Neutral Citation Number: [2025] EAT 103

Case Nos: EA-2023-000451-BA,
EA-2023-000454-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 July 2025

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mrs K Mesuria

Appellant

- and -

Eurofins Forensic Services Ltd

Respondent

- -
- -

Ms P Baria, Appellant's sister for the **Appellant**
Mr J Boyd (instructed by **JMW Solicitors LLP**) for the **Respondent**

Hearing date: 9 July 2025

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JUDGMENT

SUMMARY

Practice and procedure

The Employment Tribunal erred in law in dismissing the claims at a Preliminary Hearing. The care required in deciding whether to fix a Preliminary Hearing to consider time points and in setting the issue(s) to be determined discussed.

His Honour Judge James Tayler:

Time points at Preliminary Hearings; preliminary issue or strike out

1. Care should be taken before directing a preliminary hearing to consider a time point; and, if so, in defining the issue, or issues, to be determined, making orders to prepare for the hearing and ensuring that the hearing is fair. Unfortunately, this appeal illustrates what can go wrong.

2. The time limit for discrimination complaints is set by section 123 **Equality Act 2010** ("**EQA**"):

> 123 Time limits
>
> (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of **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. [emphasis added]

3. Section 140B **EQA** permits an extension of time while ACAS early conciliation is undertaken, the details of which are not relevant to this appeal.

4. The Employment Tribunal has a broad discretion to apply a time limit longer than 3 months (and any relevant extension for ACAS early conciliation). Leggatt LJ held in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, [2018] ICR 1194:

> 18 First, it is plain from the language used ("such other period as the

> employment tribunal thinks just and equitable") that **Parliament has chosen to give the employment tribunal the widest possible discretion**. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corpn v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2009] 1 WLR 728, paras 30–32, 43, 48 and *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72, para 75.
>
> 19 That said, factors which are **almost always relevant** to consider when exercising any discretion whether to extend time are: (a) **the length of, and reasons for, the delay** and (b) **whether the delay has prejudiced the respondent** (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). [emphasis added]

5. The authorities draw a distinction between a one-off act with continuing consequences and conduct extending over a period. In **Barclays Bank Plc v Kapur and Others** [1991] 2 A.C. 355 the House of Lords considered a situation in which the bank refused to take previous service with East African banks into account in computing pension entitlement. This ongoing provision of less favourable terms of employment was treated as an act extending over a period rather than an omission.

6. There are two ways of dealing with a time point at a Preliminary Hearing:

   6.1. determining the time point as a matter of substance

   6.2. deciding whether the complaint should be struck out because there are no reasonable prospects of the complaint being found to be in time

7. The two determinations are fundamentally different and generally require different

preparation. Lawyers often confuse these questions, so it is not surprising litigants in person can find the distinction difficult to understand.

8. The distinction has its origin in the Employment Tribunal Rules.

9. This case was decided under the 2013 Rules. In deciding whether to fix a Preliminary Hearing to determine a time point, the Employment Tribunal should consider the overriding objective in Rule 2 **ET Rules 2013** (now rule 3 **ET Rules 2024**)

> 2. Overriding objective
>
> The **overriding objective** of these Rules is to enable Employment Tribunals to **deal with cases fairly and justly**. Dealing with a case fairly and justly **includes**, **so far as practicable**—
>
> (a) ensuring that the **parties are on an equal footing**;
>
> (b) dealing with cases in ways which are **proportionate to the complexity and importance of the issues**;
>
> (c) **avoiding unnecessary formality** and **seeking flexibility** in the proceedings;
>
> (d) **avoiding delay**, so far as compatible with proper consideration of the issues; and
>
> (e) **saving expense**.
>
> A Tribunal **shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules**. The **parties and their representatives shall assist the Tribunal to further the overriding objective** and in particular shall co-operate generally with each other and with the Tribunal. [emphasis added]

10. As shall become apparent, what happened in this case did not advance the overriding objective.

11. Directing a Preliminary Hearing is a case management order governed by Rule 29 **ET Rules 2013** (now rule 30 **ET Rules 2024**)

> 29. Case management orders
>
> The Tribunal **may at any stage of the proceedings, on its own initiative or on application, make a case management order**. Subject to rule 30A(2) and (3)

> the particular powers identified in the following rules do not restrict that general power. **A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice**, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made. [emphasis added]

12. Once an order is made fixing a Preliminary Hearing, it can generally only be varied if it is in the interests of justice to do so, such as where there has been a material change in circumstances.

