

Neutral Citation Number: [2026] EAT 140

Case No: EA-2024-000522-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 September 2026

Before:

HIS HONOUR JUDGE AUERBACH

Between:

MR J KOFKIN

Appellant

- and -

WARBURTONS LIMITED

Respondent

Nathaniel Caiden (instructed via the Free Representation Unit) for the **Appellant**
Iris Ferber KC (instructed by Eversheds Sutherland International LLP) for the **Respondent**

Hearing date: 4 August 2026

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Extension of Time

At a full merits hearing the employment tribunal concluded that it was not just and equitable to extend time in respect of an out-of-time complaint of failure to comply with the duty to make reasonable adjustments, and so dismissed it.

The tribunal did not err in concluding that there would be forensic prejudice to the respondent were time to be extended, in particular because of fading memories in relation to relevant factual issues. The tribunal was not limited to considering the impact of the period of delay between the last day to present the complaint in time and the date on which it was in fact raised. **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 and **Concentrix CVG Intelligent Contact Limited v Obi** [2022] EAT 149; [2023] ICR 1 considered. The tribunal's conclusion that there was such forensic prejudice was properly rooted in an analysis of the relevant factual issues, the state of witnesses' memories and its consideration of the extent to which contemporaneous documents or text messages could or could not assist.

Nor did the fact that the tribunal did not expressly refer to the fact that the claimant would lose the chance to have the complaint adjudicated on its merits, were time not extended, bespeak an error of law. Nor was it correct to say that the tribunal erred, because the complaint had succeeded on its facts and the tribunal had failed to weigh that in the balance.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This is an appeal by the claimant in the employment tribunal from a decision in which the tribunal declined to extend time in respect of an out-of-time complaint of failure to comply with the duty to make reasonable adjustments.

The Facts and the Tribunal's Decision

2. The respondent makes bread and other baked products. Its customers are retailers around the country. It employs what it calls primary drivers to drive larger vehicles. Secondary drivers drive smaller vehicles, and will call at a number of different customers during the course of a single day. The claimant has worked for the respondent as a secondary driver since 2018. It was not disputed before the tribunal that he has the disability of generalised anxiety disorder.

3. Following a period of ACAS Early Conciliation from 15 April to 16 May 2022 the claimant presented a claim form on 23 June 2022. This had with it a grounds of complaint document.

4. On 22 July 2022 solicitors for the claimant applied to amend the grounds of complaint. The proposed amended grounds contained the particular proposed complaint of failure to comply with the duty of reasonable adjustment that is the subject of the present appeal. That application was subsequently granted by a decision sent to the parties on 12 November 2022, but on the basis that there was a live time point in relation to that complaint.

5. The matter came to a full merits hearing at Watford, before EJ Quill, Ms A Brosnan and Mr N Boustred, in February 2024. Both parties were represented by counsel. The issues before the tribunal included the time points. One complaint of discrimination arising from disability succeeded and the tribunal awarded compensation in respect of it. All other complaints failed. The complaint that is the subject of this appeal failed because it was out of time and time was not extended.

6. The background to that complaint, which is set out in more detail in the tribunal's findings of fact, was, in summary, as follows. During July 2021 the respondent decided that, essentially because of reduced driver capacity, it would have to implement something called Route Rationalisation. The potential impact on secondary drivers such as the claimant was as follows.

7. Full-time secondary drivers worked a pattern of four days on two days off. Prior to Route Rationalisation deliveries were made to a given individual customer on every day of the week. This meant that an individual driver could be assigned to a particular route, delivering to a particular set of customers on that route, and then always drive that same route, on whichever day of the week that they happened to be working, in accordance with the four days on, two days off cycle. After Route Rationalisation deliveries would be made to any given customer on only three days per week. This meant that a much greater number of new routes had to be designed and implemented, and a driver working the four on, two off cycle could no longer expect to drive the same route, delivering to the same set of customers, on every day that they worked.

