Appeal No. UKEAT/0020/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal

On 28 February 2018

Handed down on 19 March 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

PRESIDENT

Sitting with

MR M SIBBALD

MR B BEYNON

ROYAL MAIL GROUP LIMITED APPELLANT

MS KAMALJEET JHUTI
BY HER LITIGATION FRIEND JANE ATKINSON

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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For the Respondent

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SUMMARY

Practice and Procedure

1. The appeal and cross-appeal challenge

(i) whether the detriment claims are in time in circumstances where the grievance detriment claim failed; and

(ii) whether the grievance detriment claim was wrongly rejected on the basis of too narrow an approach to the list of issues agreed in the case.

2. Both appeal and cross-appeal succeeded. The Employment Appeal Tribunal held that since the Claimant failed to prove that there were any actionable detrimental acts that post-dated 30 March 2014, there were no ongoing similar acts or failures to act that could form part of a series for the purposes of enlarging time under s.48(3)(a).

3. Further, it was not open to the Tribunal to find that there was a connection or continuum between the established and proven acts that gave rise to detriments, occurring no later than 30 March 2014, and the subsequent act relied on by the Claimant in relation to the grievance that was not proven. The proven acts that occurred no later than 30 March 2014 may have had continuing consequences in terms of the detriment experienced by the Claimant but on any view, there were no further proven acts after that date.

4. In the unusual circumstances of this case (given the subsequent materially changed circumstances and the Claimant's pleaded case in relation to the grievance) the Employment Tribunal was in error in sticking slavishly as it did to issue 7a as originally formulated. That approach prevented the Employment Tribunal from discharging its core duty of determining the case in accordance with the evidence permitted to be adduced. It meant that the Employment Tribunal did not do justice between the parties.

THE HONOURABLE MRS JUSTICE SIMLER (PRESIDENT)

Introduction

1. This is a unanimous judgment of the Employment Appeal Tribunal. We were unable to conclude our deliberations and give judgment on the same day, but have endeavoured to provide this judgment as soon as practically possible. For convenience we refer to the parties as the Claimant and the Respondent, as they were before the Employment Tribunal below.

2. The appeal and cross-appeal challenge two linked aspects of the judgment of the Employment Tribunal (comprising Employment Judge Baty and members, Mr Simon and Mr Eggmore) promulgated on 12 November 2015 (referred to below as "the Judgment") which upheld a number of complaints made by the Claimant that she was subjected to unlawful detrimental treatment meted out to her primarily by her line manager, Mr Mike Widmer, (but by others too) contrary to s.47B(1A) Employment Rights Act 1996 (ERA) on the ground that she made protected disclosures during her employment by the Respondent. A number of complaints of whistleblowing detriment failed. The Claimant also failed in her complaint of automatic unfair dismissal pursuant to s.103A ERA because, although Mr Widmer had prohibited grounds for treating her as having a poor performance record, the dismissing manager was unaware of that motivation and made the decision to dismiss in good faith on the basis of what she reasonably understood to be inadequate performance.

3. A differently constituted Employment Appeal Tribunal (Mitting J) allowed the Claimant's cross-appeal in May 2016 on the basis that Mr Widmer's unlawful motivation should have been treated as the reason for the dismissing manager's decision to dismiss. The Court of Appeal reversed that decision on the basis, in short summary, that unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial to an unfair dismissal claim unless it can properly be attributed to the employer. That did not, however, preclude the Claimant from advancing a claim for losses occasioned by her dismissal as compensation for the unlawful detriments found under s.47B ERA. Remedy remains unresolved.

4. The Court of Appeal's judgment also left unresolved two particular grounds of challenge originally raised before Mitting J in May 2016, but not addressed on the footing that it was unnecessary to deal with them in light of the conclusions he reached. This case has accordingly returned to the Employment Appeal Tribunal for determination of those remaining grounds.

5. The two challenges concern (i) whether the detriment claims are in time in circumstances where the grievance detriment claim, the only claim which was within the primary limitation period, failed; and (ii) whether the grievance detriment claim was wrongly rejected on the basis of too narrow an approach to the list of issues agreed in the case.

