

Neutral Citation Number: [2025] EAT 133

Case No: EA-2023-001277-BA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 17 September 2025

**Before :**

**HIS HONOUR JUDGE AUERBACH**

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**Between :**

**MR N AHMED**

**Appellant**

**- and -**

**CAPITAL ARCHES GROUP LIMITED**

**Respondent**

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The **Appellant** appeared in person  
**Daisy van den Berg** (instructed by Ashfords LLP) for the **Respondent**

Hearing date: 2 September 2025

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**JUDGMENT**

## **SUMMARY**

### **RELIGION OR BELIEF AND RACE DISCRIMINATION**

#### **Extension of Time**

The claimant presented his claim form to the employment tribunal in October 2022. At a substantive hearing to determine time points the employment tribunal identified that the live complaints of religion or belief or race discrimination (subject to the time points) related to alleged conduct in a period ending in October 2018, at which point time began to run. It did not err in so doing. **Parr v MSR Partners LLP** [2022] ICR 672; [2022] EWCA Civ 24 applied; **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] ICR 1231; [2025] EWCA Civ 185 considered.

It was not unfair to the claimant that his line manager did not appear as a witness at the hearing. The respondent did not rely upon her as a witness and did not rely upon a witness statement of hers that had been tabled by it prior to an earlier hearing. Nor did the tribunal rely upon that statement.

**HIS HONOUR JUDGE AUERBACH:**

**Introduction and background**

1. The claimant in the employment tribunal appeals from the decision of Employment Judge Klimov at a public preliminary hearing held at London Central on 15 September 2023. The tribunal decided in its judgment that all of the claimant’s complaints “were presented out of time, and it is not just and equitable to extend time”. It therefore dismissed the whole of the claim for want of jurisdiction. The final hearing that had been listed to take place in February 2024 was vacated. Written reasons were sent to the parties on 2 October 2023.

2. At the appeal hearing before me the claimant appeared in person. The respondent was represented by Ms van den Berg of counsel. I had before me skeleton arguments from both parties, including a reply skeleton argument from the claimant. I had core and supplementary bundles prepared by the respondent and a supplementary bundle and other materials tabled by the claimant. There was an authorities bundle prepared by the respondent and the claimant was also provided with one further authority to which Ms van den Berg referred. There had been an application by the claimant in the run-up to the hearing relating to bundles, but I indicated at the start that both parties were at liberty to refer me to any of the materials that had been tabled on either side; and both were content with that approach. I heard full oral submissions and argument on both sides.

3. The background, so far as relevant to what I have to decide, is as follows.

4. The claimant began working at a McDonald’s restaurant in London on 18 May 2018. He was initially employed by McDonald’s Restaurants Limited but his employment transferred to the respondent on or around 1 October 2018.

5. The claimant presented a claim form on 27 October 2022. At that time he was still in the respondent’s employment, although he had been off long-term sick since around June 2021. He ticked the boxes to indicate that he was pursuing complaints of age, race, disability and religion or

belief discrimination. The narrative account in box 8.2 included the following:

**“When I started my job, a group of Bengali Muslim employees started discrimination on basis of my race and religion when I did not share their religious activities during Ramzan in July 2018. The situation got worse when I complained their alleged behaviour to the business manager Ms Celine Lyan who instead of giving me relief increased pressure on me, put me on work that involved heavy manual tasks. I submitted my medical certificates to my manager that I am unable to cope up with some aspects of my job. However, she failed to relieve me. As a result, the stress built up more heavily due the perceived work problems in combination with prior psychological vulnerability due to my immigrant status which I have discussed with her several times before. Working 40 hours a week in night shift continuously for the whole winter season further resulted in the deterioration of my physical health as well which reduced my working hours as per my GP advice. However, the nature of my duty was not changed as result I started shoulder pain that ended up with my present disability in May 2020 since then I never go back to my work and on continuous sick leave.”**

6. In box 15 the claimant wrote:

**“I have repeatedly informed and provided update about my deteriorating health condition to business manager Ms Celine Lyan and shift managers Mr Mark, Mr Aizaz Ahmed, Ms Cristina, Ms Ramona, Mr Lucas, Mr Karol which was causing me immense pain in carrying out the tasks that were given to me but nothing was done to rectify the situation.”**

7. The claim form named both the respondent and McDonald’s Restaurants Limited, but it appears that the respondent did not initially get notice of the claim. Following an initial case-management hearing and receipt of the notice of claim it entered a response. This set out its case that the claimant had been moved from the kitchen to the dining area because he was not productive in the kitchen. He initially worked night shifts but was later moved to day shifts when he requested this on health grounds, although, on the respondent’s case, he was not specific about these. The respondent’s case was that he had raised some unhappiness about colleagues, but not allegations of racial or religious harassment. It was denied that his line manager, Celine Lyan, had responded to any complaints by giving him heavy manual tasks or otherwise treating him adversely. The change in work assignment was not related to any such complaints. The allegations of racial/religious harassment by colleagues were denied. All of the complaints were said to be out of time. The respondent complained of a lack of any particulars of disability discrimination or age discrimination.

