Appeal No. UKEATS/0004/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 10 June 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS LINDA McCABE — APPELLANT

GREATER GLASGOW HEALTH BOARD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR L G CUNNINGHAM (Advocate) Instructed by: The PRG Partnership Solicitors 12 Royal Crescent Glasgow G3 7SL
For the Respondent	MR J LEWIS (of Counsel) Instructed by: NHS Scotland Central Legal Office Anderson House Breadalbane Street Bonnington Road Edinburgh EH6 5JR

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

UNFAIR DISMISSAL - Dismissal/ambiguous resignation

A claim for unfair dismissal was held out of time on the basis that the dismissal occurred on 1 November, but the ET1 was filed on the following 15 February. The Claimant asserted that the EDT was 29 November, since there was no gross misconduct, she was entitled to notice, and had been told she would receive notice pay. She said giving her notice was what the parties intended. Her claim for discrimination on the ground of her disability relied on dismissal as the last identified act, and in the absence of any evidence or submission that it was just and equitable that time should be extended the Employment Tribunal held that out of time too.

Held. An Employment Tribunal had to approach the question whether a dismissal was with or without notice objectively. The intention of the parties could be derived only from what they did and what the surrounding circumstances showed was probable. If, objectively viewed, there was a dismissal without notice it did not matter that this would be a breach of contract by the employer or that the employer may not have intended it: there was only a very limited role for evidence of one party's expressed intention. Objectively, the Employment Tribunal was entitled to conclude there was a dismissal on 1 November.

A submission that the rejection of the appeal against dismissal was an act of discrimination, and because of its date extended time for the acts relied on to within three months of the claim, asserted a continuing act of which there was no sign in the ET1, where the last act relied on had been dismissal itself. This submission was rejected. The process of appeal did not in this case extend time to within the primary period. Since the Employment Tribunal was not bound to consider if time should be extended without there being evidence or submission to that effect, the appeal was dismissed. An application for costs was rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Where an employee is told by a senior manager that their employment is being terminated with effect from, let us say, 1 November and four days later receives a letter saying that their last day of employment had been 1 November and that this employment had been terminated, it might seem unpromising for the employee to argue that they had not in fact been dismissed until 12 weeks later, let alone for them to complain that an Employment Tribunal which found that they had been dismissed on that date was in error of law or was perverse in so concluding. Yet that is what Mrs McCabe complains of through her solicitor in respect of a decision of Employment Judge Wiseman at Glasgow, Written Reasons for which were delivered by her on 18 November 2013. By that decision Employment Judge Wiseman dismissed claims for unfair dismissal and discrimination on the ground of disability on jurisdictional grounds since they were brought too late. As to the claim of unfair dismissal, that was brought more than three months after 1 November. Since the claim form was dated 15 February 2013, that alleging discrimination on the ground of disability was more than three months after the act complained of, and there was no act which extended in time beyond the one act of which specific reference was made in the ET1 until within three months of 15 February.

The Facts

2. Procedurally, the ET1 was presented on 15 February 2013. It alleged dismissal on 29 November 2012. That date was within three months of the presentation of the ET1. It was the date on which the Claimant said she had received payment of sums which had otherwise been due to her in respect of the notice period to which, under a combination of her contract and section 86 of the **Employment Rights Act 1996**, she was entitled. She said that she had

worked as a staff nurse for a considerable number of years, working in the radiology department at the Victoria hospital. She had had a partial knee replacement. It was an unfortunate consequence of her knee condition that she could not easily bear heavy weight. As part of her work in radiology, she was required, no doubt on grounds of health and safety, to wear a lead coat. That was too heavy, according to Occupational Health, for her safely to be allowed to continue to wear it without the risk of damaging her knee. Because she could not do so, the employer sought to see if there was any suitable alternative employment which would not involve significant heavy weight-bearing. Travel of any distance was also a problem. The combination of those difficulties were such that the employer said that it was unable to identify any suitable alternative employment.

3. The Claimant said in her originating application that in consequence she was told on 1 November that she was to be dismissed. Those words looked to the future and do not record that the dismissal had actually happened on 1 November. She also complained not only that her dismissal was unfair but that it was because of a reason related to her disability. It was because of her inability to bear the weight that she had to bear in her normal work. That was a consequence of her disability. As a result, dismissal because of that consequence was dismissal which, had she put it this way, would have been a dismissal within section 15 of the **Equality Act 2010** - she did not, however, refer specifically to any section of statute.

4. In the ET3, her employer joined issue with the question of when dismissal had occurred. It said that that was 1 November 2012.

