further case management."

5. The issues identified by EJ Hodgson all remained relevant and appropriate for determination having regard to the progress of the case since the hearing before him.

Procedure

6. The hearing took place by Cloud Video Platform.

7. The Tribunal was provided with a 236-page hearing bundle and a 620-page bundle of authorities.

8. As provided for in EJ Hodgson's directions, I received written submissions from both sides. Further submissions followed after the hearing from the Claimant in the circumstances I shall return to below.

9. It is convenient to use a number of definitions and acronyms as follows:

- AAv1 - Short for Amendment Application version 1[pp. 59-102]. This is Claimant's first application to amend submitted on 10 February 2025.

- AAv2 – Short for Amendment Application version 2 [pp. 110-128]. This is described by the Claimant as a response to the Respondent's letter of 21 February 2025. It was submitted on 24 February 2025. It is also an application to amend in that the Claimant includes material not within AAv1 which is designed to comply with the direction that he must apply to amend to include specific information in respect of his intended whistleblowing claims [p.56 paragraph 3.5]. That direction was made as an "unless order".

- The Citation Table - This is the table annexed to the Respondent's solicitors' letter of 4 June 2025 [pp. 222 – 232].

- The Claimant's Skeleton – the document entitled Claimant's response to the skeleton argument of the Respondent, served on 3 June 2025

- The Claimant's Amended Skeleton - The amended skeleton submitted to the Tribunal on 10 June at 16.32.

10. In the course of the hearing I received an email and a number of screenshots from the Claimant connected to his son's medical treatment in 2024. Mr Davidson did not oppose this.

11. At my request I received a copy of the outcome of the Claimant's grievance, as well as a direct email to him from Ms Wiseman confirming the conclusion of her whistleblowing investigation.

12. I declined the Claimant's request to order disclosure of the outcome of the Respondent's internal whistleblowing report during the hearing. I did so on the basis that this was not directly probative of the reason for any detriment and for his dismissal; even if it is shown that the investigation substantiated any public interest disclosures he made, that will not establish liability. Against that is to be weighed that the document is confidential, that this was a preliminary hearing and the merits of his whistleblowing claims are not of relevance to the reasonable practicability of him bringing them.

13. I also declined the Claimant's request for the production of an email (his email to S Klinker). This is referred to within another email in the hearing bundle [p.129]. There, Klinker's email is cited as a reason for extending the Claimant's probation.

14. The Claimant says this was never put to him as a reason for the probation extension. Correspondingly, he considered it would tend to support his case that the extension and subsequent dismissal were enacted on spurious grounds. As I explained to the Claimant, there are limits to the factual enquiry to be undertaken at his hearing. I noted the Claimant's position and took this into account alongside the Respondent's submission that there were consistent concerns about his communication style, of which the undisclosed email was said to be a part.

15. I gave priority to adjudicating upon time limits above determination of whether there had been material compliance with the unless order. The latter related only to the whistleblowing and unfair dismissal claims, was significantly disputed and even if non-compliance was found, would likely prompt an oral application from the Claimant making it necessary to consider whether relief from sanction should be granted. The same cannot be said of a substantive determination of time limits. This was accordingly a better use of the Tribunal's time.

16. I raised with the parties the question of whether the determination of time limits should be dealt with before or after the Claimant's application to amend. I did so highlighting the point made in **Sakyi-Opare** (below).

17. Mr Davidson submitted it was appropriate to deal with time limits prior to amendment. Mr Hassan made no specific submission.

18. I determined it was in the interests of justice to take the time limits before amendment. The chief reason was that the amendment application did not raise any new, "in time" complaint. It had no potential to save any out of time claim as the last act, or failure to act, in a series. There would be no unfair prejudice to the Claimant in proceeding in this way.

19. No direction had been given for the Claimant to serve a witness statement. I expressed my preference to hear oral evidence from Dr Hassan.

20. Counsel had prepared cross-examination based on various documents in the bundle in which the Claimant advanced his explanation for the delay in bringing in the claim. I directed that the material at pp. 117 – 120 should stand as his evidence in chief as it is devoted to an explanation for the delay. This is set out under eight separate headings.

21. I allowed the Claimant to be questioned about matters going to the merits. Mr Davidson foreshadowed this by reference to the principles **Kumari** (below) whereby it is permissible to take into account the merits when considering an extension of time. The Claimant was on notice that the merits of his claims were within the scope of the hearing; paragraphs 57 to 63 of the Respondent's skeleton were devoted to the assertion that the claims had no reasonable prospect of success and built upon earlier correspondence [pp.106 to 107] to like effect. The Claimant had engaged with, and responded extensively to, all of those points in writing [pp. 120-126 and pp.214 to 217]. It was fair for him to be questioned, therefore.

22. I reminded myself that I was not conducting a mini-trial and of the limits to the evaluation that was open to me given neither disclosure nor exchange of witness evidence had taken place. I also kept in mind that no witness of the Respondent was presented for equivalent such questioning by the Claimant.

23. I requested that Mr Davidson cover in his cross-examination anything relevant to the continuing act point noting the test identified in **Aziz** (below) as appropriate for a pre-hearing review.

24. I heard evidence and submissions which took matters to around 5pm.

25. I indicated I would give a written judgement with reasons. This was to follow compliance by the Claimant (by Wednesday 11 June) with directions for a response as to whether or not he accepted the contents of the Citation Table as accurate. They arise out of the Claimant's deployment of AI-derived caselaw in AAv2 and the Claimant's skeleton. I shall address this further in the Record of this preliminary hearing as some quite discrete issues arise. For the present I simply record that I have read and taken into account the following further documents:

- the Claimant's Amended skeleton;
- the Claimant's emails of 10 June (timed at 16.32 & 22.36) and all of the attachments thereto, including the letter of 27 May 2025 in reference to his new employment; and
- the Respondent's solicitors' email of 10 June (18.05) and letter of 19 June.

26. These documents were only all available to me on Monday 30 June 2025. This fact, together with other sitting commitments since, mean it has not been possible to complete this judgment sooner. I apologise to the parties for any inconvenience caused.

Relevant Findings of Fact

27. The Claimant has many years' experience in finance, banking and risk management. He is university educated. He holds a number of postgraduate qualifications, including at least one masters and a doctorate. He is a confident and proficient user of IT and of the internet.

28. The Claimant's employment with the Respondent commenced on 11 October 2023.

29. Mr Clayton line managed the Claimant from 11 October 2023 to 19 January 2023. Paul Kennedy line managed the Claimant thereafter until 14 March 2024.

30. On14 March 2024 Paul Kennedy notified the Claimant his employment was terminated with immediate effect and that he would be given 4 weeks' payment in lieu of notice. The Respondent pleads that the communicated (and actual) reason was that the Claimant was not showing the progress required. The Claimant disputes that; he says that during the termination meeting the Respondent described him as skilled and professional.