8. There was a further case-management hearing before EJ Hodgson on 6 April 2023. The complaint of age discrimination was dismissed upon withdrawal. The judge considered that the other complaints lacked particulars or were unclear. It also appeared to the judge that all of the complaints

may be out of time. He directed that the claimant must make any application to amend, setting out properly particularised complaints, by 19 May 2023. There would be a further preliminary hearing (PH) to consider any such application, and, at the tribunal's discretion, whether any of the complaints had no reasonable prospects of success, and/or whether there was no reasonable prospect of time for bringing any complaint being extended. He gave directions for preparations for that further PH.

9. On 19 May 2023 the claimant made an application to amend. He began by indicating that he wished to add complaints of constructive dismissal and for non-payment of statutory sick pay, annual leave and furlough pay. There followed a series of number paragraphs beginning as follows:

**“1. I was employed as a crew member by the respondent on 18-05-2018 and my work role involved preparing food stuff in kitchen. I was appointed in kitchen initially and my working hours classed me a night worker in term of Working Time Regulation 1998, incorporated into my employee contract by default. Under the contractual terms and conditions, it was a duty of employer to arrange medical assessment before assigning me (10pm to 6am) night duty which the defendant failed to perform.**

**2. The facts of the case are same as enunciated in letter dated 23-02-23 para 5 where I explained that how due to my lack of belief in Islamic traditions during Ramzan 2018, I was made subject to bunter by Mr Aizaz Ahmed (shift manager) and Alla Din during the early course of my employment in June 2018.**

**3. In July 2018, when I complained orally to Miss Celine the business manager of the unwanted behaviour of the Mr Aizaz Ahmed and Alla Din, and thereafter in several meeting held in office, she made substantial change in my duty condition and appointed me as cleaner in lobby in October 2018, quite in contrary to my job description as crew member. In this way she segregated me from the rest of staff and put me in detrimental position as, working alone in lobby, I was unable to learn anything related to my job descriptions as crew member. This change in the nature of my duty, i.e., from crew member to cleaner, constituted a breach of my employee contract. However, when I tried to raise my concerns against this change, by putting questions such as why only I was chosen to perform cleaner's duty as there are other crew members who are less educated and younger than I, I was handed over P45 form on 02-10-2018. This was the time when Capital Arches Group had already taken hold of the restaurant. (See page 1 p60).”**

10. The succeeding paragraphs contended that there had been a constructive dismissal by way of a substantial change in working conditions in connection with a TUPE transfer. They developed the proposed money claims. They then gave an account of the claimant having been diagnosed with anxiety and depression in January 2019, and being advised to request a move to day shifts; and of his developing a problem of shoulder pain leading to his being off work from June 2021, and having shoulder surgery in April 2023. He complained that the respondent was in breach of its duties to provide him with a safe work place and to provide him with financial support as an injured person.

11. On 15 June 2023 the claimant tabled a statement. It gave his account of events on 18 May 2018, and specifically of his alleged treatment by Alla Din and Aizaz Ahmed. He referred to having complained of “this unwanted behaviour” to Ms Lyan. He then gave an account of a further conversation, soon after, with Mr Ahmed. He then gave an account of being informed by Ms Lyan in September 2018 that a cleaner had resigned unexpectedly, and being assigned their role, initially temporarily, but then, despite his protest, permanently from October 2018.

12. That statement went on to give an account of events during the course of 2019, 2020 and through to the claimant going off long-term sick in June 2021, including in relation to further incidents of being given onerous or inappropriate tasks by colleagues, on his case at Ms Lyan’s direction, and of other communications with Ms Lyan, in view, on his account, of his health problems worsening.

13. The respondent tabled a statement of 19 June 2023 from Ms Lyan. She referred to the claimant being “moved from the kitchen to the dining area” of the restaurant, probably one or two months after the start of his employment. She wrote that all Crew Members needed to work on different stations, and they got moved around quite frequently. The claimant was moved because he could not keep up with duties in the kitchen. She regarded the move as not a demotion or a punishment, but supportive.