13. If a time point is determined as a matter of substance, it is a preliminary issue for the purposes of Rule 53 **ET Rules 2013** (now rule 52 **ET Rules 2024**):

> 53.— Scope of preliminary hearings
>
> (1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—
>
> > (a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);
> >
> > (b) **determine any preliminary issue**;
> >
> > (c) **consider whether a claim or response, or any part, should be struck out** under rule 37;
> >
> > (d) make a **deposit order** under rule 39;
> >
> > (e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).
>
> (2) There may be more than one preliminary hearing in any case.
>
> (3) **"Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability** (for example, **an issue as to jurisdiction** or as to whether an employee was dismissed). [emphasis added]

14. Rule 37 **ET Rules 2013** (now rule 38 **ET Rules 2024**) provides a power to strike out a claim because there are no reasonable prospects of the complaints being in time:

> 37.— Striking out
>
> (1) **At any stage of the proceedings, either on its own initiative or on the**

> **application of a party**, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> > (a) that it is scandalous or vexatious or has **no reasonable prospect of success**;
> > …
>
> (2) A claim or response **may not be struck out unless** the party in question has been given **a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing**.

15. The distinction between time as a preliminary issue and strike out because there are no reasonable prospects of the complaint being within time was considered by HHJ Auerbach in of **Caterham School Limited v Mrs K Rose** UKEAT/0149/19/RN:

> 58. First, **it is always important for there to be clarity, when a Preliminary Hearing is directed**, at such a Hearing, and in the Tribunal's decision arising from it, as to whether the Tribunal is considering (or directing to be considered), in respect of a particular complaint, allegation or argument, **whether it should be struck out (and/or made the subject of a deposit order), or a substantive determination of the point**.
>
> 59. The differences, in particular, between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, are generally well understood, but still worth restating. A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. **If a strike out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point, or on the merits), that will bring that complaint to an end. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be.**
>
> 60. **By contrast, definitive determination of an issue which is factually disputed requires preparation and presentation of evidence, to be considered at the Preliminary Hearing, findings of fact, and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited** at the Full Merits Hearing of the case.
>
> 61. All of that applies equally where the issue is whether there has been conduct extending over a period for the purposes of the section 123 time limit. If the Tribunal considers (properly) at a Preliminary Hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be

struck out. But if it is not struck out on that basis, that time point remains live. If, however, the Tribunal decides at a Preliminary Hearing, that the claim does relate to something that is part of continuing conduct, and so is in time, then the issue has been decided and cannot be revisited.

62. Some of the authorities do, I think, need to be read with some care in this regard, because it is not always apparent, without a close and careful reading, whether the Tribunal's decision under challenge was by way, effectively, of a decision whether or not to strike out a complaint by reference to a time point, or by way of definitive determination of that point. That is, sometimes, because the authorities do not always use the express language of "strike out", or refer to the strike-out Rule, or use the language of "no reasonable prospect of success". But, on a careful reading, it is clear that a number of these authorities are, indeed, concerned with whether a particular complaint or complaints should have been struck out, on the basis that there was no reasonable prospect of success of establishing that they were in time because they formed part of conduct extending over a period; and that these authorities (properly) use the "prima facie case" test as a synonym or shorthand for the strike-out test.