31. It is common ground that immediately following that meeting the Claimant was escorted from the premises [p.36].

32. The Claimant is aggrieved by the manner in which he says this took place. Across various materials before me he says it involved requiring him to wait at reception, being informed not to go back into the office, being unable to collect his personal belongings or say goodbye to colleagues, and being immediately from that point cut off from independent access to company resources, including internal policies and procedures. He has described the treatment as humiliating [p.150] and has suggested his human rights and dignity were violated, and he was treated as a criminal or somebody who had caused the bank harm [p.138].

33. The day following the termination of his employment the Claimant wrote a lengthy email to Mr Adrian (CEO). He identified wrongdoing in the bank risk team. He made various assertions using some legal terminology. This included breach of contract, discrimination (specifically *"why... no non-white ever survive [in ERP team]"*), and that the reasons given to him for his earlier probation extension were bogus. He said the treatment was unlawful and that he should not have to choose between being unlawfully dismissed and maintaining his integrity on regulatory issues [p.141]. He urged an investigation and disciplinary action against those responsible.

34. Mr Adrian acknowledged the Claimant's email indicating it would be referred to Ms Weisman, Head of Compliance. She would investigate and contact him as required.

35. On 19 March 2024 the Claimant wrote to Mr Adrian and Ms Weisman offering his cooperation. His email identified that a comprehensive review of matters and a "*brief anonymous legal validation"* had taken place. The Claimant had not in fact taken any legal advice at all.

36. The Claimant said the legal validation had established that the decision to extend his probationary period may have been unduly influenced by discriminatory factors rendering it susceptible to legal challenge and that the subsequent termination of his employment had also been called into question. He proposed that he be reinstated to a period consistent with what he regarded as the earliest lawful date upon which his probation could have ended and offered to take gardening leave. He described that this was consistent with the standards of treatment for staff members who have demonstrated a less comparable level of competence and loyalty.

37. On 21 March the Claimant learned that James Beck, the Respondent's Deputy Head of Legal, had been appointed investigation manager of the grievance sent on 19 March 2024. The Claimant was invited to attend a Teams meeting.

38. The grievance investigation meeting with the Claimant took place on 26 March 2024. The Claimant in his email of later the same day asked the following of Mr Beck:

    "...would you kindly let me know at what stage I would need support from outside the bank (legal or other), if needed?"

39. Mr Beck replied:

    "As an employee of the bank and the Investigating Manager it is not appropriate for me to advise you when to seek independent advice, legal or otherwise. You will need to determine if that is necessary"

40. Mr Beck gave as the expected date for completion of his investigation, 5 April 2024.

41. Mr Beck did not stick to that date. The grievance outcome followed on 10 May. It is a focused, single page response which records both sides' agreement (at the meeting) that only 5 points would be discussed. These were all grievance points and none connected to whistleblowing. In terms of the outcome, Mr Beck identified that the Claimant should have been

provided with a completed probation objective form but did not otherwise uphold the grievance. He notified the Claimant of his right to appeal for which an appeal manager would be appointed. The deadline for the appeal was 17 May.

42. On 9 May 2024, meanwhile, the Claimant participated in a Teams meeting with Ms Weisman in reference to his recent whistleblowing disclosures as set out in his email to Mr Adrian 15 March 2024.

43. The claimant was dissatisfied with the grievance outcome and the meeting with Ms Weisman. On 10 May he escalated the matter to Mr Adrian indicating that he wished to challenge aspects of Mr Beck's grievance outcome. He also added to the 5 points previously identified, a further point under the heading "whistleblowing and *"doing the right thing" victimisation"*.

44. The Claimant requested a comprehensive examination and stated:

"I only have until next week's Friday *before when I have to go ahead with a legal case against the bank, which also includes whistleblowing to FCA etc. [Claimant's own emphasis]"*

45. The day identified was Friday 17 May. Although that chimes with the date given as the deadline for an internal appeal, I find (as was the Claimant's evidence), the Claimant was referring to a date he had nominally set himself for bringing external legal action given what lay ahead with his son's surgery. I further find he mentioned this in order to introduce urgency and to exert pressure on the bank to address his complaints. In reality, he had not looked into any processes or deadlines for bringing employment tribunal proceedings at this time.

46. Mr Adrian responded on 13 May highlighting the two separate formal procedures of grievance and whistleblowing. He offered reassurance to the Claimant that the bank would take action to address the formal conclusions of both investigations "*including any learnings and other appropriate measures (internal/external) which are required".*

47. Mr Adrian also indicated it would be willing to consider a further goodwill payment in respect of the grievance investigation but said that pending the outcome of the appeal process it would be inappropriate to contemplate this. On the question of timing, the letter said this:

"...I understand you consider that there is a deadline of Friday 17 May to commence proceedings against the Bank. My understanding is that you have until 12 June 2024, noting that your termination date was 14 March 2024 and you may wish to confirm this with your legal advisor. We shall of

course conclude the appeal procedure in respect of your grievance as quickly as possible"

48. On 4 June 2024 Mr Phillip, European Head of Financial Crime Compliance/UK money-laundering regulatory officer, wrote to the Claimant indicating that his appeal in respect of the grievance investigation had been unsuccessful. Mr Phillip stressed that his decision was final and there was no further right of appeal.

49. On 6 June 2024 Ms Weisman emailed the Claimant a letter saying that her investigation into the disclosures had been concluded by her in accordance with the bank's internal procedures and that *"the bank has taken/will be taking the measures that it considers to be appropriate".* She expressly told the Claimant that the result of the investigation and the measures were confidential. Ms Weisman confirmed to the claimant that the process was concluded. I am satisfied that both this letter and Mr Phillip's letter were read and received by the Claimant no later than 10 June since he wrote to the Respondent about them both, on that day.

50. In order for a claim in respect of his dismissal to be in time, 13 June 2024 was the last day on which the Claimant needed to commence the early conciliation process.

51. On 14 June 2024 Andrew Singh, European Head of Human Resources at the Respondent, informed the Claimant he would henceforth be his point of contact for communications. He reported to the Claimant that in light of overarching confidentiality obligations the reports generated by both Ms Weisman in relation to whistleblowing and by Mr Phillip in reference to his grievance could not be shared. He said that a number of learnings had been identified. It was reiterated that the grievance process was complete and the appeal decision final.

52. The Claimant replied promptly the same day. He expressed dissatisfaction at not being provided with the reports. He said he remained concerned about the adequacy of the intended remedial measures. Despite having been told the outcomes were final, he stressed the urgency of escalating the matter to the group CEO and the Board of Directors. I find his letter requested by *"mid next week"* a final decision as to whether the matter would be escalated in that way. He said that decision would allow him to proceed to escalate matters to them himself or instruct solicitors to make escalation. He described this all as being *"before initiating legal action"*.

53. The date of mid -next week was 19 June 2024.

54. Mr Singh replied on that day. There was some confusion over whether or not the Claimant's letter was intended to raise a new disclosure. The

Claimant was provided with details of the bank's whistleblowing portal for that purpose. The bank's position otherwise was that there had been completed grievance and whistleblowing investigations, the decisions of which were final. He was asked to discuss any further matters with the bank's external solicitor, Mr Humphreys.

