Appeal No. UKEAT/0517/13/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 16 January 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS A MOSEKA — APPELLANT

SHEFFIELD TEACHING HOSPITAL NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	DR ROLAND IBAKAKOMBO (Representative)
For the Respondent	MR MATTHEW BRADLEY (of Counsel) Instructed by: DAC Beachcroft LLP 7 Park Square East Leeds LS1 2LW

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

JURISDICTIONAL POINTS – Claim in time and effective date of termination

Whether Employment Tribunal erred in law in approach to deciding whether complaints of race and disability discrimination amounted to "conduct extending over a period". Save in respect of the characterisation of one complaint (relating to grievance complaint), ET approach and decision upheld.

HIS HONOUR JUDGE EADY QC

Introduction

1. This is an appeal by the Claimant in this matter - I refer to the parties as the Claimant and the Respondent as they were before the Employment Tribunal. The appeal is against a Judgment of Employment Tribunal sitting at Sheffield, Employment Judge Sneath sitting alone, on 12 August 2013. The Judgment was sent to the parties with Reasons on 19 August 2013.

2. The Respondent is an NHS Foundation Trust. The Claimant, who describes herself for the purpose of her race discrimination claims as a black woman of African origin, commenced employment with the Respondent back in March 2004 in the capacity of domestic cleaner. I understand that she was dismissed from that employment on 21 May 2013 and I am told that the reason given by the Respondent for that dismissal was said to be incapability due to ill health.

The background

3. As at the date of the Sneath Employment Tribunal hearing with which this appeal is concerned, the Claimant had presented two claims. The first was presented on 4 December 2012, which dealt with matters up to that date ("the 2012 claim"). The second, was presented on 16 February 2012 and dealt with a specific incident in January 2013 ("the 2013 claim"). I am told that the Claimant has since presented two further claims in the Tribunal: one on 21 August 2013, complaining of unfair dismissal and disability discrimination against the Respondent, and a further claim on 13 December 2013, alleging disability and race discrimination against the Respondent. This appeal is concerned only with the first claim, the 2012 claim.

4. In its response in those proceedings, the Respondent had contended that many of the complaints were out of time, were not a continuing act as the Claimant had alleged, and that it would not be just and equitable to extend time. Accordingly, pursuant to a direction by EJ Rostant at an earlier telephone Case Management Discussion on 11 April 2013, a preliminary hearing was listed to consider whether some of the claims were out of time as the Respondent contended and, if so, whether it would be just and equitable to extend time so as to give the Tribunal jurisdiction to hear them.

5. As part of that Case Management Discussion before EJ Rostant, the Claimant's representative clarified the nature of the claims made, as listed at paragraph A2.2 of the Case Management Discussion orders (pp. 67-69 of the Appellant's EAT bundle):

> **"A2.2 The Claims and the Time Issue**
>
> **The Claimant's complaints are wide ranging and various and as has been noted stretch over a very considerable span of time. Prior to this Case Management Discussion it was not clear what the legal nature of each complaint was. I conducted a careful consideration with the Claimant's representative which covered each matter raised by the two claim forms. He was extremely helpful in pinning down the nature of the claims and the results of that discussion are set out below.**
>
> **In the first claim form the Claimant complains of a failure to move her to her to lighter duties whilst she was pregnant in 2004 but accepts that the adjustment was made in January 2005. The Claimant asserts that this is an act of racial harassment.**
>
> **The next matter of complaint relates to a failure by a supervisor to record an accident at some point in 2006. This, the Claimant now says is direct race discrimination.**
>
> **The next matter after that relates to the Claimant's race and a requirement that she produce her work permit. This was not until 2009. This, the Claimant now says is direct race discrimination.**
>
> **There are then a number of matters complained of (first claim-paragraphs 6 to 11 inclusive) which are complaints of direct discrimination and harassment because of race. They deal with incidents between July 2009 and March 2010 involving the Claimant's supervisor Ms Thomas.**
>
> **At paragraph 11.1 to 11.5, the Claimant sets out details of a further incident between the Claimant and her then supervisor, Ms Thomas, in October 2010. This incident, the Claimant now asserts, was one of harassment because of race.**
>
> **In June 2010 the Claimant had lodged a grievance about various matters and in October 2010 she added to that grievance a complaint about the October 2010 incident with Ms Thomas.**
>
> **The Claimant complains about the handling of the grievance and of a separate bullying and harassment investigation by the Respondent which at the time of this CMD is still not yet complete. The Claimant asserts that the process has been delayed and that the decisions at each stage so far completed have been adverse to the Claimant because of her race and this is direct discrimination.**

The Claimant was away from work ill between 2 August 2010 and 18 May 2011 with chronic back pain.

At paragraph 13 the Claimant complains that upon her return to work she was required to do a ward assistant's post. The duties of that post caused her pain because of her back and reasonable adjustments ought to have been made by moving her away from that work. That offer of adjustment, a move to administrative, office based work, was not made until 19 November 2012. The Claimant accepts that that was a reasonable adjustment.

The Claimant is currently off work ill because of her back and has been since 10 September 2012. She says she cannot do any work at all at the moment.

