Appeal No. UKEAT/0101/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2013

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MEARS GROUP PLC — APPELLANT

MR R VASSALL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON EMSLIE (of Counsel) Instructed by: Sherbourne Solicitors LLP 10 Royal Crescent Cheltenham GL50 3DA
For the Respondent	MS SHIRLEY JONES (Representative) (Free Representation Unit)

SUMMARY

REDUNDANCY – Fairness

DISABILITY DISCRIMINATION – Reasonable adjustments

The Claimant (C) was one of several carpenters made redundant by the Employer (E). He brought claims of unfair dismissal (UD), direct disability discrimination (DD) and failure to make reasonable adjustments (RA). C attended the hearing with bundle of undisclosed documents seeking to raise all aspects of UD claim. E opposed late admission of the documents and claimed that the UD issues had been narrowed by concession at an earlier CMD. If the hearing was to proceed, E said it should be limited only to issue of whether C had a disability.

Employment Tribunal (ET) admitted the late documents, held that all issues of UD were "live", and declined to restrict scope of hearing to disability alone. ET upheld the UD claim, dismissed the DD claim and allowed the RA claim.

On E's appeal it was contended: (1) the hearing should have been restricted to the disability issue or wholly postponed; and/or (2) the ET had not explained why the RA claims were 'in time' for the purposes of the statutory provisions, nor applied the **Matuszowicz** decision.

HELD:

(1) Ground 1 dismissed. It was impossible to say that the decision to proceed had been a perverse exercise of case management powers.

(2) Ground 2 allowed. The ET had not referred to the relevant statutory provision nor the **Matuszowicz**. The RA claim would go back to them to consider afresh whether it had been brought in time.

MR RECORDER LUBA QC

1. Richard Vassall is a carpenter. He was an employee of Mears Group plc, to whom I shall refer as "Mears". It provides repair and maintenance services under contract to, among others, social landlords. The employment was terminated on 4 August 2011. The reason given was 'redundancy'. Mr Vassall was among several carpenters made redundant by Mears at the same time. Mr Vassall made a claim to the Employment Tribunal Service, contending - among other matters - that he had been unfairly dismissed, that his dismissal had been an act of direct discrimination against him on the grounds of disability, and that during his employment Mears had failed to make reasonable adjustments to take account of his disability.

2. The claim was heard by the Employment Tribunal, sitting at London South (Employment Judge Nash and members). The Tribunal's written Reasons are erroneous in being headed by reference to Employment Judge Nash sitting alone. She was in fact sitting with lay members.

3. The hearing took place over several days, starting on 9 July 2012. In the event, the Employment Tribunal rejected the claim of direct disability discrimination, and nothing further arises in relation to that. The Employment Tribunal upheld the complaints of unfair dismissal and of disability discrimination for failure to make reasonable adjustments. It gave formal Judgment in Mr Vassall's favour in respect of those two matters. The formal Judgment is accompanied by clearly expressed written Reasons extending over some 120 paragraphs.

The Judgment below

(1) The unfair dismissal claim

4. The Employment Tribunal was satisfied that Mears had faced a genuine redundancy situation in early 2011. The Tribunal was also satisfied that Mears had adopted unobjectionable

selection criteria in order to determine which members of the pool of carpenters were to be made redundant. It found that the company had ultimately dismissed Mr Vassall by reason of 'redundancy'. However, it found that the dismissal was unfair. That was because, based on the specific facts it found, it was satisfied that there had been

> **"...pre-selection of the Claimant for redundancy and that the selection for redundancy was not administered fairly or reasonably in respect of the Claimant." [paragraph 71 of the Reasons]**

5. Its reasons for that conclusion are set out thereafter in the written Reasons in some detail.

(2) The reasonable adjustments claim

6. The Employment Tribunal decided that Mr Vassall was a disabled person for the purposes of the **Equality Act 2010**. His relevant disability was dyslexia. His work had required him to use an electronic personal digital recorder or assistant, known simply as a "PDA". That was a means of recording the work he had undertaken through his working day. When Mears had become his employers, on a transfer of undertakings, he had been supplied with a new PDA, which was more complex and involved more inputting than the PDA supplied by his previous employers. His working pattern was also changed in a way which meant that there was more work needed on inputting to the PDA.