Date of dismissal – the principles

5. Where unfair dismissal is alleged, the date of dismissal, the EDT as it known, is determined by applying the statute and does not depend directly upon contractual principles, as it would if it were a common law case: **Gisda Cyf v Barratt** [2010] ICR 1475 SC. These matters can be stated: (a) the question is statutory not contractual;

(b) section 97(1)(a) of the **Employment Rights Act 1996** provides under the heading "Effective date of termination" as follows:

> **"Subject to the following provisions of this section, in this Part 'the effective date of termination'—**
>
> > **(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,**
> >
> > **(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect..."**

(c) The decision whether a matter falls within (a) as opposed to (b) is a question of fact. It can simply be stated, though it may not so easily be resolved, by asking whether there has been termination by notice, on the one hand, or without notice, on the other;

(d) The determination of that question, being a matter of fact, is objectively to be assessed. It does not and cannot depend directly upon the intention of the parties. Just as the question whether a contract has been made at all is to be judged objectively, and the question whether there has been a breach of contract is at common law also to be judged objectively, so in my view the question whether there has been a termination on notice or without notice is to be determined by asking what actually happened. This is not to say that evidence of intention may not be relevant. Intention may characterise actions. For instance, an apparently innocuous act which forms part of a series of events which leads to dismissal or resignation, in circumstances in which an employee is entitled to resign by reason of the employer's conduct, may be repudiatory if it becomes objectively clear that the employer intended it to be hostile to the employee. An apparently hostile act which comes plainly to be known and seen as an

unfortunate mistake, with it becoming clear that the employer wished to retain an employee in service, may lead to the opposite conclusion. But intention is not directly relevant, and what has to be assessed by a Tribunal is the objective consequence of its factual findings; (e) Much has been argued before me, in the papers, and I understand before the Employment Tribunal, to the effect that the employer could not properly have dismissed the claimant summarily in this case because it would be in breach of contract by doing so. It was therefore argued that the Tribunal's conclusion was perverse, or that the actions of the employer should be characterised as not leading objectively to the conclusion which the Judge drew, since to do so would be to ascribe to the employer an intention to break its contract with its employee.

6. As to that, I was shown the common sense observations of HHJ Hull, giving Judgment for the Employment Appeal Tribunal in the case of **BT Rolatruc Ltd v Bown** [1994] UKEAT 954/1404. He observed that, in deciding what a conversation which was said to be an act of dismissal added up to, it was natural to infer, in a case in which an employee was caught red-handed in dishonesty, that the employer was dismissing him then and there, but:

> **"On the other hand if the employee has committed no gross misconduct, but his performance after two or three years is found wanting, then it is much more natural to suppose that the ordinary employer will wish to act lawfully, and say, 'I have not got any excuse to dismiss you summarily, but I am going to ask you to go tomorrow, or today, and I will pay you in your notice period, but I do not require you to do any more work for me'".**

In that case, dismissal would be regarded objectively as being on notice.

7. I accept that it is always likely to be relevant to know if an employer is in breach. This is especially so where the employer is a public authority or another large body which one would expect to behave responsibly. The improbability of such an employer acting in breach of contract is however only likely to be decisive if the facts are otherwise somewhat uncertain or ambiguous and have also to be balanced, to some extent, by knowing that if such an employer

did not wish to breach the contract by its behaviour, it could very shortly afterwards have said so and attempted to retrieve the situation. If it did not do so, this of itself would tend to support a conclusion that its being in breach was not so improbable as first sight would suggest. I must emphasise that this is only one factor in an assessment which centrally depends on how the parties behaved: in particular, (1) what the employer (if a large employer, a manager on its behalf) actually said; (2) what the parties did; (3) what any contemporaneous document shows was said and, more particularly, understood; (4) whether at the time the parties objectively showed that they had the same understanding of what had happened. Understanding itself is of course subjective. The point here is that if both parties contemporaneously demonstrated by their actions that they had the same understanding, that would indicate there was some feature or nuance of the facts which objectively supported that understanding. This would render it correspondingly difficult and less probable for a Tribunal later to conclude that the reality was contrary to that understanding.

8. Essentially, dismissal from employment is a simple idea. Whether an employee has been sacked or not, and when, should be capable of simple understanding. It ought not to be over-complicated by intellectual sophistry. It is essentially, taking that approach, a matter for the Tribunal to determine as fact.