63. So, **in short, the prima facie case test is appropriate, as shorthand for the "no reasonable prospects of success" test, where the Tribunal is persuaded that the matter is suitable for consideration at a Preliminary Hearing, of whether a particular complaint or complaints should be struck out on the basis that it is, in isolation, out of time, and there is no reasonable prospect of success, on the pleaded case, of it being found in time as forming part of continuing conduct.**

64. **But a determination of whether, substantively, there is conduct continuing over a period, cannot be reached at a Preliminary Hearing on the basis merely of consideration of whether there is a prima facie case on the pleading.** Were it otherwise, it would mean that there was actually a lower threshold for establishing conduct extending over a period, if the matter were considered at a Preliminary Hearing, than if it were considered at a Full Hearing. That cannot be right. Read as a whole, and with care, none of the previous authorities so holds.

65. The authorities do indicate that it is not *necessarily* in every case an error of law for an Employment Tribunal to consider a time point of this sort at a Preliminary Hearing, either on the basis of a strike out application, or, possibly even, in an appropriate case, substantively. *If* that can be done properly, it may be sensible and, potentially, beneficial, so that time and resource is not taken up preparing, and considering at a full merits hearing, what may be properly found to be truly stale complaints that ought not properly to be so considered.

66. **But, as is well-known, the authorities also repeatedly urge caution – having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; because there may be no appreciable saving of preparation or hearing time** in any event, if episodes that could potentially be severed as out of time, are in any case relied upon as background to more recent complaints; because of the acute fact-

> sensitivity of discrimination claims, and the high strike-out threshold; and because of the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue." [emphasis added]

16. In one respect Ellenbogen J differed from HHJ Auerbach in **E v X, L, Z, L v X, Z, E** UKEAT/0079/20/RN (V), UKEAT/0080/20/RN (V):

> 47. With respect to His Honour Judge Auerbach, I do not share his view as stated at paragraph 59, that:
>
> > "A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact." (emphasis added.)
>
> It seems to me that the emphasised parts of such a conclusion are at odds with the conclusion of Hooper LJ, at paragraphs 10 and 11 of *Lyfar* (cited above), by which I am bound. It is also at odds with the way in which such cases proceed in practice and without criticism by the higher courts – see, for example, *Hendricks*, at paragraph 22, from which it is clear that the claimant had produced a 42-page witness statement and given oral evidence at the preliminary hearing. In my judgment, whilst, in any given case, it may be possible and appropriate to determine a strike-out application by reference to the pleaded case alone, it cannot be said that that approach should be adopted on every occasion. That is not to say that the tribunal is to consider the assertions made by the claimant uncritically, or to disregard any implausible aspects of the claimant's case, taken at its highest. Save, *possibly*, to highlight any factual basis for asserted implausibility (which is not synonymous with the mere running of an alternative case), one would not expect evidence to be called by a respondent in relation to the existence, or otherwise, of a prima facie case (see, for example, paragraph 36 of *Hendricks*; and paragraphs 23 and 35 of *Aziz*).

17. Despite differing with HHJ Auerbach about the appropriateness of hearing evidence when considering strike out, Ellenbogen J accepted the distinction between a preliminary issue and strike out when dealing with time points. When considering strike out in a case where it is asserted that there is conduct extending over a period, some authorities refer to a test of whether there is a *prima facie* case that there was conduct extending over a period. I agree with HHJ Auerbach that this is an example of the application of the strike out test set by Rule 37 **ET Rules 2013** (now rule 38 **ET Rules 2024**) of whether the complaint has no reasonable prospect of success. There is no other basis in the rules to dismiss a complaint which is said to be part of conduct extending over a period on the basis a *prima facie* case has not been made out.

Background to the appeal

18. The claimant was employed by the respondent as a senior document examiner. She is disabled, having multiple sclerosis and blepharospasm, a visual impairment. The claimant began a period of sickness absence in August 2018 from which she has not returned.