7. The Employment Tribunal accepted that Mr Vassall had asked his managers at Mears, on more than one occasion, for help with use of the new PDA. None had been forthcoming. Against that background, the Employment Tribunal decided that a provision, criterion or practice adopted by Mears had been applied to Mr Vassall. That PCP was:

> **"...the need to use the PDA within the timeframe and to the level commensurate with a person with conventional capabilities (that is, without dyslexia) in respect of reading, writing and inputting information into handheld electrical devices..." [paragraph 106 of the Reasons]**

8. It decided that this put him at a substantial disadvantage compared to a hypothetical comparator and that was because he was

> **"...unable to operate the PDA in the timeframe and to the standard that the Respondent expected because of his dyslexia and this caused him stress." [paragraph 108 of the Reasons]**

9. The Tribunal held that by reason of the requests he had made for assistance in respect of the PDA, Mears had been on notice of the effect of this PCP upon him. The Tribunal found that a duty to make a reasonable adjustment had been triggered. It identified the adjustments reasonably needed as being more time to operate the PDA and more training. It concluded that Mears had unreasonably failed to make those adjustments in Mr Vassall's case.

The appeal

10. Mears brings this appeal contending that the Employment Tribunal erred in law. Its original Notice of Appeal was considered on a paper sift by HHJ Birtles. He found that it disclosed no reasonable grounds of appeal. Mears then exercised its right under rule 3(8) of the Employment Appeal Tribunal Rules to submit a replacement or fresh Notice of Appeal. The replacement Notice of Appeal essentially pursues two points. First, that in the light of the procedural events which happened, the company was denied a fair hearing of its case before the Employment Tribunal because the Employment Tribunal wrongly failed to either confine the issues to be heard or to grant a postponement. Second, and quite separately, it is contended that the Employment Tribunal erred in law in not dismissing the reasonable adjustment claim on the basis that it had been brought out of time.

11. This fresh Notice of Appeal was considered on a further paper sift by HHJ Shanks. He directed a preliminary hearing in order to further consider whether it disclosed reasonable grounds of appeal.

12. The preliminary hearing was conducted before HHJ McMullen QC. On the first of the issues relating to procedural events, Judge McMullen directed an affidavit from Mears relating to its account of the procedural events. It also directed a response be provided to that affidavit from the Employment Judge. That order generated an affidavit of Mr Simon Birks. He is the Group Legal Manager at Mears. He had conduct of the case throughout and he had been the representative for the company at the Employment Tribunal hearing.

13. The Employment Judge provided her response in writing, having read the affidavit of Mr Birks and having listened to a tape recording of the relevant parts of the Employment Tribunal proceedings in order to refresh her memory.

14. For his part Mr Vassall had the opportunity, provided for him by HHJ McMullen's order, to file an affidavit in reply, either in his own name or his from his Tribunal representative. That opportunity was not taken. Mr Vassall did apply by his representative for a transcript to be made of the tape recordings of the relevant parts of the proceedings before the Employment Tribunal. That application was refused as disproportionate by order of HH Jeffrey Burke QC. There has been no application before me to review or revise that order, and it has not been appealed. In the event, no affidavit was filed by Mr Vassall or his representative in answer to Mr Birks' affidavit or in support of, or response to, the comments of the Employment Judge. I should note, not intending any criticism, that Ms Shirley Jones, appearing for Mr Vassall, provided an extensive written skeleton argument, which was infused with many matters of fact relating to the conduct of the Tribunal below. I declined to give attention to those matters as it seemed to me any relevant issues of fact should have been addressed in an affidavit, as HHJ McMullen QC had contemplated.