The Current Case

9. In the present case the Employment Judge found what had been said at paragraph 7:

> **"...Ms Ross [she being the manager who, on the employer's case, dismissed the employee] informed the claimant that having reviewed all of the information, she felt she had no option but to terminate the claimant's contract of employment with effect from that day. The claimant was informed the payment of notice and holiday pay would be made at the end of the month in the usual pay run."**
>
> **8. Ms Ross accepted the claimant had been shocked and tearful at hearing this news, but Ms Ross considered she had made it clear the termination of employment was effective from that day, and she was satisfied the claimant had understood this.**

9. The claimant asked whether she would return to her shift and was informed she was not required to do so."

10. Mr Cunningham, who appears before me to argue the appeal on behalf of the Claimant, submits that it was incumbent upon the Tribunal to identify the precise words used by the employer. He complains that they were not set out. I do not accept that for two reasons. First, the precise words spoken may, in the usual way of the world, not be capable later of precise recollection. What matters is the effect of what was said. But secondly, the Judge did later set out words in quotation marks, indicating they were the precise words she thought Ms Ross had said at paragraph 60: "dismissal that day", adding that Ms Ross had also referred to "no option but to terminate her employment effective that day". The words "that day" were repeated at paragraph 62 as being what Ms Ross had said.

11. On both bases, therefore, I reject Mr Cunningham's argument on this.

12. Ms Tanner was present at the Tribunal and gave evidence which was confirmatory of that of Ms Ross. She had made notes. Before me today, it was accepted that those notes were made at the time. They read, "Dismissed from today – payment for A/L etc." (presumably annual leave). Thus the direct evidence of what was said and the documentary evidence contemporaneously recorded showed, and showed only, that the Claimant was dismissed with effect from that day.

13. As for the common understanding of the parties, the Judge identified at paragraphs 13, 14 and 15 the way in which the Claimant herself had behaved immediately after 1 November. In three respects, she indicated an understanding that she had been already dismissed. At paragraph 13 the Judge referred to her appealing on 17 November against her "dismissal" on

health grounds; at paragraph 14 to her seeking assurance on the very next day, 2 November, that she would not lose her pay for the balance of the shift which she had been performing when dismissed; and at paragraph 15, wishing to remind Miss Tanner that she had not been dismissed for misconduct - this being by way of complaint, I think, about arrangements made for her to collect her personal belongings when she did not wish to be seen in the same light as those who left under a cloud. She did not leave under any such stigma: she was a faithful and long-serving employee, who was simply not permitted to continue as she would otherwise have wished.

14. Mr Cunningham argues that the reference made in conversation to the payment of pay in respect of the period of notice meant that what had happened was a dismissal on notice and not without notice, a dismissal which would therefore be effective from the end of the period of notice and not at the start of it. He argued that, at paragraph 7 the Judgment made reference to the Claimant being informed about the payment "of notice". That was inconsistent, he submitted, with a finding that no notice was given. In my view, this is a misreading of what paragraph 7 actually says. The expression, taken as a whole, is "the payment of notice and holiday pay." It refers, therefore, to notice pay and does not suggest that there was a notice period, as such, other than one by reference to pay. As has been made clear, in a succession of authorities beginning with **Adams v GKN Sankey** [1980] IRLR 416 and continuing through **Robert Cort & Son Ltd v Charman** [1981] ICR 816 and **Lee v Ariston Domestic Appliances Ltd** EAT/51/89, 24 May 1990 into more recent times, if the date of termination of employment is immediate, but salaries or moneys are paid in respect of a subsequent period, they are to be taken as compensation for immediate dismissal and not by way of payment for the continuation of the employment. A court has to remember that, at the time of dismissal, the parties are not likely to be concerned with the legal niceties. The employee is concerned for her job. The employer is concerned that there should be no

misunderstanding of the practical position. A reference to pay in lieu of notice does not, of itself, indicate either that there is notice or not, though it is perhaps more consistent with the latter. The phrase, as has been pointed out in authority after authority, may have within it some ambiguity. But here, suffice it to say that I see nothing inconsistent between the expression which the Tribunal set out in paragraph 7 and its finding of fact. Its central finding in fact was reached at paragraph 71. That was expressly upon the basis of what was said, what was written as having been said, and a letter dated 5 November, which referred back to the conversation on 1 November. The material part of that, set out at paragraph 66, read:

> **"...your last date of employment was 1 November 2012, and as your employment has been terminated on the grounds of incapacity, you are entitled to pay in lieu of notice."**

15. Further, there had been no suggestion that the Claimant was being placed on either garden leave or special leave. The Judge added to the factors which she took into account matters which were absent, but which one would have expected to be present if indeed this had been a dismissal on notice.

