

Neutral Citation Number: [2026] EAT 105

Case No: EA-2024-001490 BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 July 2026

Before:

THE HONOURABLE MR JUSTICE SWIFT

Between:

WASHINGTON WAITHAKA

Appellant

- and -

BARCLAYS EXECUTION SERVICES LIMITED

Respondent

Lydia Seymour KC (instructed by Bellevue Law Limited) for the Appellant
Olivia Dobbie (instructed by Hogan Lovells International LLP) for the Respondent

Hearing date: 22 – 23 April 2026

JUDGMENT

SUMMARY

Race discrimination; Continuing act Strike out/dismissal; Delay in tribunal judgment; Claim in time.

The Employment Tribunal had dismissed part of the claimant's case having concluded: (a) that it had been commenced out of time; and (b) that it was not just and equitable to extend time.

The decision that part of the claim had been commenced out of time rested on the conclusion that the submission that part of the claim was part of conduct extending over a period that included the part of the claim that had been commenced within the three-month time limit, had no reasonable prospect of success.

There was significant delay (15 months) between the tribunal hearing and provision of the reasons for its decisions.

The claimant appealed against both decisions contending that each decision rested on errors of principle and/or was perverse. The challenge to the first decision was directed to the decision that the conduct extending over a period submission had no reasonable prospect of success. The claimant also relied on ECHR article 6 contending that the delay providing the judgments meant he had been deprived of the right to a judgment within a reasonable time.

The article 6 ground of appeal was dismissed on the ground that the delay did not amount to freestanding serious procedural error: *Bangs v Connex South Eastern Limited* [2005] ICR 763, applied.

The appeal on the out of time issue was allowed. The tribunal's conclusion that the conduct extending over a period issue had no reasonable prospect of success was a conclusion that no reasonable tribunal properly directing itself on the law and the facts could have reached.

The appeal on the extension of time issue was therefore academic. However, had it been necessary to reach a conclusion on it, the appeal would have been dismissed. Parts of the tribunal's reasoning were faulty. Nevertheless, if those matters were disregarded the conclusion the tribunal had reached was a permissible option.

THE HONOURABLE MR JUSTICE SWIFT**A. Introduction****(1) The decisions appealed against**

1. At a preliminary hearing on 4 July 2023, the Employment Tribunal sitting at Watford (“the Tribunal”) considered an application by the Respondent, Barclays Execution Services Limited (“Barclays”) that claims under the Equality Act 2010 (“the 2010 Act”) of direct discrimination on grounds of race, victimisation, and harassment brought by the Appellant, Washington Waithaka (Mr Waithaka), should be dismissed because they had been commenced too late (outside the three-month period provided by section 123(1)(a) of the 2010 Act). The Tribunal also considered Mr Waithaka’s application that, if the claims had been commenced late, the Tribunal in exercise of its power under section 123(1)(b) of the 2010 Act, should extend time to permit them to proceed and be determined on their merits. These applications concerned only part of the complaints made by Mr Waithaka in proceedings he had commenced on 5 September 2022.

2. At the hearing, the Tribunal allowed Barclays’ application and gave summary reasons for its decision, orally. The decision on Mr Waithaka’s application was reserved pending written submissions from the parties that were filed after the hearing. On 7 October 2024 the Tribunal sent to the parties the written record of its decision on Barclays’ application. In the same document the Tribunal provided its written decision and written reasons on Mr Waithaka’s application for an extension of time. That application was refused. On 14 October 2024 Mr Waithaka requested written reasons for the decision given at the hearing in July 2023. Those written reasons were sent to the parties on 27 January 2025.

3. The upshot of the decisions was that part of Mr Waithaka’s claim was dismissed as having been commenced out of time. By this appeal Mr Waithaka challenges both decisions taken by the Tribunal.

4. As is readily apparent from the chronology above, delivery of the judgments on the applications was severely delayed. Following the hearing and before the written documents were provided, the Regional Chairman had written to the parties acknowledging the delay, apologising for it, and informing them that he “[continued] to work with [the Employment Judge] to enable the work to be completed”. In the written reasons for refusing Mr Waithaka’s application the Employment Judge said that the delay was because of ill health.

(2) The claim to the Employment Tribunal

5. Mr Waithaka commenced work in the Barclays group in 2010. By the time of the events that gave rise to his claim to the Tribunal he was employed by Barclays as Vice-President, Funding and Liquidity Management in the Treasury department, managing a team of employees.

6. Mr Waithaka’s claim was presented on 5 September 2022. It comprised complaints of direct discrimination on grounds of race, of victimisation, and a claim of harassment. Save for one matter that the Tribunal identified as having occurred in March 2019, the complaints spanned the period from January 2020, to the date the claim was presented, and beyond. Mr Waithaka’s employment with Barclays had come to an end before he presented his claim. On 14 October 2021 he had been given notice of dismissal on grounds of redundancy, to take effect on 3 January 2022. By agreement, the effective date of termination of his employment was brought forward to 31 October 2021. Mr Waithaka started work with a new employer on 2 November 2021.

7. The claim presented to the Tribunal was carefully pleaded. It included 33 allegations of less favourable treatment amounting to direct discrimination. These complaints were divided into groups. There were allegations: (a) that Mr Waithaka had been subjected to unfair criticism by senior managers; (b) that senior management had undermined him and excluded him from work he should have done; (c) that he had not been supported by senior managers; (d) that he had been required to undertake work outside the scope of his job; (e) that his career progression had not been supported

and had been undermined; and (f) that Barclays had failed properly to deal with a grievance he had raised in October 2021.

8. The grievance arose from a complaint Mr Waithaka made in October 2021. The grievance was investigated by Barclays during 2022 and the decision on the grievance was sent to Mr Waithaka on 23 November 2022. Mr Waithaka's complaint was dismissed. He appealed. The appeal decision, which upheld the original decision dismissing the grievance, was provided to Mr Waithaka on 28 April 2023.