15. I have set out that background to the progress of the appeal in some detail, because it culminated in an application to yet further amend or revise the grounds of appeal. In the course of his opening, Mr Emslie for Mears acknowledged that there were several typographic and other errors in the fresh Notice of Appeal and that it would need correction. The corrections required were identified in the course of argument, and over the short adjournment I was provided with a replacement document. That too failed to meet the bill because it did not describe itself as 'amended' grounds of appeal. It did not identify the particular amendments and it was not dated today's date or otherwise capable of demonstrating that it was an amendment made pursuant to permission of mine. However, on Mr Emslie's undertaking to file a suitable replacement document within 24 hours, I gave permission to amend. The application was not opposed by Ms Jones, since it did not go to the substance of the grounds of appeal but rather their form.

16. I turn, then, to the two points pursued in the amended Notice of Appeal.

(1) The unfair hearing point

17. The history of matters between the lodging of Mr Vassall's claim on 12 October 2011 and the commencement of the hearing on 9 July 2012 is not a happy one. The Employment Tribunal Rules, and the case management orders made pursuant to them in any given case, are designed to ensure that on the scheduled hearing date the parties and the Tribunal will have access to all the relevant evidential material and the necessary witnesses. Further, that the parties will have had an ample opportunity to prepare their cases before the scheduled hearing commences. Primary responsibility for compliance with the requirements of the Tribunal Rules and any directions lies with the Claimant, who is responsible for driving the case forward and who will seek to make good his claims. In this case, the Claimant was not in a position to even exchange his own witness statement until 9pm on the evening of 2 July 2012,

that was not only but a single week before the hearing, but it was itself at the very end date of a further period for the exchange of such evidence which had generously been extended by order of the Employment Tribunal from an originally ordered date of 25 June 2012. Mr Vassall's witness statement raised a range of matters that Mears had not previously understood to be in issue for the forthcoming hearing, and it referred to numerous documents which he, Mr Vassall, had not disclosed. Indeed, on the morning of the hearing Mr Birks, Mears' representative, was served there and then with a supplementary bundle of some 50 pages, being those documents which Mr Vassall had referred to in his recent witness statement.

18. It is plain from the terms of Mr Birks' affidavit, the Employment Judge's response to it, and the Employment Tribunal's written Reasons that Mr Birks forcefully protested at this turn of events on the morning of the first day of the Tribunal hearing. He opposed the introduction of the supplementary bundle. He pointed to the absence of any explanation for lateness of its disclosure and he drew attention to the previous departures by Mr Vassall from the Tribunal's directions. He also opposed the perceived attempt to enlarge the ambit of the hearing to consider issues that he at least thought had been previously conceded at an earlier case management discussion. He drew attention to the fact that he did not have available the particular witnesses he would need in order to respond to these matters and that he had had no opportunity to consider the additional documents handed to him that morning or to call rebuttal documentary evidence. He urged the Tribunal that, if it was to proceed at all with the hearing, it should do so by limiting itself only to a determination of the question of whether Mr Vassall had the protected characteristic of 'disability'. That possibility, that is to say of the determination of a preliminary issue, had been flagged up as part of an earlier case management order.

19. This last submission of Mr Birks was pregnant with an implicit, if not explicit, application to postpone determination of any other issues by the Tribunal on that date. Ms Jones, representing Mr Vassall at the Tribunal as she was subsequently to do before me, was heard by the Tribunal in opposition to the propositions advanced by Mr Birks.

20. Having heard argument on these points, which argument it described as "discussions", the Employment Tribunal retired to consider the position. As the Employment Judge was later to explain to this Employment Appeal Tribunal in her written response, "The matters overlapped to a certain extent, as did the discussions."

21. In the event, the Tribunal resolved to allow late disclosure and admit the supplementary bundle. It decided to permit Mr Vassall to pursue aspects of the claim that Mr Birks had believed, correctly or otherwise, were not being pursued. And it decided that it should not confine the hearing to simply the disability issue but that it should determine the whole of the claims. Its explanation is given in paragraphs 4 to 8 of its written Reasons, which read as follows:

> **"4. The Respondent contended that the Claimant had, at the Case Management Discussion, made a concession on unfair dismissal in that he had limited his case to the Respondent's taking into account the allegedly disability-related sickness absence when scoring him against the criteria. The Claimant denied making such a concession.**
>
> **5. The Tribunal considered the matter and found that it was bound by the Order made at the Case Management Discussion on 19 January 2012 which did not record any such concession and which had not been challenged until the first day of the hearing. Accordingly the Tribunal considered all the issues as set out in the Case Management Order in respect of unfair dismissal.**
>
> **6. The second matter was whether to hear the Section 6 point (did the Claimant have the protected characteristic) either before the rest of the case or at the same time. The Claimant invited the Tribunal to hear the case at the same time and the Respondent objected. The Tribunal concluded that it was best to hear all the evidence together due to the overlap of evidence.**
>
> **7. On the morning of the first day the Claimant applied to make a very late disclosure of documents. Most of these documents were already in the Respondent's possession and for this reason the Claimant had not disclosed them. The Tribunal reminded the Claimant that he was in flagrant breach of an order made at the Case Management Discussion which could not have been in clearer terms – to disclose all documents to the Respondent by the return date; the fault lay solely with the Claimant.**

> **8. However, in light of the overriding objective, the Tribunal permitted these documents to be added to the bundle. The reasons for this decision were that these documents were highly relevant to the issues, that most of these documents were already in the Respondent's possession and that the prejudice to the Claimant in refusing to consider these documents was greater than that to the Respondent."**

22. The Tribunal, having reached those conclusions, was obviously alive to the impact that the outcome of these preliminary rulings would have on the ability of Mears to present its case. Thus it is that it records, at paragraph 9 of its written Reasons:

> **"Following these preliminary decisions, it was agreed that the Respondent would present its case after the Claimant, to allow further time to prepare for the unfair dismissal case."**

23. Having given that indication, the Tribunal then proceeded with the hearing in that way. On the appeal, Mr Emslie submitted that these preliminary rulings had caused irremediable unfairness and prejudice to his client. It had been deprived of an opportunity for a fair trial. The unfair dismissal claim had ultimately succeeded on points that Mears had believed were not being pursued and with which it had not been prepared to deal. Heavy reliance had been placed by the Employment Tribunal on the documents that had been contained in the supplementary bundle. The reasonable adjustments claim had turned on what was or was not said in 'return to work' interviews, the forms in relation to which were only disclosed in the supplementary bundle. The Employment Tribunal had erred in law, Mr Emslie submitted, in not confining itself to simply the disability issue or in not adjourning the whole of the proceedings.

24. For Mr Vassall, Ms Jones contended, as she had no doubt done before the Employment Tribunal, that Mears' lack of preparedness for a full hearing had been the consequence of its own fault. It had wrongly believed issues to have been conceded when they had not been. It had always known the full nature of the complaint in relation to reasonable adjustments but had not prepared its witness evidence to deal with that. Many, if not most, of the documents disclosed in the supplementary bundle were relevant documents that had been

throughout in Mears' own possession. Further, she submitted that there had not actually been any express application for a postponement, and that was to an extent borne out by the written response of the Employment Judge. In short, she contended that there had been no error of approach or law by the Employment Tribunal in proceedings as it did.

25. I have given a short summary only of the respective submissions made by the representatives before me. Both provided helpful written skeleton arguments and further submissions in oral argument. I have taken into account all that was written and said. Mr Emslie well recognised the uphill task he faced in persuading this Appeal Tribunal to disturb an exercise by an Employment Tribunal of its case management powers either to limit or expand the issues to be addressed at a hearing or to adjourn such a hearing. He was right to do so. The authorities on this subject speak with one voice. As long ago as the decision of the Court of Appeal in **Noorani v Merseyside TEC Limited** [1999] IRLR 184 Henry LJ made it clear that the Employment Appeal Tribunal should only in exceptional circumstances interfere with the exercise of a Tribunal's case management discretion. That was a case about whether the Tribunal should or should not have issued a witness summons, but at paragraph 32 of his Judgment Henry LJ made the following statements, which are of general application:

> **"These decisions are entrusted to the discretion of the court at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such decisions are, essentially, challengeable only on what loosely may be called *Wednesbury* grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was 'outside the generous ambit within which a reasonable disagreement is possible'."**