55. The Claimant replied on 20 June saying that as it was evident the bank was unwilling to engage in further meaningful dialogue, he would no longer be contacting the bank directly and his *"legal counsel"* would handle all communications, including the escalation of complaints, to external organisations and regulatory bodies. In fact, as the Claimant confirmed in his evidence to the Tribunal, he still did not have legal counsel at that time. Rather, he says he made the statement in case he got legal counsel. He was, I find, actually in the process of trying – unsuccessfully - to find a solicitor to take the matter on, on a conditional fee basis.

56. Correspondence between the Mr Humphreys and the Claimant followed, beginning first with a letter of Penningtons of 20 June, in which Penningtons asked for confirmation of whether employment tribunal proceedings had been issued. The Claimant answered that request only indirectly; he asserted that the bank had: *"intentionally engaged in investigations they knew would not lead to meaningful resolution with the sole purpose of delaying the process beyond the three-month time limit (minus one day) for bringing a case to the employment tribunal".*

57. The Claimant before the hearing [AAv2 p.118] wrote that he only discovered the existence of ACAS and early conciliation through *"coincidental discussions with potential solicitors"*. This discovery came about, he said, while seeking general legal advice about his situation.

58. His evidence during the hearing was that on 10 May he was not aware of the ACAS process. He denied that following the letter of 13 May indicating the Respondent's assessment of the deadline (paragraph 47 above), that he then undertook any research. He said that he learned about it for the first time when communicating with a solicitor about undertaking the case on a no-win no-fee basis. The solicitor said that he should *"already have done the ACAS*". Logically, this conversation must have been after 13 June when that deadline passed. I accept that evidence.

59. The Claimant's evidence was also that he only started checking the legal position once he was told (as he was on 20 June) not to communicate with the bank. He said he could not accurately remember the date of the chance enquiry but that he had approached several solicitors by telephone and email between 20 and 24.

60. I find the Claimant only became aware of the ACAS deadline on 20 June.

61. One of the most telling pieces of evidence here is the Claimant's letter of 14 June (paragraph 52 above) in which the Claimant indicated he would bring legal proceedings if he received no satisfactory response in reference to (among other things) appropriate financial compensation for unjust termination. The letter is robustly written. It is unsparing in its criticism of the Respondent. It sets out his detailed, extensive requirements for resolution, including a full public statement. It concludes by saying the Claimant will not hesitate to take all necessary steps to *"protect"* his rights and interests.

62. Although not beyond the common or garden tactical bluff of implying legal advice had been taken when it had not, I am certain that if the Claimant had known that the ACAS deadline had expired he would not have written his 14 June letter in those terms. I am convinced he would have recognised that the negotiating lever of bringing proceedings had lost some force and that through his own inaction, he had handed the Respondent a possible limitation defence. The Bank, to his knowledge, had a legal director and a deputy legal director. The latter had dealt with his grievance. I do not think his letter of 14 June was a bluff.

63. By 20 June however, the terms of the Claimant's letter to Penningtons makes crystal clear the Claimant knew the deadline had been breached. It is not conceivable in my view that he could have learned of, and rehearsed, the three month less one day time limit with such exactitude and *not* also understood that he needed to go to ACAS first, within the same period. He confronted the issue head on albeit on the basis, he said, that it was the Respondent's doing. He felt he had been caught in a trap.

64. The Claimant commenced the early conciliation process on 24 June 2024. It ended on 10 July 2024.

65. The Claimant presented his claim on 16 July 2024.

66. Into the above narrative must be woven the following findings about family health matters affecting the Claimant.

67. The Claimant has a son who is now nine years old. He has a heart condition which has been ongoing from birth. A team of consultants determined, in around July 2023, the condition required surgery. The planning for this started in February 2024 and the surgery took place on 31 July 2024. It required admission the day before and a period of recovery afterwards in intensive care.

68. Rightly, the Tribunal is not aware of the exact diagnosis or nature of the surgery. There are limits, as matters of proportionality, confidentiality and expertise, into how far the Tribunal needs to delve into this aspect.

69. The Claimant has described his son's condition as *"life-threatening requiring surgical intervention"*. As to the surgery, the Claimant has described it as a *"serious" operation*. There is nothing which in any way gainsays either of those things. Indeed, the Claimant has produced corroborative documentary evidence of: an extended two-hour consultation and observations session on the 14 February 2024, a "video visit" by paediatric cardiac psychology on 16 May 2024 and the necessity for his son to be admitted to hospital a day prior to the planned surgery. These are all markers of a serious procedure.

70. I have not seen documentary evidence concerning other appointments. However, I accept as likely that there were as many as three appointments for monitoring, tests and consultations in each of the months in the period beginning 1 February 2024 and 26 July (when the claim was presented). It is right to say though, that the weight of evidence produced by the Claimant – even accepting that it is not exhaustive – shows rather greater activity in the post-surgical period. That is not germane to the issues before me.

71. I find some appointments in the material period were rescheduled but not the date of surgery. There was some complexity added because of where the lead consultant was based versus where the surgery needed to be undertaken.

72. The Claimant did not have any diagnosable adverse mental health issues as a result of his son's medical issues, or related to any other reason, in the material period. I find he was understandably concerned about his son's surgery. There was personal strain associated with this which was on top of stress from his unforeseen loss of employment and difficulties obtaining new employment. The latter was frustrating and burdensome to him on a personal level. He felt unable to satisfactorily account for his departure from the Respondent to potential new employers. I am satisfied he was being asked to do this.

73. The Claimant was not working but was busy with his job search. This included interviews. I find his intellectual abilities and concentration were not significantly hindered. That follows from the detail, complexity, length and range of letters he wrote to the Respondent and the strategic decisions he made as to how to direct his correspondence up the hierarchy. A feature of this is the rapidity of some of his replies. I am not satisfied he was particularly short of time. It has to be remembered, he had been dismissed from a full-time job which, until March 2024, he had been managing alongside his son's health concerns.

RELEVANT LAW

Contruction of pleadings

74. The issue of whether a particular allegation or legal complaint already forms part of a claim form requires examination of the claim form as a whole and should be construed generously; **Ali v Office for National Statistics [2005] IRLR; Mecharov v Citibank UKEAT0019/17**.

Interplay between amendment application and determination of time limits

75. If a claim form is presented out of time with the result that the Tribunal has no jurisdiction to hear it, there is no claim capable of amendment: **Cocking v Sandhurst (stationers) Ltd [1974] ICR 650**. Related to that point, where issues of amendment and time limits arise for consideration at the same time, it may be an error not to consider the application to amend first. In **Sakyi-Opare v The Albert Kennedy Trust UKEAT/0086/20** the EAT found that the Employment Tribunal had materially erred in law by not determining an application to amend before the determination of time limits. That was because (per Matthew Gullick sitting as a deputy judge of the High Court):

20. The Employment Tribunal was, in my judgement, required to determine the Claimant's application to amend before then addressing the time point that might have arisen in this case. The error made by the Employment Tribunal is, in my judgement, material to its ultimate decision because the Claimant was contending that her claim form should be amended to include events that had taken place after it was filed. In my judgement, only in the context of there being a determination one way or the other of that application could the Employment Tribunal then go on to consider the issue of whether any other part of the claim was out of time by reason of there being no "conduct extending over a period" and, if so, whether time should be extended...