14. There was then an open PH before EJ Snelson on 22 June 2023. He granted the claimant’s application to amend, but only in respect of the complaints of direct discrimination because of religion or belief and/or race, and in so far as, if any such complaint succeeded, the claimant was seeking compensation for personal injury. The judge directed a further open PH to take place on 15 September 2023 to determine whether the complaints of direct discrimination were out of time. His directions included that no later than 25 August 2023 “the parties shall exchange witness statements in the names of all witnesses (including the Claimant)” to be called at the PH.

15. In his commentary EJ Snelson observed that his ruling on the amendment application meant that the “harassment or direct discrimination claims rest on the matters pleaded in the claim form as

clarified in the Claimant’s letter of 19 May, numbered paragraphs 1 – 3.” The claimant’s document of 15 June added some further information “but I stressed that I was not permitting the 15 June document to be used as a vehicle through which to add claims in respect of post-2018 matters.”

16. EJ Snelson also identified that the position going forward was that there was no other complaint before the tribunal, and, in particular, no complaint of disability discrimination of any form. He went on to explain why he had decided to list a further PH to determine the time issue definitively as a substantive issue (rather than for consideration of a strike-out); and he observed that “the point of jurisdiction is not complicated by any argument about ‘conduct extending over a period’ (see the Equality Act 2010 s123(3)), given the scope of the amendment permitted.”

17. EJ Snelson also made deposit orders in respect of the live complaints on the basis that they “all rest on acts or events which occurred during 2018”, and on the basis of his assessment of the prospects of the tribunal concluding that it would be just and equitable to extend time.

18. Prior to the PH on 15 September 2023 the respondent did not table any further witness statement. The claimant tabled a further witness statement dated 8 September 2023. Both parties tabled bundles for that hearing. The claimant, who was a litigant in person throughout, appeared at that hearing in person. The respondent was represented by counsel.

### **The Tribunal’s Decision**

19. In his written reasons EJ Klimov summarised the background emerging from EJ Snelson’s decisions, noting the references in the main record to paragraphs 1 – 3 of the 19 May letter and to the matter not being complicated by any argument about conduct extending over a period, and to the observation, in the deposit-order reasons, that all of the complaints rested on acts or events which occurred in 2018, so that the tribunal would only have jurisdiction if it was just and equitable to extend time. EJ Klimov stated that he did not place any weight on EJ Snelson’s assessment, when making the deposit orders, of the prospects of success. He noted that the claimant had presented a

witness statement, gave sworn evidence and was cross-examined. The respondent had submitted a bundle. The claimant had submitted an additional bundle, described by EJ Klimov as largely containing his medical records.

20. EJ Klimov began his account of the facts as follows.

**“8. The claimant has been employed by the respondent as a Crew Member since 18 May 2018. From mid-2019 he had been signed off as unfit to work periodically, predominately due to his shoulder problem. Since July 2021, he has been off work continuously due to his shoulder condition.**

**9. The claimant presented his claim on 27 October 2022, having gone through the Acas early conciliation procedure between 21 October 2022 and 24 October 2022. Accordingly, all complaints about something that happened before 22 July 2022 prima facie are out of time.**

**10. Following EJ Snelson’s ruling, the remaining complaints in the claim are of direct race discrimination and of religion or belief direct discrimination (s. 13 EqA) and harassment related to race and religion or belief (s.26 EqA).**

**11. The remaining complaints are about the events in July – October 2018, when in July 2018 the claimant claims his work colleagues had made various unwanted comments about the claimant not sharing their Muslim practices during Ramadan. He complained about that to his manager. In response, the claimant claims, she put him on cleaning duties in October 2018. There is no extant complaint before the Tribunal in relation to anything after October 2018.”**

21. The judge went on to make further findings about the claimant’s periods of sickness absence, including on account of his shoulder condition, which was continuing, and for which he had undergone surgery and was expected to have further surgery; and about his other activities, including having been on a law degree course from 2019 to 2023. The judge directed himself as to the law, including as to the guidance in the authorities concerning just and equitable extension of time in respect of a discrimination complaint. That self-direction is not criticised by this appeal, as such.

22. The judge began his analysis and conclusions by observing at [22] that the claim was presented “almost four years after the expire of the primary limitation period” which was “a very long delay”. He went on to consider the claimant’s explanations for the delay, all of which he considered to be unconvincing and not credible, for reasons that he set out in some detail. He then continued:

**“41. Turning to the issue of prejudice, I find that if I were to allow the claim to proceed, this would be seriously prejudicial to the respondent. The events in question are more than five years old. Memories fade. The bulk of the claimant’s allegations are about verbal conversations in July 2018 between him and his former colleagues, who the respondent says are no longer employed by it, and some had left some years ago. To defend the claim the respondent would have to trace those former employees and persuade them to come and give**

evidence for the respondent. Without their evidence it would be very difficult, if not impossible, for the respondent to answer those allegations.”