8. The tribunal found that the introduction of this change amounted to a PCP which placed the claimant at a substantial disadvantage compared with non-disabled drivers, because of the adverse effects on him of the stress and anxiety caused by the loss of consistency of his daily driving route. The respondent had the requisite knowledge of his disability and of that substantial disadvantage.

9. Following a long period of sickness absence the claimant began a phased return to work on 22 July 2021, on what was called route 752, which was a suitable route for him. As of mid-August 2021 Route Rationalisation had not yet been implemented. But the tribunal found that it had been implemented, and route 752 had permanently disappeared, by no later than 2 September 2021.

10. The witnesses for the respondent included two managers, Mr Shaw and Mr Bishop. Both recalled in oral evidence that one of the new routes created after Route Rationalisation combined

three former routes with which the claimant was familiar – route 752 and two others. A driver working that new route would go to one set of customers on a Monday, Wednesday or Friday, and another set on a Tuesday, Thursday or Saturday. Sundays were unpredictable.

11. The tribunal accepted that each of Mr Bishop and Mr Shaw had discussions with the claimant about this possible new route for him; but it said that “neither of them have any clear recollection about what was decided” [85]. On Thursday 2 September 2021 the claimant texted that he “would not be able to work the new arrangements” or “not straight away at least”. He asked to take an unpaid period of absence until Thursday 9 September. Mr Shaw responded that if he was not fit he should take it as sickness absence. In further exchanges Mr Shaw gave the claimant some further information about the new route which incorporated elements of the old route 752.

12. On Friday 3 September 2021 the claimant texted that he was going to be unable to work that day. The texts that day referred to discussions about a particular route with which the claimant was going to try to familiarise himself by driving it with his partner. The claimant was then off for a few days, during which he sent a text referring back to Friday 3 September and stating his intention to try out the route when he returned on Thursday 9 September.

13. The tribunal accepted the claimant’s evidence that when he returned on Thursday 9 September he was given a “completely different route that I had never done before” and that on Friday 10 September he was given “another new route”. The tribunal also accepted at [94] that neither of the routes that the claimant was given on those two days was the new route about which he had been given information on 3 September. The tribunal also observed at [95]

“The witnesses in the hearing were giving evidence about events more than 2 years earlier. There was a genuinely poor recollection of the specific dates of events and sequence of events in the period July to September 2021.”

14. After Friday 10 September 2021 the claimant had a period off work for reasons unrelated to

his disability. He was due to return to work on 21 September but in the event remained absent from then until 15 February 2022.

15. During this period of absence there were meetings between the claimant and Mr Bishop and between the claimant and Mr Shaw. The claimant was accompanied at these by his union representative and sometimes by his partner. Someone from HR also sometimes attended. None of the meeting notes recorded the claimant being allocated a permanent route. The tribunal set out some passages from a meeting note of 28 October 2021, but observed of it, at [101] that “memories appear to have faded already”, as it noted that there were some errors in the timeline that the minute set out, going back to when the claimant had returned from sickness absence in July 2021.

16. Following an OH report in November 2021 there was a wellbeing meeting on 8 December 2021. The tribunal noted that, among points that were discussed was “the recommendation for a route with fewer calls”. It recorded the claimant saying that “752 last time was fine” and Mr Bishop observing that: “You had 115 last time”.

17. The tribunal commented:

“108.6 In their oral evidence, neither Mr Shaw nor Mr Bishop were able to recall the number of the route which they had discussed with him (that, after route rationalisation, included calls from the former Routes 710, 711 and 752). It is possible that “115” is a reference to that, but the witness evidence did not expressly state that.

108.7 On the assumption that the route being discussed in the minutes is the same one they referred to in their evidence, the description of it in this meeting is not as detailed as that which we set out above, which was based on Mr Shaw's and Mr Bishop's oral evidence.

