Appeal No. UKEAT/0047/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 September 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR C EDWARDS

MR T STANWORTH

MR C RICHMAN — APPELLANT

KNOWSLEY METROPOLITAN BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MAWDSLEY (of Counsel) Direct Public Access Scheme
For the Respondent	MR ALAN JOHNSON (Solicitor) Knowsley MBC Legal Services Archway Road Huyton Knowsley Merseyside L36 9YU

SUMMARY

DISABILITY DISCRIMINATION – Disability

JURISDICTIONAL POINTS – Extension of time: reasonably practicable

In the middle of the Employment Tribunal hearing the Employment Judge took a point against the Claimant on time-bar. An inadequate opportunity was given to the Claimant to respond. The Respondent had not taken the point in any of the extensive case management stages. The Employment Tribunal misdirected itself by looking for a policy, and should have found the disciplinary process was a continuing act or a state of affairs. EAT held the claim was in time and remitted the full case to a hearing before a different Employment Tribunal.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the time bar on Employment Tribunal proceedings, which is three months less a day following the relevant date. This case is set in the context of a claim of disability discrimination.

2. This is the Judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We shall refer to the parties as the Claimant and the Respondent.

Introduction

3. It is an appeal by the Claimant in those proceedings against the Judgment of an Employment Tribunal sitting in Liverpool sent with Reasons on 20 November 2012 signed by Employment Judge Reed. The parties are represented by Mr David Mawdsley of counsel and Mr Alan Johnson, in-house solicitor, respectively. The Claimant made claims of disability discrimination principally to do with the instigation of disciplinary proceedings against him. The Respondent contended that there was no act of disability discrimination in those internal proceedings.

The process

4. The description of the issue and the facts in this case is made more difficult for us by the extraordinary nature of the way in which the problem arose. There had been extensive case management of the case in the hands of Judges in the Employment Tribunal in Liverpool leading to what was to be a three-day hearing of the Claimant's claims. The Claimant gave evidence in accordance with his statement, and so did his wife. Mr Mawdsley closed the case.

Then, Mr Johnson called his first witness, Mr Hunt, who was being cross-examined towards the end of the day, when Employment Judge Reed said that it occurred to him there might be a time-bar problem in this case, and he indicated to the advocates that he would look at this matter the next day.

5. The next day came, and it was put specifically by the Employment Judge that the claim was out of time. Mr Mawdsley asked for time to reflect on this and to consider the authorities. He was given 20 minutes and did the best he could, but in that time he was able to research and to put before the Tribunal what we hold are the relevant authorities, which are **Owusu v London Fire & Civil Defence Authority** [1995] IRLR 575, **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 and **Cass v Croydon College** [1998] EWCA Civ 498. The Judge entered into debate with Mr Mawdsley and then heard from Mr Johnson, who had not taken the time point but understandably acknowledged the point that was being made in exchanges with the Judge, and as a result was prepared to accept the points being made by the Judge against Mr Mawdsley's proposition. The Tribunal then decided that the claim was out of time, and proceedings were stopped.

6. The appeal, therefore, is against the ruling the claim out on the basis that there had been no presentation within three months of the relevant date.

The facts

7. The Claimant is disabled by reason of a bipolar condition. On 10 January 2011 an event occurred that it is now common ground – in fact, was common ground on the advice given by the Respondent's occupational health physician very shortly thereafter – that the event was caused by the Claimant's condition. On 13 January 2011 the Respondent resolved to institute

its disciplinary procedure against the Claimant for the incident. It was and remains its case that this was a disciplinary event, all its employees are treated the same, although consideration would be given in any particular case to a difficulty by a disabled person, and that this case should proceed along the lines of its disciplinary procedure. The Claimant resisted that, and it is his case that this was a capability issue if anything and that deciding to hold the incident, which was, on his case, caused by his disability, against him in disciplinary proceedings is an act of disability discrimination contrary to the **Equality Act 2010** (EqA).