The Claimant asserts that she was not paid for her work on 6th and 7th September. This is asserted as being a claim of direct discrimination because of her disability.

The Claimant confirms that she had no complaint about her medical suspension. On 10 September.

In December 2012 the Claimant raised a further grievance about the failure to offer her redeployment until November. That has yet to be resolved.

The foregoing are all the complaints covered by the first claim.

The second claim relates entirely to an incident on 14 January 2013 when the Trust convened a grievance meeting. There was a question as to whether the Respondent should deal with the grievance at stage 1 or, as the Respondent wanted, at stage 3. As a result of that disagreement the Claimant became ill and collapsed.

The Claimant asserts that this is discrimination because of the Claimant's disability due to her stress. This was a failure to make reasonable adjustments during the meeting.

The Claimant relies upon the PCPs of the conduct of the meeting and the decision in relation to the stage of the grievance.

First, the Respondent failed to conduct the meeting sympathetically:

Secondly, Mrs Sharland, against whom the Claimant had already made a grievance was present and that was distressing to the Claimant;

Finally, the Respondent ought to have complied with its own policy and agreed to deal with the grievance at stage 1 and its failure to do so was distressing to the Claimant.

The Claimant also relies on what she says was the aggressive conduct of the meeting by Miss Lawford as an instance of racial harassment."

6. As set out at A2.2, those were expressly identified as the only complaints to be determined by the Employment Tribunal in those proceedings. As Employment Judge Rostant put it:

> **"This schedule sets out the complaints to be determined and the issues to be decided for that purpose. These are the matters to be decided by the Tribunal and no other matter will be decided at the hearing."**

7. At first sight, it seemed to me that there might be some lack of clarity as to whether EJ Rostant's listing of the claims included complaints of disability discrimination other than the

complaints about the failure to pay the Claimant for her work on 6 and 7 September. It was accepted by both parties before me, however, that they had understood that the disability discrimination complaints were more extensive than that, as was made clear from the table attached to the witness statement of the Respondent's witness before the preliminary hearing. That table included a complaint relating to a failure to offer the Claimant redeployment until November 2012 – i.e. a complaint of failure to make a reasonable adjustment; a failure to deal appropriately with the Claimant's grievances - also apparently understood as a reasonable adjustment complaint; and a failure to address the Claimant's grievance - put simply under the label "direct discrimination", not specifying particular protected characteristic.

8. As so clarified, and allowing for the fuller summary provided in the table supplied by the Respondent, it is apparent that the Claimant's complaints effectively extended over almost the entirety of her career with the Respondent, going back to a complaint of a failure to move her to lighter duties when she was pregnant back in 2004 and ending, so far as the 2012 claim is concerned, with a complaint about the failure to resolve her grievance in December 2012.

9. Having identified the claims made, EJ Rostant had directed there should be a preliminary hearing, as I have said, observing:

> **"B1 It is apparent from the discussion of the issues that there are two preliminary issues which could be dealt with before a substantive hearing. The first of these is the issue of time limits and I agreed with the parties that that would feature as the subject of a Pre-Hearing Review. Although the Claimant asserts that she is complaining of continuing acts, there are obvious difficulties with that assertion given the gaps in time, the variety of persons involved and the disparate nature of the claims being brought. It is therefore appropriate that the Tribunal should consider whether some of the claims were not brought within the time limit laid down by statute and if not whether it would be just and equitable to allow them to proceed."**

10. The preliminary hearing was ordered to take place on 12 August 2013, for four hours, and directions were given for that hearing, including as to bundles and witness statements. Thus, the matter came before EJ Sneath.

The Sneath tribunal

11. The essential chronology that EJ Sneath had to address is set out against the parties' respective positions and was as follows. Since the first ET1 was presented on 4 December 2012, any acts relied on by the Claimant predating 5 September 2012, were prima facie out of time. That would not be so if those acts were properly to be seen as conduct extending over a period which only ended on or after 5 September 2012. Alternatively the Employment Tribunal would have a discretion to extend time in any time for such period as it considered just and equitable.

12. For completeness, I note that whilst in the 2012 claim the Claimant had mentioned the fact that she had been medically suspended from work on 10 September 2012, she had confirmed at the CMD that she had no complaint about her medical suspension on that date.

13. At the preliminary hearing, EJ Sneath, having heard from the Claimant and received in evidence a witness statement from a Sonia Lawford for the Respondent, held as set out below.

14. First, that the complaints of disability discrimination arising out of the Respondent's failure or refusal to pay the Claimant for her absences from work on 6 and 7 September 2012 would proceed to a full hearing.

15. Second, that the Claimant's claim of race discrimination in respect of the alleged delay in completing a grievance/bullying and harassment procedure would also proceed to a full hearing.

16. Otherwise, all the complaints of the 2012 claim were out of time. It would not be just and equitable to extend time and, accordingly, those claims should be struck out.