26. If there were any doubt as to whether that was the present state of the law, it is well settled by the more recent decision of the Court of Appeal in **O'Cathail v Transport for London** [2013] EWCA Civ 21, reported at [2013] IRLR 310:

> **"...decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt..."**

27. Mr Emslie acknowledged, therefore, that he needed to put the case on the basis either that the approach of the Tribunal was flawed in the **Wednesbury** sense or that its conclusion was perverse, likewise in the **Wednesbury** sense, i.e. irrational. Mr Emslie sensibly accepted that, taken alone, he could not impugn as erroneous in law the Tribunal's determination of the issue of whether to admit into evidence the documents in the supplementary bundle or its decision on the scope of the unfair dismissal claim. But, he submitted, the Tribunal had erred in its failure to restrict the issues which it would hear and determine or to postpone the whole hearing if it was not limited to the disability question.

28. I deal, first, with the proposition that the Tribunal erred in approach. Mr Emslie's case was that the Tribunal had failed to have regard to relevant considerations. Manfully as he tried, both in writing and in oral argument, Mr Emslie was, in my judgment, quite unable to identify any relevant factor or matter to which the Tribunal had manifestly failed to have regard. True it is, as he reminded me, that the Tribunal had expressed itself only shortly as to the reasons for deciding to proceed with the whole case rather than just the disability issue. The reader is reminded of the last sentence of paragraph 6 of the Tribunal's written Reasons. But, in my assessment of the matter, that gets Mr Emslie no further forward. The Tribunal was there identifying its conclusion. The question is whether it failed to take into account relevant matters that had been urged upon it in the course of submissions, and that is the difficulty. It is quite clear from the account given by Mr Birks in his affidavit, and from the account given by the Judge in her written response, that the issues which were relevant to the question of whether

the hearing should be restricted or postponed were fully alive and fully articulated before the Employment Tribunal itself.

29. Mr Emslie, in the alternative, submitted as part of this limb of his case that the structure of the Tribunal's written Reasons, and the Employment Judge's response to the affidavit of Mr Birks, demonstrated that the Tribunal had dealt with the questions before them on these preliminary issues in the wrong order. In my judgment, there is nothing in that criticism. This is a case in which the Tribunal heard the argument on all the preliminary issues together. It retired to consider them, and it must be taken to have determined them in the round. The precise sequence in which they are recorded in the written Reasons is, in the view of this Appeal Tribunal, of no weight. This is not a case in which the Employment Tribunal plainly declined to hear argument or evidence on a relevant matter. It did not refuse to hear Mr Birks on such questions as the prejudice which might follow were the applications made by the Mr Vassall to succeed. It is quite plain, in my judgment, that everything material was canvassed, and it is impossible to contend that the Tribunal closed its mind to any particular aspect of the relevant material before it.

30. In those circumstances, Mr Emslie sensibly concentrated his fire on his alternative limb of ground 1, that is to say 'perversity'. How, he asked, could any reasonable Tribunal, faced with the material before this Employment Tribunal, have not granted an adjournment if it was not prepared to restrict the scope of the hearing? He reminded me again of all the matters that had weighed in support of an adjournment or at least a restriction of the issues. Surely, he submitted, they should have carried the day. But that is not the point. These are not matters for me. They might or might not have persuaded me to adjourn or restrict the hearing. The point is that they failed to persuade a unanimous Employment Tribunal, seized of all the relevant facts, matters and submissions. Parliament has, through the Employment Tribunal Rules and the

statutory scheme, conferred case management powers on Employment Tribunals, not on me. It is, in my judgment, impossible to say that in this case the conclusion of the Tribunal manifestly demonstrates that it was acting outside the scope of matters within which a reasonable disagreement is possible. Applying the approach required by **Yeboah v Crofton** [2002] EWCA Civ 794, it is not possible to say that an overwhelming case has been made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, could have reached. In my judgment, this is a case that does not enable one to say that the conclusion of the Tribunal was such that it must have 'taken leave of its senses'. It follows that this ground of appeal must fail.