8. The Tribunal recorded the state of play on what became then the central issue – that is, whether the claim was out of time – and said this:

> **"7. It was not suggested on the part of Mr Richman that he could assert that any failure on the part of the Council in that respect was an act that could be said to have occurred within three months before presentation, which took place on 13 December 2011.**
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> **8. The second area of complaint of Mr Richman was the fact that, following an incident on 10 January 2011, the Council had seen fit to institute a disciplinary process, had investigated (he said in an unsatisfactory way) certain allegations, had used the conduct rather than capability procedure in order to do so, had failed to address grievances he had raised and had failed to deal with satisfactorily with requests made on his behalf, specifically in relation to the disclosure of documents.**
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> **9. It was suggested on the part of Mr Richman that although none of those matters had occurred within three months before presentation, the claims were 'in time' because the actions of the Council in those respects could be said to be the manifestation of an underlying policy, since the avowed intention of the Council from the very beginning was to be rid of Mr Richman.**
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> **10. We did not consider that, even if Mr Richman were able to establish the existence of such an intention, the acts of the Council could sensibly be described '… some policy, rule or practice, in accordance with which decisions are taken from time to time' (see [*Owusu*]). It followed that the claim document had been presented more than three months after the relevant events. […]**
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> **12. It was pointed out that Mr Richman was in the course of internal proceedings at the time. Furthermore, the balance of prejudice clearly favoured him, since it was not suggested on the part of the Council that the delay had occasioned them any particular problem. Nor was this a case in which the claims could sensibly be described as 'ancient'. In broad terms, the relevant acts occurred in the spring and summer of 2011, the claim document being presented in December 2011."**

9. The Tribunal then went on to consider whether to extend time in accordance with the jurisdiction under section 123 of the EqA, which provides for a period of three months or such

extra time as is just and equitable in all the circumstances, and the Tribunal made the following holding:

> **"13. However, Mr Richman was represented by a trade union representative in the early part of his dealings with the Council and, from May 2011, by Counsel, Mr Mawdsley. It was clear from a very early stage that Mr Richman was alleging mistreatment on the ground of his disability and yet we were given no explanation as to why, in relation to the specific acts or omissions referred to by Mr Richman, neither he nor his representative took any action to being the matters before the Tribunal within three months of their occurrences.**
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> **14. We remind ourselves of the judgment in *Robertson v Bexley Community Centre* [[2003] EWCA Civ 567]: the exercise of the power to extend time should be the exception rather than the rule. As a very minimum there must be some sort of explanation for the delay. Here, in reality, there was none."**

10. We have, effectively, provided all of the Judgment in this short case.

The Claimant's submissions

11. On behalf of the Claimant it is contended that there was a continuous act extending over a period of time pursuant to section 123(3) the EqA. The decision to implement disciplinary proceedings taken on 13 January 2011 was maintained right up to the date the claim form was presented on 13 December 2011. There was an error of law by the Employment Tribunal in applying **Owusu** without more, and the evidence before the Tribunal was that there were continued steps being taken by the Claimant and the Respondent in accordance with the disciplinary process. There were a number of occasions when there was a review of the decision so that there was not a one-off decision but a continuing one.

12. In any event, the Tribunal had failed to consider the relevant factors in exercising discretion, which are pursuant to **British Coal Corporation v Keeble** [1997] IRLR 336, more or less those contained within the **Limitation Act 1980**, section 33. As Mr Mawdsley says, the findings made by the Tribunal on this point were all in his client's favour, and the only thing

that swayed it was that the Claimant was found to have been in receipt of advice from his union and from Mr Mawdsley, providing his services under the Bar direct-access scheme.

The Respondent's case

13. Mr Johnson, in an elegant and scholarly essay, has presented the arguments of the Council in the best way they could be. The proposition that he advances is that the Council did not discriminate in its decision. He accepts that the disciplinary process was ongoing as at the date of presentation and for that he is of course aware that he wrote the letter on 5 December 2011 that said the following:

> **"Secondly, we have been able to take instructions from senior management concerning your without prejudice proposal intended to settle Mr Richman's claim against the Council. It is the position of the Council that we see no reason to make any offer in respect of this claim. This decision has been taken following further investigation of the circumstances behind the issues surrounding this case. We believe that the Council has at all times acted properly towards Mr Richman and therefore any proceedings brought against the Council would fail.**
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> **Finally, we appreciate that the matter of the internal disciplinary proceedings has still not been resolved notwithstanding Mr Richman's imminent retirement. We are prepared to continue with this process and proceed to a disciplinary hearing in order that this matter can be resolved. However, in the event that Mr Richman decides that he does not wish to participate with the process after his retirement, we would be willing to discontinue these proceedings once his employment ceases."**

The legislation

14. The relevant legislation is as we have described above, and the issue is to decide whether there was a continuing act; or whether the case should be allowed to proceed on the grounds that it was just and equitable to do so if there were no continuing act.