The appeal

17. The Claimant now appeals against that Judgment and the appeal has been permitted to proceed to a full appeal hearing on the basis identified by the President of the EAT, The Honourable Mr Justice Langstaff, in his consideration of the matter on the papers as follows:

> **"The issue which I think requires to be heard is whether the judge erred in deciding there was no continuing act/state of affairs at least insofar as the Claimant's relationship with her supervisor were concerned, without hearing the evidence. More cases are being struck out at an early state, despite *Anyanwu* than was the case a few years ago, and this may be one too many. Since allegations of discrimination remain for decision, and per (*Anya*) the "back story" may need to be explored to place them in context, the gain in time from an early strike out may be marginal."**

18. I observe that permission was not given for this appeal to proceed on the basis that any challenge to EJ Sneath's conclusion that it would not be just and equitable to extend time. That was plainly a matter for the exercise of his discretion. The issue before me, therefore, is solely whether or not he was correct in his decision that there was no "conduct extending over a period" or, as it is more often put, no continuing act or state of affairs such as to mean that the earlier complaints were in time in this case.

The law

19. Before turning to the submissions made before me, it is helpful to refer to the relevant statutory provisions and some of the guideline case law. I start with s.123 of the **Equality Act 2010**, which provides relevantly as follows:

> **"(1) Proceedings on a complaint […] may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable.**

[…]

(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;

(b) failure to do something is to be treating as occurring when the person in question decided on it."

20. The approach to time limits in discrimination cases has been the subject of failure extensive consideration in the appellate courts. The starting point is the guidance provided by Mummery LJ in the case of **Hendricks v The Commissioner of Police for the Metropolis** [2003] IRLR 96:

"48. On the evidential material before it, the Tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the Commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed from the Service. She remains a serving officer entitled to the protection of Part II of the Discriminations Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the Service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism,' 'a prevailing way of life,' a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination.

49. At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.

50. I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that he ground of the less favourable treatment is race or sex.

51. In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on 'continuing acts' was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574 at paragraphs 21-23; *Rovenska v General Medical Council* [1998] ICR 85 at p.96; *Cast v Croydon College* [1998] ICR 500 at p.509 (cf the approach of the Appeal Tribunal in *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833 at p.841 where there was an 'accumulation of events over a period of time' and a finding of a 'climate of racial abuse' of which the employers were aware, but had done nothing. That was treated as 'continuing conduct' and a 'continuing failure' on the part of the

employers to prevent racial abuse and discrimination, and as amounting to 'other detriment' within section 4(2)(c) of the 1976 Act).

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

21. Mummery LJ had occasion to revisit this issue in the case of **Arthur v London Eastern Railway Limited** [2007] IRLR 58, a case involving the analogous time provisions in whistle-blowing cases:

"29. Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short 3 month period is not an isolated incident or a discrete act. Unlike a dismissal, which occurs at a specific moment of time, discrimination or other forms of detrimental treatment can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a Tribunal. It is not always reasonable to expect an employee to take his employer to a Tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the 3 month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice, scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment. If, for example, an employer victimised an employee for making a protected disclosure by directing the pay office to deduct £10 from his weekly pay from then on, the employee's right to complain to the Tribunal would not be limited to the deductions made from his pay in the 3 months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the deduction in the 3 months would be treated as the date of the act complained of.

30. The provision in section 48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the 3 month period. There must be an act (or failure) within the 3 month period, but the complaint is not confined to that act (or failure). The last act (or failure) within the 3 month may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.

31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3 month period and some outside it. The acts occurring in the 3 month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the 3 month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a 'series' and (b) being acts which are 'similar' to one another.

[…]

35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by follow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find 'motive' a helpful departure from the legislative language according to which the determining factor is whether the act was done 'on the ground' that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure.

36. Ms Seymour objected that, if this was the case, there was no point in having a Pre-Hearing Review to determine time-limit issues in a case such as this. The matter would always have to go to a Full Hearing. Two points can be made on this submission. First, it is possible to direct a Preliminary Hearing with *evidence* relevant to the time limit point. Secondly, I agree that there would be no real point in having a Preliminary Hearing with evidence, if it was not going to save time and costs. That will often be the case in this sort of situation. Even if it is decided at a Pre-Hearing Review or other Preliminary Hearing that there is no continuing act or series of similar acts, that will not prevent the complainant from relying evidentially on the pre-limitation period acts to prove the acts (or failures) which establish liability. It will in many cases be better to hear all the evidence and then decide the case in the round, including limitation questions, on the basis of all the evidence: see, for example, *Hendricks v Metropolitan Police Commissioner* [2002] 1 All ER 654 (particularly at paragraphs 48 and 49) regarding the approach to multiple acts alleged to extend over a period."

22. Then again in **Ma v Merck Sharp & Dohme Limited** [2008] EWCA Civ 1426 Mummery LJ returned to the issue in a race case where the Employment Tribunal's striking out of parts of the claimant's case had been upheld by the EAT. In **Ma**, Mummery LJ made various observations as to the approach to be adopted in such cases:

"15. I can well understand the thinking behind the attempts on the part of Merck and of the Tribunals themselves to keep this case within reasonable bounds by a combination of case management powers and the application of time limits. The extraction of the 12 issues from Dr Ma's ET1 brought a coherent structure to his allegations. Both sides have benefitted from that. However, practical problems persisted. The ET had to decide, in advance of hearing all the evidence, whether the disputed acts extended over a period or were a succession of isolated specific acts. The decided cases cited to the Tribunals and discussed in the written submissions illustrate the problem and offer modest guidance, but they do not, and cannot supply, the answers to the particular case, which must always depend upon its own facts.