23. The judge recognised that if he refused to extend time the claimant’s entire claim would stand dismissed; but this could not “by itself” be a valid reason to grant an extension. He then concluded:

“43. Considering my findings and conclusions on the length of the delay, the reasons for the delay advanced by the claimant, and the prejudice to the respondent, and looking at all other circumstances of this case, I have no hesitation in concluding that it will not be just and equitable to extend time.”

### The Appeal

24. The claimant is a litigant in person in the EAT. His original grounds of appeal were lengthy and discursive. They were considered by a judge on paper not to be arguable. However, at a rule 3(10) hearing HHJ Shanks permitted three focussed grounds of challenge (only) to proceed to this full hearing. He identified these, and why he considered them arguable, in the following passage:

“2. Mr Ahmed explained that his case was that following the incident concerning Ramadan and his co-workers in July 2018, he complained to his manager Ms Lyan and she responded not by helping him but (i) by disclosing the fact of his complaint to the co-workers and (ii) by segregating him and making him work nights in the lobby area which involved heavy manual tasks for which he was not provided with training or equipment and which led ultimately to his frozen shoulder. He also told me that in spite of his on-going complaints about this and the effect it was having on his health he was kept in that position for the next three years until he went off sick in July 2021.

3. I think it is arguable that a case along these lines was to be found in the ET1 as supplemented by the letter of 19/5/23 and that it was therefore arguable that the race/religious discrimination claim involved a course of conduct which lasted until July 2021. If that was right it would feed into the judge’s assessment of (a) the length of delay and (b) the prejudice to McDonalds if the case was allowed to proceed. On (a), it is right to observe that EJ Snelson says in the deposit order reasons (which were quoted by EJ Klimov at para 4 of the judgment) that the complaints rest on acts and events which occurred in 2018 (and by implication exclusively in 2018) but it may be arguable that EJ Klimov ought not to have considered himself bound by this and ought to have considered whether there was a course of conduct lasting to July 2021. On (b), it may have been significant that if the case was understood in this way the really important witness for McDonalds would be Ms Lyan who had in fact provided a witness statement for the PH on 15/9/23 (at p55 in the rule 3(10) bundle) and who would have been able to speak to what had happened over the whole period to July 2021.

4. The notice of appeal also raises a complaint about the fairness of the hearing because Ms Lyan was not made available for cross-examination. It is not clear to me why that was or what impact it may have had on anything EJ Klimov had to decide but, given the obvious disadvantage Mr Ahmed was under, it may warrant some consideration by the EAT. I doubt Mr Ahmed can give much information on the point but, if he wants to he will have to make an affidavit about what happened.

5. For those reasons I consider that the appeal should proceed to FH in relation to (a) the correct date when time began to run for the purposes of section 123 EqA, (b) the assessment of prejudice to the respondents and (c) the fair trial point (which are effectively the first, second and fourth grounds identified in Mr Ahmed’s grounds of appeal document dated 24/10/23).”

25. As mentioned in those reasons, HHJ Shanks directed that if the claimant wished to give evidence about what had happened in relation to Ms Lyan's evidence and the fact that she was not available for cross-examination at the PH before EJ Klimov, he could do so. If so, the respondent could table an affidavit in response. He directed that, if there was a dispute about what had happened, the parties could apply for directions seeking further information from EJ Klimov.

26. The claimant did table an affidavit, of 22 August 2024. I will return to the contents.

### **Discussion and Conclusions**

27. It is important to note at the outset the limits of this appeal. First, this is not an appeal against the decision(s) of EJ Snelson, but only against the decision of EJ Klimov. Secondly, and importantly, the only live grounds of appeal before me are the three grounds (a), (b) and (c) that were permitted to proceed by HHJ Shanks, raising, respectively, the correct date when time began to run, the assessment of prejudice to the respondent, and the fair trial point.

28. In his skeleton arguments, affidavit and oral submissions the claimant sought at points to raise a number of other matters, for example in relation to disability discrimination, aspects of his amendment application that were refused by EJ Snelson, and EJ Klimov's assessment of his explanation in evidence about why he did not present his claim form sooner. These matters are not within scope of the appeal before me. The claimant also submitted at points that there was clear and indisputable evidence that he was, and is, a disabled person (by reference to his shoulder injury) and, at one point, that as a disabled person the usual rules on limitation did not apply to his complaints. But that is, with respect, not correct. I do appreciate that, as the claimant explained, he has undergone major surgery, and continues to suffer pain and distress because of his physical condition. But that does not assist his case in relation to this appeal.