108.8 However, the claimant was asked if he had seen a copy of the route, and he said that he had. If it was the same one that he had driven with his partner on 3 September, he did not say so. In any event, he was asked what he thought of that route. He did not say that he had driven it with his partner and found it acceptable. He did not say that he had expected to be given it on 9 and 10 September 2021, but had not had it allocated. He did not answer the question at all; he neither said it was suitable nor that it was not suitable.

108.9 The Claimant's response to the question was to say that he had thought that his union representative was going to speak to Steve Gaish (Centre Distribution Planner). In context, given what the claimant had said immediately beforehand about how 752 had been acceptable to him, his response when asked about route 115 meant that the claimant did not believe that route 115 was suitable for him even if he was permanently allocated to that route. He was seeking something different to that.

108.10 As of the date of this meeting, the claimant was of the opinion that none of the suggested routes were suitable for him and that instead a route should be developed specifically for him.”

18. The tribunal made findings about a further meeting on 25 January 2022. At that meeting the claimant indicated a willingness to widen the range of geographical locations to which he would deliver, something that the respondent’s managers had hitherto understood was not an option for him. This led to new options being explored and ultimately to a return to work on 15 February 2022. It is not necessary to this appeal to set out the tribunal’s findings about the period following that return.

19. In its self-direction of law the tribunal set out the relevant parts of section 123 **Equality Act 2010**. It also referred to authorities on the concept of conduct extending over a period. It continued:

“153. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not mean that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

154. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

155. The factors that may helpfully be considered include, but are not limited to:
155.1 the length of, and the reasons for, the delay on the part of the claimant;
155.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;
155.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents.”

20. In setting out its conclusions in relation to the complaints of failure to comply with the duty to make reasonable adjustments, the tribunal first considered the period beginning when the claimant returned to work on 15 February 2022. For reasons it set out, it concluded that the respondent had taken sufficient steps during that period, and there was nothing further that it could reasonably have been expected to do. In the course of that passage the tribunal concluded at [206] that “providing the claimant with a fixed route every day was not a step that it was reasonable for the respondent to have

to take”. The complaint of failure to comply with the duty of reasonable adjustment relating to that period from 15 February 2022 onwards failed on its merits.

21. The tribunal then turned to the reasonable-adjustment complaint relating to the earlier period prior to 15 February 2022. At [213] the tribunal said this:

“Neither the grounds of resistance nor the written witness statements make any suggestion that the claimant was guaranteed a particular route to replace 752. On the contrary, they state that he was not.

213.1 Those documents do not say that he was offered a route of the type described to us in evidence by Mr Shaw and Mr Bishop, namely a route which was not the same every day, but was the same for each of Monday, Wednesday, Friday and then was also the same for Tuesday, Thursday, Saturday.

213.2 As mentioned in the findings of fact, each of Mr Shaw and Mr Bishop recall (and we accept that their recollections are truthful and accurate) that there was some discussion with the Claimant about that type of route potentially being available, and its being one which incorporated the patch formerly covered by Route 752.

213.3 However, neither Mr Shaw nor Mr Bishop were able to provide precise details (the route number, for example) of either the route, or of what the Claimant said about it, or of whether a firm offer was made to the Claimant that he could do this route all the time.

213.4 There has also been no specific evidence from the Claimant about whether he believed that the Respondent was telling him that he could have the route if he wanted it and, if so, whether it would have been acceptable to him and, if not, why not.

213.5 On the assumption that the route which Mr Shaw and Mr Bishop recall discussing with the Claimant is the same route which the Claimant drove with his partner on 3 September 2021, then, according to the contemporaneous documents in the bundle, the Claimant’s objections in September seemed to be less about whether he could do that route, and more about the fact that he was not put on it on 9 or 10 September.

213.6 However, on the assumption that this is the same route (Route 115) which Mr Bishop asked the Claimant about on 8 December 2021, at that time, the Claimant did not state that he thought the route was suitable and nor did he complain that he should have been on it from September 2021 onwards. He did not assert that if he had been allocated that route every day then he would not have been required to start a sickness absence. He did not say that if he was allocated that route every day at that point, then he would be able to start a phased return. Instead, he implied the route was not suitable. His return in February 2022 was not to that route.”