16. The ET and the EAT approached the issue with the correct legal principles well in mind. They took commendable care in reaching their decisions that there were some complaints in time, as they were reasonably arguable instances of a connecting link to one another and to Dr Ma's Chinese ethnicity, and then distinguishing those complaints from other complaints which did not satisfy the time limits requirements.

17. I have no difficulty in agreeing with Mr Gailbraith-Marten's submission or with the decisions of the Tribunals below that it is not enough for Dr Ma simply to assert that the acts are continuing acts or that they evidence a state of affairs extending over a period. The complainant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.

18. I am also of the view that this court should not be hyper-critical or over-analytical in its treatment of Tribunal decisions which, even if not themselves technically discretionary case management issues, are closely connected to the practical management of complex or

intractable litigation. After all it is the ET and not the Court of Appeal that is going to try the case. That said, however, there are features in the present case that have led me to the conclusion that a question of law does arise from the decision of the ET to limit or exclude from the substantive hearing on time limit grounds some of Dr Ma's complaints and evidence of them, and that there should be some variation in the ET's order.

19. There is no need to repeat or to re-formulate the general guidance on time limits in cases that are claimed to be cases of continuing acts: see, for example, *Commissioner for the Police v Hendricks* [2003] ICR 530. I was disappointed to be told by Mr Gailbraith-Marten, who also appeared in that case, that the hopes expressed in that case about parties reaching sensible agreements on the formulation of lists of issues and on reducing the areas of dispute and the evidence by concentrating on the most serious and the more recent allegations have had no effect in practice. There is no point in judicial repetition of vain aspirations. In this case I would simply make the following points on the ET decision as upheld by the EAT."

23. The way in which an Employment Tribunal is to approach its task in this regard again came before the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548:

"10. I turn to the first issue: the test to be applied by the ET. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686 Mummery LJ (with whom the other members of the Court agreed) set out the test to be applied at a Preliminary Hearing [now a Pre-Trial Review] when the Claimant, otherwise out of time, seeks to establish that a complaint is part of an act extending over a period. The Claimant must show a prima facie case. Miss Monaghan submitted that the ET must ask itself whether the complaints were capable of being part of an act extending over a period. I, for my part, see no meaningful difference between this test and the prima facie test.

11. To resolve that issue it may be advisable for oral evidence to be called, see e.g. *Arthur v London Eastern Railway Limited (trading as One Stansted Express)* [2006] EWCA Civ 1358. […]"

24. Further guidance was provided by the Court of Appeal in **Aziz v FDA** [2010] EWCA Civ 304:

"33. In considering whether separate incidents form part of 'an act extending over a period' within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02/DA) at paragraph 208.

34. One issue of considerable practical importance is the extent to which it is appropriate to resolve issues of time bar before a main hearing. Obviously there will be a saving of costs if matters outside the jurisdiction of the ET are disposed of at an early stage. On the other hand a Claimant must not be barred from presenting his or her claim on any issue where there is an arguable case.

35. The Court of Appeal considered the correct approach to this matter in *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548. In that case the Claimant complained of 17 incidents of racial discrimination over a period of many months. The question of time bar was dealt with at a Pre-Hearing Review. The Claimant gave oral evidence on that occasion. Having heard the Claimant's evidence, the ET allowed five of the Claimant's complaints to proceed but dismissed the other 12 complaints as being

> **out of time. The EAT and the Court of Appeal both upheld that decision. Hooper LJ gave the leading judgment, with which Hughes LJ and Thorpe LJ agreed. Hooper LJ stated that the test to be applied at the Pre-Hearing Review was to consider whether the Claimant had established a prima facie case. Hooper LJ accepted counsel's submission that the ET must ask itself whether the complaints were capable of being part of an act extending over a period.**
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> **36. Another way of formulating the test to be applied at the Pre-Hearing Review is this: the Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs: see *Ma v Merck Sharp and Dohme Ltd* [2008] EWCA Civ 1426 at paragraph 17."**

25. As to what Employment Tribunals should consider on such cases, guidance has been provided most recently in **City of Edinburgh Council v Kaur** [2013] CSIH 32:

> **"18. The essence of the Respondents' position was that the Tribunal had no jurisdiction to consider any allegedly discriminatory acts which allegedly took place prior to 23 March 2010, being a date three months prior to the submission of the Claimant's second claim to the Tribunal on 22 June 2010, and therefore outwith the primary statutory time limit for claims in terms of sections 68(1)(a) and 68(7)(b) of the Race Relations Act 1976 then in force. Employment Tribunals do not have jurisdiction to deal with claims which are this time barred (sections 54(1) and 68(1) of the 1976 Act; see eg *Radakovits v Abbey National plc* [2010] IRLR 307, Elias LJ at para 16). In this case, time bar was 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)."**