19. The respondent has a group income protection policy with UNUM which formed the background to her complaints.

20. On 4 September 2021, the claimant submitted a claim form bringing complaints of disability discrimination (direct and victimisation) and a complaint seeking "other payments". On 10 May 2022, the claimant submitted a second claim making complaints of disability discrimination (direct, indirect, discrimination because of something arising in consequence of disability), victimisation and for holiday pay for the 2021 holiday pay year.

21. A Preliminary Hearing for Case Management was held before Employment Judge Barker on 5 December 2022. Employment Judge Barker directed that the two claims would be heard together and set out a detailed list of issues.

22. Employment Judge Barker also directed that a Preliminary Hearing be held:

> 5. The matter is listed for a **one day open preliminary hearing** on 3 March 2023 **to determine the matters set down in the Notice of Hearing** relating to that hearing. This **includes** whether **some or all of the claimant's claims are out of time**, **or** whether she has **any reasonable prospect of success at a final hearing of establishing that the claims are brought in time**. This **may involve consideration** of **whether the claimant has prospects of establishing that there has been discriminatory conduct extending over a period**, **or** the Tribunal **granting a just and equitable extension of time** to allow some or all of the claims to be brought late. [emphasis added]

23. There are a number of points that arise from this direction:

23.1. the direction was for either consideration of time as a preliminary issue or strike out

23.2. the consideration of conduct extending over a period was of whether there was a [reasonable] prospect of establishing conduct extending over a period; i.e. strike out

23.3. the same also appears to have been the case for consideration of whether it is just and equitable to apply a longer time limit than three months (plus any extension for ACAS early conciliation) - i.e. whether there were reasonable prospects of establishing that it is just and equitable to apply a longer time limit

23.4. consideration of strike out was limited to the time point

24. Provision was made for the claimant to submit a witness statement but not for any witness evidence from the respondent.

25. The purpose of the hearing was recorded differently in the Notice of Hearing:

> 4. At the hearing, **an Employment Judge will decide if any complaint presented outside the time limits** in sections 123(1)(a) & (b) of the Equality Act 2010 and **if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it**? **Further or alternatively**, **because of those time limits (<u>and not for any other reason</u>), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues** including: **whether there was "conduct extending over a period"; whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought**; when the treatment complained about occurred. [emphasis added]

26. There are a number of points that arise:

26.1. time might be considered as a preliminary issue "further or alternatively" strike out

26.2. strike out was limited to time "and not for any other reason"

26.3. it appears that the possibility of conduct extending over a period and extending the time limit on just and equitable grounds could be considered as a component of the preliminary issue and/or strike out

26.4. the notice of hearing added the possibility of making a deposit order

27. These differences in the issues described in the case management order and the Notice of Hearing were not addressed before or at the Preliminary Hearing.

28. There are significant challenges in considering whether there is conduct extending over a period as a preliminary issue. Generally, where the conduct is disputed it will be necessary to determine whether the conduct occurred. The nature of the conduct and the reason for the conduct is likely to be relevant. This means that there often will be little to be gained from considering whether there is conduct extending over a period as a preliminary issue as opposed to determining all issues at a final hearing.

The hearing in the Employment Tribunal

29. The Preliminary Hearing was held remotely before Employment Judge Wright on 3 March 2023. The claimant was represented by her sister. The Employment Tribunal recorded that:

> 2. **Ms Baria said in her submissions that she had only prepared to deal with the time point, not the strike out**. It was however **clear that the hearing had been listed to consider strike out and in the alternative, a deposit order**. [emphasis added]

30. It appears that the Employment Judge thought that the hearing was listed to include consideration of strike out on the merits of the complaints despite the fact that this had been specifically excluded. The Employment Judge did not say at the start of the hearing whether the time point was to be considered as a preliminary issue, or for the purposes of strike out, or both. Nothing was said about any difference in the structure of the hearing depending on how the time point was to be considered.