9. Returning to the Tribunal claim, in addition to the complaints of direct discrimination Mr Waithaka made one complaint of harassment which he said had happened in September 2020, and 15 complaints of victimisation which were said to have taken place between July 2020 and April 2023 (the date of the decision on the grievance appeal). The claims that post-dated the original presentation of the Tribunal claim were added by amendment following an application made on 28 May 2023.

10. On their face the complaints other than the complaints about the grievance process were made well outside the three-month period provided section 123(1) of the 2010 Act. This point was addressed at paragraphs 63 to 64 of the Amended Grounds of Claim.

“63. It is the Claimant's case that the various acts and omissions complained of for the purposes of [his] complaints of discrimination and victimisation amount to conduct extending over a period, within the meaning of section 123(3) [of the 2010 Act], which remains ongoing at the date of the presentation of this claim.

64. In the event that the Tribunal finds that any of the Claimant's complaints do not form part of conduct extending over a period and have been presented outside the primary time limit by reference to section 123(1)(a) [of the 2010 Act] (as extended by section 140B), the Claimant will aver that it would be just and equitable for the Tribunal to extend time in respect of the same.”

11. Section 123(3)(a) of the 2010 Act states that “conduct extending over a period is to be treated as done at the end of the period”. Mr Waithaka's case was that all the matters complained of in the grounds of claim were evidence of a course of conduct stretching from the time of the earliest pleaded

complaint (at the beginning of 2020) until Barclays' final decision on his grievance complaint in April 2023. The pleaded case did not provide further particulars of the assertion that all the pleaded complaints comprised conduct extending over a period.

(3) The grounds of appeal

12. The grounds of appeal fall into three parts. The *first* part is directed to the decision that the pleaded complaints did not comprise conduct extending over a period. This was the premise for the further conclusion that part of Mr Waithaka's claim had been commenced out of time. The Tribunal concluded, in exercise of its power at rule 37(1)(a) of the Employment Tribunals Rules, that the submission that the matters complained of were, collectively, conduct extending over a period, had no reasonable prospect of success. In this appeal it is contended: (a) that this conclusion "failed to take into account ... that there was an issue of institutional racism within [Barclays'] business, and ... an institutional failure ... properly [to] address the ... the protected acts"; and/or (b) that the conclusion the tribunal reached was perverse (respectively, Ground 2 and Ground 4 of the Amended Grounds of Appeal). The *second* part of the appeal concerns the decision to refuse Mr Waithaka's application for an extension of time. The appeal contends: (a) that the Tribunal's consideration of the merits of the claim for this purpose was flawed; and (b) that the decision not to extend time was a perverse decision (Ground 5 and Ground 7 of the Amended Grounds of Appeal, respectively). The *third* part of the appeal is directed to both judgments. Provision of the judgments was severely delayed. The hearing was on 4 July 2023 and the parties provided written submissions on the extension of time issue shortly after. Although summary reasons for the decision on the act extending over a period issue were given orally at the hearing, the decision on the application for the extension of time was not sent to the parties until 7 October 2024, some 15 months later. When written reasons for the decision on the conduct extending over a period issue were requested, three months passed before they were sent to the parties on 25 January 2025. The appeal contends, relying on the decision of the Court of Appeal in *Bangs v Connex South Eastern Limited* [2005] ICR 763, that these

circumstances reveal a procedural failing amounting to a breach of Mr Waithaka's article 6 right to a fair determination of his civil rights and obligations "within a reasonable time". (Ground 6 of the Amended Grounds of Appeal.)

B. Decision

(1) The article 6 ground of appeal (Ground of Appeal 6)

13. Although the delay in providing the judgments in this case was very regrettable, I do not consider that of itself this affords any successful ground of appeal.

14. Article 6 provides rights to a fair and public hearing of any dispute on civil rights and obligations, by an independent and impartial tribunal, "within a reasonable time". All these requirements have long been features of the common law. When the complaint is that a judgment has been delayed, the Court of Appeal, when considering appeals from the High Court, has tended to apply careful scrutiny to the trial judge's findings of fact and reasoning to ensure that neither has been impaired by the passage of time. Where judgments that have been delayed have been successfully challenged it has commonly been because the passage of time has affected the integrity of the decision and in particular the integrity of the fact-finding process. Thus, the passage of time is not usually significant for its own sake, but only when it calls into to question the substance of conclusions reached by a first instance court which are susceptible to appeal. This functional approach is entirely consistent with the article 6 requirement for a determination within a reasonable time.

15. In *Bangs* the Employment Tribunal allowed a claim of race discrimination but 18 months passed between the end of the hearing and promulgation of its decision. The Employment Appeal Tribunal allowed the employer's appeal. When the case came to the Court of Appeal (on further appeal by the employee) Mummery LJ, who gave the leading judgment, referred to the Employment Appeal Tribunal's decision as follows:

“11. A striking feature of the decision of the Employment Appeal Tribunal, from whose decision Mr Bangs appeals, is that, in reliance on art 6 of the convention, it allowed the appeal by Connex against the finding of direct race discrimination without expressly identifying an error of law on the part of the employment tribunal. The appeal was allowed on the ground that the delayed decision of the employment tribunal was ‘unsafe’, as the delay had led to errors and omissions in the findings of fact and reasoning of the employment tribunal.”

Thus, the issue for the Court of Appeal was the operation of the right under article 6 to a determination of a claim within a reasonable time in a jurisdiction where the right of appeal lay only on a point of law.

16. The court’s conclusion and reasons are at paragraph 43 of Mummery LJ’s judgment.

“43. In my judgment, an appeal from an employment tribunal on the ground of unreasonable delay in promulgating its decision is governed by the following principles.