26. In support of her arguments on the appeal, whilst accepting that the mere submission of a grievance complaint does not necessarily mean that the grievance process becomes part of a continuing course of conduct along with the original act, the Claimant places reliance on the case of **Bahous v Pizza Express Restaurant Limited** UKEAT/0029/11/DA. In that case the Employment Tribunal had found as a fact that the grievance had been about an unlawful act of discrimination and had been raised on the same day as the claimant's suspension and formed part of an ongoing situation. Although the respondent had sought to cross appeal this finding the EAT considered that it was a finding of fact open to the Employment Tribunal and the respondent was unable to surmount the high threshold required to establish perversity as per **Yeboah v Crofton** [2002] IRLR 634.

27. Turning specifically to the disability discrimination/reasonable adjustments claim, it was accepted by the Claimant that the case of **Matuszowicz v Kingston upon Hull City Council** [2009] EWCA Civ 22 applies (see, in particular paragraphs 22 per Lloyd LJ and paragraph 35 per Sedley LJ):

> **"22. In the Employment Tribunal the complaint of failure to make reasonable adjustments was treated as an allegation of an act, or of continuing acts running through from August 2005 up to 1 August 2006. It seems to me, with respect, that that is not the correct analysis. Rather, a failure to make adjustments, at any rate in this type of case, is an omission, not an act. There may of course be positive acts that are inconsistent with the duty but the failure to make adjustments is in this nature an omission. In *Humphries v Chevler Packaging Limited*, UKEAT/0224/06, 24 July 2006, decided by the Employment Appeal Tribunal, His Honour Judge Reid QC sitting alone, said at paragraph 24 'the failure to make adjustments is an omission. The Respondents are omitting to do what (on the Appellant's case) they are obliged to do. They are not doing any act, continuing or otherwise.' That was a case in which the Respondent employer, after lengthy dealings with the Appellant or her representatives, replied on 11 April 2005 to a letter from her solicitors asking for its intentions in respect of the availability of suitable employment, by saying that the only job available was a cleaning job which had been offered to her and which she had refused but which was still open to her. She contended that that was not a compliance with the duty to make reasonable adjustments and on 16 May she resigned. She later issued a complaint in the Employment Tribunal. If time ran from 16 May 2005 then her complaint was in time but if it ran from 11 April 2005 the complaint was too late. Judge Reid held that the latter was the position because on 11 April there had been a definitive refusal to make any other reasonable adjustments than offering the job as a cleaner which was not accepted to be a reasonable adjustment. The Appellant contended that time ran from the time when she left the employment because the duty to make the adjustments continued until then, but the judge held that the letter of 11 April was a definitive refusal and was, albeit an omission, a deliberate omission decided on as at that date and, in effect, that paragraph 3(4)(a) applied. At paragraph 25 he said this:**
>
> > **'There is no requirement of motive in paragraph 3(3) and (4) as is suggested by the Claimant. Under paragraph 3(3)(c) the question is whether there had been a decision not to do something. If there had been an inconsistent act, then (in absence of evidence to the contrary) the paragraph provides that the decision is to taken as having been made when the inconsistent act is done. If there is no inconsistent act, then the person is taken (to paraphrase) to have decided upon the omission at the end of a reasonable time. Thus, in the absence of evidence to the contrary, if there is no evidence of a deliberate decision, a deliberate decision is imputed to the person'.**
>
> **[…]**
>
> **35. The point of general importance which emerges from his judgment, and is worth stressing, is that the effect - unfortunately not a readily obvious one - of paragraph 3 of Sch 3 to the 1995 Act is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment. The evident purpose is to prevent a situation of neglect from dragging on indefinitely, and to do this, where no overtly inconsistent act has set time running, by putting the onus on the Claimant to decide when something should have been done about the omission and to bring his or her claim within 3 months of that date."**

The Claimant's submissions

28. The Claimant's case before me is put on the basis that EJ Sneath erred in law by failing to apply the guidance in cases such as **Hendricks** when deciding:

> **"1.1 […] whether the Claimant's case is 'ongoing situation or a continuing state of affairs' covered by the concept of 'an act extending over a period'. Particularity; the Claimant asserts that her case is a continuing act from 2004 up to the presentation of the first claim in 2012 and the Respondent's handling of the Claimant grievances including delay in completing the combined Stage 4 Appeal and bullying & harassment procedure (the procedure and decision at each Stage) formed part of an 'ongoing situation or continuing state of affairs' to borrow Mummery LJ's phrase used the above authority consequently:**
>
> **1.2 The Employment Judge erred in law by failing to focus on the substance of the Claimant complaints or on the evidence material before it in relation to an ongoing situation or a continuing state of affairs to indicate discrimination treatment from 2004 up to the handling of the Claimant grievances including delay in completing the combined Stage 4 Appeal and bullying & harassment procedure which still ongoing up to date."**

29. The Notice of Appeal argues that the Employment Judge failed to give proper consideration to the ET1, the Claimant's witness statement, and the material adduced by the Respondent in this case at the preliminary hearing.