Automatically unfair dismissal - statutory time limits

76. The Employment Rights Act 1996 (ERA) provides time limits for bringing claims of automatically unfair dismissal. Section 103A provides that:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

77. Section 111(2) provides that:

(2)Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
(a)before the end of the period of three months beginning with the effective date of termination, or
(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

78. Section 207B provides:

(2) In this section—
(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

Whistleblowing detriment claims – statutory time limits

79. Section 47B(1) ERA provides the substantive protection as follows :

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

80. In regard to time limits for whistleblowing detriment claims, section 48 provides:

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

…(3) An employment tribunal shall not consider a complaint under this section unless it is presented;
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection 3 -
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on…"

81. By dint of s.24(4A) section 207B applies for the purposes of the three month period provided for under s.48(1A).

82. There is thus a complete symmetry between the tests for extending time in respect of both automatically unfair dismissal and whistleblowing detriment

Not reasonably practicable

83. The Claimant bears the burden of establishing that it was not reasonably practicable for the complaint to be presented before the end of the time limit (as extended by the relevant ACAS early conciliation). If they are successful in that regard the Tribunal must then determine whether the claim was presented within such further period as the tribunal considers reasonable.

84. Reasonably practicable does not mean that which is reasonably capable of being physically done; it means more than merely this. On the other hand, it is not just equivalent to reasonable (**Palmer v Another v Southend-on-Sea Borough Council [1984] 1 WLR at 1141**)

85. Following **Asda Stores Ltd v Kauser EAT 0165/07** *"the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done"*.

86. In circumstances where a Claimant's claimed reason for delay is that they were ignorant of their rights, the truth of that assertion falls to be tested as part of determining the substantial cause of the failure to present the claim in time. Relevant questions will be what were the opportunities for finding out that they had rights? Did they take them? If not, why not? (**Dedman v British Building and Engineering Appliances ltd 1974 ICR 53**). Rather than subjectively what was known, the tribunal must ask whether the Claimant "ought" to have known (**Porter v Bainbridge Ltd 1978 IC 943)**

87. If it is established that a Claimant is aware of their rights to claim unfair dismissal, they are generally taken to have been put on inquiry as to a time limit and to be obliged to seek information and advice about how to enforce that right **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488 at 491.** A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so (**Cygnet Behavioural Health Ltd v Britton [2022] EAT 108** as per Cavanagh J at paragraph 53).

88. The reasonableness of making enquiries and the extent of those enquiries is fact specific. For Claimants with a good education and command of English and ready access to the internet and sources of advice it will generally be reasonably practicable for them to find out about the enforcement of their rights (**Inchape Retail Limited v Mr A Shelton 0142/19/JOJ** as per HHJ Richardson at paragraph 31)

89. The EAT in **Bodha v Hampshire Area Health Authority [1982] ICR 200** declined to follow the earlier dictum in another EAT case **Crown Agents for Overseas Government and Administration v Lawal [1979] ICR**

103. The Court of Appeal in **Palmer** approved of the approach in **Bodha** saying (at 1141) they preferred the view that the mere fact of a pending appeal is not sufficient by itself, to justify a finding that it was not reasonably practicable to present a complaint. Accordingly, there is no rule by which a claimant who during an appeal process is caught by the effluxion of time should be entitled to an extension. On the other hand, it may be necessary to consider whether there has been any misrepresentation by the employer of any relevant matter (May LJ at p.1141).

90. Where a Claimant has a mistaken belief that an unfair dismissal claim need not be brought until after an internal appeal procedure it does not follow that it was not reasonably practicable to commence proceedings. The Tribunal must still consider what enquiries the Claimant ought to have made and what knowledge he ought to have acquired (**Inchape Retail Limited v Mr A Shelton 0142/19/JOJ**, as per HHJ Richardson at para 30)

91. The whole of the period is to be considered but with a particular focus upon the closing weeks of the three month period ***(*Schultz v Esso Petroleum Company [1999] IRLR 488 at paragraph 30** and **Norbert Dentressangle Logistics Limited v Mr Graham Hutton** at para 18]).

92. Being stressed or very stressed will not be sufficient to elide the statutory limit where there is no illness or incapacity **Asda Stores v Mrs S Kauser [2007] 10 WLUK 350**. However, whilst medical evidence establishing incapacity is not essential, it is desirable - **Norbert Dentressangle Logistics Ltd v Hutton [2013] 8 WLUK** as per Langstaff P at paragraph 35)

Equality Act 2010 Claims - Statutory Time Limits

Section 13 Direct Discrimination claims

93. The Equality Act 2010 (EqA 2010) provides time limits for bringing claims of discrimination as follows:

(1) Subject to section 140B, proceedings on 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
…
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it"

94. **E v X, L & Z UKEAT/079/20/RN** contains a useful review of the position in relation to preliminary hearing on time limits in cases under the Equality Act. I have had regard to the key principles distilled by Ellenbogen J.

95. I have also considered **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA** and **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA** in respect of the correct approach to continuing acts. The Tribunal should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer. In some cases, resolution of the whether the requisite connection exists between the alleged discriminatory acts may need to be left to the final hearing when all of the facts have been found. On the other hand, it is sometimes both fair and possible to determine even at a preliminary hearing that there is no continuing act. In **Aziz v FDA [2010] EWCA Civ 304** the Court of Appeal noted that a way of formulating the test to be applied at the pre-hearing review is this: the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs

Discretion to extend time - Just and Equitable

96. The tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b), EqA 2010). Following **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23** caution must be exercised against over-reliance on the so-called "Keeble factors"(so named after **British Coal Corporation v Keeble [1997] IRLR 336** in which the factors of length of and reasons for the delay, the extent to which the cogency of the evidence may be affected and the steps taken by the Claimant to obtain advice were said to be relevant). The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, *including* in particular the length of, and the reasons for, the delay (as per Underhill LJ in **Adedeji** at paragraph 37).

97. It was submitted by the Respondent that where a Claimant simply does not explain the delay, they are unable to discharge the burden of showing it is just and equitable to extend time. Also, a disbelieved explanation falls to be treated in the same way. However, I consider **Edomobi v La Retraite RC Girls School [2016] UKEAT** not to reflect the up-to-date position following **Concentrix CVG Intelligent Contact Limited v Obi [2022] EAT 149,** as confirmed at **Owen v Network Rail Infrastructure**

Limited [2023] EAT 106. There is no rule of law that the Tribunal is bound to refuse an extension simply by virtue of there not being any explanation for the delay.

98. It was established in **Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 122** that the proposed merits of a claim which is not plainly so weak that it would fall to be struck out, are not necessarily an irrelevant consideration when deciding whether it is just and equitable to extend time or whether to grant an application to amend. On the other hand, the deposit rule threshold is not imported into the exercise of discretion for a just and equitable extension (per HHJ Auerbach at paragraph 61).