16. It was argued that other findings in fact were inconsistent. Thus it was said in paragraph 19 that Miss Tanner, the note-taker, had confirmed that notice would be paid, together with annual leave at the end of the month. The suggestion that notice would be paid was, submitted Mr Cunningham, inconsistent with a finding that the dismissal was without notice. He submitted further that at paragraph 66, from which I have just quoted the wording of the letter of 5 November, the letter itself contained a central inconsistency. It described the Claimant as ***entitled*** to pay in lieu of notice. Whereas "pay in lieu of notice" suggested that there was no notice, the word "entitlement" was not appropriate where what was being considered was a payment on account of damages for breach. Moreover the reference to "monies owing" envisaged contractual payments, not unliquidated damages for breach.

17. I do not think that those matters are truly matters which show any central inconsistency in the reasoning of the Judge or any material misapprehension of the facts. The Judge was looking at a situation often described by employers and employees alike in terms which are familiar to them but which may not have the precision which a pedantic lawyer would insist upon. But the matter is not one of artificial legalism. The question is whether there was, in the understanding of the parties, a dismissal there and then or whether there was to be a dismissal on notice. As to that, I am not entitled myself to reach any conclusion, merely to ask on appeal whether the Judge was herself in error in coming to that conclusion. Subject to one point and one point alone, I have concluded that there is no such inconsistency as could vitiate her Judgment.

18. I do not accept that the position is one in which the Decision was perverse. Perversity is a very high hurdle. To be perverse a decision has to be one which flies in the face of reality. That cannot be said of a case in which there was evidence from two witnesses to the conversation of 1 November as to what had been said and that, in their view, what had been said amounted to dismissal there and then. There was no evidence given by the Claimant to support that which she had said in her ET1, that she was told she was "***to be*** dismissed" with its indication of what was yet to come. She had the opportunity to give evidence on this. It was not taken. Accordingly the evidence was all one way, subject only to the effect of cross-examination. There was much cross-examination designed to show, in effect, that what had happened was not a dismissal there and then because the employer's managers had not intended to act in breach of contract. The Respondent recognised on paper that it had. The Claimant was entitled to notice. She could have had it. But she did not. As a matter of practicality, in

this case nothing except for the timing of the application to the Tribunal depended upon the difference.

19. Mr Cunningham, in his submissions, argued that something might have been done by way of pension entitlement, financial entitlement and the like. I suspect that in most cases that will not be a reality since, if a person is entitled contractually to a period of notice which they are not given by the employer, they are entitled to damages for breach, to be assessed upon the footing that the contract had been fully and properly performed. In such a case, if the consequence of continuing the contract would have been an enhanced pension or further payment or pay rise or the like, then there is a legitimate claim for that, subject only to the duty to mitigate. None of that is relevant directly to this present case, and I mention it for completeness only.

20. There was here no argument that it was not reasonably practicable to commence a claim for unfair dismissal within three months of 1 November. Accordingly, subject only to the one point, to which I now turn, there was no basis for supposing that the Judge was in error of law.

21. The one matter which for a short time concerned me was the way in which the Judge dealt with a letter. She said this, at paragraph 69:

> **"I considered I was supported in my conclusion by the fact (i) the claimant's representative confirmed Ms Ross had made it very clear to the claimant that her employment was terminated with immediate effect from the date of the disciplinary hearing; (ii) Ms Tanner's note of the disciplinary hearing which confirmed 'dismissed from today'; (iii) the letter of termination of employment and (iv) the fact neither the claimant nor her trade union representative queried the EDT and it was not raised as an issue at the appeal hearing."**

22. The Claimant's trade union representative was Eleanor Harvey. The Claimant's case was that the Respondent wished to put before the Tribunal answers to questions which it had asked Ms Harvey about what had happened on 1 November. The questions were:

> **"Whether Lynn Ross and Sue Tanner made it clear at the hearing on 1 November 2012 that Ms McCabe's employment was being terminated immediately on that date".**

The answer to that was:

> **"Lynn Ross made it clear to Mrs Linda McCabe that her employment was terminated with immediate effect from date of hearing."**

The second question was whether Ms McCabe ever queried the fact that her employment had been terminated immediately on that date or whether she thought she was still employed during her notice period but was simply not required to come into work. The answer to that was Ms Linda McCabe did know and understand that her employment had been terminated with immediate effect. This was made very clear to her by Lynn Ross. The third question was whether Ms McCabe was informed about Tribunal deadlines for submitting an Employment Tribunal claim and, if so, when. The answer to that suggested that the deadline dates were made clear to her in a letter from the trade union regional officer of 21 January 2013.