30. Specifically, whilst accepting that EJ Sneath was right to take the claims to be as defined by EJ Rostant (although with the further clarification provided by the Respondent's table, as attached to Ms Lawford's witness statement), the Claimant argued that, the Employment Judge failed to take into account that there was a reasonable adjustment disability discrimination complaint still live, which the Respondent accepted involved a complaint of a continuing failure to make reasonable adjustments into the three-month period immediately preceding the submission of the ET1.

31. Similarly, it was argued that the Employment Judge had failed to take into account the evidence that the Respondent had accepted that the grievances were ongoing in general terms not just in respect of the Stage 4 that the Employment Tribunal had permitted to proceed.

32. It was further argued that the Employment Judge had failed to properly understand how the Claimant was putting her claims. Had he done so then he would have found the following connections:

(a) back in 2004 when she was pregnant and was not given lighter duties but had back pain, this was a similar complaint to how she was being treated in respect of her back complaint and her duty to make reasonable adjustments later on;

(b) as for the 2006 failure to report and record the accident at work, that was a continuing act because it only got recorded in 2013;

(c) the 2009 complaint (concerning the request that the Claimant provide a work permit) as that was referred to in the letter in January 2011, that was also a continuing act; furthermore, there was a failure to deal with this point under the Respondent's grievance procedure which made it an ongoing matter;

(d) the other complaints in 2009 and going into 2010, all related to a continuing course of conduct on the part of the Claimant's then supervisor Ms Thomas. This became part of the grievance complaint thereafter.

33. As for the disability discrimination/failure to make reasonable adjustments complaint, although paragraph 51 of the Judgment appeared to make a specific finding in respect of this, that paragraph displayed the Employment Judge's lack of understanding as to how the Claimant's case was put, alternatively was perverse.

34. The Claimant accepted that time ran from when it could be said that the Respondent could reasonably have been expected to have made the reasonable adjustments contended for by the Claimant. There had, however, been a separate occupational health report on 9 October 2012 and so that had generated a new duty at that stage.

35. More generally, paragraph 52, in which the Employment Judge concluded that he could not find that the Claimant had established a prima facie case of race discrimination such as would shift the burden of proof, was not a matter which the Employment Tribunal was set to hear at that preliminary hearing and so was not a relevant finding.

The Respondent's submissions

36. For the Respondent, in general terms it is observed that the corollary of Mummery LJ's reference to unconnected acts in **Hendricks** is the requirement that a Claimant can establish a connection between the relevant acts and it was observed that a similar approach was adopted in **Arthur** and in many subsequent cases.

37. Moreover, the Respondent submitted that the Employment Tribunal was entitled to make a critical assessment of the true nature of the claims being made. A mere assertion as to the existence of a continuing act cannot suffice. On this point the Respondent observes that it is for the Claimant to raise a prima facie case that there was a continuing act, not for the Respondent to prove that there was not.

38. In this case specific directions had been given for the evidence to be adduced at the preliminary hearing and EJ Sneath heard oral evidence from the Claimant herself and took in, with the agreement of the Claimant's representative, a witness statement from Ms Lawford for the Respondent, which attached a full chronology. That chronology sought to summarise the claims being put by the Claimant, as the Respondent understood them, it did not make concessions that her assertions were correct. There was further a bundle of documents of some 150 pages and there were submissions from both sides.

39. The Respondent contends the Claimant simply did not provide an evidential basis to demonstrate any connection or link, she simply made the bare assertion that there was a continuing act or that she had been advised that one existed and her witness statement failed to go any further than that on this point.

40. Having considered the evidence, the Employment Judge concluded at paragraph 52 as follows:

> **"[…] the Claimant has not properly, if at all, identified any facts from which the Tribunal could conclude that the Claimant was less favourably treated because of her race. Plainly she can point to a difference of race and she could argue less favourable treatment but that is insufficient of itself to shift the burden of proof. Thus, I have considerable reservations about the merits of her race discrimination complaints and add that factor to my reasons for holding that it would not be just and equitable to put this Respondent to the trouble of defending those complaints."**

41. It is observed that there is no appeal against paragraph 52 of the judge's reasons and the Respondent notes that the EAT is thus being asked to:

> **"[…] permit complaints of race discrimination to proceed because, per C, she can show a prima facie case as to a continuing act, in the face of an unappealed finding that those same complaints disclose no prima facie case of race discrimination."**

42. As for the specific points made by the Claimant:

(a) the ongoing back pains point: it was submitted that the way in which the Claimant had put her case in her ET1 just did not demonstrate a link to the 2004 complaint as is now being suggested. Specifically, the Respondent observes that the disability discrimination complaint at paragraph 25 of the 2012 claim is specified as follows:

> **"25. In 2006, the Claimant fell down due to water spillage at her place of work consequently, since that period the Claimant had developed ongoing back pains."**

(b) In respect of the alleged failure to record an accident at work in 2006, the Claimant was simply asserting that the subsequent reporting of this accident in May 2013 was sufficient to make this a continuing act, but it plainly needed more.