29. I will now consider each of the grounds of appeal in turn.

*Ground (a)*

30. Section 123 **Equality Act 2010** concerns time limits. Section 123(3)(a) provides:

“For the purposes of this section—

**(a) conduct extending over a period is to be treated as done at the end of the period;”**

31. As I have set out, at [11] of his reasons EJ Klimov identified the live complaints, following EJ Snelson’s ruling, as being “about the events in July – October 2018”, ending with the claimant being put on cleaning duties in October 2018. He observed that there was no extant complaint before the tribunal in relation to anything occurring after October 2018.

32. I note that, as to the alleged harassing remarks by the claimant’s two colleagues, the claim form put this as having happened in July 2018, the 19 May 2023 application to amend said June 2018 and the statement of 15 June 2013 said that this happened in May 2018. However, I do not think anything turns on this. What was consistent was that the claimant’s case was that he had subsequently raised these allegations with Ms Lyan, she had not responded supportively, but had told others about his complaint, and she had responded by moving him on to different duties, thereby also “segregating” him from his colleagues in the kitchen. He said that this had happened in October 2018.

33. As I have noted, when considering whether or not to grant a just and equitable extension, EJ Klimov therefore treated time as running from when, on the claimant’s case, that decision was taken and implemented, being October 2018. That is clearly why the judge reckoned the delay in presenting the complaint to be almost four years following the expiry of the primary limitation period.

34. HHJ Shanks was persuaded that it was arguable that EJ Klimov should have treated the live complaints as being of conduct extending over a period up until July 2021, when the claimant went off long term sick, so that, if so, pursuant to section 123(3), time to complain to the tribunal would only start to run in July 2021. If so found, a just and equitable extension would still be required, but the period of delay, and the length of extension required, would be appreciably shorter.

35. It might, potentially, be claimed that EJ Klimov had erred in either of two ways in taking October 2018, rather than July 2021, as his starting point. The first way would be if Ms Lyan's decision, in October 2018, to change the claimant's duties, should *itself* be characterised as conduct extending over a period for as long as it continued to have an *effect* on the claimant. The second way would be if EJ Klimov should have concluded that the live complaints that he was considering included complaints about *further conduct* occurring between October 2018 and July 2021. I am not sure that the first potential way of putting the challenge was what HHJ Shanks considered arguable and permitted to proceed under ground (a). To my reading it was the second way of putting the challenge that he considered arguable and permitted to proceed. But, for good order, and as both were addressed in argument, I will consider both.

36. I consider first, the contention that HHJ Klimov should have considered the alleged conduct in October 2018 as itself amounting to conduct extending over a period. The correct legal approach to such issues has been considered in several authorities over the years, notably in **Barclays Bank v Kapur** [1991] 2 AC 355 (HL) and **Sougrin v Haringey Health Authority** [1992] ICR 650 (CA). These establish that there is a distinction between conduct extending over a period, and a one-off act which is *not* such conduct, *even though*, after it has occurred, it has continuing *consequences*.

37. More recently, these, and other, authorities were reviewed by the Court of Appeal in **Parr v MSR Partners LLP** [2022] ICR 672; [2022] EWCA Civ 24. In that case the claimant was demoted from the status of equity partner in the respondent firm to that of ordinary partner. Bean LJ (Lewis and Elisabeth Laing LJJ concurring) held that there was no logical reason to treat a demotion differently from a dismissal. Both were correctly analysed as one-off acts with continuing consequences, and as not being conduct extending over a period. Bean LJ noted at [43] that the authorities drew a distinction between a case in which an employer applies an ongoing *policy* which inevitably means that an individual is barred from valuable benefits – which would be a continuing act of discrimination – and one which involves the exercise of a discretion in the particular case.

38. The present claimant noted in oral argument that the respondent contended that the change in duties did not amount to a demotion. So, he reasoned, if it was not a demotion, it was not a one-off act. But, I observe, the basis of the claimant's case was that there was an enforced change in his duties, which he claimed was in breach of contract, but in any event in practice a demotion and a detrimental change in his working conditions in a variety of ways. The respondent disputed that the change was detrimental. If that was right, then his complaint about it could not have succeeded.

39. I agree with Ms van den Berg that on the claimant's case this was a one-off act analogous to the decision not to promote in Sougrin. In terms of the distinction explored in Parr, it was never a part of the claimant's case that Ms Lyan was following an underlying general policy or practice of the respondent about the duties that were to be allocated to different employees by reference to race or religion, as opposed to Ms Lyan having taken a specific decision in his case. That decision was correctly viewed in law as being, for the purposes of the claimant's claim, a discrete decision or act with continuing consequences. So this first way of putting the challenge does not succeed.