31. The Employment Judge only gave a limited self-direction as to the law:

> 4. The time limits are deliberately short in the Employment Tribunal. This is so that claims are presented promptly and are considered whilst matters are still fresh in the parties' minds. If there is, as is currently the case, delay due to an oversubscribed system, the fact a claim has been presented promptly means that evidence can be preserved if the hearing is not going to take place for some time. Personnel move on and can be difficult to trace. Employment Tribunal time limits are not aspirational, they are deadlines. A lack of legal knowledge does not excuse, particularly when a simple internet search will reveal the time limits within approximately three clicks. There are numerous, well-known sources of information, such as Acas, CAB, the GOV.UK website etc.

32. While not subject of a ground of appeal, I do not consider that this is an accurate summary of the broad discretion that an Employment Tribunal has to apply a time limit in excess of three months where it is just and equitable to do so: see **Abertawe Bro Morgannwg University Local Health Board** above. The Employment Judge did not give any self-direction as to the law concerning conduct extending over a period or strike out.

33. The initial judgement dated 3 March 2023 ("the time judgment") stated:

> The claimant's first claim was presented out of time. The Tribunal does not have jurisdiction to consider it and so it is dismissed.

34. The Employment Judge then issued a certificate of correction ("the certificate of correction") providing:

> The claimant's first claim was presented out of time. The Tribunal does not have **jurisdiction to consider it. The second claim is struck out as it has no reasonable prospect of success.** [emphasis added]

35. The Employment Judge considered the complaints one by one. The first complaint of direct discrimination was of a lack of support ("the support allegation"):

> 9. Going then through the allegations one-by-one, the first allegation of direct discrimination was failing to contact the claimant and to offer her support during her sickness absence from August 2018 (2.1.1); the respondent submits that may be a continuing act. Mr Boyd referred to the claimant's own note of a previous absence in 2016 when she stated in writing her Manager was contacting her every two weeks or so**. Looking however at the substance of the allegation, the respondent submitted that it is going to be difficult for the claimant to demonstrate that a failure (if any) was because of the claimant's disability and referred to the 'reason why' the respondent omitted to contact the claimant or to support her**. …
>
> 16. The Tribunal therefore finds that any omission by the respondent crystallised in September 2019. If there was a second failure to act arising out of the same complaint from October 2019 to 2021, this ceased in February 2021. **There is no continuing act, any allegation which pre-dates 26/3/2021 is out of time. It is not just and equitable to extend the time limit as the claimant (later via her sister) proved that she was capable, despite any ill health, to raise matters with the respondent and to the extent that the respondent was able to, it resolved matters, or at least informed the claimant of the difficulties or reasons for any delay**. [emphasis added]

36. The Employment Judge considered the merits of the support allegation. There is no

analysis of why there was "no continuing act" including whether the treatment complained of in the support allegation might form part of conduct extending over a period together with other complaints. There is no explanation of why it would not be just and equitable to apply a longer time limit.

37. The second complaint of direct discrimination was about a failure to apply the UNUM income protection policy ("the UNUM complaint"):

> 17. The second allegation of direct discrimination (2.1.2) is that the respondent failed to apply the Unum policy to the claimant sooner. It should have been applied from about the 10/11/2018 and it was not applied until November 2019, following the recission of the claimant's dismissal.
>
> 18. **That claim is out of time and it is not a continuing act**. The claimant said she was told about a claim for injury to feelings and time limits in 2019. It is also difficult to see how the reason for not applying the Unum policy in 2018 was because of the claimant's disability. **The respondent's non-discriminatory explanation is that due to various acquisitions and changes in personnel, HR staff were not aware that the claimant had the benefit of the Unum policy. The 'reason why' therefore was a lack of knowledge, not less favourable treatment because of the claimant's disability. There is no just and equitable basis for extending the time limit**. [emphasis added]

38. There was no consideration of whether the UNUM complaint might form part of conduct extending over a period together with conduct complained of in other complaints. The Employment Judge considered the merits of the UNUM complaint, possibly on the basis it was a reason not to extend time on just and equitable grounds, although that is not clear from the judgment.