(c) The reference in the letter of 10 January 2011 to the earlier request for a work permit simply did not evidence any continuing course of conduct and EJ Sneath was entitled to make the finding that he did in this regard.

More generally, the simple fact that the Claimant subsequently lodged a grievance complaint cannot turn isolated individual acts into one general course of conduct and does not suggest otherwise.

43. On the disability discrimination/reasonable adjustments complaint, the Respondent observed that how the Claimant now sought to characterise the complaint, i.e. placing emphasis on the occupational health report of 9 October 2012, was just not how her case was put before the Employment Tribunal. It is not a complaint that can be discerned from the ET1 and EJ Sneath cannot be blamed for not having understood the Claimant's case to be presented in that way and for approaching it on the basis of EJ Rostant's summary. His understanding of the way in which the complaint was being put is apparent from paragraphs 32 to 33 of his Judgment where he quotes from EJ Rostant's schedule of claims as follows:

> **"32. The Claimant was away from work ill between 2 August 2010 and 18 May 2011 with chronic back pain.**
>
> **33. At paragraph 13 the Claimant complains upon her return to work. She was required to do a ward assistant's post. The duties of that post caused her pain because of her back and reasonable adjustments ought to have been mode by moving her away from that work. That offer of adjustment, and movement to administrative office based work, was not made until 19 November 2012. The Claimant accepts that that was a reasonable adjustment."**

44. Thus, his conclusion at paragraph 51 neither discloses an error of law nor is it perverse.

45. As for any more general complaint about the grievance process, although the Respondent had included this in its table under the general label direct discrimination, given EJ Rostant's order, this was plainly not seen as part of the disability discrimination case, which was limited to reasonable adjustments and failure to pay the Claimant for her work on 6 and 7 September.

Conclusions

46. The starting point here is to note the care that had been taken by the Employment Tribunal at the CMD stage to try to make sure that the Claimant's claims were properly understood. It is unfortunate that some of the labels to be attached to the disability discrimination claims were omitted from EJ Rostant's list but that does not detract from the utility of the exercise as a whole.

47. Given the very wide ranging and, on their face, quite diverse complaints, it was also (as the parties accepted) appropriate in this case to consider the time issue at a preliminary hearing. That will not always be the appropriate course in all cases but one can see why it was ordered here and sensible directions were given as to the evidence that would be adduced at the preliminary hearing with both parties being put on notice as to the matters on which they should focus.

48. Turning to the preliminary hearing itself, it is apparent that as per the guidance in **Kaur**, the Employment Judge first sought to ensure that he had properly ascertained the nature of the complaints as put by the Claimant. In this task he was assisted by the work that had been done by EJ Rostant at the telephone CMD with the assistance of the Claimant's representative. His summary at paragraphs 3 to 37 of his Judgment, however, goes further and descends into the

details of the complaints plainly taking into account further information obtained from the evidence adduced before him.

49. I have read the Claimant's witness statement as it was presented before EJ Sneath and consider it unfair to criticise him for not understanding it to be making all the points that have been made in submissions before me today. The focus of the statement would appear to have been on the question of what would be just and equitable and I consider it to be fair criticism - as made by the Respondent in its skeleton argument - that the Claimant's statement did not assist greatly on the issue and question of whether there was a continuing act.

50. Turning then to the submissions made for the Claimant on this appeal, to a large extent the case is dependent upon it being accepted that the specific acts complained of are all part of a continuing discriminatory state of affairs along with the Respondent's response, or failure of response, to the Claimant's grievances. I do not accept that as a general statement of the law. That is not to say, as per **Bahous**, that a grievance cannot be part of an ongoing situation or continuing state of affairs, and that is properly a matter to be considered by the Employment Tribunal on the facts at first instance.

51. In this case, the Employment Judge had the benefit, which I do not have, of hearing from the Claimant herself and of considering the 150 pages in the bundle put before him by the parties. His conclusion was that there was simply no link in this case. Given his findings as to the specific acts complained of, that seems to me to be a conclusion open to the Employment Judge on the findings he had made and on the basis that the complaints as put before him.

52. Even if the Employment Judge had in some way misunderstood how the Claimant put her complaints before him, on the basis of the submissions made before me I do not see that any

different outcome would be reached. For example, pointing to the fact that a failure to record an accident at work was rectified in 2013, i.e. after the complainant had complained about this very thing, does not meant that there was a continuing act of discrimination from 2006 until 2013. There was, on the Claimant's case, an omission to act to record the accident in 2006. After complaint by her, the Respondent took a remedial step in 2013. That is not a continuing state of affairs.

53. Similarly, to the extent the Claimant complains of a particular line manager's treatment of her from 2009 to 2010, there might be an argument that that period in time saw a continuing course of conduct or an ongoing discriminatory situation (assuming the Claimant's allegations are true), but once it had come to an end the subsequent handling of a grievance into that period does not, without more, become part of the conduct.