22. The tribunal went on to find that, while the lack of fixed routes placed the claimant at a disadvantage, during the period from the end of August 2021 onwards, the respondent was not able to offer the claimant a route that was exactly the same every single day, just as it was not able to do so after his return to work in February 2022. At [218] the tribunal continued:

“For the avoidance of doubt, had the Respondent actually ensured that, every day, from September 2021, the Claimant was allocated to the route mentioned in Mr Shaw’s and Mr Bishop’s oral evidence, it does not necessarily follow that the outcome would have been something other than the

Claimant commencing sick leave in September 2021. It is impossible to assess the likely outcome. The route might have met some of the Claimant's requirements (such as giving him predictability about which route he would be doing on a given day, and ensuring that he was doing calls to places/people with which he was familiar). However, the number of calls was higher than he thought desirable. In the January meeting, the Claimant seemed to prioritise having fewer calls per shift over some of the other requirements; thus, the route was not necessarily one which would reduce the disadvantage of route rationalisation. However, the Respondent has not proven that it would not have done so, and not proven that it could not have made arrangements such that the Claimant drove it every time he was on duty."

23. The tribunal also considered that the respondent could not reasonably be expected to widen the geographical area under consideration prior to 25 January 2022, given the claimant's stance on this aspect prior to the meeting that took place on that date. The tribunal continued:

"220. There is a gap in the evidence about whether the Respondent could have offered the Claimant a route which was not the same every day, but which was, as described above, a route which, Monday to Saturday, was one of two possible sets of calls (in the same sequence).

220.1 We accept that each of Mr Shaw and Mr Bishop thought at one point (and we infer around 3 September 2021) that it might be possible to give the Claimant the new route mentioned above. However, the gap in the evidence is that neither recalls exactly what (if anything) changed. In particular, did one of them decide not to offer the Claimant the route (and, after that, the Claimant's sickness absence commenced)? Or did the Claimant's sickness absence commence despite this possible route being "on the table" for him.

220.2 Similarly, the evidence potentially shows (though there is a lack of clarity and specificity) that the route Mr Shaw had in mind, and had described to the Claimant around 3 September, was not allocated to the Claimant on 9 or 10 September. However, it is unclear as to whether Mr Bishop or Mr Shaw would have ensured that would be done provided the Claimant confirmed that that was what he wanted.

221. Based on the evidence presented, we would have been unlikely to have been persuaded that, as a matter of fact, the Claimant was made a firm and unequivocal promise that he could have the route which Mr Shaw and Mr Bishop described in their oral evidence. The evidence does not establish one way or the other whether the Claimant's sickness absence would have commenced if he had been offered that route on a permanent basis (and, in particular, there is no evidence about what the arrangements would have been had the Claimant been required to work Sundays).

222. The evidence does not show that the Claimant proactively sought that particular route as an adjustment. There is no onus on a worker to have to identify the specific adjustments that the Respondent is obliged to implement. However, for time limit purposes, it is significant that the Claimant did not demand that route, even when he was specifically asked about it in December 2021, and he was not put on it in February 2022.

223. For the period from September 2021 to February 2022, the evidence presented is not necessarily sufficient for Respondent to discharge the burden of showing that there were no steps that it was reasonable for it to have to take to reduce the disadvantages caused to the Claimant by route rationalisation.

223.1 Given the way that the new route, and its availability, was described to us, then the Respondent has neither shown that it would not have been reasonable to have had to offer that route to the Claimant, nor that it did offer it.

223.2 Offering the route to the Claimant would not have met all of the Claimant's requirements as per his OH reports. Notably, it would not have been the same each day.