99. It will be appreciated, therefore, that the "just and equitable" test is very much more generous towards the Claimant than the "not reasonably practicable" test

Amendment

100. The longstanding lead authority in relation to amendment applications is **Selkent Bus Company Limited v Moore [1996] ICR** in which a series of relevant considerations are identified. This is often referred to as the "Selkent" test and encompasses: (a) the nature of the amendment (is it the addition of factual details to existing allegations, does it amount to the addition or substitution of other labels for facts already pleaded, or does it represent the making of entirely new factual allegations which change the basis of the existing claim?); (b) the applicability of time limits, and (c) the timing and manner of the application (it is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery). The Selkent test also requires that consideration should be given to all of the circumstances, balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

101. The Employment Appeal Tribunal has more recently provided further guidance in the area of amendment: **Vaughan v Modality Partnership [2021] ICR 535**, **Choudhury v Cerberus Security & Monitoring Services Limited [2022] EAT 172 and Pereira v GFT Financial Limited [2023] EAT 124**. Those cases all highlight that a practical approach of balancing of the injustice and/or hardship of allowing or refusing the proposed amendment is of paramount importance.

Strike out

102. The power to strike out is found in rules 38. Under r. 38(1):

(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

103. The general effect of the authorities is that:

(a)the discretion should be used sparingly and cautiously (**Madarassy v Nomura International Plc [2007] ICR 867**);

(b) there is a particular public interest in the substantive determination of whistleblowing and discrimination complaints so they should be approached with particular care as to whether they are truly without any reasonable prospect of success (**Lockey v North East Homes Leeds)**;

(c) where there is a serious dispute on the facts the tribunal should not conduct an impromptu trial of the facts however there may be cases where it is instantly demonstrable that the central facts in the claim are untrue (**Tayside Public Transport Company v Reilly**); and

(d) where, taking the case at its highest, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic a claim may properly be struck out (**Chandhok v Tirkey [2015] IRLR 195**).

Analysis and Conclusions

104. Central to determining the applicable time limits and any associated discretion to extend is identifying, with as much precision as possible, the nature and dates of the complaints comprised in the ET1. The ET1 includes a narrative document [pp.18-19].

105. My assessment is that the clear intended complaints (putting aside whether they are adequately particularised and/or disclose prospects of success) are these:

- Whistleblowing detriment between January 2024 and 13 March 2024 [point 3, section 8.2 of the ET1, p.10 read along with point 3 on p.18]

- Automatically unfair dismissal on 14 March 2024 because it occurred because of the Claimant's whistleblowing [point 4, section 8.2 of the ET1 and point 4, p.19]; and

- Direct race discrimination on 14 March 2024 whereby the less favourable treatment asserted is: being immediately escorted from the Respondent's premises and not being afforded three months' gardening leave. The protected characteristic is the Claimant's race, and the Claimant's race (though not specified) is other than white [point 5, section 8.2 ET1 and point 5, p.19]

106. It is significantly less clear what kind of legal complaint is being made about:

- The extension of probation on 5 January 2024 [point 2, section 8.2. ET1, p.10 and point 2, p.18]

- Lack of giving clear information about the procedures for appealing the termination decision or for lodging internal or external complaints [point 6, section 8.2, ET1, p.10 and point 6, p.19]

- Intentionally prolonging investigations beyond the Tribunal deadline [point 6, section 8.2 p.10]. Pausing there, given the identifiable deadline, this must constitute a complaint that the relevant investigations were ***not*** concluded prior to 13 June 2024 which was the last day that the Claimant could go to ACAS and retain his rights.

107. I refer to these as the opaque complaints A, B and C respectively.

108. Common to all of the opaque complaints is that they do not identify the specific wrongdoing as a matter of employment law.

109. Applying the concluding remarks in section 8.2 of the ET1 to them gives rise to an assertion that these actions are part of a pattern of *"discrimination and victimisation stemming from my insistence on regulatory compliance".* At their very highest therefore, they rest on two alternate bases: discrimination or whistleblowing.

110. As for the claim indicated by the Claimant by ticking the box in box 8.1 of the ET1 for a claim of discrimination on the grounds of religion or belief, this is wholly elliptical. I refer to this as the "bare belief complaint". No reference is made in either the ET1 or the attached narrative document to the Claimant's religion or any belief. It is not made out by the overarching remarks I have referred to in paragraph 109 above. It is belied by the clear statement at p.19 which says: *"I assert the Bank ABC's actions constitute unlawful discrimination* ***based on disability and race, victimisation for raising concerns*** *and unfair dismissal" (*my emphasis).

111. The Claimant at the case management hearing before EJ Hodgson said that all six matters were proposed to be put as claims of direct discrimination (race and religion) and whistleblowing detriment [p.54, paragraph 2.8]. Before EJ Hodgson the Claimant described himself as an arab muslim and identified no other belief at all.

112. So far as the opaque complaints go, the assertions made before EJ Hodgson by the Claimant have simply not been carried through in the Claimant's proposed amendments.

113. I note that across AAv1 and AAv2 the Claimant asserts:

- Probation extension was part of a pattern of retaliation for whistleblowing [p.75]

- The intentional prolongation of the investigations and lack of information is only touched upon in *"the systematic cover up pattern – institutional concealment of wrongdoing" .* There,

reference is variously made to manipulation of timelines (e.g. *"CEO email suggesting 12 June 2024 deadline without prior notice"* and "*absence of deadline information in termination letter*"). The Claimant goes on to set out in detail the legal principles he says the identified behaviour may violate. His detailed list includes infringements of the ACAS code of practice, breach of the duty of trust and confidence but conspicuously *nowhere* mentions anything to do with discrimination or whistleblowing detriment [p.99]

114. Finally on this point, the Claimant's evidence to the Tribunal was entirely consistent with the above. In his evidence, the Claimant was challenged about his allegations of detriment being advanced on inconsistent bases. The Claimant made quite clear that he ascribes the extension of his probation to his whistleblowing and that the manner of his dismissal was related to his race.

115. On the question of the prolongation of the grievance process he was challenged that the nature of his complaint was not of discrimination or whistleblowing detriment but of a tactical ruse to defeat any claim. The Claimant did not contradict this; he was completely equivocal, acknowledging that the proposition may be right.

116. A further point of some force is this: the allegation of prolongation of the grievance and whistleblowing allegations to a date passed 13 June is conclusively disproved to be wrong as a matter of fact. Both were completed in full by 6 June and the Claimant knew that to be the case no later than 10 June.

117. Putting all of this together, I find the opaque complaints B and C are wholly unsupportable on the Claimant's own case and evidence before me as either whistleblowing claims or race discrimination claims.

118. I would add here that as a matter of procedure, the Claimant was on notice of the possibility that consideration would be given to strike out. It is also consistent with the overriding objective to take that step so as to give appropriate focus to the time limit issues. It is wholly disproportionate to examine the careful balancing exercise in respect of claims that are clearly not ones the Claimant himself has any belief in. They are accordingly struck out.