39. The third complaint of direct discrimination was about not increasing the claimant's salary to 100% ("the 100% salary complaint")

> 19. The third allegation of direct discrimination is failing to pay sums equivalent to her full salary from February 2019 (comprising of 50% salary from the Unum policy and 50% salary under contractual sickness pay) (2.1.3). Mr Boyd submitted, this allegation was tied to when cover under the Unum policy was applied to the claimant, so in November 2019. Certainly, any omission took place on the claimant's own case in February 2019. **It is out of time. It is not a continuing act; if anything, it is an act with continuing consequences. It is not because of the claimant's disability. As already found, it is because of the respondent's lack of awareness of the Unum policy and that it applied**

> **to the claimant. For the reasons already provided, it is not just and equitable to extend the time limit.** [emphasis added]

40. The Employment Judge concluded that an ongoing failure to make payment was not a continuing act but a one-off omission with continuing consequences. It is hard to see how this reasoning fits with **Kapur**. The Employment Judge again considered the merits of the 100% salary complaint, possibly on the basis that was a reason not to extend time on just and equitable grounds, but this is not clear from the judgment.

41. The fourth complaint of direct discrimination related to re-engagement on varied terms and conditions ("the re-engagement complaint")

> 20. The fourth allegation of direct discrimination is re-engaging the claimant on varied terms and condition in November 2019 which prevent her from being able to return to work at some point in the future (2.1.4). Whatever this allegation relates to, it clearly is a decision taken, based upon the claimant's own case, in November 2019**. It is out of time and it is not a continuing act. It is not just and equitable to extend the time limit.** [emphasis added]

42. The Employment Judge stated "it is not a continuing act" which demonstrates that the re-engagement complaint was considered in isolation. There is no explanation of why it would not be just and equitable to apply an extended time limit.

43. The fifth complaint of direct discrimination related to re-engagement on terms that did not provide for holiday pay ("the re-engagement holiday pay complaint"):

> 21. The fifth allegation was re-engaging the claimant on varied terms and conditions in November 2019 which did not provide for the payment of holiday pay (2.1.5). **This is a decision taken in November 2019 with continuing consequences. It is out of time. It is not just and equitable to extend the time limit**.

44. There is no explanation of why this was a decision with continuing consequences having regard to **Kapur**. Again there is no explanation of why it would not be just and equitable to apply an extended time limit to the re-engagement holiday pay complaint.

45. The sixth complaint of direct discrimination concerned failure to top up holiday pay ("the holiday pay complaint"):

> 22. The final allegation of direct discrimination was a failure to make regular payments of holiday pay to the claimant alongside sums paid from the Unum policy (2.1.6). It was agreed this was a decision taken in November 2019 when the payments under the Unum policy commenced. **It is out of time. It is a decision taken with continuing consequences. It is not just and equitable to extend the time limit.**

46. There is no explanation of why this was a decision with continuing consequences having regard to **Kapur** or of why it would not be just and equitable to apply an extended time limit to the holiday pay complaint.

47. The Employment Tribunal then considered a complaint of discrimination because of something arising in consequence of disability ("the section 15 complaint")

> 23. The allegation in respect of s.15 EQA discrimination arising from disability, the **unfavourable treatment was alleged to be failure to apply the Unum policy to the claimant's absence which began in August 2018 and instead subjected her to a capability procedure which resulted in her dismissal** (3.1.1.). The date for this was agreed to be 11/10/2019 when the claimant was dismissed. **This claim is out of time. It is not just and equitable to extend the time limit.**

48. There is no consideration of whether the section 15 complaint might form part of conduct extending over a period together with other complaints or why it was not just and equitable to apply a longer time limit.