(1) It is confined to questions of law. Section 21(1) of the 1996 Act says so in the clearest terms. In general, there is no appeal on the independent ground that the tribunal made erroneous findings of fact. The employment tribunal is the final arbiter of facts found by it so long as there was no error of law. It is not the function of the Employment Appeal Tribunal or of this court to interfere with findings of fact by weighing the evidence and assessing its importance with a view to ‘correcting’ erroneous findings of fact by the tribunal or requiring them to be re-litigated before another employment tribunal.

(2) No question of law arises from the decision itself just because it was not promulgated within a reasonable time. Unreasonable delay is a matter of fact, not a question of law. It does not in itself constitute an independent ground of appeal. Unreasonable delay may result in a breach of art 6 and possibly give rise to state liability to pay compensation to the victim of the delay, but it does not in itself give rise to a question of law, which would found an appeal challenging the correctness of the delayed decision and for obtaining an order reversing the delayed decision or for a retrial. I agree with the appeal tribunal that in cases of delayed decisions –

‘it ... cannot be just that there should be an automatic sanction of a rehearing, because, quite apart from the adventitious loss to one or the other party of a result in his or her favour, that will only compound the problem, in leading to yet further delay, and to the risk of the yet

further dimming of recollections.’

(3) No question of law arises and no independent ground of appeal exists simply because, by virtue of material factual errors and omissions resulting from delay, the decision is ‘unsafe’. A challenge to the tribunal’s findings of fact is not, in the absence of perversity (see 43(4), below), a valid ground of appeal and there is no jurisdiction under s 21(1) of the 1996 Act to entertain it.

(4) In order to succeed in a challenge to the facts found by the tribunal it is necessary to establish that the decision is, as a result of the unreasonable delay, a perverse one either in its overall conclusion or on specific matters of material fact and credibility. Perversity is a question of law within s 21(1) of the 1996 Act. It is extremely difficult to establish in general (see *Yeboah v Crofton* [2002] EWCA Civ 794) and particularly where the challenge is to findings on credibility.

(5) It is not incompatible with art 6 of the convention for domestic legislation to limit the right of appeal from an employment tribunal to questions of law. It was not argued that there was any such incompatibility.

(6) Even if it were incompatible with art 6 to limit appeals to questions of law, it is not possible by use of s 3(1) of the 1998 Act or otherwise to interpret s 21(1) of the 1996 Act as expanding a right of appeal expressly limited to questions of law to cover questions of fact. To interpret s 21(1) as allowing appeals to be brought because the decision is factually ‘unsafe’ and the findings of fact were ‘wrong’ would be an exercise in amending the 1996 Act. It would be outside the scope of legitimate judicial interpretation.

(7) There may, however, be exceptional cases in which unreasonable delay by the tribunal in promulgating its decision can properly be treated as a serious procedural error or material irregularity giving rise to a question of law in the ‘proceedings before the tribunal’. That would fall within s 21(1), which is not confined to questions of law to be found in the substantive decision itself. Such a case could occur if the appellant established that the failure to promulgate the decision within a reasonable time gave rise to a real risk that, due to the delayed decision, the party complaining was deprived of the substance of his right to a fair trial under art 6(1). Article 6(1) guarantees a right to a fair trial. A point on whether or not a person has had a fair trial in the employment tribunal is capable of giving rise to a question of law. Section 21(1) does not, in my view, expressly or impliedly exclude a right of appeal where, due to excessive delay, there is a real risk that the litigant has been denied or deprived of the benefit of a fair trial of the proceedings and where it would be

unfair or unjust to allow the delayed decision to stand. That could give rise to a question of law ‘in the proceedings before the tribunal’, which are still pending while the decision of the tribunal is awaited. Although this interpretation of s 21(1) is more restrictive of the right of appeal than in an ordinary civil case, it would be not be incompatible with art 6(1).”

17. This reasoning reconciles the requirements of article 6 to an appeal right based on error of law, by aligning them to the prohibition against serious procedural error. This sets a high bar for any appeal that rests only on the fact of a passage of time between the end of a hearing and the date the judgment is delivered. On the facts in *Bangs* that ground of appeal failed. At paragraph 52 of his judgment, Mummery LJ concluded.

“52. Apart from the perversity point already discussed, it was not argued that there is any error of law in the decision itself or that the decision was defective for lack of reasons. Connex is left only with the contention that, due to unreasonable delay, this is an "unsafe" decision. I do not doubt that Connex considers that the decision against it is "unsafe" and that there has been a miscarriage of justice. In my judgment, however, the errors and omissions relied on as making the decision “unsafe” do not satisfy the more stringent test for raising a question of law in such circumstances. Reading the decision as a whole in the light of the specific criticisms made of it I am satisfied the delay in promulgating it did not create a real risk that Connex was deprived of the benefit of a full and fair trial. It is fair and just to allow the decision to stand rather than to order a new hearing by a different tribunal.”

However, this does not mean that consideration of the passage of time is discounted for all other purposes. The passage of time may well weigh in the balance when considering other well-established grounds of appeal, such as the requirement for rational fact finding, and the requirement to provide adequate reasons which is itself an aspect of the requirement for procedural regularity.