23. The parties are not agreed before me as to what happened in respect of this letter. The Claimant submits that, when the Respondents sought to rely upon it, there was an objection. The objection was not that the letter could not be evidence but that it would be unfair to Ms McCabe to admit it in evidence without giving her the opportunity to deal with it, in particular by cross-examination of Eleanor Harvey. That objection having been made, Mr Cunningham tells me that it was said by the Respondent that the purpose was simply limited to asking the witness at the time whether the contents of the letter came as a surprise to her.

What good evidentially that would have been I hesitate to think, but in the event no objection was taken to that question being asked and it was.

24. The Respondent's case in respect of the letter was that the objection which was taken was in respect of the third question. That plainly asked for details of communications between the Claimant and those who were advising her as to her legal position at the time. The objection was made on the basis of confidentiality, certainly closely analogous to legal professional privilege. It was said that that objection was made but the letter nonetheless admitted.

25. In the recollection of both parties there was another letter. The Respondent's case was that it was that letter which led to the question about surprise. The Claimant does not accept this.

26. It seems to me that I am in no position on this appeal, to resolve that dispute of fact and I do not do so. For it to be founded upon would require the Claimant to go through the procedure set out in the Practice Direction of the Appeal Tribunal. That has not been done.

27. It ultimately would require reference back to the Tribunal Judge to see what in fact had been the circumstances as she recollected them, rightly or wrongly. But it seems to me that I do not need to resolve the dispute. That is because, as Mr Lewis submits, the conclusions of fact, based upon that letter, were not central to the decision which the Judge reached. The opening words of paragraph 69 show that she had already reached her conclusion. The material she set out there, of which the contents of this letter form one part, therefore were further grounds for reaching an already clear conclusion. Given the certainty and clarity with which the Judge had expressed her earlier findings of fact, and taking the Judgment as a whole, I am satisfied this

was not a central or any basis for reaching the primary conclusion. It was, as the Judge said, something she could have used for reaching her primary conclusion, though in fact she regarded it as merely supportive.

28. Accordingly, though troubled at one stage at the way in which this letter had been treated and whether there had been any material unfairness to the Claimant, I am satisfied that the decision would have been the same in any event and that there was no such unfairness as would require resolution of the dispute between the parties. The way this letter was dealt with affords no ground of its own for allowing the appeal.

29. I turn then to deal with the second part of the appeal, that in respect of discrimination. The question whether there is jurisdiction to determine a complaint relating to an allegation of discrimination in respect of work is set out in section 123 of the **Equality Act 2010**. It provides for a three-month period, but by 123(3):

> **"For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period..."**

30. The Claimant submits that the dismissal took place at a disciplinary hearing. The disciplinary hearing was part of a disciplinary process. That act extended over a period. It lasted at least until the appeal, which was heard on 7 January 2013, well within the three-month period.

31. The Judge, dealing with this primary case, had regard (paragraph 77) to the claim form. At paragraph 79 she said that, in order to argue that there was a continuing act, that being the

way in which the words "act extending over a period" are often referred to, the last act relied upon ought to have been identified. She said:

> **"There was no evidence and no information beyond the bald assertion made at today's hearing that the appeal and appeal outcome were alleged acts of discrimination. The respondent had not, prior to today's Hearing, been aware of this assertion.**
>
> **80. I could not accept Ms Quinn's submission that there had been a continuing act culminating in the appeal, in circumstances where this has not previously been set out in the claim form or correspondence. The claim form clearly set out the alleged act of discrimination and limited it to the dismissal. I decided, having had regard to all of these points, that the alleged act of discrimination was the dismissal which occurred on 1 November 2012."**

32. She therefore concluded that was too late. At paragraph 82 she turned to the question of whether she should, in her discretion, extend time. She said this:

> **"The claimant did not give evidence. I accordingly concluded there was no basis upon which to consider a just and equitable extension of the time limit. I considered I was supported in this conclusion by the fact the claimant's representative made no submission that it would be just and equitable to extend the time limit. In the circumstances, the claim of disability discrimination has been presented late and it cannot proceed."**

33. This gives rise to two questions: first, whether there was an act which extended over a period such that the Judge's conclusion was in error of law or perverse; secondly, if she was entitled to conclude that there was no complaint of conduct extending over a period, bringing it within three months of the claim, whether she should, in any event, have considered whether it was just and equitable and whether, in deciding as she did at paragraph 82, she displayed an error of law.

34. Mr Cunningham referred me to **City of Edinburgh Council v Kaur** [2013] CSIH 32, in particular to paragraphs 19-25. From those, in effect, he drew the principle that it was sufficient for the Respondents to be given fair notice of the substance of the Claimant's case. There should not be an overly strict interpretation of relevance in paragraph 25.

