

**BETWEEN**

**MR JON HOLBROOK**

**Appellant**

**and**

**(1) TOM COSGROVE KC**

**(2) PHILIP COPPEL KC**

**(3) JAMES FINDLAY KC**

**(4) RANJIT BHOSE KC**

**(5) HARRIET TOWNSEND**

**(6) RYAN KHOLI**

**(7) ROBIN GREEN**

**(8) WAYNE BEGLAN**

**(9) ROB WILLIAMS**

**(10) ASHLEY BOWES**

**Respondents**

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**NOTICE OF APPEAL**

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1. The appellant is Mr Jon Holbrook of [REDACTED].
2. Any communication relating to this appeal may be sent to the appellant care of Paul Maynard, Gaby Hardwicke, 33 The Avenue, Eastbourne, East Sussex BN21 3YD; Email: paul.maynard@gabyhardwicke.co.uk; Tel: 01323 435 912.

3. The appellant appeals from the judgment and reasons of the London Central Employment Tribunal (Employment Judge Brown (the ‘Judge’), sitting alone) sent to the parties on 2 August 2022 (the ‘Judgment’).
4. The parties to the proceedings before the employment tribunal, other than the appellant, were:
  - 4.1. Tom Cosgrove KC
  - 4.2. Philip Coppel KC
  - 4.3. James Findlay KC
  - 4.4. Ranjit Bhose KC
  - 4.5. Harriet Townsend
  - 4.6. Ryan Kholi
  - 4.7. Robin Green
  - 4.8. Wayne Beglan
  - 4.9. Rob Williams
  - 4.10. Ashley Bowes,

all of Cornerstone Barristers, 2-3 Gray’s Inn Square, London, WC1R 5JH. All respondents were represented before the employment tribunal by Anthony Sakrouge of Russell-Cooke LLP, 2 Putney Hill, London SW15 6AB; Email: [anthony.sakrouge@russell-cooke.co.uk](mailto:anthony.sakrouge@russell-cooke.co.uk); Tel: 0208 394 6504.

5. Copies of
  - 5.1. the written record of the employment tribunal’s judgment and the written reasons of the employment tribunal;
  - 5.2. the claim (ET1), including the Statement of Case as originally presented and the final Amended Statement of Case;

5.3. the response (ET3) of each individual respondent to this appeal, a single copy of the Grounds of Resistance as originally presented on behalf of all respondents, and the Amended Grounds of Resistance

are attached to this notice.

6. The appellant has not made any application to the employment tribunal for a review or reconsideration of its judgment.
7. The grounds upon which this appeal is brought are that the employment tribunal erred in law in that:

### **Numbered Grounds**

#### **Ground 1: failure to determine reasonableness of, and/or application of wrong test to, change in the Appellant's assessment of his rights**

7.1. The Judge failed to determine the reasonableness of the change in the Appellant's assessment of his rights before and after the judgment of the Employment Appeal Tribunal ('EAT') in Forstater v CGD Europe & others [2022] ICR 1, EAT, and/or applied the wrong test in respect of that factor:

- (a) The Judge accepted the Appellant's evidence that, prior to reading the EAT's judgment in Forstater, his assessment, based on the first instance judgment in that case and commentary on it, was that his beliefs were unlikely to be protected under the Equality Act 2010 ('EqA10'), and that his assessment changed upon reading the EAT's judgment (Judgment, §§15-18 & 27).
- (b) That change in the Appellant's assessment of his rights was central to his case on extending time under EqA10, s123(1)(a): it was incumbent on the Judge to determine the reasonableness of that change because a reasonable change in a claimant's perception of his rights as a result of new authority is a relevant factor. The test of reasonableness in that regard is whether a claimant's respective assessments of his rights before and after the decision in question were assessments that a reasonable litigant in his circumstances could make.

- (c) Having found that the Appellant made a *'considered decision'* not to claim (Judgment, §49) based on his *'judgment that his claim would not succeed on the law'* (Judgment, §50), the Judge's reasons for concluding that this factor did not weigh in favour of extending time were that the first instance judgment in Forstater did not present a *'legal impediment'* to bringing a claim because it was (i) not binding authority, and (ii) concerned different beliefs (Judgment, §§50-51). Whether there was a *'legal impediment'* to claiming was not the correct test. Moreover, it does not follow from either of the propositions on which the Judge relied that it was unreasonable for the Appellant, as a barrister assessing his prospects in light of such a decision and the commentary on it, to conclude that nevertheless the principles and/or approach of the first instance tribunal in Forstater were likely to be upheld and likely to lead to the same conclusion in respect of his beliefs. If the Judge had properly considered that question, the only proper conclusion would have been that the Appellant's assessment was reasonable.