54. As for the Claimant's lower back pain and how the Respondent responded to that, I could see that there might be something in this if the Claimant was simply putting different labels onto the same course of conduct complained of, i.e. it could be seen as an act of race discrimination back in 2004 but subsequently becomes an issue of disability discrimination/reasonable adjustments later on. But here that is not how the Claimant put her case in the ET1. Given how the Claimant has chosen to describe her complaint, it is difficult to see how that could then be found an ongoing situation going back to 2004. That being so, the 2004 complaint remains, as the Employment Judge found, an entirely separate and isolated incident on the Claimant's own case.

55. Turning to the reasonable adjustments case, the difficulty for the Claimant here is, again, that how she seeks to put the case on appeal is just not how it appeared before the Employment

Tribunal, either before EJ Rostant or EJ Sneath, and that is understandable given how it was put in the ET1.

56. Having already read in paragraph 25, I read the rest of that section under the heading Disability Discrimination:

> **"26. On 22 December 2010 the Claimant was assessed by Dr Juliet Terry, GP Clinical Assistant at occupational Health clinic: adjustments to be considered in view of the Claimant low back pain.**
>
> **27. On 8 June 2011, the Claimant was assessed by Dr Juliet Terry, GP Clinical Assistant at occupational Health clinic who states: 'provided the Adjustments can be continued and she has good support, as at present'**
>
> **28. On 15 May 201, Dr Prosenjit Giri, Consultant Occupational Physician states: the Claimant has a chronic back problem and her GP is not expecting any easy solution and that he cannot foresees any signification improvement of her back condition in the foreseeable future and therefore any modifications of her job are likely to be permanent."**

Applying **Matuszowicz v Kingston upon Hull City Council**, and on the basis of how the Claimant was putting her case before the Employment Tribunal, I see no error of law or perversity in the Employment Judge's conclusions at paragraph 51.

57. Having reached these conclusions, I turn finally to the one matter where I have some concern as to the Employment Judge's Judgment, and that relates to the argument in respect of the grievance.

58. The Judgment allows the Claimant's complaint to go forward to the extent it relates to the Respondent's delay in completing the combined Stage 4 Appeal and bullying and harassment procedure as being a complaint of less favourable treatment because of her race. The Claimant has argued before me that given the way in which the Respondent itself had understood this to also fall under the heading of disability discrimination, it was perverse of the Employment Judge to limit it to being a matter of race discrimination.

59. It is right to observe that the table attached to Ms Lawford's witness statement deals with this matter at point 17 under the heading "Direct Discrimination". It is in the section of her table which otherwise deals with disability discrimination but it is correct to say that she does not associate it with any particular protected characteristic.

60. Before me, the Respondent observes that the list of claims and issues from the telephone CMD only can be read as including a disability discrimination complaint in relation to the failure to make reasonable adjustments. I am not entirely satisfied that is right. If I look at paragraph A2.2, I have to observe that the paragraph dealing with the reasonable adjustments complaint does not specifically label it as being a disability discrimination complaint. Indeed, it was that omission that initially caused me some confusion as to whether the disability discrimination complaint had extended beyond the complaint relating to the failure to pay the Claimant on 6 and 7 September.

61. The parties, however, had reassured me that all had understood the reasonable adjustments complaint had gone forward and was included in EJ Rostant's order. That being so, I note the last paragraph where it is stated that in December 2012 the Claimant raised a further grievance about the failure to offer her redeployment until November. That has yet to be resolved. I see no reason for distinguishing that reference from the earlier reference. It is a matter that is still included within the claims; the Claimant is not recorded as having conceded or withdrawn it. The only question is whether it has been given a label in terms of which particular protected characteristic to which it relates. I would, therefore, have some sympathy with Ms Lawford in drawing up the table as referring this as a matter of direct discrimination and being unspecific as to whether it is a matter of race discrimination or disability discrimination.

62. It seems to me that the assumption made by EJ Sneath, that this was solely a matter of race discrimination, limits the Claimant's case in a way that had not been done by EJ Rostant and which she had not done in her submissions at the preliminary hearing. That being so and given the acceptance that the complaint in relation to the delay in completing the combined Stage 4 Appeal and bullying and harassment procedure should go through, it seems to me that there is an error disclosed in relation to that final claim identified by EJ Rostant.

63. Therefore, to the limited extent that EJ Sneath dismissed the Claimant's claim relating to her further grievance as identified in the last paragraph relating to the 2012 claim in EJ Rostant's order, I consider that is a matter where there is an error in the Employment Judge's Judgment and I allow the appeal to that limited extent. Save on that point, I would dismiss this appeal.

64. Finally, I referred earlier to the Claimant's submission that paragraph 52 of the Employment Judge's Judgment referred to matters not properly before him.

65. I am not at all sure that the Employment Judge was not entitled to take the view that he did at paragraph 52. He heard evidence relating to the way in which the Claimant put her case and, in order to demonstrate a continuing act, she would have needed to set out the building blocks of her complaint of race discrimination, i.e. matters from which a Tribunal could conclude that the explanation was that she had been treated the way she had because of her race, absent some other explanation from the Respondent. In any event, however, I did not need to refer to paragraph 52 in order to determine this appeal. It was unnecessary for my conclusions and I cannot see that the Claimant's concern in this regard goes anywhere in any event.