119. The position in relation to the bare belief complaint is somewhat different. I take the very strong view that without any amendment that claim is strikeable on its face. However, by his amendment application the Claimant seeks to advance such a complaint as an alternative claim to his whistleblowing detriment claim but relying on the same facts. I shall return to this below, therefore.

Reasonably practicable

120. I unhesitatingly find that it was reasonably practicable for the whistleblowing detriment and automatically unfair dismissal claims to have been presented in time. I find the Claimant was clearly aware that he had personal legal rights to challenge the Respondent's treatment of him other

than internally. That is evident from the correspondence (see, for example, paragraphs 35 and 38). From an early stage following his dismissal, the Claimant was using legal parlance.

121. I accept his evidence was honestly given when he said he did not know of the process by which to claim those rights and that he was ignorant of the deadline for his complaint until 7 days after it had passed. But as the authorities make clear, I am concerned with what the Claimant ought to have known.

122. I am amply satisfied that it would have been well within the Claimant's ability to undertake research about bringing a claim and that he had the time and mental acuity to do so, even in the weeks up to the deadline expiry. Frankly, it would have been a moment's work. I reflect on the comments of Cavangh J in **Cygnet:** (p*aragraph 56):*

Even if the pandemic meant that it was not easy to speak to somebody, it makes no sense, in my judgment, that the claimant would not have been able to type a short sentence into a search engine and to seek information about unfair dismissal time limits, or to ask an acquaintance by email to search for that information. The ET said that the claimant could have asked for information by email as a fallback to speaking to someone and there is little difference between doing this and putting a question in a search engine

123. Had the Claimant undertaken such a search, that would inevitably have taken him to conspicuously reliable resources such as ACAS. In turn this would have alerted him to what is always a strongly emphasised point in any literature about ET claims: the shortness of, and the importance of, the deadline.

124. On this point, I have reflected on what if anything relevant it might reveal about the Claimant's state of mind, that someone of his intelligence did not undertake this cursory research. Is it, in fact, a marker of profound stress? I am not satisfied that it is. I return to the array of well-constructed correspondence that he was issuing at the same time which speaks to the contrary. I conclude he thought through his persistence and persuasion he would obtain an acceptable resolution which would be agreed by the Bank on a commercial footing. He focused on that to the detriment of protecting his position in the meantime. It was feasible, however, for him to pursue his negotiated outcome alongside that.

125. I turn then to specific arguments advanced by the Claimant [pp:117 – 120].

126. **Points 2.1 and 2.2** I take together. These points are variations on a theme which reflects the non-complaint point about alleged obstruction of justice.

127. It is simply wrong to say that the proceedings were not issued in time because the Respondent in some sense culpably failed to provide information about appeal rights or complaint procedures. I can certainly

appreciate that the Claimant's termination left him unable at first to access the relevant policies independently. I also accept therefore that in order to intimate his grievance he needed to use Linkedin to get the relevant contact details of the CEO. However, the fact is that he did so and that set in motion two investigations in which he participated.

128. The Respondent did not seek to obscure the availability of, or deadline for, legal proceedings. It went so far as to explicitly mention, with the appropriate disclaimer, the date it calculated as the deadline. In fact, - it might be said to the Claimant's advantage had he actually acted upon it - they gave as the relevant date, a day earlier than it was.

129. There was, as is usual, a separation made by the Respondent between the investigation into the whistleblowing disclosures and the Claimant's grievance. I also find the Claimant appreciated the whistleblowing investigation report was unlikely to bear directly on his complaints about his employment; he would not otherwise have felt it necessary to add this in as a fifth point to the grievance appeal. He understood there was a separation. I find he hoped vindication of his underlying disclosures might cause the Respondent to look more benignly at his employment claims, and that settlement was his goal. The Claimant's thought process was not illogical, but it was somewhat speculative and undoubtedly hopeful. In any event both the grievance appeal outcome and the whistleblowing outcome indicated they were final stages and by 10 June at the latest, he had received communication about both with no indication of further positive action in his favour.

130. **Point 2.3** I cannot follow the disadvantage being claimed from a premature deadline being given.

131. A fair reading of Mr Aiden's email of 13 May was that there was a possibility of a further discretionary payment after the conclusion of the appeal process. This would be purely in relation to the grievance investigation. This did not create any legitimate expectation that the Claimant would or was likely to receive compensation. It was equally not a representation that he should wait to see what might fall out of the appeal process before presenting a claim. I decisively exclude that given the clear information conveyed that (a) there was a deadline for commencing proceedings (b) it was 12 June but that was not definitive ("you may wish to confirm") and (c) the appeal procedure would be concluded as quickly as possible. There was no explicit or implied assurance that the outcome would be given before 12 June. The Claimant at this point knew that Mr Beck's investigation had taken well over a month.

132. **Point 2.4** The Claimant criticises the Respondent for not telling him about the ACAS process. He clearly feels it should be otherwise, but they were under no obligation to do so. Their relationship with the Claimant as an employer had ended. They were under no statutory or common law duty to bring the ACAS process to the Claimant's attention. Rather, the expectation is that he will act to protect his own rights.

133. **Point 2.5** I reject the Claimant's points about both emails.

134. In respect of the 13 May email there was no recognition of any deficiency. The undertaking given to address the conclusions of the investigations was clearly conditional on their outcome. That was not and could not be known. It was an expression of good faith and no more.

135. So far as the letter of 19 June is concerned, that can have no bearing on the question of whether it was reasonably practicable to bring proceedings in the primary period because the relevant date had already passed.

136. **Point 2.6** I am greatly sympathetic to the Claimant for the worry he must have faced around his son's surgery. It can only have been a very testing time for him and his family. However, I find compelling Mr Davidson's submission that the best indicator of what was reasonably practicable for the Claimant to do is what he did do in this period, despite this undoubted source of worry. What I know is that the Claimant engaged in the whistleblowing and grievance investigation processes, he raised an appeal, and he escalated his concerns in lengthy correspondence. This carried on past the ACAS deadline. As the important surgery grew closer, the Claimant contacted ACAS, undertook conciliation and presented the claim. This is all before his son's surgery happened. This is the best evidence that it was reasonably practicable throughout the previous 3 months up to 13 June, including the crucial last few weeks of that period, to commence conciliation.

137. **Point 2.7** The claims in the ET1 straightforwardly resonate (with the exception of the bare belief complaint) with what the Claimant had been saying for some time in correspondence. The Claimant placed some legal labels on the impugned actions but there is really nothing that demonstrates any great time at all being spent on setting out the claims. I cannot detect any complex analyses. Indeed, the sparsity in relation to whistleblowing claims was the cause of the unless order made by EJ Hodgson. Further, the Claimant accepted in evidence that he was not asserting that he had done the full research for his claim at the time of presentation.

138. On the other hand, the remedy section [p.9.2] is considerably more detailed. I have noted it includes references to Vento bands and details of the precise basic and compensatory awards sought. I can accept quite a lot of work was done here. It is not such, however, that I believe the Claimant could not have reasonably have undertaken this before limitation expired.