40. I turn to the second line of argument, which is the one which I apprehend that HHJ Shanks had, or had mainly, in mind, being that the live discrimination complaint of religion or belief or race discrimination embraced further alleged conduct during the period up to July 2021. The claimant cited a number of authorities, starting with Hendricks v Metropolitan Police Commissioner [2003] ICR 530; [2022] EWCA Civ 1686, which explore the extent to which ostensibly discrete incidents strung out over a period of time may, yet, be viewed, for the purposes of section 123(3) as together amounting to conduct extending over a period. However, it is unnecessary to consider these in any detail, as the error here is said to have been the failure the tribunal to have considered this question *at all*. Whether it did so err depends on whether it was wrong to identify the live complaints as being limited to the conduct ending with the decision to reassign the claimant's duties in October 2018.

41. In his reasons HHJ Shanks referred to the claimant having told him that "in spite of his

ongoing complaints” he was kept in the new position for the next three years. HHJ Shanks considered it arguable that a case along these lines was to be found in the claim form as supplemented by the letter of 19 May 2023; and that, while EJ Snelson said in the deposit reasons that the live complaints rested “on acts and events which occurred in 2018” it “may be arguable” that EJ Klimov ought not to have considered himself bound by this.

42. My conclusions on this way of putting the challenge are as follows.

43. First, I consider that, on a correct reading, EJ Snelson had determined that the only complaints that he was permitting to proceed (subject to the time points relating to them) were the complaints of religion or belief or race direct discrimination or harassment, relating to the alleged conduct of the claimant’s two colleagues, and the conduct of Ms Lyan by way of her decision to change the claimant’s duties, which occurred in the period up to, and ending in, October 2018.

44. It is true that paragraph (1) of EJ Snelson’s order does not there specify that the complaints of religion or belief or race discrimination which EJ Snelson permitted to proceed were those referred to in paragraphs 1 – 3 of the claimant’s letter of 19 May, but this was made expressly and unambiguously clear by the commentary accompanying the order. Paragraph 3 expressly referred to the claims as clarified in those three paragraphs. It went further and said – expressly – that the judge was not permitting the 15 June document to be used as a vehicle to add fresh claims “in respect of post-2018 matters.” Paragraph 4 then referred to the harassment or direct discrimination claims “dating from 2018 clarified in the letter of 19 May, numbered paras 1 – 3 and none other.”

45. Had EJ Snelson’s commentary in the reasons for his deposit order not accurately described what he had decided in the substantive decision, then the substantive decision would arguably have prevailed. But what he had decided was the scope of the claims he was permitting to proceed was clear from the substantive decision itself. His further remarks in the reasons for the deposit order, that all of the complaints that were not live “rest on acts or events which occurred in 2018” accurately

reflected the substantive decision.

46. This was a determination by EJ Snelson as to which complaints or proposed complaints he was allowing to go forward. Had the claimant considered that EJ Snelson had erred in refusing permission to amend his claim more widely, or indeed had effectively wrongly struck out an already live part of his claim, the proper course would have been to appeal EJ Snelson's decision.

47. It follows that I conclude that EJ Klimov correctly identified the complaints that were live before him and in relation to which it fell to him to determine the time point.

48. In oral argument Ms van den Berg indicated that, if, perhaps, it could have been said that it should have been apparent to EJ Klimov that EJ Snelson had got the analysis of the scope of the religion or belief or race complaints which were already live when the matter came before him, horribly wrong, there might have been scope to say that EJ Klimov could or should have rectified that. However, she submitted, EJ Snelson's analysis had in fact been right.

49. Whether or not, had there been a manifest error of that sort on the part of EJ Snelson, it would have been open to EJ Klimov to treat himself as not bound by EJ Snelson's analysis is not something I have to decide. That is because I agree with Ms van den Berg that EJ Snelson did not so err. That is for the following reasons.

50. As a starting point, what EJ Snelson had to consider was how the claimant had pleaded his case – see the recent reminder of this point in **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] ICR 1231; [2025] EWCA Civ 185. In this case the general factual narrative of alleged events or developments in the original claim form covered the original alleged harassing conduct by the two colleagues, the decision of Ms Lyan in October 2018 regarding the claimant's duties, and then some further developments. But he did not identify that he was specifically complaining of anything that had occurred in the period after October 2018 as being an act of religion or belief or race discrimination or harassment. Nor was this a case where that should

have been regarded as inherently and obviously part of the logic of the case that he had advanced.

51. As to the application to amend, in accordance with EJ Hodgson’s direction, that was set out in the letter of 19 May 2023. On a fair reading, the further information about the religion or belief or race discrimination or harassment complaints that the claimant was seeking to advance was found in paragraphs 1 – 3 of that letter. It might, indeed, be said that it was generous reading to treat the complaint about the change of duties in October 2018 as being of that type, as the contention which the claimant advanced in paragraph 4 was that it was an act of TUPE-related constructive dismissal. But EJ Snelson treated the religion or belief or race complaints as extending to it in any event.