18. In the present case I do not consider that the time taken to provide written reasons amounted to a serious procedural error. There is no doubt that there was serious and significant delay. At the hearing on 4 July 2023 the Tribunal gave its decision on conduct extending over a period of time issue and gave oral reasons for that decision. Under the procedural rules then in force (the Employment Tribunals Rules 2013), rules 61 and 62 concerned announcement of decisions and the

giving of reasons. By rule 61(2) when a decision is announced orally, a written record of the decision must be provided “as soon as practicable”. By rule 62(3) where reasons have been given orally, written reasons are to be given only if requested within 14 days of the date on which the written record of the decision is sent to the parties. In this instance the written record of the decision on the conduct extending over a period was not sent to the parties until 7 October 2024. Written reasons were requested on 14 October 2024, but were not sent to the parties until 25 January 2025. Given the time taken to send the written record of the decision, the further time taken to provide the written reasons was unfortunate. In the written reasons for the reserved decision on the extension of time application the Employment Judge stated, “the delay has been caused by my ill health” and said the judgment had been provided “as soon as practicable”. I do not consider this bare explanation sufficient for me to conclude that there was no delay. There was delay and it was significant.

19. Yet while the delay was significant there is nothing to suggest that its impact went beyond the possibility that the Tribunal reached conclusions of facts that were perverse or provided insufficient reasons for its decision. Thus, any consequences of the delay can be appropriately considered in the context of the other pleaded grounds of appeal. This was, in substance, the way in which leading counsel for Mr Waithaka, Ms Seymour KC put his case, submitting that the passage of time between the hearing and the reasons provided context and circumstantial support for the other grounds of appeal rather than providing an entirely independent basis on which the Tribunal’s decisions should be set aside.

20. For these reasons this ground of appeal does not succeed. However, to the extent that the remaining grounds of appeal call into question the robustness of the Tribunal’s findings of fact and reasoning I will have the passage of time following the July 2023 hearing well in mind.

(2) The challenge to the decision on the conduct extending over a period issue. (Grounds of Appeal 2 and 4)

21. The Tribunal’s decision was that Mr Waithaka’s conduct extending over a period contention failed, with the consequence that the major part of his complaint had been commenced outside the three-month time limit in section 123(1) of the 2010 Act.

22. Barclays’ response to Mr Waithaka’s claim had divided his complaints into two parts. One part comprised complaints about the grievance commenced in October 2021 which was only finally decided in April 2023. In Barclays’ Grounds of Resistance these were referred to as the “post-termination” complaints. The other part of Mr Waithaka’s claim, as characterised by Barclays, comprised all other parts of the claim. Barclays’ pleaded case referred to these as the “pre-termination” complaints. Barclays’ case was that the pre-termination complaints were out of time. Mr Waithaka had anticipated this argument by contending that all the matters complained of, collectively, were conduct extending over a period so that by reason of section 123(3)(a) of the 2010 Act all parts of his complaint were in time: see paragraphs 63 to 64 of the Amended Grounds of Claim, above at paragraph 10.

23. The Tribunal formulated the issue to be addressed:

“Whether the claimant’s contention that the pre-termination acts of discrimination formed part of a continuing act with the post-termination acts of discrimination has no reasonable prospects of success and should be struck out (rule 37(1)(a) Employment Tribunal Rules of Procedure 2013.)”

In its judgment, the Tribunal listed and categorised the pre-termination complaints. This was done at some length (see paragraphs 5 to 31 of the judgment). The Tribunal identified 28 pre-termination complaints and 8 “categories” of complaint.

24. The Tribunal considered the case law on section 123(3)(a) of the 2010 Act. The key authority on the meaning of the phrase “conduct extending over a period” is the judgment of the Court of Appeal in *Commissioner of Police of the Metropolis v Henricks* [2003] ICR 530. Mummery LJ gave the leading judgment in that case. He noted that the notion of “conduct extending over a period” was the way the legislation (at that time the Race Relations Act 1976 which at section 76(6)(b) put the

matter using the words “any act extending over a period”) accounted for notions of institutional discrimination. He emphasised that whether there was conduct extending over a period is a matter for general factual evaluation. He put the matter as follows:

“51 In my judgment, the approach of both the employment tribunal and the appeal tribunal to the language of the authorities on “continuing acts” was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574, 580-581, paras 21-23, *Rovenska v General Medical Council* [1998] ICR 85, 96, and *Cast v Croydon College* [1998] ICR 500, 509. (Compare the approach of the appeal tribunal in *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833, 841 where there was an “accumulation of events over a period of time” and a finding of a “climate of racial abuse” of which the employers were aware, but had done nothing. That was treated as “continuing conduct” and a “continuing failure” on the part of the employers to prevent racial abuse and discrimination, and as amounting to “other detriment” within section 4(2)(c) of the 1976 Act.)

52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of “an act extending over a period”. I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a “policy” could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is “an act extending over a period” as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.”

25. The Tribunal also considered the case law on the power to strike out claims (then at rule 37(1)(a) of the Employment Tribunal Rules 2013), which have “no reasonable prospect of success”. That case law urges caution when it come to the use of that power, especially in claims where the outcome will turn on the Tribunal’s evaluation of the reason why the matters complained of occurred. Where the outcome of a claim turns on evaluation of facts, and whether or not to draw an inference

that what happened was because of a protected characteristic (direct discrimination under section 13 of the 2010 Act), or because the claimant had done a protected act (victimisation under section 27 of the 2010 Act), any tribunal considering an application to strike out must have well in mind that the material available to it will fall well short of the material that will be available to the tribunal at a full merits hearing of the case.

26. The Tribunal recognised the thrust of Mr Waithaka’s case (in his pleading and his witness statement), that the complaints about how he had been treated during his employment could be treated together with the complaints about the conduct and determination of the grievance as part of a single course of conduct that had started in early 2020.

27. The submission for Mr Waithaka was that the existence of this course of conduct was reasonably arguable and should be considered further at a full evidential hearing. Mr Waithaka’s case was the way he had been treated by different senior managers since 2020, including those who had considered his grievance, was conduct extending over a period because all these matters were evidence of a culture of less favourable treatment of black staff employed in junior managerial positions. Mr Waithaka also relied on the findings in internal reports dating from 2018 – 2019 and 2020 that had noted prejudice towards black employees at Barclays and under-representation of black employees at Barclays at director and managing director level. Mr Waithaka’s witness statement in support of his claim made clear his own belief that he had been a victim of discrimination in each of the four business units he had worked, and that the grievance he raised in October 2021 had been the direct consequence of that treatment. The witness statement also prayed in aid more generic evidence including evidence that was not specific to Barclays’ business or its employees.