(2) The time limit point

31. The Employment Tribunal was satisfied that Mr Vassall's claim for discrimination by reason of failure to make reasonable adjustments was out of time. It proceeded on the basis that time had begun to run at the latest on 8 April 2011 (see written Reasons paragraph 115) and that accordingly the claim should have been presented no later than 7 July 2011 (see paragraph 116). The claim had in fact not been presented until 12 October 2011. The Tribunal, however, decided that it had a discretion to exercise as to whether to extend time from 7 July to 12 October 2011. It decided that it would be 'just and equitable' to grant such an extension and, having done so, it therefore entertained the reasonable adjustments claim on its merits and came to the conclusions that I have recounted at the outset of this Judgment.

32. The ground of appeal advanced by Mears is straightforward. It is said that, in order to properly exercise the discretion as to extension of time, the Employment Tribunal first needed to direct itself correctly to the relevant start date. If it got the identification of the start date wrong, as Mears submitted it did, then its exercise of discretion cannot stand. That being the nature of the ground of appeal, I turn to the statutory provisions.

33. The text of Chapter 3 of the **Equality Act 2010** is headed "Employment Tribunals", and that chapter contains a series of what might be described as generic sections intended to set general rules applicable to the various types of complaint that might be made to an Employment Tribunal, arising under the various disparate aspects of the **Equality Act 2010.** Section 123 deals with time limits, and it is these terms:

> **"(1) Proceedings on a complaint within section 120 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.**
>
> **(2) Proceedings may not be brought in reliance on section 121(1) after the end of—**
>
> **(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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 treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."**

34. Mr Emslie submitted that section 123 governed both aspects of the Tribunal's essential approach to this question of the reasonable adjustments claim and the time limits for bringing it. That is to say, it fixed the time limit (see the provisions of subsections (1), (3) and (4)) and it included the discretion to extend time if the time limit was exceeded (see section 123(1)(b)). I agree with those submissions. Further, Mr Emslie submitted that, in a reasonable adjustments case, one was concerned not with action but with failure to act, that is to say failure to make the reasonable adjustment, or, to put it another way, one was concerned with omission rather than action or conduct. Again, I agree with those submissions.

35. Against that context, one turns to subsection (3) of section 123 to identify the applicable approach to ascertaining the time from which the requirement to present a claim begins to run. Reasonable adjustment cases not being cases of 'conduct', but being cases of 'failure' to do something, the applicable provision is subsection 123(1)(b). That provides, as set out above, that a failure to do something is to be treated as occurring when the person in question decided on it. That is to say, time runs from when a person, in the present context an employer, decides not to make a reasonable adjustment. Of course, in many cases, there can be no precise identification of when an employer made such a decision. It is for that reason that subsection (4) has been included because it sets a time limit running even in the absence of evidence as to when a person expressly decided to not do something. These are complex provisions as to when time begins to run. Fortunately for this Appeal Tribunal and for the Employment Tribunals on the front line, the provisions of what are now section 123 have been helpfully considered by the Court of Appeal in **Matuszowicz v Kingston Upon Hull City Council** [2009] EWCA Civ 22, reported at [2009] IRLR 288. The Court of Appeal was there concerned with the predecessor provisions of section 123, but the wording is almost identical. In the IRLR, after an explanation of the relevant facts and of the correct approach to section 123, the headnote continues in these terms:

> **"That analysis leads clearly to the conclusions that in the context of the legislation and of the duty to make reasonable adjustments, even if the employer was not deliberately failing to comply with the duty and the omission to comply with it was due to lack of diligence or competence or any other than conscious refusal it is to be treated as having decided upon it at what is in one sense an artificial date. Certainly it may not be a date that is readily apparent either to the employer or to the employee. The date is imposed for the purpose of starting time running under the enforcement provisions."**

36. For his part, Sedley LJ gave a short Judgment, which is summarised in the headnote in this way:

> **"Claimants and their advisors need to be prepared once a potentially discriminatory omission has been brought to the employer's attention to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission."**