Conclusion and discussion of the legal principles

15. It is accepted by Mr Johnson on behalf of the Respondent that the ruling in paragraph 10 represents an error of law. He accepts that the approach set out in **Owusu** requiring some

policy, rule or practice is modified now by the Judgment in **Hendricks** and the correct approach is as follows:

> **"The *Owusu* principle was further extended in [*Hendricks*] where Mummery LJ, at paragraph 48, set out the test to be applied:**
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> > **'… the burden is on her (the Appellant) to prove, either by direct evidence or by inference from the 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".'**
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> **15. In a direct reference to *Owusu*, Mummery LJ further stated at paragraph 52:**
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> > **'The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of which 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" … 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 Services 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.'"**

16. Mr Mawdsley also relies on the Judgment of the Court of Appeal in **Lyfar v Brighton & Hove Hospitals Trust** [2006] EWCA Civ 1548 upholding a Judgment of mine in this court where Hooper LJ says that the approach therefore was to expand the cases where discrimination might be found beyond those where a policy could be identified. It follows from that very realistic concession by Mr Johnson, which is properly made, that to apply the unvarnished **Owusu** principle of looking for a policy, rule or practice is an error; something wider is required, and here it is said that there was a continuing state of affairs. It was that the disciplinary process was started, a number of steps had to be taken within it and that that process was ongoing or continuing, and indeed the words "continue these proceedings" is used as late as 5 December 2011.

Discussion

17. The decision we reach is that the Employment Tribunal misdirected itself by that too-narrow approach. The question for us is whether or not in the light of that error the

decision can stand; is it unarguably right? We consider that the issue is open to us to decide. We heard debate from the advocates. It was Mr Mawdsley's case that this was a simple matter and could be decided by us since the answer was clear, but Mr Johnson invited us, if this were to be our view, to send it back to an Employment Tribunal for it to consider the time point.

18. We have looked carefully at the correspondence in this case and have no doubt that this was a continuing act. First, there are many instances of steps being taken pursuant to preparing for the upcoming disciplinary hearings, which were postponed on a number of occasions. There are four themes, all ongoing throughout 2011: the first is the investigation by Mr Hunt and an application for him to disclose the DVD of the incident, which was not disclosed at that time and indeed not until the eve of the Employment Tribunal proceedings; secondly, there were requests for references to occupational health, and there was no disclosure of Dr Orton's report, given as early as 19 January 2011, pointing away from disability and towards capability; thirdly, there was a number of applications for the Claimant's grievances to be investigated, which went unanswered; and fourthly, there were attempts to try to resolve this matter. The clear purpose of an informal resolution negotiated between the representatives was that the Council would reconsider its decision to invoke disciplinary proceedings and to allow the Claimant to retire without the threat of a disciplinary hearing over him. As Mr Mawdsley said, the last thing his client wanted in his particular condition, which was deteriorating by the day, was to go through a formal process.

19. Therefore, there are significant events during the agreed chronology placed before us that indicate steps being taken in accordance with the disciplinary procedure in order to prepare for it. True it is that at one stage Mr Mawdsley on 9 August 2011, probably in exasperation, says that his client will not co-operate with the procedures until proper disclosure has been effected,

and so while the disciplinary procedures were ongoing without proper disclosure that was his position.

20. The second point Mr Mawdsley makes is that in any event there were on the papers examples of reviews being taken of the decision. This brings into play the Judgment in **Cast v Croydon**, where the following was decided in the Judgment of Otton LJ:

> **"Accordingly, it seems to me that the Industrial Tribunal, having found that the College reconsidered and looked at the matter again in 1993, erred in law in failing to consider the implications of that finding for the purpose of the running of time. It is true that the best that Mrs Cast could have achieved on this approach was a determination that the final refusal occurred on 10th May 1993. That was still outside the three months time limit, but only by three days, a trivial over-run when compared with that of thirteen and a half months if the refusal on 26th March 1992 were the only potential act of discrimination […]."**