The facts

6. The facts relevant to the issues raised by the appeal and cross-appeal can be summarised shortly by reference to the Judgment.

7. The Claimant was employed as a media specialist in the Respondent's sales division, promoting the use of mail by businesses engaged in marketing. She was employed initially for a trial period of six months.

8. Soon after she commenced employment, the Claimant observed what she believed to be irregularities in the way that colleagues offered customers "tailor-made incentives" (referred to as "TMIs"). The Claimant reported her concerns to her line manager, Mr Mike Widmer, in two emails dated 8 and 12 November 2013. The Employment Tribunal found these to be protected disclosures. On 13 November 2013 Mr Widmer had a long meeting with the Claimant in response to her emails. The Employment Tribunal, accepting the Claimant's account in preference to Mr Widmer's, found that he put her under great pressure to withdraw her allegations with a veiled threat that if she did not do so her employment would not continue beyond the end of her probation period. He deliberately mischaracterised her complaint about TMIs. The Claimant was shocked and upset by his hostile response and asked him what she should do. He responded that she should write withdrawing her allegations and she did so subsequently.

9. In the months that followed Mr Widmer was critical of her performance and imposed unreasonable targets and requirements for improvement which the Claimant attributed to his reaction to her protected disclosures about the misuse of TMIs. In February 2014, the Claimant complained to the HR Department. An arrangement was made for her to be managed directly by Mr Reed, Mr Widmer's immediate line manager. He extended her probation period by a further month and she was unhappy about this.

10. On 7 March 2014 the Claimant met with Ms Rock (a manager). Ms Rock asked her how a doctor's appointment had gone and went on to say that when Mr Reed last saw her, he was really worried about her well-being. She said she was in a position to offer the Claimant three months' money to leave there and then. The Claimant did not accept that offer. On 10 March 2014 the Claimant raised a formal grievance about her treatment by Mr Widmer and others. On 12 March 2014 her GP signed her off work suffering from work-related stress. She did not return to work thereafter.

11. While the Claimant was off sick she continued to receive emails and telephone calls and texts from both Ms Rock and Mr Reed. On one occasion (no later than 30 March 2014) Ms Rock advised the Claimant that there was authority to offer her a year's salary to enable her to get herself well and back into the job market.

12. In April 2014 an appeal casework manager was appointed to investigate the Claimant's grievance. He tried to contact her but she was too unwell to speak and eventually he informed her on 16 June 2014 that her grievance could be dealt with in writing.

13. Also in April 2014, a dismissal officer, Ms Vickers, was appointed to advise the Respondent on its approach to the Claimant's continued employment. By letter dated 11 July 2014 she wrote to the Claimant indicating that consideration was being given to terminating the Claimant's employment. She invited the Claimant to attend a meeting on 18 July 2014.

14. The Claimant responded with lengthy and often incoherent emails raising many points. Among the issues she raised were complaints about "being sacked for telling the truth" about the business "cheating the public". Ms Vickers was sufficiently concerned by those references and contacted Mr Widmer to discuss them. She left him a voicemail explaining what she needed to discuss and in response, he sent her an email (set out paragraph 212 of the Judgment) confirming that the Claimant had raised the issue referred to but stating that it had been resolved. Ms Vickers accepted what Mr Widmer said without further investigation.

15. The Claimant did not attend the meeting on 18 July 2014. By letter dated 21 July 2014 Ms Vickers, acting on behalf of the Respondent, gave the Claimant three months' notice of dismissal.

16. The Claimant remained unwell and unable to deal with matters concerned with her employment and therefore instructed solicitors. She indicated to the Respondent a wish to appeal. Ms Madden was appointed to hear the appeal and wrote to her on 8 August 2014. By a further letter dated 1 September 2014 the Claimant's solicitors raised the fact, in addition to other matters, that the Claimant's formal grievance had not been dealt with. As a result it was agreed that all issues would be dealt with together in a combined grievance and appeal against dismissal process (see paragraph 219).