223.3 Offering the Claimant that route each of Monday to Saturday, would still have left a further issue to be solved for Sundays. Although, the Respondent has not proved that there could not have been a reasonable adjustment to solve that (for example, not requiring the Claimant to work Sundays).

224. The Respondent did, however, make clear to the Claimant that route rationalisation was here to stay, and he would not be offered any fixed route that was the same each day. At the very latest, this was made clear to him at the 8 December 2021 meeting when the Claimant repeatedly mentioned that Route 752 had been suitable and Mr Bishop made unequivocally clear that there were no longer any fixed routes, or route owners, and the Respondent was not going to implement an adjustment that the Claimant had such an arrangement.”

24. Turning to when time began to run, the tribunal considered that, in so far as the claimant was complaining of not being given a fixed route throughout the week, it was, at the latest, made clear to him that this was never going to happen at the meeting on 8 December 2021, and time began to run on that date, with the three-month period for limitation purposes ending on 7 March 2022.

25. The tribunal continued that, if it was wrong about that, time began to run on 14 February 2022, as there was no ongoing failure to comply with the duty to make reasonable adjustments after that date, nor any meritorious complaint about something occurring later, with which it could form part of conduct extending over a period. The effect of early conciliation having been from 15 April to 26 May was that the last day to complain about this failure to make a reasonable adjustment was 26 June 2022. The grounds of complaint accompanying the claim form presented on 23 June 2022 did not include this particular complaint. It was raised for the first time, out of time, on 22 July 2022 when the application to amend was made. On that basis, applying the guidance in **Galilee v Commissioner of Police of the Metropolis** [2018] ICR 634 (EAT) time ran from 22 July 2022.

26. Accordingly, the claim was out of time unless the tribunal decided that it had been presented within such other period as it considered to be just and equitable. The tribunal’s reasoning on that issue was as follows:

“230.1 During the claimant's absence, the respondent did repeatedly inform the claimant that it was not going to be able to give him fixed routes at which met all of his requirements. It made clear that it perceived that his requirements included that any route allocated had to be within the same geographical location that the claimant had previously delivered to.

230.2 The claimant knew, during his absence, that 752 was not going to be reinstated and the respondent had said so expressly. The claimant knew that the respondent was making clear that it was not returning to the previous arrangements of fixed routes and route owners.

230.3 An error was made on 23 June. The Claimant submitted a document which had been drafted for his 2020 claim. He did not submit the document he had drafted for his 2022 claim [Bundle 49 to 50].

230.4 The document that he had intended to submit on 23 June is not the Grounds of Complaint which subsequently formed the basis of the amended claim. The new Grounds of Complaint was drafted by the Claimant's solicitors and bears the date 22 July 2022.

230.5 We accept that it was human error by the Claimant that he failed to present, on 23 June 2022, a complaint which alleged failure make adjustments from July (or August or September) 2021 onwards, as a result of a PCP implemented around that date. However, he did, in fact, fail to do so and that did, in fact, cause prejudice to the Respondent.

230.6 We have not been provided with any details of any documents that were allegedly lost or destroyed as a result of the delay. We think it unlikely that the Respondent would have discarded helpful documents in all the circumstances, including the fact that there had been a previous claim from the Claimant and the fact that he had started a period of long term sickness. The Claimant had, for example, mentioned EQA when submitting his flexible working request in July 2021. The Respondent ought to have been on notice that there might be further litigation and that it might be sensible to retain documents where possible.

230.7 The Claimant had had legal representation in the past, and had union representation at all the relevant meetings. He was aware of his rights generally and of the existence of EQA in particular. The Claimant was aware of the right to present a claim to an employment tribunal. It has not been argued on the Claimant's behalf that he did not know about the existence of time limits and it has not been argued on the Respondent's behalf that the Claimant had sufficient knowledge or expertise to calculate an exact deadline.