28. The Tribunal’s reasons were divided into two parts although in substance the reasons in each part are not distinct. At paragraphs 60 – 64 of its judgment the Tribunal set out “general” reasons.

“60. The specific issue to be determined was whether the pre-termination acts of discrimination formed part of a continuing act

with the post-termination acts. It was not a question of whether the pre-termination acts themselves formed part of a continuing course of conduct. Although inevitably some consideration of their own connection is inevitable, particularly when considering prospects of success.

61. It was put forward on the Claimant's behalf that his claims relate to a failure to deal with complaints and treatment experienced after a complaint. Therefore, a complaint is a prerequisite. This is not a situation where an unrepresented Claimant has not expressed himself clearly, and he's unwittingly ended up with a narrow argument. It is a position that he has put forward, which has been maintained and relied on within documents and submissions prepared on his behalf.

62. Whilst a Tribunal may be able to draw inferences from evidence suggesting institutional racism, taking the Claimant's case at its highest, he makes no specific assertion that any of alleged perpetrators was motivated by race. This is particularly relevant when there are no inherently discriminatory act(s) alleged, aside from within allegation 17. This is not a situation where an allegation of a discriminatory act or comment is made, and denied by an alleged perpetrator, and witness evidence (whether in statement form or as a result of cross-examination) will therefore be determinative of what happened. The primary evidence in relation to the individual allegations is the Claimant's, and he has provided a detailed account already.

63. Similarly, none of the post-termination allegations relate to inherently discriminatory acts.

64. Taking his evidence at its highest, the Claimant relies on the assertion of institutional racism within the Respondent company support that his allegations must be because of his protected characteristic, and that this is sufficient to connect pre-termination allegations with the post-termination allegations which arise from the handling of a grievance that considered the earlier allegations. From the available material, it is not reasonably arguable that the various acts are continuing acts or constitute an ongoing state of affairs."

Then, at paragraphs 65 – 71, the Tribunal provided reasons on the 28 "pre-termination allegations".

"65. As the first complaint by the Claimant was in July 2020, anything that pre-dates this cannot be connected to the fundamental basis of the Claimant's claims, let alone to the post-termination acts. Those allegations are relevant in that they form the basis of the complaint in July 2020 but are not examples of a failure to deal with a complaint or of treatment following a complaint.

65.1. Therefore, there are no reasonable prospects of success of establishing that allegations minus 1 to 12 are part of a continuing act with the post-termination acts.

65.2. These allegations are therefore out of time and may be struck out, unless an extension of time is just and equitable.

66. As the Claimant accepts that there is no overlap or direct link between the individuals who feature in the post-termination allegations and any of those who feature in the pre-termination allegations, the nature of the connection has to be considered for the remaining allegations. In relation to personnel, I also note that there is no assertion that any of the individuals named in the pre-termination were linked or colluded together.

67. The only nexus appears to be that the complaints relate to grievance and appeal complaints which is insufficient.

68. In light of the findings in relation to allegations minus 1 to 12 above, allegation 13 stands alone within the pre-termination matters. This is because it is isolated in person and nature, being the only pre-termination matter relating to being required to undertake additional onerous tasks falling outside of the Claimant's team's remit (the only other was allegation 4).

68.1. This further disconnects it from the post-termination allegations;

68.2. It is therefore not reasonably arguable that this can be part of a conduct extending over a period, and there are no reasonable prospects of success of establishing it is part of a continuing act with the post-termination acts.

68.3. This allegation is therefore out of time and may be struck out, unless an extension of time is just and equitable.

69. Allegations 14 to 16, 18 to 21, 27 & 28 are expressed as dual allegations of race discrimination and victimisation detriments. Those elements are connected to each other in that, the detriments are alleged to have occurred after the Claimant raised complaints of racial exclusion. As race discrimination complaints, they span a range of categories. On the basis of this, and the general conclusions above, they are more clearly individual events that flow from protected acts, and it is not reasonably arguable that this can be part of a conduct extending over a period.

69.1. There are no reasonable prospects of success of establishing that these are part of a continuing act with the post-termination acts.

69.2. These allegations are therefore out of time and may be struck out, unless an extension of time is just and equitable.

70. Allegation 17 does allege an inherently discriminatory act (the only allegation to do so), but is isolated nature in nature and person.

70.1. This further disconnects it from the post-termination allegations;

70.2. It is therefore not reasonably arguable that this can be part of a conduct extending over a period, and there are no reasonable prospects of success of establishing it is part of a continuing act with the post-termination acts.

70.3. This allegation is therefore out of time and may be struck out, unless an extension of time is just and equitable.

71. Allegations 22 to 25 are clearly connected by person, and aside from 25 are connected in nature. However, last alleged act is May 21, even if there were a continuing state of affairs it's clearly not persisting for many months before the termination in October 2021.

71.1. This further disconnects then from the post-termination allegations;

71.2. It is therefore not reasonably arguable that these can be part of a conduct extending over a period, and there are no reasonable prospects of success of establishing it is part of a continuing act with the post-termination acts.

71.3. These allegations are therefore out of time and may be struck out, unless an extension of time is just and equitable."

29. In some places the reasons are not as clearly expressed as they could be. However, in summary, they come to this.

(1) Mr Waithaka did not contend that those responsible for discriminatory events were "motivated by race" (paragraph 62).