35. The starting point, as it seems to me, has to be what was alleged by the Claimant. The purpose of an originating application is to set out with reasonable clarity the case which is being

made against a Respondent so that the Respondent can deal with it. It should be sufficiently clear so that not only the parties but also the Tribunal and any court of appeal can understand what is being alleged.

36. Currently more litigants in person (party litigants in Scotland) are making claims than ever before and representing themselves. That gives rise to difficulties for a court. Over-technicality may defeat a perfectly proper claim. Discrimination is a social evil. It would be a great pity if over-insistence upon strict pleading were to defeat the elimination of discrimination where it existed. There are, thus, pressures which can persuade a court to be more indulgent towards litigants than before. But, all that said, the position remains as it has been set out in a number of cases. Viewed generally, they are first those cases which set out the requirements for a claim to be amended. To require formal amendment would be unnecessary if all that originating applications were required to do was simply to set the ball rolling, allowing for any claim, broadly similar, to be advanced subsequently. That shows that allegations must be made with reasonable particularity. If they are not made, then it is wrong for a Tribunal to resolve them (see **Chapman & Another v Simon** [1994] IRLR 124).

37. As was said at paragraph 18 in the decision of **City of Edinburgh Council v Kaur** by the Lord Justice Clerk on behalf of the House, dealing with a case in which a time bar had been raised by the Respondents as a preliminary issue to be decided at a Pre-Hearing Review:

> **"The Employment Judge's task at that stage was simply to ascertain the nature of the complaint from the terms of the claimant's form ET1; the relevant question being 'what the ET1 meant to the reasonable reader' (*Charles v Tesco Stores Ltd* [2012] EWCA Civ 1663, Mummery LJ at para 20). Where it is clear, on a fair and reasonable reading of the ET1 as a whole, that a claimant is alleging continuing discrimination and that the final specific allegation in that context is at a time within the primary time limit, that may be sufficient, to determine that a claimant's case is potentially timeous (ibid, paras 18, 22 and 24)."**

But he then went on to say (paragraph 19):

> **"It is not enough for a claimant to make a bare assertion that specific acts are part of a continuing act (*Ma v Merck Sharp & Dohme* (supra), Mummery LJ at para 17) albeit, equally, no particular terminology in respect of acts 'extending over a period' need be adopted (*Khetab v AGA Medical* [2010] UKEAT/0313/10, unreported, 21 October 2010). The claimant has to set out a 'reasonably arguable basis' for that contention (*Ma v Merck Sharp & Dohme* (supra), ibid)."**

38. He went on to point out that the Employment Judge need only have concerned herself in that case with whether the Claimant had set out a prima facie case that the allegations were capable of forming part of a continuing act extending over a period.

39. Those words are given further force when considering what the form currently in use for an ET1 requires. In the pro forma introduction to paragraph 5.2 it asks a Claimant to give details of the claim, saying:

> **"The details of your claim should include the date when the event(s) you are complaining about happened. For example, if your claim relates to discrimination, give the dates of all the incidents you are complaining about or at least the date of the last incident."**

It is a short paragraph. It could not be clearer.

40. In the present case the Claimant made no reference to any date after 1 November 2012 except for 29 November. That was the date upon which in other parts of her ET1 she said she had been dismissed. It was the date she received the payments to which she would otherwise have been contractually entitled. As to disability, she added this paragraph:

> **"The claimant considers she was unfairly dismissed for a reason connected with her disability. Esto, the Claimant was not dismissed for a reason connected with her disability (which is denied) the Claimant was unfairly dismissed on account of the fact that on the evidence, the Claimant was fit to carry out her duties and had been carrying out her duties for approximately two years prior to her dismissal on grounds of capability."**

41. There is no reference here to the appeal hearing being any part of the discrimination against her. It is not identified as a separate act. The date of it is not identified as the date of a separate act. The latest date referred to is the 29 November. That has no relationship, on the face of it, to the discrimination alleged. The dismissal is what is complained of as the detriment

arising out of discrimination. The detriment was the dismissal. The only date given for that is, if not 29 November, 1 November, but certainly not the date of the appeal. Accordingly, on the face of the document, I am satisfied that the Judge was entitled to conclude that there was no allegation being made there of an act extending over a period.

42. Mr Lewis points out that the Claimant had been told, in correspondence and documents prior to the hearing, that the Respondent said there was no allegation of any detriment beyond the dismissal. No application to amend the ET1 was made.