21. The law is that where there has been a reconsideration of a decision already made it ceases to be a one-off and time begins to run again. Mr Mawdsley points to a number of times where this occurs. For example, on 25 July 2007 there is expressly a reference by Mr Ennis to the following:

> **"First, in terms of my review, I am satisfied that this matter should be dealt with under the Council's Disciplinary Procedure. That said, I accept the point that Mr Hunt as Investigating Officer should have sought advice from Occupational Health in respect of Mr Richman's medical condition. There I will arrange that.**
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> **I will also seek advice from Occupational Health in respect of Mr Richman's attendance at a hearing and any support he may require.**
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> **Secondly, I do not accept your view that the grievances raised by Mr Richman have 'nothing to so [sic] with his alleged behaviour on 10 January 2011'. It is my view that they are related and therefore it would be appropriate to deal with both issues concurrently."**

22. On 12 August there is a reference by Mr Ennis to an ongoing useful discussion. On 25 November 2011 there is him offering his apology for the delay and indicating, "We will be in a position to respond fully next week", and the conclusion of that further consideration is, as we have cited from the email of Mr Johnson, on 5 December 2011. So, in our judgment, the

record discloses a number of reviews and reconsiderations of the initial decision to go through the disciplinary process so as to correspond to the kind of situation envisaged in **Cast**. Thus if there were no continuing act in place, contrary to our primary holding, there was a reconsideration, the latest of which was 5 December 2011, and the claim was presented a bit later and was in time.

23. That is sufficient to dispose of the case. We have no doubt as to how a Tribunal would approach this matter, and so this is a case where we can confidently say that there is only one answer, which is the one we have given.

24. We turn then to the issue of whether, if we are wrong, there should have been a just and equitable extension. There are problems in this Judgment. The first is that the Tribunal does not identify at all what date it takes as the beginning of time, the second is that the Tribunal does not analyse the factors in **Keeble**, and the third is that those factors that might be said to emanate from **Keeble** are all decided by the Tribunal in favour of the Claimant. Therefore one has to wonder how it can be that he would lose the just and equitable discretion. The answer is that it was because he was alleging what the Tribunal described as mistreatment on the ground of disability and he gave no reason why they took no action within three months.

25. In our judgment, the material does disclose why that occurred, but it seems to be based upon the fact that the Claimant had access to legal advice, and that is not one of the factors in **Keeble**. It is not necessarily incorrect to invoke it, but it has to be done in the context of other relevant factors. However, we need not explore this further, because Mr Johnson has helpfully conceded that the Tribunal erred in its approach to what is just and equitable. It would be required to look at the factors and any others to make decisions on what were the relevant dates

and to decide within the context of the ongoing relationship, for example the attempts to resolve this matter, quite properly, between the parties within troubling a Tribunal, to decide whether it was just and equitable. Of course, someone in that situation must keep an eye on the clock, as Mr Johnson in his written argument points out, but it is a factor to note that the parties are together engaging in talks when exercising the just and equitable jurisdiction. Since we have already decided this matter on the basis of the first point, it was not necessary for us to call upon the parties to address us further in the light of the approach taken by Mr Johnson. This would be a matter that we could not ourselves decide, because there is not enough material here, and if this were the only matter, then we would have sent it to an Employment Tribunal to look at it, but it is not necessary so to do. This claim is in time.

Disposal

26. Having canvassed the disposal of this case with both of the advocates, it is their joint position that this matter should be sent to a fresh Tribunal. We of course consider this for ourselves; we look at the utility in sending it back to the same Tribunal. The Tribunal only heard the evidence for one day, and it may be difficult to reconstitute precisely the same Tribunal effectively more than a year later. The Claimant understandably as a lay person has reservations about the way in which the time-bar point emerged at the instance of Employment Judge Reed and would not feel confident in going back in front of him, and a number of submissions were made to Employment Judge Reed by Mr Mawdsley. It seems to us that now that we have resolved the time-bar issue this case could start again before a fresh Tribunal, and that is where the interests of justice lie. So, this will go to a freshly constituted Employment Tribunal. The advocates now in the light of the way in which they have heard the evidence develop consider four days is the appropriate time for which the case should be listed, but that is a matter for the region.

27. It remains for us to say thank you very much to both of the advocates today. I had indicated that we had all considered these were very careful skeleton arguments that have saved us a good deal of court time.