37. Mr Emslie's first and most straightforward submission was that the Employment Tribunal had simply failed to direct itself at all in accordance with the statutory provision or the guidance upon it offered by the Court of Appeal. He reminded me that the Tribunal in setting out what they believed to be the relevant law did not set out section 123. Moreover, it is not even mentioned in the relevant part of the written Reasons dealing with the extension of time. There is no reference at all to the decision of the Court of Appeal in the leading case, and nor is there any discussion of the principles which guided the Court of Appeal and which provide so much assistance to Employment Tribunals. Those submissions, in my judgment, beat the air unless it can be demonstrated that the failure to set out the statute and refer to the relevant authority actually made any material difference.

38. One turns again then to the terms of the written Reasons. Mr Emslie submitted that the terms of the written Reasons are themselves revealing. Had the Tribunal had regard to the statute, it would have been concentrating on the employer's "failure to do something" or alternatively an "omission". A reasonable adjustments case is not a case about the employer's acts. Nevertheless, says Mr Emslie, it is plain that that is how the Tribunal approached it. See the reference to "the Respondent's act" at paragraph 160 and the reference to "an act" continuing, in paragraph 190. Identifying the correct start date for the running of the time limit is by no means easy in the light of section 123 and even with the benefit of the Court of Appeal's guidance.

39. Take the facts of the present case. They are about the alleged failure of an employer to make a reasonable adjustment to help an employee who, by reason of his disabilities, was in

difficulty using a PDA device. It is uncontroversial that the Tribunal found that the employers were first asked by Mr Vassall for such assistance in August 2010. There was an omission to do anything. Mr Emslie submits that one approach open for the Tribunal was to take August 2010 as the appropriate trigger date, but, he submitted, the Tribunal might have been indulgent and permitted the employer a suitable period in which to respond to the request and make the necessary adjustment. In this case, Mr Vassall went on long-term sick leave on 24 November 2010. So, submitted Mr Emslie, by that point the employer had done nothing, despite repeated requests, for a period of some three months. That, he submitted, must have triggered the running of the time limit. Even if that was wrong, Mr Emslie indicated that any Tribunal, properly directing itself to the statutory provisions, would have had regard to the possibility that in this particular case, on any view, the time limit had been triggered in January 2011. He took me, for the purpose of that submission, to paragraph 35 of the Tribunal's written Reasons, which contains this finding of fact in relation to the position as at January 2011:

> **"The Claimant refused this or any other meeting. The reason he gave was that he had sought help for so long and the Respondent had failed; accordingly he had lost trust in the Respondent..."**

40. On any view, submits Mr Emslie, if a Tribunal applies section 123 and the decision of the Court of Appeal, time must be taken to have started running in January, not on the later April 2011 date alighted upon by the Tribunal.

41. For her part, Ms Jones contended that there had been no error of law. The Tribunal had, she submitted, been entitled to treat this as a case of continuing failure: that is to say, an omission occurring over a continuing period which had only come to an end in April 2011. True it is that the Tribunal deal with that matter in paragraph 119 but they only do so after they have exercised their discretion as to an extension of time. That strikes one in reading the

written Reasons as being something of an afterthought. It is telling, in particular, because in the case of **Matuszowicz**, the Court of Appeal had had to concern itself with the situation where an employer is faced with a contention by the employee that the failure to make reasonable adjustments can be treated as running over a period.

42. Ms Jones further sought to uphold the reasoning of the Employment Tribunal. She reminded me that in August 2010, when he first made his request, Mr Vassall was a transferring employee, but then that is a feature also of the case considered by the Court of Appeal. It is submitted by Ms Jones that Mr Vassall acted as soon as was reasonably proper and that no omission on his part should speak against him, at least none before the start date identified by the Employment Tribunal in April 2011. My assessment of Ms Jones' submissions were much to the effect that she could not deal head-on with the commencement of time limit point, but was largely addressing my attention to what might justify an extension of time once the start date had been identified.