49. The Employment Tribunal next considered a complaint of indirect discrimination ("the indirect discrimination complaint"):

> 24. Under indirect discrimination, the PCP is alleged to be a practice of not informing or training employees, including those in management, about the availability and operation of the Unum policy (4.1.1). This PCP was also relied upon for the indirect discrimination claim (5.2.1). This crystalised in November 2019 when the respondent applied the policy to the claimant. **This is out of time and it is not just and equitable to extend the time limit.**

50. There was no consideration of whether the indirect discrimination complaint might form part of conduct extending over a period or explanation why it was not just and equitable to apply a longer time limit.

51. The Employment Tribunal considered a complaint of victimisation concerning the terms of a proposed settlement agreement ("the victimisation complaint")

> 33. It was clear from the correspondence that the respondent was prepared to compromise and wished to reach a settlement without the need for these Tribunal proceedings. The respondent did not concede every point the claimant had taken. The fact that the respondent did not agree to every amendment the claimant proposed was detrimental to the claimant. There was however nothing unreasonable about this and it was not because the claimant had done a protected act. If that were the case, the Tribunal finds that the respondent would not have made a settlement offer once it became aware of the claimant's protected act on 1/7/2021 (page 238) and would have withdrawn completely from the proceedings once the Acas certificate was issued, rather than continuing to negotiate with the claimant. **The respondent's refusal to make the amendments the claimant had proposed was due to the respondent wishing to protect its legal position. It was not because the claimant had done a protected act.**

52. The Employment Tribunal only considered the merits of the victimisation complaint although that was not an issue referred to in the case management order or Notice of Hearing.

53. The Employment Tribunal made a generalised comment on extension of time on just and equitable grounds:

> 34. The general observation is repeated that the claimant said that in 2019 she knew of the time limits. She was also a member of a Trade Union and had sought advice from it. Other than ill health (the claimant was not incapacitated), which did not prevent the claimant from engaging with the respondent from 22/4/2021, **there was no cogent reason advanced as to why the Tribunal should exercise its discretion and extend the time limit.** There was no material change in the claimant's circumstances before and after the 22/4/2021. **The claimant's sister was under a misapprehension that any time limit started to run from the 6/5/2021, that was incorrect and even if it were correct, the claim was still presented out of time.**

54. The Employment Tribunal appears to have considered that there must be a cogent reason to apply an extended time limit. There is no such requirement as is made clear by decisions such as **Abertawe Bro Morgannwg University Local Health Board**.

55. The Employment Tribunal finally considered complaints about holiday under the **Working Time Regulations 1998** ("the working time complaint") and for unauthorised deduction from wages ("the wages complaint"):

> 35. The list of issues refers (at 8.1) to holiday pay due under the Working Time Regulations 1998. This claim however is not particularised and refers to holiday which had accrued but had not been taken when the claimant's employment terminated. The claimant's employment had not terminated when this claim was presented (the dismissal on 11/10/2019 was rescinded). **There therefore cannot be such a claim before the Tribunal.**
>
> 36. The final claim listed on the list of issues is for unauthorised deductions. The allegation is set as: 'Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?' It is not clear what this claim refers to. In the claim form, the claimant stated that she had a grievance meeting on 13/7/2021 and although the respondent did not uphold all her grievances, it agreed to pay the money she should have received under the Unum policy and she was paid £13,104.94 gross on 31/8/2021. **The is no sum claimed in respect of unauthorised deductions in the claimant's schedule of loss. Furthermore, there is no entitlement to a payment in lieu of holiday pay whilst the claimant remains in the respondent's employ.**

56. The only consideration was of the merits of the working time and wages complaints, which were not issues fixed for consideration at the Preliminary Hearing.

The appeals

57. The claimant appealed against the time judgment and the certificate of correction. Limited grounds of appeal were permitted to proceed. I have concluded that the key challenge is ground 6:

> **Failing to ensure the parties were on an equal footing** and **conducting the proceedings in such a way as to deprive the claimant of a fair hearing**, and by not allowing her representative to re-examine.