(2) The complaints did not include events that were "inherently discriminatory acts", which I take to mean acts of overt race discrimination (paragraphs 62 and 63).

(3) The post-termination complaints and the pre-termination complaints concerned different managers (paragraph 66).

(4) Mr Waithaka did not allege collusion as between the managers criticised in the pre-termination complaints (paragraph 66).

(5) The complaints about events before July 2020 were separate from the post-termination complaints because they were not about a failure to deal with internal complaints or complaints about victimisation (paragraph 65)

(6) One allegation (allegation 13) was separate from the post-termination complaints because it was a complaint about over work (paragraph 68)

(7) The pre-termination complaints arising between July 2020, when Mr Waithaka made his first internal complaint, and January 2021, which were allegations of both direct discrimination and victimisation, were separate from the post-termination complaints because they were complaints about many different matters and the points (1) and (2) above applied (paragraph 69).

(8) The pre-termination complaints about events occurring between February and May 2021 were separate from the post-termination complaints because they happened some time before the post-termination complaints (paragraph 71).

(9) The complaint of harassment was separate from the post termination complaints because it did not concern anyone named in the post-termination complaints and it was the only complaint of harassment (paragraph 70).

(10) Mr Waithaka's case on what had happened (as opposed to why it had happened) was not disputed and so did not require any evidential hearing (paragraph 62).

(11) Mr Waithaka's case comprised an assertion of institutional racism from which he invited the Tribunal to infer that the pre-termination allegations and post-termination allegations comprised conduct extending over a period. That case was not reasonably arguable (paragraph 64).

30. Mr Waithaka's submission is that the Tribunal either failed to consider the substance of his case on why there was conduct extending over a period, and/or that the decision that it was not arguable that such conduct existed was a conclusion that no tribunal could reasonably have reached. The submission also points to what are said to be defects in the Tribunal's reasoning. It is contended that these defects, which may or may not be the consequence of the passage of time between the hearing and the written reasons, support the conclusion that the Tribunal's decision was not a conclusion reasonably open to it. In practice the submissions merged. Barclays' response is that the Tribunal's reasons must be considered reasonably and fairly and in the round. The question for the Tribunal was a question of fact and, notwithstanding the caution that is to be exercised when applying the no reasonable prospect of success test to any discrimination claim, and notwithstanding that in places the Tribunal expresses itself in ways that are awkward or even obscure, the conclusion the Tribunal reached, was a permissible conclusion.

31. The Tribunal was correct to approach the application to strike out Mr Waithaka's case on conduct extending over a period on the footing that it should take his case "at its highest", meaning accepting for the purposes of its decision his realistic best case on the evidence. However, with this in mind, large parts of the Tribunal's reasoning is wide of the mark.

32. The points above at (1) and (2) consider matters that formed no part of Mr Waithaka's case. Moreover, neither "an inherently discriminatory act" nor a racial motivation is a necessary element of a viable race discrimination claim. Thus it was not relevant, let alone "particularly relevant", that neither formed part of Mr Waithaka's pleaded case. A fair reading of paragraph 62 of the Tribunal's judgment is that the Tribunal regarded the absence of these conditions as a matter that counted against Mr Waithaka for the purpose of the strike out application. That was wrong. The fact that a differently pleaded case containing different averments might have greater apparent merit is not the same as saying that a pleaded case without those averments has no reasonable prospect of success. By taking these matters into account the Tribunal considered matters that were materially irrelevant, or at least

largely peripheral, to whether Mr Waithaka's case on conduct extending over a period had a reasonable prospect of success.

33. The Tribunal's reasoning summarised at (3) to (9) also concerns matters that were largely peripheral to its task. All the matters referred to – that Mr Waithaka's case included complaints against different people, about a range of different decisions on different occasions all happening sometime before the grievance was commenced in October 2021 – were all evident from his pleaded case. All these matters were reasons why Mr Waithaka needed to rely on the conduct extending over a period provision, not reasons why that provision might not apply.

34. The critical parts of the Tribunal's reasons are those summarised at (10) and (11) above. The latter concerns paragraph 64 of the judgment and the conclusion that on the evidence available, Mr Waithaka's case on conduct extending over a period had no reasonable prospect of success. The former, at paragraph 62, was the Tribunal's view that notwithstanding the absence of a full evidential hearing, a conclusion on the merits of Mr Waithaka's case on conduct extending over a period could safely be reached. Taking these matters together, and having regard to the special need to exercise caution before summarily dismissing a claim of racial discrimination, I do not consider it was a permissible conclusion that Mr Waithaka's case on conduct extending over a period had no reasonable prospect of success. Mr Waithaka's pleaded case supported by the evidence in his witness statement comprised three elements. The *first* was his history of complaints from the beginning of 2020. As the Tribunal pointed out there was no dispute that the events Mr Waithaka relied on had occurred. The issue in dispute concerned the reason or reasons for the treatment afforded to him. The *second* part of Mr Waithaka's case was his belief that what had happened to him was discrimination either in the form of less favourable treatment because of his race or victimisation, or one occasion harassment – i.e. his case on the reason why what had happened to him had happened. The events complained of could not all be discounted as the sort of run of the mill occurrences in a work place from which it was unlikely that any claim of discrimination could arise. In this case the

answer to the “reason why” issue might quite obviously be informed by a full evidential hearing at which a tribunal could consider and evaluate Mr Waithaka’s evidence and the evidence of Barclays’ witnesses. The *third* part of Mr Waithaka’s claim was his case on conduct extending over a period. This was not a matter of bare assertion. It was supported by the internal reports dating from 2018 – 2019 and 2020. Copies of these reports were, it appears, not before the Tribunal. But the material parts of them were explained in Mr Waithaka’s evidence and there is no suggestion the Tribunal concluded this part of his evidence to be unfounded. It was not suggested either that the reports did not exist or were not to the effect Mr Waithaka said. Although the case for conduct extending over a period based only on these reports might be a weak case, it is not fanciful to suggest that it is a case that could draw strength from what might emerge at an evidential hearing on the reasons why the events in 2020 and 2021 that Mr Waithaka complained of had occurred. That would be consistent with one point implicit in the remainder of Mr Waithaka’s case: that the run of events in 2020 and 2021 to his disadvantage could not be explained as simple coincidence.