43. Having heard and carefully considered those respective submissions, I am quite satisfied that the Employment Tribunal did not direct itself according to law. The Employment Tribunal, faced with this difficult question about the appropriate date from which discrimination for failure to make reasonable adjustments should be treated as starting, ought to have stood fast by the provisions of section 123(3) and (4). This Tribunal failed to even mention them. It failed to explain how it was applying the statutory rubric to the facts it found. It failed to refer to the decision in **Matuszowicz** or make any reference to the principles it contained. I am satisfied that had those matters been taken into account by the Tribunal, it is possible, and the Appellant need establish no more than that, that the Tribunal would have reached a different decision as to the correct start time for a complaint to be presented and would in consequence potentially have

reached a different decision as to whether or not time should be extended, having regard in particular to the total extent of delay.

44. Put shortly, Mr Emslie has demonstrated to my satisfaction that the error made by the Tribunal could have led to a significant difference in ascertaining the start date and/or in the exercise of the Tribunal's discretion. What then is to be done? There are three alternatives. I could remit the matter to the same Tribunal. I could remit the matter to a different Tribunal. Or I could determine the matter for myself. Both parties, somewhat surprisingly, urged that I should deal with the matter myself. I assume by those submissions that they were intending that first I should apply section 123 and the **Matuszowicz** test to the relevant facts. That seems to be an inappropriate task for an appellate judge. It is for the front-line Tribunal to determine a commencement date.

45. Further, both parties urged me to exercise my discretion and determine whether it would be just and equitable to extend time once I had ascertained the relevant delay. When asked what materials I should take into account in making that determination, Ms Jones in particular broadly urged that I should take into account virtually everything that had been before the Employment Tribunal and is now before the Employment Appeal Tribunal.

46. Again, I consider, even though that approach was common ground, it to be misguided. This, again, is an exercise of discretion that has been vested in the front-line Tribunal, and unless there is a good reason for them not to exercise it, it should be exercised by that Tribunal rather than by this appellate Tribunal. Mr Emslie urged on me that the recent trend in the appellate jurisdiction was to take decisions where doing so would be expeditious and save the cost and expense to the Tribunal system and to the parties of remitting cases. I agree with the good sense of that proposition where all the factual matters are agreed, and one is simply

seeking to apply the relevant law. In the present case, there is much in dispute as to the determination of the correct start date and as to the appropriate features that should weigh in the question of any extension of time.

47. For all those reasons, I shall not take the decision myself.

48. The next question is whether the matter should be remitted to a different Employment Tribunal or the same Employment Tribunal. The more attractive option is, of course, to remit it to the same Tribunal. They, after all, are seized of all the facts and matters and they can determine the issues with the benefit of my Judgment. Although he did not develop his submissions on this point, I took Mr Emslie to be against that approach. No doubt he would have submitted that the Employment Tribunal in this case has already made a decision on extension of time favourable to the Claimant and might therefore be tempted or persuaded to do that again rather than to take a step back in the light of a proper self-direction as to the law. I am quite satisfied that this particular Employment Tribunal can be trusted to consider the matter afresh, having regard to the relevant law contained in section 123 and the guidance contained in the Court of Appeal's decision in **Matuszowicz**. It will be for it to ascertain the date from which time started to run and explain its finding by reference to the statutory provisions. It can thereafter address any submissions the parties may wish to make to it as to the relevant exercise of the discretion to extend time.

49. For those reasons, therefore, the appeal against the Judgment in relation to unfair dismissal will be dismissed. The appeal in relation to the Judgment on reasonable adjustments will be allowed. And the question of whether the reasonable adjustments claim is in time will be remitted to the same Employment Tribunal, if such a Tribunal can be assembled and, if not, to a Tribunal suitably assembled by the Regional Tribunal Judge.

50. Mr Emslie applies to me for permission to appeal from my Judgment in relation to ground 1. In doing so, he very eloquently puts again the very matters which I have considered in my Judgment. The challenge is restricted to a perversity challenge in relation to the exercise of case management powers and a discretion. In my judgment, for the reasons I have given, it cannot be said that this Employment Tribunal erred in law, nor can it be said that there is a real prospect of success in an appeal from my own Judgment on the matter.