17. The Tribunal found that by letter dated 13 October 2014 the Claimant set out in a lengthy document "written extremely clearly" what she maintained she had observed regarding TMIs and how both Ms Mann and Mr Widmer would benefit in terms of the impact on their targets and bonuses from what was being done in this regard. She attached "a great deal of relevant correspondence" including her emails of 8 and 12 November 2013 to Mr Widmer as well as her emails to Ms Heath of 6 February 2014 and Ms Rock of 25 and 26 February 2014. Those were the documents containing protected disclosures as the Employment Tribunal found.

18. The Tribunal found that before the grievance could be investigated, the Respondent confirmed to the Claimant that her dismissal would take effect on 21 October 2014 on the expiration of the three months' notice she had been given.

19. So far as the grievance is concerned, the Tribunal made findings of fact at paragraphs 223 to 233. In particular, it found that Ms Madden (who gave evidence) interviewed Mr Reed, Miss Murphy and Mr Widmer in November and December 2014. She did not interview or contact a number of others including, particularly relevantly, Ms Mann and Ms Rock. She conceded that she should have done so in evidence to the Tribunal (paragraph 226).

20. Ms Madden forwarded copies of her interview notes to the Claimant's solicitors on 13 December 2014 but "inadvertently forgot to include the notes of Mr Widmer's interviews" (paragraph 227). She received a reply from the Claimant's solicitors on 19 January 2015 raising this but the email went straight to her junk mailbox and she did not find it until she checked that box in April 2015. She did not therefore forward Mr Widmer's interview notes to the Claimant's solicitors until 20 April 2015.

21. In early May 2015 Ms Madden was advised by her line manager that the investigation of the Claimant's grievance and appeal were to be put on hold as the Respondent was considering an issue related to TMIs. The Tribunal found that:

> **"Ms Madden was not given any detail beyond this and did not know (and still did not know at this Tribunal) the reason for why this request was made." (paragraph 229).**

On 5 August 2015 Ms Madden was told that she could continue to hear the appeal and grievance. Again no explanation was given to her as to why she had been asked to put matters on hold (paragraph 230).

22. Upon being given that instruction, the Tribunal found that Ms Madden considered her decision in the light of the information she had looked at. By letter dated 28 August 2015 she rejected the grievance and turned down the appeal against dismissal. In relation to the TMIs issue she accepted what Mr Widmer told her and concluded at paragraph 230:

> **"I am therefore satisfied that KJ did raise these issues with MW. I also am satisfied that MW then took action to discuss the issues with KJ and NM and SO.**
>
> **Having done so KJ apologised to MW for her misunderstanding over the TMI issue. Having met with and interviewed MW I am satisfied with the explanation that he has provided to me.**
>
> **I found MW to be credible and there was no suggestion to me whatsoever that what he told me was not the truth.**
>
> **I am also satisfied that his explanation to me corroborated the email trails from the time which recorded how the matter had been dealt with."**

At paragraph 233 the Tribunal found that the Respondent had since discontinued the use of TMIs as a product but none of the Respondent's witnesses were able to give the Tribunal any information about the rationale for that.

23. The Claimant's ET1 claim form was presented on 18 March 2015 (with ACAS conciliation concluding on 19 February 2015). The last date for an act that could be relied on by her as an in time act giving rise to a detriment based on the ordinary three month time limit was therefore 20 October 2014.

The relevant conclusions in the Employment Tribunal's Judgment

24. The Tribunal found that the protected disclosures (identified above) were a reason or ground for the following detrimental acts it found proved:

(i) From 13 November 2013 until he relinquished line management control of the Claimant on 20 February 2014, Mr Widmer subjected the Claimant to a series of 1-2-1 meetings which were detriments (see paragraphs 299 to 304). The reason for those detriments was the protected disclosure made in emails dated 8 and 12 November 2013 (see paragraphs 305 to 307): detriment 2(e) and 4(e).

(ii) On 5 February 2014 Mr Widmer imposed performance plan objectives on the Claimant that ran for a six-week period until 21 March 2014 (though in fact the Claimant was absent from work from 12 March). There was also a requirement imposed on the Claimant that she pass on all key contacts from her previous employment in the travel sector. This was detrimental treatment done on the ground of the same protected disclosures as above (see paragraphs 309 to 311): detriment 2(f) and 4(f).