230.8 The Claimant was well enough to attend meetings, and did so. The November OH report said he was well enough to return to work. There was no medical reason preventing him presenting a tribunal claim during the period of his September to February absence. Furthermore, on his return to work, he was well enough to present an informal request to Ms Nash in February, and a formal grievance in March. He was also well enough to in February and March 2022 to present a tribunal claim.

230.9 However, the disadvantage to the Respondent was that (on our assessment) it was required to discharge a burden of proof for the period from implementation of route rationalisation to 14 February 2022. (It was also required to do so for the period after that date, but we are satisfied it has done so for that period). We have not been shown sufficient evidence that there was a good enough reason to not have made a firm and unequivocal offer of the route discussed with the Claimant on 3 September; we have not been shown sufficient evidence that such an offer was unambiguously made. However, the discussions with Mr Bishop and Mr Shaw at this time were oral, and the two of them genuinely do not recall the details. Indeed, there was a genuine lack of recollection on their part about the precise dates when route rationalisation started. Had a tribunal claim been presented more promptly than Mr Bishop's and Mr Shaw's memories would have been fresher and that might have assisted the Respondent to discharge its burden. We cannot say that they would have been unable to give sufficiently clear, consistent and accurate evidence to persuade us that the burden had been discharged had the claim been presented in time.

27. The tribunal concluded that it would not be just and equitable to extend time, and so the entire complaint of failure to comply with the duty to make reasonable adjustments failed.

The Appeal

28. At a rule 3(10) hearing, at which Mr Caiden appeared for the claimant under the ELAAS scheme, amended grounds of appeal were permitted to proceed in relation to the decision that it was not just and equitable to extend time in relation to this complaint. The tribunal is said to have erred by failing to have regard to two factors that were plainly relevant, expressed as follows:

“(i) the balance of prejudice, there being no consideration it appears of prejudice to the Claimant, including the prejudice to him given that he had succeeded at trial on the facts; and or

(ii) whether the delay in presenting the claim actually caused forensic prejudice to the Respondent given (a) the nature of the claim and evidence heard from the Tribunal, there being at para 94 a finding of fact that the Claimant had been made on 9-10 September 2022 to do two different routes and neither was the route discussed on 3 September 2022 which the Tribunal concluded was the reasonable adjustment (thus any offer being immaterial as it was not implemented) and further at paras 213.1 and 221 an indication that the Respondent had put a positive case that it had made a firm and unequivocal promise (which evidently was not accepted), and (b) fact that the Respondent was provided with the requisite information on one basis only a month later than being in time.

Discussion and Conclusions

29. There is, as I will explain, an element of overlap or inter-action between the issues raised by the two sub-grounds, and I find it most convenient to start with ground (ii). This contends that the tribunal failed to consider whether the delay in presenting the claim caused actual forensic prejudice to the respondent. It then relies upon a number of particular features.

30. Of these, it is convenient to take first the reliance placed by the ground on the fact that, on one of the two ways in which the tribunal analysed when time began to run in respect of this complaint, it was “only” raised one month out of time. The argument, by reference to that, is that the tribunal failed to consider whether this period of delay, as such, was likely to be significant in terms of the impact on memories (or availability of other evidence) of the delay in being alerted to the complaint, and/or in terms of when the matter actually came to trial.

31. However, the difficulty with this line of challenge is that, once it was held that the complaint was raised out of time, and so an extension was required, the tribunal was not confined to considering

whether the delay in raising the complaint by (possibly) one month had put the respondent at a material forensic disadvantage. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 at [32], the issue was whether to extend time in respect of a complaint of constructive discriminatory dismissal, which was three days out of time, but factually covered events said to have occurred over a significant period of time prior to the claimant's resignation. Underhill LJ (Moylan and Newey LJJ concurring) said at [32]:

“As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago.”