43. Mr Cunningham referred to **Richman v Knowlsey MBC** for a submission that reference to dismissal and to the disciplinary hearing was sufficient as a basis to argue that the appeal hearing was intrinsically part of the disciplinary process and bound up with it so as to permit the Judge to be able to say that there was here a continuing act. He referred to paragraph 15 of that decision (5 September 2013, UKEAT/0047/13, a decision of the Appeal Tribunal presided over by HHJ McMullen QC). Paragraph 15 set out the well-known passage at paragraph 52 of the decision of **Hendricks v The Commissioner of Police for the Metropolis** [2003] IRLR 95, which showed that it was necessary only to identify a continuing state of affairs and not limit consideration of whether there was an act extending over a period to cases where there was a policy, rule, practice, scheme or regime. That does not assist here, but at paragraph 16 reference was made to an "ongoing disciplinary process" and that in that case plainly was capable of being regarded as a continuing state of affairs.

44. I have concluded that the first question for the Judge was whether there was a discriminatory act within time. Having come to the conclusion, to which she was entitled to come, that the act of dismissal had been, for the purposes of unfair dismissal, effective on

1 November 2012, then in the context of the claim as presented there was no basis upon which she could reasonably have come to the conclusion that there was an act extending over a period beyond 1 November to a time within three months of the hearing.

45. I would add this. Where there is a disciplinary process, during which an employee is dismissed, a complaint that that decision is discriminatory or has been reached by a discriminatory process against the Claimant does not necessarily cover the question whether the process as a whole, or other parts of it, could be acts of discrimination themselves. On the face of it, to offer an appeal to someone who has been dismissed at one part of the process is to confer upon them a potential advantage should they wish to have it. Far from being a detriment, it is an advantage. There could be no unlawful discrimination in offering that, provided of course that the disciplinary process is genuine and not biased, nor one in respect of which there were other reasons for thinking the process itself was an act of discrimination. As Mr Lewis points out, it was up to the Claimant to choose whether to appeal or not. It would be very odd if exercise of a choice of that sort led to an extension of the discrimination against her such that the Claimant was choosing to subject herself to further discrimination. Here, therefore, the Judge was in my view entitled to come to the view that there was no basis upon which she could conclude that the act was a continuing one (other than assertion which she, though she did not refer to **Ma v Merck Sharp & Dohme** [2007] All ER (D) 66, identified at paragraph 79 as a "bald assertion"). As a matter of pleading, she was entitled to take the view she did. Moreover, although the matter was properly ventilated before her in the sense of being raised at a time when the Respondent could object, there was no application to amend, as there would have to be if the Judge was properly to consider this. There was not.

46. I turn then to the question whether the Judge was entitled to reach the decision she did as to whether it would be just and equitable to extend time. Here, Mr Cunningham challenges the causative link between the Claimant not giving evidence and the conclusion that there was no basis on which to consider a just and equitable extension, indicated by the use of the word "accordingly" in paragraph 82. It is not always necessary for a Claimant to give evidence. As to this, he points to the decision of **Accurist Watches v Wadher Ltd** (UKEAT 0102/09), a decision of Underhill J sitting alone as President, in which what had happened was that a Judge had exercised the discretion to extend time but without hearing from the Claimant. The reason she did so was that there was clear evidence before the Tribunal that the Claimant had suffered from a form of stress reaction to events which was disabling. There was therefore material put before the Judge for her to consider relevant to the reasons for the absence of evidence.

47. In the course of the discussion by Underhill J, at paragraph 17 of the Judgment, he said:

> **"I was referred in this connection to the decision of this Tribunal (Beatson J. sitting alone) in *Outokumpo Stainless Ltd v Law* UKEAT/0119/07, BAILII: [2007] UKEAT 0199_07_0410). That was a case in which a claimant was seeking an extension of time but the employment tribunal had heard no evidence from him as to the reason for his delay. Beatson J described that omission as 'troubling' (see para. 17) and went on to say this at para. 18:**
>
> > **'Where a claimant does not put evidence before a tribunal in support of his application explaining his delay and saying why an extension should be granted now, how can the tribunal be convinced that it is just and equitable to extend time'**
>
> **I entirely agree with and endorse that observation insofar as it makes it clear that there must be evidence before the tribunal. But Beatson J. was not concerned with the question of the form that that evidence must take, and I do not read his observations as in any way insisting on the evidence taking the form of a witness statement."**

48. Mr Cunningham referred me, in addition, to **Robinson v Bowskill & Others** EAT/0313/12, a decision of HHJ Jeffrey Burke QC of 20 November 2013. That was a case in which the Claimant had not given evidence herself. Her solicitor had. The Tribunal had concluded that it was insufficient to explain or justify the extension of time that the solicitor had wrongly advised her client. In **Robinson**, just as in **Accurist**, there was therefore evidence

before the Judge on which she could have exercised her discretion to extend time or not. The question of whether it would be just and equitable to extend time in the present case was floated before the hearing on a number of occasions. At the hearing no submission was made, and the Claimant was not called. I was told that that was a forensic decision. It was plainly hoped that the evidence was sufficient to sustain the argument that there had here been a dismissal on notice which would accordingly have been within time and would not have required any just and equitable extension. There were understandable risks in any witness, the Claimant being no exception, being exposed to the rigours of cross-examination.