(iii) On 7 March 2014 (but wrongly recorded as 28 February 2014) Ms Rock invited the Claimant to accept three months' pay to end her employment. The Tribunal found that by this time knowledge of potential abuse of TMIs at the Respondent was widespread amongst management and this was the reason for this detrimental act (see paragraphs 330 to 332): detriment 5(g).

(iv) On an unspecified date but no later than 30 March 2014, Ms Rock offered the Claimant one year's salary to end her employment. This was done for the same reason and with the same knowledge as the earlier offer of three months' pay (see paragraph 335): detriment 5(i).

(v) The Tribunal rejected the allegation that the failure to investigate and provide a grievance outcome was a detriment on the basis of the way the issue was set out. However at paragraph 340 the Tribunal held:

> **"Had the issue before us been that there was a failure to investigate adequately or provide an outcome in a timely manner, that treatment would have been made out. We have already found that, in relation to the investigation, there were several important witnesses whom Ms Madden failed to interview and whom she admitted in cross-examination she should have interviewed. Furthermore the length of time between the grievance being lodged in October 2014 and the outcome in August 2015 was extremely lengthy and not timely. The main reason for the excessive delays was that the respondent ordered that the investigation be put on hold for reasons, connected to TMIs which were never explained to us."**

25. At paragraphs 347 to 349, the Employment Tribunal dealt with jurisdiction as follows:

> **"347. The claim was presented on 18 March 2015. ACAS early conciliation commenced on 19 January 2015 and concluded on 19 February 2015. Therefore, the earliest date on which an alleged event could take place such as to be in time in relation to this claim was 20 October 2014.**
>
> **348. As a result, and as agreed, the last of the detriment complaints, relating to the grievance, was brought in time. However, all of the other detriment complaints are prima facie out of time.**
>
> **349. However, the complaints made by the claimant which were not resolved all the way through to the grievance/appeal against dismissal and indeed beyond, all related to the same chain of events which started with the protected disclosures which she made in November 2013. There was an ongoing course of conduct, primarily meted out by Mr Widmer, as a result of her making these protected disclosures and, when she complained about it, those complaints about the same issues and the same individuals were not resolved, into her grievance and beyond. Therefore, we have no hesitation in concluding that the detriment complaints made by the claimant amounted to a series of similar acts or failures for the purposes of section 48(3) Employment Rights Act 1996 such as to be in time. The fact that the claimant ceased to be managed by Mr Widmer on 25 February 2014, went on sickness absence on 12 March 2014, and stated to Ms Vickers on 11 July 2014 that she was intending to pursue her claims through the courts and referred to legal guidance and instructing her solicitors do not have any impact on that, contrary to Mr Peacock's submission. The claimant's interactions with other individuals along this journey, such as Ms Rock, Ms Vickers and Ms Madden, are all incidental to the fact that the issues of her treatment as a refult of making protected disclosures in November 2013 form a continuum. The tribunal therefore does have jurisdiction to hear all of the claimant's complaints."**

The relevant legal principles

26. The right not to suffer detriment for whistleblowing is provided by s.47B ERA:

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

27. Section 48(1A) affords a worker a right to present a complaint that he or she has suffered a detriment in contravention of s.47B.

> **"(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."**

28. Section 48(3) provides:

> **"(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented –**
>
> **(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
>
> **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."**

29. Section 49 deals with remedies and by s.49(1) provides:

> **"(1) Where an [employment tribunal] finds a complaint [under section 48(1), (1ZA), (1A) or (1B)] well-founded, the tribunal –**
>
> **(a) shall make a declaration to that effect, and**
>
> **(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates."**

30. It is common ground that a number of basic principles follow from the above.

31. 'Act' and 'detriment' are different concepts (although in reality they are often the same thing) as Langstaff P observed in Flynn v Warrior Square Recoveries Ltd UKEAT/0154/12 referring to s.47B at paragraph 3:

> **"3. As to those words: first, cause and effect must carefully be distinguished. The act, or the deliberate failure to act, must be a cause of the detriment. The act, or the failure to act, has to be done on the ground specified by the employer. The detriment, however, is coincidental, or consequent upon, the act, or deliberate failure to act. The distinction between cause and effect is essential to bear in mind because of the terms of section 48 of the ERA 1996."**

32. Time runs from the date of the 'act' regardless of whether a claimant has any knowledge of the detriment that the act produces: see Flynn v Warrior Square Recoveries Ltd [2014] EWCA Civ 68 and McKinney v Newham London BC [2015] ICR 495.