32. In **Concentrix CVG Intelligent Contact Limited v Obi** [2022] EAT 149; [2023] ICR 1 the complaints concerned a number of alleged incidents of sexual harassment said to amount to conduct extending over time. If so, then by reference to the date of the most recent incident the claim was one day out of time. Applying the reasoning in **Adedeji** I observed at [69] that

“... just as it is not an error to take such ‘real time’ forensic prejudice into account, when considering whether it is just and equitable to extend time from the formal date on which the primary time limit expires, so, conversely, in a case where there may be an issue of such potential forensic prejudice, if time were to be extended, the tribunal would err in principle if it failed to consider that aspect, as it would fail to take into account a relevant consideration.”

33. I also said at [70] that:

“...in principle the reasoning in Adedeji must carry across from the constructive dismissal scenario, to the conduct extending over a period scenario, insofar as both give rise to issues about what did or did not factually happen going back potentially very much earlier than the date on which limitation begins to run. When such features are obviously present in a given case, it would be an error of principle for the tribunal not to consider them at all.”

34. Mr Caiden argued that the present case is factually different from **Obi** because it is not concerned with a factual investigation of alleged conduct going back over the sort of timescale that was involved in that case. However, the tribunal plainly considered that precisely what happened at the beginning of September 2021 was crucial to the issue of whether the respondent had taken reasonable steps to mitigate the disadvantage to which Route Rationalisation put the claimant – in particular, precisely which route was discussed, on what basis, what the claimant's attitude to it had

been, whether he could have worked it after 9 and 10 September, and why he went off sick.

35. It is also clear that the tribunal considered that the respondent was in forensic difficulty in this regard because its two key witnesses were unable to recall key factual aspects, and the gaps in their recollections were not plugged by the claimant's evidence nor by the contemporaneous documentary evidence, whether of the text messages or the meeting minutes. This is clear from a number of passages to which I have referred, or set out, earlier, including at [85], [95], [101] and [108.6].

36. The context is one in which the tribunal had found in terms (albeit when considering the period after 14 February 2022) that it would not have been reasonable to require the respondent to continue to allocate the claimant a single route that was the same on every day when he worked. Against that background the tribunal did not err in regarding the details of these aspects as potentially crucial.

37. Nevertheless this ground of appeal highlights the tribunal's clear finding that the routes allocated to the claimant on each of 9 and 10 September 2021 were not whatever route had been discussed on 3 September. Mr Caiden argued that the tribunal had found that allocating the route discussed on 3 September would have been a reasonable adjustment, and so that clear finding – that he was not given that route on his return after a week's break – rendered the other areas of factual uncertainty irrelevant.

38. However, as I have set out, while the tribunal, in the course of [213], [218] and [220] – [222], concluded that the available evidence did not show clearly precisely what route had been discussed on 3 September, whether the claimant was given to understand that he could work it if he wanted, nor that it would *not* have been a reasonable adjustment, it also considered that it was not clear, on the evidence that it had, what his attitude to it was, whether, had he wanted to, he could have worked it *after* 9 and 10 September, and why he went off sick at that point. This analysis properly supported its conclusion at [230.9] that, had recollections been better, the evidence might have supported a

finding that the respondent had done all that it reasonably should by way of adjustment.

39. The ground also contends that the respondent's case was that the route discussed by its witnesses had been offered to the claimant, but the tribunal did not accept that case. Relatedly, Mr Caiden submitted that the tribunal's reasoning was faulty because it was doing no more than speculating about what the position *might* have been had there been more evidence. However, the tribunal's whole point was that the respondent was at a disadvantage because of the problems of recollection, and because it was entirely possible that, had memories been better, and had the gaps in the evidence been filled, it *could* have concluded that reasonable adjustments had been made.

40. For all of these reasons I conclude that the tribunal did not err by failing to consider whether there was actually any forensic prejudice to the respondent, whether on the basis of the particular points raised in ground (ii) or generally. It clearly concluded at [230.5] and [230.9] that there was real forensic prejudice to the respondent, and it was entitled to do so.