58. The supporting text included the following:

> **The claimant is a litigant in person represented by her sister Ms Baria, lay representative.** This was their first experience of a preliminary hearing at an employment tribunal. The respondent was represented by counsel.
>
> The hearing was listed for 1 day. Other than asking respondent's counsel his time estimate for cross examination (30 minutes) **the Judge gave no introduction as to how the hearing was to be structured** or that she was working to a strict timetable to be finished by 12.30 to adjourn and give her judgment after lunch.
>
> **There was confusion on the claimant's part in not knowing which issues were being discussed, when they finished and the next started. There was no direction or input from the judge.** [emphasis added]

59. This overarching ground of appeal is made out. It is clear from the Employment Judge's notes of the hearing that the Employment Judge did not clarify at the outset whether she was going to consider the time point as a matter of substance or strike out or, possibly both. This was important as significantly different tests apply. If the time point was to be considered in substance or alternatively for strike out at the same time, there had to be some explanation of how that would be managed. It was unclear whether findings of fact were to be made. The Employment Judge did not explain that she was considering the underlying merits of the complaints for possible strike out despite the fact that the strike out issue identified in the case management order and notice of hearing was limited to the time point. Mr Boyd suggests that he mentioned the merits of the complaints on the basis that this could be relevant to the question of whether an extended time limit should be applied on just and equitable grounds. If that was the manner in which the merits of the complaints were thought to be relevant, the Employment Judge should have explained that was the case. Furthermore it is clear that the merits were taken into account more generally. The victimisation, working time and wages complaints were all struck out solely on the merits although this was not something that the Preliminary Hearing had been fixed to consider.

60. Mr Boyd contends that there was no unfairness because of the weakness of the claimant's complaints. While I accept that there may be significant challenges in advancing some or all of the complaints I do not accept that means that there was no unfairness. The claimant and her sister were entitled to have advance notice that the merits of their complaints would be considered.

61. I have concluded that the appeals against the time judgment and the certificate of correction must succeed because there was substantive unfairness in the manner in which the hearing was conducted that requires that the decisions be set aside. The matter must be remitted for consideration by a different Employment Tribunal. The respondent should consider with

care what, if any, application for strike out or deposit it seeks to advance, particularly whether there is likely to be any saving in expense by holding a Preliminary Hearing. The claimant would be well advised to seek some advice about the merits of her complaints.

62. As a result of my overall decision I shall deal only briefly with the other grounds that HHJ Auerbach permitted to proceed.

63. HHJ Auerbach permitted ground 2 to proceed that asserted the Employment Judge erred in law when considering whether it was just and equitable to apply a longer time limit to the 100% salary complaint and the holiday pay complaint by failing to carry out a balancing exercise of the relative prejudice to each party. I consider the ground is made out. If, as appears to be the case, the time point was determined as a preliminary issue, the Employment Judge failed to make the necessary underlying findings of fact and did not conduct the necessary balancing exercise required by authorities such as **Abertawe Bro Morgannwg University Local Health Board**.

64. HHJ Auerbach also permitted ground 4 to proceed that asserted the Employment Judge failed to explain in relation to the 100% salary complaint and the holiday pay complaint why the alleged failures by the respondent did not amount to conduct extending over a period. I consider that this ground is established. The Employment Judge considered whether the individual complaints constituted conduct extending over a period. The Employment Judge did not consider **Kapur**. The Employment Judge also did not consider whether the complaints might form conduct extending over a period together with other complaints.

65. HHJ Auerbach allowed ground 5 to proceed that challenged the strike out of the victimisation complaint because the respondent was protecting its legal position. I consider the fundamental point is that strike out on the merits was not a matter that was before the Employment Tribunal.

66. HHJ Auerbach allowed ground 3 of the appeal against the certificate of correction to

proceed which challenged the strike out of the working time and wages complaints. Again I consider the fundamental point is that strike out on the merits was not a matter that was before the Employment Tribunal.