35. Drawing matters together, on these three points it could be said that as matters stood at the time of the tribunal hearing, Mr Waithaka’s case on conduct extending over a period was a claim that might fail. However, the conclusion that his case had no reasonable prospect of success was not one reasonably available to the Tribunal. I accept Mr Waithaka’s submission to this effect. The Tribunal’s decision striking out part of Mr Waithaka’s case must be set aside.

(3) The challenge to the decision not to extend time (Grounds of Appeal 5 and 7)

36. My conclusion that Grounds of Appeal 2 and 4 succeed means that Mr Waithaka’s full claim will now proceed to a hearing for determination on its merits. The Tribunal’s further decision not to extend time has been overtaken by events. However, since I have had the benefit of counsels’ full submissions on Grounds of Appeal 5 and 7 I will set out my conclusions on those matters.

37. By section 123(1)(b) of the 2010 Act a tribunal may permit a claim to be brought outside the three month period specified in section 123(1)(a) of the Act if the tribunal “thinks [it] just and

equitable” to do so. This is a broadly framed power. Any decision in exercise of the power is in the nature of an exercise of the discretion. A tribunal’s decision will be susceptible to successful challenge only where the decision rests on some error of principle that affects the outcome or where it is a decision not reasonably open to the tribunal on the facts before it.

38. The submission for Mr Waithaka may be summarised as follows. *First* the Tribunal incorrectly took account of: (a) the merits of the out of time complaint; and (b) Mr Waithaka’s decision in August 2022 to engage in ACAS early conciliation rather than to ask ACAS to issue an early conciliation certificate at the earliest opportunity. *Second* the Tribunal reached conclusions not reasonably available to it: (a) on the merits of the out of time complaint; and (b) that the extension of time requested would cause prejudice to both parties. Mr Waithaka further criticises the Tribunal’s reasoning as lacking coherence.

39. The Tribunal’s judgment is a far from perfect document. It lacks focus, direction and coherence. This is particularly apparent in the conclusions section of the judgment (paragraphs 59 to 94). In this part there is no sustained attempt to draw the various factual strands together or explain how competing considerations are to be weighed against each other. Instead, each is considered in isolation. The result is an appearance of patchwork reasoning, in parts inconsistent and in parts incoherent. This is then followed by a single sentence:

“93. Taking account of all the relevant factors, [Mr Waithaka] has failed to satisfy the burden of persuading the Tribunal that it is just and equitable to extend the time for presentation of the claim from expiration of the primary limitation period until 5 September 2022, in relation to each of his pre-termination complaints.”

This provides little insight into how the Tribunal took account of the “relevant factors” or evaluated the situation overall. Much, if not all, is left to the imagination.

40. However, doing the best that can be done reading the conclusion section in the round, the Tribunal’s route to reaching its conclusion can be summarised in this way:

- (1) It was common ground that Mr Waithaka's claim had been commenced on 5 September 2022.
- (2) At some points in its judgment the Tribunal notes that so far as the claim concerned complaints dating back to early 2020 it had been commenced more than two years outside the three month permitted period. However, the premise of the greater part of the Tribunal's reasons appears to take 31 October 2021 (the effective date of termination of Mr Waithaka's employment) as the working proxy for the date the three-month period started to run.
- (3) The Tribunal concluded that by October 2021 Mr Waithaka was aware of all the matters he later came to include in his tribunal claim, because all these matters had figured in the grievance he had submitted to Barclays. The Tribunal concluded that Mr Waithaka was "definitely aware of his rights" by May 2022 when he received legal advice. The Tribunal further concluded that Mr Waithaka had acted reasonably by pursuing the grievance (rather than commencing Tribunal proceedings) until March 2022 and for a short period beyond that until May 2022 (judgment at paragraph 60).
- (4) The Tribunal later stated (at paragraph 84) that the relevant question was whether Mr Waithaka had acted promptly from October 2021, the date he was aware of all matters later included in his tribunal claim. The Tribunal stated Mr Waithaka "did not act promptly in the circumstances". It is not clear whether this is a conclusion in respect of the whole period from October 2021 or only in respect of the period from May 2022 which the Tribunal had concluded was the point when it had ceased to be reasonable for Mr Waithaka to pursue his complaints only through the grievance process. For present purposes I will assume, in Mr Waithaka's favour, that the Tribunal's conclusion was that he had failed to act

promptly only after May 2022 and that had proceedings been commenced then the application for an extension of time would have been allowed.

- (5) The Tribunal then considered three further matters as relevant to its decision on the application to extend time. The first was the merits of the out of time complaints. The Tribunal concluded that the chances that the claim based on these complaints would succeed were “low”, stating that only one complaint contained “a specific reference to race” and referring to the other claims as being “about subjectively discriminatory acts”. The second matter concerned time spent on early conciliation. Mr Waithaka had first attempted early conciliation in June 2022. However, the steps he took at that time were ineffective as he had misidentified the defendant to the claim, referring to Barclays Plc. Early conciliation with the correct defendant was initiated on 12 August 2022. The Tribunal criticised Mr Waithaka for spending too long on this process stating that both in June 2022 and August 2022 he should have asked ACAS to issue an early conciliation certificate at the earliest possible opportunity rather than spend time on conciliation. The third matter was prejudice arising from the delay. The Tribunal stated that Barclays would be prejudiced by the possible unavailability of two witnesses who had left its employment (one in October 2021, the other in March 2022) and in the event that those witnesses were unable to attend a hearing Mr Waithaka would also be prejudiced.