41. I turn to ground (i). This concerns the question of prejudice to the claimant. There are two strands to the ground. First, it is asserted as a general proposition that the tribunal gave no consideration at all to the prejudice to the claimant, were time not to be extended – being that this complaint would be dismissed for that reason, rather than determined according to its merits.

42. It is true that this tribunal's decision does not expressly refer anywhere to that prejudice. But it is axiomatic, and obvious, that a discrimination complaint that is brought more than three months after the act to which it relates will be dismissed, unless the tribunal concludes that it has been brought within such period as it considers just and equitable. That is the consequence of what the statute itself provides. It is the very reason why the tribunal had to consider this question at all.

43. Further (unless there is some other fundamental problem with the complaint) in every case the claimant will suffer this disadvantage if time is not extended – and conversely, if it is, the

respondent will suffer the disadvantage of being exposed to a complaint to which it would not otherwise be exposed. While these respective disadvantages go into the scales, the discussion will usually need to focus on the other relevant factors that will be fact sensitive and vary from case to case, such as the particular reason why, in the given case, the claimant did not raise the complaint sooner than they did, and whether, in the given case, the respondent would also face any forensic difficulty in defending the complaint. In this case the tribunal, having actually heard all the witnesses give oral evidence at a full merits hearing, was particularly well placed to assess these matters.

44. While it would have been better had the tribunal expressly referred to this disadvantage to the claimant, I therefore conclude that its failure to do so did not amount to, or bespeak, an error of law.

45. However, this ground also has a more particular strand, which is to the effect that the tribunal erred by failing to take into consideration that, in this case, not extending time meant not merely that the claimant had lost the *chance* of having the complaint in question considered on its merits, and possibly adjudicated in his favour, but had suffered the prejudice of this complaint being dismissed, in circumstances where it “had succeeded at trial on its facts.”

46. However, it is in respect of this point that ground (i) and ground (ii) are, as I flagged up earlier, overlapping or inter-related. The implicit premise of this part of this ground is that this was a case in which the merits could be fairly adjudicated independently of the time point. But in this case that is a false premise. In essence, this was a case in which the tribunal – properly – concluded that the impact of fading memories on relevant factual issues was such that it would not have been fair to the respondent to adjudicate the complaint on its merits. That was the very reason why the tribunal did not extend time and did not in fact uphold the complaint, but instead dismissed it.

47. In this case, the tribunal did also identify that, on the *available* evidence, and the facts that it was able to find, the respondent would have lost, because the other elements of the cause of action

were made out and the available evidence would not be sufficient to support a finding that it had taken the steps that it would be reasonable to require it to take. But the tribunal did so as a way of reinforcing its point about why it would be unfair to the respondent to extend time. I observe that it was sufficient that the tribunal concluded that there were gaps in the evidence on factual issues that were material to the outcome, and could make a difference. As HHJ James Tayler put it, in a case relied upon by Mr Caiden, **Logo v PAYONE GmbH** [2025] EAT 95, at [42]: “... if it is held that a respondent will suffer substantial prejudice if a time limit greater than three months is applied that would be likely to be a good reason not to extend time and therefore not to determine the complaint.”

48. In **Logo** itself, however, as HHJ James Tayler explained, on the particular evidence, and legal and factual issues, in that case (which was about complaints of harassment) there “was no real relevant prejudice” identified by the tribunal, and its analysis of that aspect in that case was truly perverse. That is, analytically, the polar opposite of the analysis and conclusions about the critical factual issues, the state of the evidence, and the implications of the gaps in it, properly undertaken by the tribunal in the present case. **Bahous v Pizza Express Restaurant Limited**, UKEAT/0029/11/DA and **Szmidt v AC Produce Imports Limited**, UKEAT/0291/14/MC, also relied on by Mr Caiden, were also, by contrast with the present case, cases in which it was accepted by the respondents in those cases, or found by the tribunal and/or the EAT, that there was *no* forensic prejudice to them.

49. For these reasons I do not uphold ground (i).

Outcome

50. The appeal is dismissed.