139. **Point 2.8** There is evidence supporting an unanswered request for minutes of the probation extension meeting. In no sense was having sight of that document a prerequisite of presenting the claim. I can see why the Claimant considered it might be helpful to bolster his case. He might have been tactically availed by the document in terms of his negotiating position. That is different to it being central to understand the existence and prosecution of his legal rights. He had sufficient understanding in those respects.

Just and Equitable to extend time?

140. Putting to one side the bare belief complaint, I must consider whether it is just and equitable to allow the direct race discrimination complaint to proceed.

141. The Respondent submits it is a claim with feeble merits, the period of the delay in going to ACAS is substantial relative to the length of the employment relationship and the Claimant's excuses are not compelling. Therefore, it says, the Claimant has not discharged the burden of showing it is just and equitable to extend time.

142. I disagree.

143. On the length of the delay, the Claimant went to ACAS 11 days after he needed to. The delay from the time I have found the Claimant had knowledge of the ACAS deadline is shorter, at 4 days (i.e. 20 June to 24 June). It is right to note that the Claimant did not immediately present his claim after the end of early conciliation but took a further 6 days which he has ascribed to preparing the Tribunal documentation [p.213]. I accept that was the reason for delay here.

144. My take on the Claimant's explanation is that it lacks insight about his own part in it.

145. A more straightforward and accurate explanation would be as follows. The Claimant had a strong view his claim was sound, was convinced that it would be borne out upon investigation and a satisfactory resolution offered. He applied pressure and effort to that end but was wrongly apt to construe all communications from the Respondent in the light of his own assessment instead of paying attention to what was clearly being said. Substantially as a result of that approach, he missed the significance of the deadline he was generously alerted to. He did not realise there was such a tight time limit which he should, and could, have checked. However, this all unfolded at a time when he had a number of significant life stressors, namely, the unforeseen loss of employment, the imperative to get new employment without a good reference to offer from his last employer and responsibility for a young child preparing for serious surgery.

146. It is unfortunate that the Claimant has rather gone on the offensive against the Respondent in his request to extend time but I have concluded it is not in his nature to acknowledge error easily. That said, I have not found his explanation to be factually dishonest in any material or grave respect either. It has tended more to the elaborate and the misconceived side of the line. That is undesirable but not a reason, of itself, to decline an extension.

147. Taking therefore my view as to the explanation, the Claimant is at some fault, the Respondent is not at any fault. But the Claimant will not be the first person to not twin-track his approach and to think altogether too wishfully when faced with the alternative of litigation and carrying other loads.

148. In its original form I find the direct race discrimination claim harnesses two aspects of less favourable treatment - the manner in which he was escorted out on the last day of his employment and not being placed on 3 months' gardening leave.

149. Gardening leave is at the instance of the Respondent arising on notice of resignation or termination. However, being in the probationary period there would be no question that if opted for, the Claimant would have been entitled to 3 months [see 17(a) of the Grounds of Resistance at p.46 and the contract of employment at pp.170-171]. The Claimant could at most have been entitled to 1 month. The second part of the allegation is therefore of *not* being treated by the Respondent, in a very specific way, more generously on termination than the Claimant was entitled to be treated. As it was, the Claimant's treatment was more generous because, as both sides agree, 4 weeks' notice was paid as PILON.

150. The Claimant does not need to plead a comparator. He mentioned Mr Clayton in the ET1. The Claimant has consistently asserted that the Respondent had planned to terminate Mr Clayton's employment. He says that he had been shown a brown envelope containing termination documents three weeks prior to Mr Clayton's last day which had been prepared by HR prepared for that purpose [p.147 & p.215]. Andrew Singh showed him these [p.124]. The Claimant says Mr Clayton was instead permitted to resign and placed on garden leave.

151. The Claimant accepts he was one level under Mr Clayton but contends the Claimant's position was also senior to the point it had been intended that he would deputise for Mr Clayton [p.216].

152. The Respondent maintains Mr Clayton is in no way a sound statutory comparator under s.23 because of material differences in their circumstances. It pleads that Mr Clayton *resigned* from the Respondent on 19 January 2024 [p.34] and that given that he was confirmed permanent employee who occupied a senior position at the Respondent and had access to the Respondent's business confidential information, the Respondent needed to sanitise him through the use of garden leave in accordance with his contract of employment [p.35 & p.45].

153. Elsewhere, Mr Clayton was described as longstanding by the Respondent's solicitors [p.107]. In his skeleton and cross examination Mr Davidson advanced that a further difference between Mr Clayton and the Claimant was that Mr Clayton had qualifying service. That was disputed by the Claimant. A short time later in the hearing Mr Davidson confirmed there had been an error in his instructions; Mr Clayton did not have two years' continuous service at the time his employment ended.

154. I note in relation to the race discrimination complaint, the following other assertions made by the Claimant in AAv1 and AAv2 to which I consider I may fairly have regard as reflecting evidence he would seek to adduce if the claim proceeds:

- On an unidentified date in 2024 Rodney, another white colleague admitted serious gross misconduct and was offered 12 weeks pay and an opportunity to negotiate terms [p.92];

- "Richard" a black colleague of the Claimant's had his employment terminated forthwith and was also escorted from the premises [p.92].

- A heavier workload was routinely given to ethnic minority staff who regularly worked longer hours [p.92].

- White colleagues worked 2-3 hours daily and ethnic minority staff worked 9 to 18.30 [p.123]. He has suggested Jannat would be a witness to this.

- The ERM team lost half of its staff and ethnic minorities were disproportionately affected [p.93]

155. It is right to acknowledge that when pressed by Counsel to point out any link or evidence beyond his own assertion of a difference in treatment that supported a discriminatory motivation, the Claimant did not leap to repeat the above points. I do not think anything turns on that. The hearing before me was not a trial. There is evidence he has been consistent in these assertions.

156. How does the above fit into the merits? It is trite law that a Claimant will not establish a prima facie case of direct discrimination by simply showing less favourable treatment compared with someone not sharing the Claimant's protected characteristic. Something more than this is required (**Madarassy v Nomura International Plc [2007] EWCA Civ 33**).

157. Crucially however, an actual comparator is not the only way to discharge the burden upon him **(Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL.)** The way the Respondent has treated employees whose circumstances are not sufficiently similar to meet the strictures of s.23 may still be sufficiently relevant for inferences to be drawn about the Claimant's treatment. Using these evidential comparators is a permissible way of constructing a picture of how a hypothetical comparator would have been treated **Chief Constable of West Yorkshire v Vento (No.1) 2001 IRLR 124, EAT.**

158. It seems to me that the main identified comparator of Mr Clayton cannot, on two agreed facts - that his role was at a more senior level, and that he was out of his probationary period - be a s.23 compliant comparator. Nevertheless, consistent with the authorities, the Claimant may be able to deploy Mr Clayton and Richard as a way of constructing a picture of how an employee otherwise in an identical position to him but who was white, would have been treated.

159. On the material I have I consider Mr Clayton is unlikely to prove a strong evidential comparator. The only similarity appears to be that (if it is shown by the Claimant) the Respondent had determined to exercise its power to terminate Mr Clayton's employment, as it had the Claimant's.