33. Employment Tribunals should not confuse a continuing detriment with a continuing act (or cause) as the EAT (endorsed by the Court of Appeal) in Flynn v Warrior Square Recoveries Ltd stated at paragraphs 4 and 5:

> **"4. Again, some observations: the detriment may last into the period of three months at the end of which Employment Tribunal proceedings are begun. It may even continue until, or indeed after, Employment Tribunal proceedings have been heard, but that has no effect one way or the other upon the time limits. The time limits relate not to when the detriment was suffered but when the act, or deliberate failure to act, which gave rise to the detriment occurred.**
>
> **5. Accordingly, in any case that considers a question or whether a complaint is out of time, it is incumbent upon an Employment Tribunal to identify carefully the act, or the deliberate**

failure to act, that the Claimant identifies as causing him a detriment. The date of that act, or the date of that failure to act, must then be established. If at the latest the act, or the deliberate failure to act, is prior to the issue of Employment Tribunal proceedings by more than three months, it is only where the Claimant can show that it was not reasonably practicable for him to present a complaint before the end of that period of there months that he will be permitted to continue. A Tribunal otherwise must not (that is the meaning of the words "shall not") consider his complaint. The Tribunal has no discretion in the matter, having found the facts, except that which is inherent in the judgment as to reasonable practicability which is called for by section 48(3)(b). Such a judgment must be based upon some evidential material. If a Tribunal has no submissions made to it nor evidence that may persuade it that it was not reasonably practicable to make a complaint earlier than was done, then it cannot exercise its power to prescribe a further period under section 48(3)(b), because it has no basis for doing so. It is for the person seeking to avoid the harsh impact of time limits to put that material before the Tribunal."

34. In Arthur v London Eastern Railway Ltd [2007] ICR 193, a case decided under s.48(3) ERA there is a full exposition of the approach to the meaning of "a series of similar acts" at paragraphs 26-36. It is sufficient to quote paragraphs 29-31, and 35:

"29. Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short three-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 three-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 three months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the last deduction in the three months would be treated as the date of the act complaint 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 three-month period. There must be an act (or failure) within the three-month period, but the complaint is not confined to that act (or failure. The last act (or failure) within the three-month period 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 three-month period and some outside it. The acts occurring in the three-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 three-month period and those outside it. The necessary connections were correctly identified by Judge Reid QC 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 fellow 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."**

In other words, a series of disparate acts that are apparently unconnected may be treated as similar and as forming part of a series where the evidence establishes a connection between them. Whether or not there is a relevant connection is a question of fact. All the circumstances surrounding the acts will have to be considered. As Mummery LJ observed (and Sedley LJ agreed at paragraph 41), depending on the facts, that connection may be no more than that they were all done on the ground of a protected disclosure.

The appeal

35. The Respondent contends that in circumstances where the last proven detrimental act occurred no later than 30 March 2014, and there were no further proven acts in the period thereafter, to 20 October 2014, the detriment claims were out of time even by reference to a continuing act or a series of similar acts, and the Employment Tribunal erred in reaching the contrary view.

36. Mr Gorton QC contends that s.48(3) ERA is concerned only with proven acts and not those acts that have been dismissed as unfounded on the facts or not done on grounds of a protected disclosure. Once an act is proved, that act can work to enlarge time for proven acts that arise outside the ordinary three month time limit if the complainant is able to establish that the act is part of a series of similar acts. However none of these provisions contemplates that non acts (in the sense of acts that have been dismissed by the Tribunal as not being whistleblowing acts that produce a detriment) can somehow be treated as proven acts so as to assist the Claimant with a time argument.