49. I am not, however, concerned for myself with whether there was or was not a good reason why the Claimant did not give evidence. All I can ask is whether the Judge was entitled to come to the conclusion she did. It would be asking too much of a Tribunal to conclude that, where there was no evidence as to why the claim was brought at the time it was, no evidence as to any particular prejudice that was caused by the failure to extend time and no submission that time should be extended, that the Judge should of her own volition not only have dealt with the question but have come to a conclusion favourable to the Claimant. A Tribunal Judge cannot be expected to anticipate arguments which might be made but have not been. She can only be asked to resolve the issues between the parties raised at the hearing or which are plainly otherwise in dispute.

50. The cases demonstrate that it is for the Claimant to show that it is just and equitable to extend time. That is accepted by Mr Cunningham. It is emphasised by the decision of Mr Recorder Underhill QC, as he was, in the Appeal Tribunal in **Hubberstey v South Ribble Borough Council** EAT/0097/01, a Judgment of 5 September 2002. At paragraph 28 he referred to the Tribunal there making a point determinative of the claim that, in the absence of

any consideration put forward by the Appellant, they had no material upon which they could exercise their discretion. The Appeal Tribunal commented:

> **"In our view this was a legitimate approach for them to take. It has been held by this Tribunal in *Dimtsu v Westminster City Council* [1991] IRLR 450, approved by the Court of Appeal in *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531, that a Tribunal is not obliged to draw an applicant's attention to the possibility of an application based on the just and equitable exception at all. It seems to us that it must also follow that a Tribunal is not obliged to consider such an application in the absence of an applicant to make the point."**

That was a case where the Applicant simply did not turn up. Where an Applicant does turn up but chooses not to give evidence, and the Applicant's representative chooses to make no submissions on the point, I see no material difference in the situation. I agree with what Mr Recorder Underhill QC there said. It follows that, in my view, the Judge was entitled to conclude as she did.

Conclusion

51. The case as to the effective date of termination is every bit as unpromising as it appeared at the outset to be. So far as the claim of disability discrimination concerned, there was no sufficient identification nor pleading nor any real evidence of an act extending over a period, and the Judge was entitled to take the view that, in the absence of any evidence going toward, or submission referring to, her discretion to extend time, she did not have to consider, nor did she consider, that it would be just and equitable to extend it. It follows that, despite the patient and persuasive way in which Mr Cunningham has advanced this appeal, it must be and is dismissed.

52. On the application for costs, two points arise. First, the question of whether this Tribunal should adjourn the question of expenses or costs to a later hearing in order to give the

disappointed party the chance to respond. No general principle can be laid down which will cover every situation. But usually a party should be able to deal with the principle of whether costs should be paid at a hearing once the hearing has concluded and Judgment has been given. I have no sympathy, therefore, with Mr Cunningham's first point, in response to an application here that the claim was misconceived, that in effect he should be permitted time to consider the matter and respond later.

53. However, I do not think that this is an appropriate case in which I should order any expenses to be paid by the Claimant to the Respondent. The occasions when a costs or expenses order are made are prescribed by Rule 34A of the **Employment Appeal Tribunal Rules 1993**. They are where proceedings were "unneccessary, improper, vexatious or misconceived or there has been unreasonable delay or other unreasonable conduct". The force of the words "unneccessary, improper, vexatious or misconceived" should not be diluted. It is very difficult, though not always impossible, for a claim to be said to be misconceived where a High Court Judge or Court of Session Judge has identified an arguable point within it. Lady Stacey did so here. She was entitled to do so. I do not consider that the case on paper, as it would have appeared then, was so obviously misconceived as it appears now to be, after argument and Judgment. That is often the effect of a hearing. There were points on which it is useful to have given Judgment, not least the significance of the intention of the parties and whether what happened should be judged by reference to evidence of their intention as opposed to the objective appearance of what had occurred. I am not prepared to go so far as to say the appeal was misconceived. That was the only ground advanced for seeking costs. Though not without some sympathy for the application, I reject it.