52. In paragraph 5 the letter then turned to the “claim for non-payment of SSP, annual holidays and furlough pay” that the claimant said he was seeking to advance, in respect of which he wrote that he wished to add medical reports to establish that after May 2021 his condition grew worse and he became unfit to work. The document went on to develop his case in support of those claims. It referred to having being diagnosed with anxiety and depression in January 2019 and being advised to request “amended duties” of morning shifts (which it appears to have been common ground was granted, as such); and it went on to give an account of the claimant’s shoulder problems, surgery and related absence. It conveyed the claimant’s case that the respondent had, in this respect, been in breach of its duty of care in relation to his health. But there was nothing to indicate that the claimant was seeking to complain that any further conduct of the respondent during this further period amounted to religion or belief or race discrimination or harassment.

53. Finally, it appears to me that EJ Snelson properly determined that what he was permitting to proceed did not include any further matters raised in the claimant’s 15 June 2023 statement, as this was not itself part of the claim form, nor the actual application to amend, which, in accordance with EJ Hodgson’s order, had been tabled in the letter of 19 May 2023.

54. At the hearing of this appeal the claimant informed me that he had recently been dismissed.

This appeal is, of course, not concerned with that, but the claimant referred to the fact that in the dismissal letter of 25 July 2025 (which he showed to me and Ms van den Berg) there was a reference to his having been off long-term sick leave since 2021 save for having worked one shift on 11 November 2022. The claimant said that, despite a previous DSA request, this was the first he knew of this. He submitted that this was new evidence which showed that there was continuing conduct up until 11 November 2022, so that these complaints were not out of time at all.

55. I do not agree. No treatment up to 11 November 2022 was the subject of the complaints which were live and before EJ Klimov when he reached his decision. For reasons I have given, he correctly proceeded on the basis that the treatment or alleged treatment that was the subject of those complaints, was in a period which ended in October 2018. The fact (if fact it be) that the claimant worked one shift on 11 November 2022 does not of itself bespeak continuing conduct from October 2018 to then, nor affect the analysis of when time began to run in respect of the complaints before EJ Klimov.

56. For all of these reasons ground (a) fails.

*Ground (b)*

57. HHJ Shanks permitted this ground to proceed on the same underlying basis as ground (a), being that it was arguable that the religious or belief or race discrimination claim related to conduct extending up to July 2021. For the reasons I have already given I do not think EJ Klimov erred in proceeding on the basis that it did not. But I need to say a little more about this ground in light of HHJ Shanks's further observations and because of the issue raised by ground (c).

58. Firstly, HHJ Shanks observed that, *if* the claimant should have been treated as complaining about what was potentially conduct continuing up to 2021, *then* the really important witness would have been Ms Lyan who would have been able to speak to the whole of the period. However, that does not hold good if, as I have concluded, EJ Klimov correctly proceeded on the basis that the complaints related to what had allegedly happened up to October 2018.

59. I would add that, in any event, a significant part of the religion or belief or race discrimination complaint that the claimant was seeking to advance would still have been about the alleged conduct of the two colleagues who were said to have harassed him in 2018. At [41] EJ Klimov referred to allegations about conversations with former colleagues [plural] who were no longer employed, which appears to reflect a concern that the respondent had raised in correspondence; and in my view that must be a reference to those other two colleagues, not to Ms Lyan. EJ Klimov was entitled to attach weight to this. I note also that it would remain the case that the claimant was complaining about specific conduct of Ms Lyan in October 2018, even if, on this scenario, he had been complained about further conduct during the period up to 2021 as well.

60. Secondly, HHJ Shanks referred to Ms Lyan's statement, which was in his rule 3(10) bundle, which he understood had been provided by her "for the PH on 15/9/23". However, from the materials presented to me at the full hearing of this appeal, it is apparent that that statement was in fact tabled prior to the hearing before EJ Snelson in June 2023, and was not relied upon by it for the purposes of the hearing which came before EJ Klimov. I will return to this when I come to ground (c).

61. For all the foregoing reasons EJ Klimov did not err in his assessment of the prejudice to the respondent, were time in respect of the live religion or belief or race complaints to be extended. Accordingly ground (b) fails.

*Ground (c)*

62. This ground contends that the claimant did not get a fair hearing before EJ Klimov because Ms Lyan did not attend, and the claimant did not get the opportunity to cross-examine her.