37. Relying on the chronology set out above, the Respondent contends that since the Claimant failed to prove that there were any acts or detriments beyond 30 March 2014 because she failed to establish that the grievance was a proscribed act, there was no ongoing series of similar acts or failures from 30 March 2014. There was therefore nothing for the Tribunal to have regard to under the second limb of s.48(3)(a) for the purposes of determining whether there was a last act in a series of similar acts that could enlarge time.

38. Furthermore, the Tribunal confused detriment with act in paragraph 349. Section 48(3)(a) is concerned with when the act or failure to act occurs and not with when the consequence of that act or failure to act is felt or suffered, particularly where the consequences are ongoing. Mr Gorton submits that it is not open to a tribunal to find that there is a connection or a continuum from the established and proven acts by reference to ongoing detriment suffered in consequence of the earlier acts. That, he submits, is what the Employment Tribunal erroneously did.

A

39. Those arguments are resisted by Mr Jackson on the Claimant's behalf. He submits that there is nothing in the legislation that limits reliance on acts or failures to act, to proven acts or proven failures for the purposes of determining jurisdiction in s. 48(3) ERA.

B

40. Mr Jackson submits that s. 48(3) (a) makes clear that the complaint must be presented before the end of the three-month period beginning with the date of the

> **"act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them…"**

and argues that there is nothing in that provision which requires that an act or a series of acts must be individually actionable. It would have been easy for the legislation to have used the words "which are found to be proven" after the words "to which the complaint relates" in the subsection. Mr Jackson contrasts s. 48(3) with s.49 which refers to a complaint that is 'well-founded' and submits that those words or words to similar effect could have been used, but were not. Similarly, he points to Mummery LJ's exposition in Arthur (set out above) and the absence of any express statement that acts must be proven to count.

C

D

41. We have concluded that Mr Gorton's submissions are plainly correct on this issue. A claimant must prove a contravention of s.47B in order to have a claim (s. 48(1A)). In other words, a claimant must prove that he or she was subjected to a detriment by an act or failure to act that the employer does not show to have been done on grounds other than a protected disclosure. If no contravening (or actionable) detrimental act is proven then the issue of time is irrelevant. The reference to "the act or failure to act to which the complaint relates" in s. 48(3)(a) must be to a complaint related to a right under s.47B and this must therefore relate to an actionable act. Further, as s. 49(1A) makes clear an award of compensation may be made in respect of "the act or failure to act to which the complaint relates" and again that must be a reference to an act that contravenes s.47B (and not to any unproven act or failure to act). In other words, it is a reference to an actionable act and a uniform interpretation must apply. In each case, the act or failure to act must be proven.

E

F

42. The harshness of the strict three month time limit is mitigated by s.48(3)(a) (and (b)), recognising (as Mummery LJ explained) that some forms of detrimental treatment can extend over lengthy periods and vulnerable workers may put up with such treatment for a long time before making a complaint to an Employment Tribunal. Inevitably in those circumstances there may be acts of detriment both inside and outside the three-month period with a connection between the two. It seems to us to be implicit in the passages cited from Arthur that in order to count for time purposes there must be at least an in time actionable act established.

G

43. Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes.

H

44. Were the proper construction to be as Mr Jackson contends, the time limits set out in s. 48(3) for detriment complaints would be rendered meaningless since claimants could rely on any act (regardless of its merits, actionability or whether it was rejected as a matter of fact) as rendering the claim a claim in time. Claims would never be time-barred on this basis. Recognising this difficulty, Mr Jackson submitted that where the final act in the series is relied on solely for the purposes of extending time and not for genuine motivations, then it cannot be treated as an act within the meaning of s.48(3)(a). That is to import a test based on sincerity of intention. There is no warrant for that in the statute and in our judgment it would be unworkable.

45. That does not mean that a claimant must succeed in establishing as actionable each and every act relied on as part of a series. In this regard we agree with and adopt, with one important caveat, the observations of HHJ Hand QC in Ekwelem v Excel Passenger Service Ltd UKEAT/0438/12. At paragraph 31 he said in the context of a series of unlawful deductions from wages, some of which had been held to be lawful deductions:

> **"A series does not cease to be a series because on analysis and on judgment it is concluded that some part of it is not unlawful. This was asserted to be a continuing act, and, in my judgment, it was a continuing act. The fact that the claimant cannot succeed on some part of it does not mean that the case was time-barred."** [1]

The caveat we add is that there must be at least one in-time proven act that infringes the relevant provision.