The Claimant has identified two different reasons Mr Clayton was told of the impending termination [compare p.123 and p.121], only one of which is consistent with the Respondent having any facility to terminate Mr Clayton's employment with less than three months' notice as a non-probationary employee. If that was established as a fact, then it would certainly narrow the differences between them but I can see there may be a hill to climb that rests on disclosure and/or a request to admit facts.

160. The Claimant may also argue that the facility given to Mr Clayton to resign (the jumping rather than being pushed) is a marker of a differential treatment. I do not consider the Claimant needs to plead that as part of the detriment (I am quite clear; he has not done so) in order to rely on it evidentially.

161. Turning to Rodney, a white employee, he is a potentially stronger, more probative evidential comparator since on the Claimant's case the right to dismiss summarily for gross misconduct had arisen and nevertheless, he was given a 12 week notice period, allowed to resign rather than be dismissed, and not made to undergo the escorted departure process.

162. To this must be added the allegations made by the Claimant about other significantly differential workplace treatment of ethnic minorities. I would not expect the Claimant to have evidence of this (other than his own account) compiled at this stage. He has suggested a witness.

163. The Respondent, I accept, has advanced material tending to bear on the reason for the dismissal. That is a different claim. I note it has not provided the Tribunal with any standard policies dealing with departure practices, or unlike the scripts in relation to the probation extension, any script in relation to the final termination meeting with the Claimant and planned physical departure from the building. No minutes have been produced either.

164. I also reflect, it is not inherently incompatible with later discriminatory treatment attending the manner of the termination that the termination itself has the appearance of being only because the Claimant was not meeting professional expectations. This claim is about treatment once the Respondent has decided that you are no longer wanted as an employee. It is not a point of any weight for the Respondent the fact that it is a subsidiary of Arab Banking Company BSC. It is not pleaded that the decision maker for the PILON or the mode of leaving the premises was Arab.

165. Bringing all of this together, I am not persuaded the merits are feeble or even that there is little reasonable prospect of success on the material currently available.

166. I turn then to the balance of prejudice to the parties.

167. On the Respondent's side of the ledger, I find there is no forensic prejudice to the Respondent as a result of the Claimant's delay. Since immediately following the termination of employment, the manner of the

dismissal has been consistently raised by the Claimant. It stands to reason that the Respondent will have considered, and so far as necessary, preserved its evidential position relevant to this complaint. It is clear the grievance investigation from as early as 26 March 2024 took in matters of differences in treatment within the Claimant's team based on race [p.38 Grounds of Resistance, paragraph 12(x(v) and (vii)].

168. Mr Davidson did not seek to advance an argument of forensic prejudice but also submitted that this was not a reason to grant an extension either. I accept it is not a decisive factor in favour of granting an extension.

169. The Respondent confirmed it did not rely on the conduct issues it has raised about the Claimant (Respondent's skeleton at paragraph 65 refers) in the context of an extension of time. For my part, even noting that there have been some developments in the conduct issues, I do not consider them to be a freestanding factor pointing to a refusal of an extension. They sound in the context of evaluating future prejudice if the Claim is permitted to proceed. I turn to that next.

170. The other form of prejudice to the Respondent is in facing an otherwise time-barred claim. Here I look forward to what is likely to lie ahead. I cannot foresee any further preliminary issues and would expect after a further case management conference the matter can proceed to a relatively short final hearing, to include remedy, of around 3 days. The relevant facts of the claim are in a relatively narrow compass. It is possible disclosure may attract applications. My findings about the Claimant's unreasonable conduct in case citation matters (as detailed separately in the Record of Preliminary Hearing), might herald proliferation of matters by him is likely. My expectation, and sincere wish, is that having regard to those findings, the Claimant is considerably more circumspect about his conduct in these proceedings. I do not presently see a high risk of repetition. The Respondent has remedies under the rules if otherwise.

171. The prejudice to the Claimant would be the loss of pursuing this claim. I take into account the strength of feeling he has expressed about his treatment compared to white employees (see paragraph 32 above). There would be the loss of potential vindication about this and of potential compensation.

172. Balancing all of these factors, the Claimant has persuaded me that it is just and equitable for time to be extended.

Remaining amendment issues

173. The effect of my decisions above is that the claim now comprises (a) a direct race discrimination and (b) the bare belief complaint, being a strikeable, presently out of time complaint of discrimination on grounds of belief

174. The belief identified is a belief in *"rigorous regulatory compliance and ethical financial practices"* [p.124]. The Claimant describes it as a deeply held conviction that has guided the Claimant's entire career.

175. Should I permit amendment so that the Claimant may essentially run all the same things identified as whistleblowing detriments and founding automatically unfair dismissal, as discrimination on the basis of philosophical belief? I decline permission.

176. The merits are conspicuously poor. I consider the belief asserted profoundly unlikely to satisfy the requirements set out in **Grainger plc v Nicholson [2010] IRLR 4**. Mr Davidon's pithy description is correct: the philosophy appears to be no more than that "people should do what they are supposed to do". From the cross-examination I was satisfied the Claimant does not assert he ever shared with his colleagues or superiors that he held this specific belief. I further accept that given the regulatory requirements imposed by the FCA Conduct Rules, whatever actions of the Claimant may have been observed by the Respondent's other employees, they would not have stood as any independent marker of his alleged belief; ethical behaviour, and even highly visible and outstanding ethical behaviour I consider, dovetails with the well-understood expectations already placed upon him. Without the knowledge of the belief – which the Claimant will need to prove - the decision makers at the Respondent could not have treated him less favourably because of it. It is a claim therefore with vanishingly small prospects of success.

177. In addition, even dating it back to AAv1 (10/2/25), it is significantly out of time. The sheer scale of the amendment and the cursory nature of the intimated claim mean this cannot fairly characterised as just further particulars. No belief or religion was ever previously identified by the Claimant in the ET1.

178. I appreciate the Respondent has been on notice of the same allegations of detriment in reference to the whistleblowing claim. However, this claim would make different enquiries and evidence-gathering necessary. It would require a new pleading. The "reason why" is different. Allowing the complaint to proceed would expose the Respondent to a claim that is otherwise now considerably narrowed in scope. The claim would be enlarged again, with the attendant cost and expense.

179. On the Claimant's side of the ledger, he would lose a highly speculative claim. Granted that would open the way, notionally, to potentially greater damages because of the discriminatory dismissal aspect but I also bear in mind that it was not such an important or serious claim to him that he ever bothered to set it out originally.

180. The prejudice to the Claimant of being precluded from running a speculative claim with poor merits when balanced against the injustice to the Respondent means it is contrary to the interests of justice to permit it to proceed.

181. The parties will receive under separate cover shortly a Record of Preliminary Hearing which details further directions in respect of future case management and costs issues arising out of the preliminary hearing.

Approved by:

Tribunal Judge Miller-Varey Acting as a Judge of the Employment Tribunal

16 July 2025

JUDGMENT SENT TO THE PARTIES ON

21 July 2025

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FOR THE TRIBUNAL OFFICE