41. I accept Mr Waithaka’s submissions, but only up to a point. Had it been necessary for me to decide the appeal against the decision refusing the application for an extension of time, I would have dismissed the appeal.

42. Even though the section 123(1)(b) provision is broadly framed, the Tribunal’s suggestion that the possibility that a claimant could be prejudiced by unavailability of one or more of the defendant’s

witnesses is an irrelevant consideration. While the possible impact of delay on a defendant's ability to defend a claim is an obviously relevant matter which should be accounted for, the possibility of prejudice to the claimant who makes the application for an extension of time is a matter only for that claimant.

43. I also agree that the Tribunal was wrong to attempt to have regard to its view on the merits of the out of time complaints. This is for two reasons. The first is practical. In this case and more likely than not in many other discrimination claims, the tribunal will be poorly placed at an early stage in the proceedings to assess the merits of the claimant's case. Any view formed on the merits would be speculative. The Tribunal's reasoning in this instance is a case in point. The Tribunal relied on the lack of "specific reference to race" in the complaints and described Mr Waithaka's case as being about "subjectively discriminatory acts". These observations are superficial. The conclusion based on them is too speculative to be of any rational worth. The second reason is one of principle. The "just and equitable" power to extend time is often compared to the discretion at section 33 of the Limitation Act 1980, applicable to claims in negligence for damages for personal injury or death. That power is framed in terms of an equitable balance between prejudice to the plaintiff if the time limit is applied and the prejudice to the defendant if it is disapplied (see section 33(1) of the Act). It is notable that in the context of that exercise it recognised that assessment of the merits of the case serves no purpose. In *Hartley v Birmingham City Council* [1992] 1 WLR 968, Parker LJ put the matter as follows (at page 979H and 980 B – C):

"It appears to me to be apparent that in all, or nearly all, cases the prejudice to the plaintiff by the operation of the relevant limitation provision and the prejudice which would result to the defendant if the relevant provision were disapplied will be equal and opposite. The stronger the plaintiff's case the greater is the prejudice to him from the operation of the provision and the greater will be the prejudice to the defendant if the provision is disapplied. Likewise the weaker the case of the plaintiff the less is he prejudiced by the operation of the provision and the less is the defendant prejudiced if it is disapplied. ...

... In my view, however, as the prejudice resulting from the loss of the limitation defence will always or almost always be

balanced by the prejudice to the plaintiff from the operation of the limitation provision the loss of the defence as such will be of little importance. What is of paramount importance is the effect of the delay on the defendants' ability to defend. The specific example given in section 33(3)(b) so indicates.”

This reasoning applies with equal force for the purposes of the just and equitable provision in section 123(1)(b) of the 2010 Act. It might be said that a tribunal should have regard to the merits of the claim because the prejudice to a respondent exposed to a weak claim, commenced out of time, includes the prejudice of having to meet its costs of defending the claim. However, I do not consider any real weight attaches to this point in litigation before the Employment Tribunal. Save for when a claim is so weak that it can be struck out (thus avoiding the costs of a full hearing), the possibility, under the Tribunal Rules, that any respondent who successfully defends a claim will obtain an order to recover his costs of the proceedings, is very limited.

44. I do not accept Mr Waithaka’s criticism of the Tribunal’s reference to early conciliation. Employment legislation promotes early conciliation. Section 18A of the Employment Tribunals Act 1996 requires all prospective claimants to contact and provide information to ACAS with a view to the possibility of early conciliation. However, there is no requirement to engage in early conciliation before proceedings are commenced. The only precondition for the start of proceedings (save for excluded cases not relevant for present purposes) is possession of a certificate provided by ACAS stating that conciliation is not possible. In practice, when the requirements to contact ACAS and provide information have been met, a certificate will be provided on request. The Tribunal’s view in this case (a case where because the section 123(1)(a) time limit had already expired early conciliation would not affect the operation of section 140B of the 2010 Act to extend the time limit) was that Mr Waithaka ought to have obtained a certificate as soon as possible so as to be able to commence proceedings at the earliest opportunity. That was a tenable view. This view cuts across a purist approach to the advantages to be gained from the policy of encouraging early conciliation. But for present purposes that is not to the point as it is a view that is consistent with one way in which the

statutory provisions for early conciliation can operate. In any event, the Tribunal's conclusion on this point did not rule out the option for Mr Waithaka to try to conciliate his claims after they had been commenced.

45. More importantly, I do not accept that considered in the round, the conclusion that it was not just and equitable to extend time was a conclusion that was not reasonably open to the Tribunal. For this purpose I disregard the Tribunal's reliance on the merits of Mr Waithaka's case and the possibility of prejudice to him in the event that two of Barclays' witnesses would not be able to attend any merits hearing of his claim. Absent those matters, the Tribunal had concluded that the delay in commencing the claim after October 2021 might cause prejudice to Barclays' defence of the claim, and that from May 2022 Mr Waithaka had not acted promptly to commence his claim. Each conclusion was reasonably open to the Tribunal. Taken together they provide a sufficient reason for the further conclusion not to extend time in the exercise of the power at section 123(1)(a) of the 2010 Act.

46. For these reasons, had it been necessary for me to reach a conclusion on the appeal against the decision not to extend time I would have dismissed that appeal.

C. Disposal

47. Subject to any further submissions counsel may wish to make on disposal, I propose to set aside the Tribunal's decision striking out Mr Waithaka's case on the conduct extending over a period issue. The entirety of Mr Waithaka's claim as set out in the Amended Grounds of Claim should now be determined on its merits. I will remit the case to an Employment Tribunal for that purpose.