63. The relevant litigation chronology, as I have already described, was this.

64. First, EJ Hodgson directed the PH which in due course came before EJ Snelson. EJ Hodgson's directions contemplated the tabling of witness statements for the purposes of that further hearing. It

might be said that that was not necessary because the agenda for that hearing included consideration of any application to amend and of whether to strike out one or more of the complaints, but did not include substantive determination of any issue. Nevertheless, the directions catered for it, and prior to that further hearing, both parties did table such statements.

65. EJ Snelson, for his part, as we have seen, did direct that the next PH (which was the one that came before EJ Klimov) would determine the substantive time points. It was therefore correct, as he did in his directions, to permit the parties to call witnesses, and to direct them to table, in advance of the hearing, witness statements of any witnesses whom they wished to call. However, a point sometimes not appreciated by litigants in person is that, in such a case, the starting point is that it is a matter for each party to decide whether they wish to call any witnesses, and, if so, who. In line with that approach, EJ Snelson's order directed that the parties exchange statements in advance of the hearing, of all witnesses who were to be called; but did not direct that any particular witness be called. (The reference to "including the Claimant" was plainly included because litigants in person do not always appreciate that, if they wish to give evidence they need to produce a witness statement.)

66. As I have described, the claimant did thereafter table a further witness statement. The respondent did not do so, whether for Ms Lyan or for anyone else. Nor did it give any indication that it intended to call Ms Lyan as a witness, nor that it intended to rely upon her statement that had been tabled prior to the hearing before EJ Snelson, at the hearing which in the event came before EJ Klimov. Nor had there been any order sought, or made, for her to attend as a witness.

67. The claimant is aggrieved that, because Ms Lyan did not attend the hearing before EJ Klimov, and was not called as a witness, he did not get the chance to cross-examine her. It appears to me that much of the basis of that grievance is that he did not get the chance to do so, in respect of her underlying alleged conduct. He has also referred at various points to the full merits hearing having been postponed, and then, as a result of EJ Klimov's decision, vacated. He refers at points to the hearing before EJ Klimov having been the final hearing. It indeed turned out to be the last hearing

that the employment tribunal held, but it was not a full merits hearing, and its purpose was not to consider the underlying complaints on their merits.

68. In so far as the claimant is aggrieved that he never got the chance to have his complaints considered on their merits at such a hearing, or to cross-examine Ms Lyan about them, that was the consequence of the complaints coming to an end because EJ Klimov dismissed them as out of time. The claimant argued that EJ Klimov was wrong to vacate the full merits hearing because EJ Snelson had said that if he had suffered personal injury then he must have a remedy. But this is a misunderstanding of what EJ Snelson said. He simply identified that the claimant's live complaints were of conduct up to October 2018 which he was saying had caused him personal injury. He was not saying that the claimant was entitled to such a remedy or to have the complaints determined on their merits. The acknowledgement of the remedy claimed did not affect the fact that, whether they were to proceed to a merits hearing was dependent on the outcome of the next hearing on time points.

69. As I have noted, as permitted by EJ Shanks's directions the claimant tabled a statement for the purposes of the full appeal hearing. In it he postulated that the respondent had not called Ms Lyan to give evidence at the hearing before EJ Klimov because she was not able to justify what he called her contradictory statement of 19 June 2023 "by which she accepted the demotion and exclusion of the applicant from the rest of the staff." However, it appears to me that the respondent, and Ms Lyan in that earlier statement, had been consistent as to their case. It had never been disputed that, in or around October 2018, Ms Lyan had decided to move the claimant from the kitchen to other duties. What was always disputed was why, and whether that should be viewed as a demotion.

70. In argument the claimant contended that the tribunal should have drawn adverse inferences from Ms Lyan not being called as a witness at the hearing before EJ Klimov. But, while it is proper to permit both parties to call witnesses for a hearing on time points of this type, it is common that a respondent does not do so. To repeat, this hearing was not about the substantive alleged conduct. There could have been no proper basis for such an adverse inference to have been drawn.

71. Finally, I note that there is no suggestion in the tribunal's decision (or otherwise in any materials before me) that, at the hearing before EJ Klimov the respondent (despite Ms Lyan not attending) sought to rely upon the contents of Ms Lyan's earlier witness statement tabled prior to the hearing before EJ Snelson. I was told (and the claimant did not dispute this) that it was not included in the bundle submitted by the respondent for that hearing; although the claimant included it in the additional bundle which he submitted. However, there is no suggestion that the claimant made any application at the hearing in light of her not having attended. Although her earlier statement was therefore included (by the claimant) in the materials that were before EJ Klimov, there is also no sign in the decision that EJ Klimov relied upon its contents in reaching his decision.

72. For all of these reasons the claimant did not receive an unfair hearing in this respect, and ground (c) fails.

### **Outcome**

73. The appeal is dismissed.