**Ground 2: failure to consider and/or give adequate reasons for rejecting the Appellant's reasons for not reading *Forstater* between 10 June and 23 August 2021**

7.2. The Judge failed to consider and/or give adequate reasons for rejecting the Appellant's reasons for not reading the EAT's judgment in Forstater between 10 June and 23 August 2021:

- (a) The Appellant's explanation for not reading the EAT's judgment in Forstater during that period included the fact that he was awaiting a decision of the Bar Standards Board ('BSB') which would have a fundamental impact on the merits and/or value of any claim against the Respondents because it would address the propriety of the main tweet in issue and/or had the potential to end his career. Awaiting the outcome of those proceedings was therefore relevant to the discretion to extend time under EqA10, s123 in a manner analogous to awaiting the result of an internal grievance or appeal. These matters were addressed in paragraphs 85 and 93 of the Appendix to the Amended Statement of Case, paragraph

73 of the Appellant's witness statement, and paragraphs 22-23 of the Appellant's Skeleton Argument. It was incumbent on the Judge to consider those matters and explain how she had taken them into account.

- (b) The Judge failed to give any, or any adequate, consideration to the Appellant's case in that regard and/or to give adequate reasons to explain how she had taken those matters into account. Her reasons for finding that the Appellant was '*significantly at fault*' for not reading the EAT's judgment in Forstater during the period in question were that (i) there were no BSB hearing or procedural steps during that period; and (ii) the Appellant's '*simply decided*' not to investigate further an avenue of legal argument based on the EAT's judgment in Forstater, without addressing the Appellant's reasons for having so decided (Judgment, §53). Those reasons do not address the Appellant's case as summarised in sub-paragraph (a) above at all.

**Ground 3: failure to weigh the particular prejudice to the Appellant in the balance and/or wrongly treating the reasons for the delay as the decisive factor**

7.3. The Judge failed to weigh the particular prejudice to the Appellant in the balance and/or wrongly treated her conclusion that he had failed to provide a good explanation for the delay as decisive:

- (a) It was incumbent on the Judge to assess the balance of prejudice by reference to the particular prejudice to the parties and not simply the general, in-principle prejudice arising from not being able to pursue a claim that any claimant will suffer if time is not extended under EqA10, s123(1)(a). That requires consideration of (amongst other things) the particular subject matter of the claim and its importance: the prejudice arising from being unable to pursue a claim about a minor discriminatory act with no on-going consequences will be much less than that which arises where the claim concerns significant reputational damage and career loss.
- (b) This claim is in the latter category. The particular personal importance of the claim to the Appellant was addressed in paragraph 106 of the Appendix to the Amended Statement of Case and in paragraphs 103-9 of his witness

statement, and included the loss of his 30-year career at the bar, the irreparable damage to his reputation, and very substantial loss of income.

- (c) The Judge failed to consider or address those matters adequately or at all. At §156 of the Judgment, she referred only to the in-principle prejudice arising from being unable pursue his claim, but made no reference to, or any attempt to assess, the particular prejudice to the Appellant. Similarly, in assessing the prejudice to the Respondents at §55, she referred only to the in-principle prejudice of having to meet a claim that was otherwise out of time (as *'the most obvious hardship'*) and the 'inherent' impact on recollections, with no, or no adequate, assessment of the particular prejudice in this case.
- (d) Moreover, at §§156-7 the basis on which the Judge concluded that even the general prejudice to the Appellant does not outweigh the general prejudice to the Respondents is that the Appellant was *'entirely responsible'* for the prejudice to him because of her findings in respect of his initial *'considered decision'* not to bring a claim. Even if (contrary to Ground 1 above) the Judge had not erred in respect of her assessment of that *'considered decision'*, she thereby elevated her conclusion on the question of whether the Appellant had a good explanation for (that part of) the delay into the decisive factor and/or failed to make any, or any adequate, finding on the balance of prejudice as a relevant factor in its own right.

**Ground 4: failure to conduct a proportionality assessment under Article 6 ECHR**

7.4. The Judge failed to conduct a proportionality assessment in order to give effect to the Appellant's Article 6 ECHR rights under ss3 and 6 of the Human Rights Act 1998:

- (a) In order to give effect to those rights, the discretionary power to extend time under EqA10, s123(1)(a) must be exercised so that an extension should only be refused if dismissal of the claim is a proportionate means of securing the legitimate aims of finality and certainty.

- (b) The judge erred in holding that such a proportionality assessment was not required (Judgment, §58) and consequently in failing to conduct such an assessment.

BEN COOPER KC

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Date: 13 September 2022

Signed: Paul Maynard

**IN THE EMPLOYMENT APPEAL TRIBUNAL**

**Appeal No.** \_\_\_\_\_

**MR JON HOLBROOK**

**Appellant**

**and**

**TOM COSGROVE KC & OTHERS**

**Respondents**

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**NOTICE OF APPEAL**

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**Solicitors for the Appellant**

**Ref. PCM.SCP.HOL.139284.1**

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