46. In the circumstances, we have concluded that since the Claimant failed to prove that there were any actionable detrimental acts that post-dated 30 March 2014, there were no ongoing similar acts or failures to act that could form part of a series for the purposes of enlarging time under s.48(3)(a).

47. The Employment Tribunal's reasoning at paragraph 349 of the Judgment in relation to a "continuum" is also in error because it confuses detriments with acts. It was not open to the Tribunal to find that there was a connection or continuum between the established and proven acts that gave rise to detriments, occurring no later than 30 March 2014, and the subsequent act relied on by the Claimant in relation to the grievance that was not proven. The proven acts that occurred no later than 30 March 2014 may have had continuing consequences in terms of the detriment experienced by the Claimant but on any view, there were no further proven acts after that date. The Employment Tribunal could not have been referring to further acts or conduct in those circumstances. That the earlier acts had continuing detrimental consequences is irrelevant for time purposes, and we are satisfied accordingly, that the Employment Tribunal erred in this regard too.

48. The appeal accordingly succeeds.

The cross-appeal

49. The Claimant set out her claims in her ET1 which was date stamped as received on 18 March 2015. So far as the grievance complaint is concerned, she said at paragraphs 24 and 25:

[1] We have silently corrected the sentence which concerned unlawful deductions from wages. As written it reads: a series does not cease to be a series because on analysis and on judgment it is concluded that some part of it is not lawful.

"24. On 13 October 2014, the Claimant sent a 14 page grievance letter in which she repeated the disclosures set out above and challenged her treatment (including dismissal) by the Respondent as a result of being a whistleblower. The content of the grievance is relied on in full as a qualifying disclosure under ss.43B(1)(a),(b) ERA 1996. Without prejudice to that fact, the Claimant gave the following new information:

"I came across this situation again in January 2014, where I was accidentally sent an email by Sarah Oakes meant for Nicola Mann on 10 January 2014 (pages 1-2 of the Email bundle), where the two were conspiring to do the very same thing with another client, The National Trust. Sarah Oakes made it clear in the email that they were going to create a TMI for the clients already scheduled campaign in the July Mailings of 2014. It was clear that they would be manipulating this so that they could claim the revenue from this posting towards their targets. As highlighted, this was against RMG policies of use for TMIs and Ofcom's policies as a violation of competition rules"

25. The Respondent has not revised its decision and as part of its investigation, it failed/made no attempt to carry out interviews with a number of key individuals, including but not limited to: (i) Mike Widmer; (ii) Nicola Mann; (iii) Sarah Oakes; (iv) Leger Holidays; and (v) Rita Rock. Furthermore, to date the Claimant has still not received a grievance outcome."

The ET3 accepted that the Claimant had raised a grievance but said it was being considered as part of her appeal (see paragraph 52). In other words, there was no outcome.

50. There was a case management hearing on 11 May 2015. Employment Judge Pearl directed that an agreed List of Issues was to be produced and sent to the Employment Tribunal by 1 June 2015. That was done. The grievance complaint was set out in the List of Issues at 7a as:

"Failing to investigate and provide an outcome to her grievance".

It is clear from the Judgment that at the outset of the full merits hearing, a small amendment was made to the List of Issues but there was no amendment to issue 7a. That is notwithstanding the fact that in the fortnight before the substantive hearing started, the Respondent produced a grievance outcome report.

51. Neither side was required to amend the ET1 or ET3 to address this development. Instead it is apparent that the Employment Tribunal proceeded on the basis that evidence of the outcome and about the investigation as a whole could be led by the Respondent and tested by the Claimant. In particular, Ms Madden gave evidence and was cross-examined about the grievance investigation; she was asked about who she interviewed and delays in the process. The adequacy of her outcome report was also explored.

52. At the end of the hearing there were closing submissions in writing from both sides. Both sides addressed the detail of the investigation and the outcome, and did not limit their submissions to the simple fact of whether there was an investigation and/or an outcome.

53. The Employment Tribunal made findings of fact about all of these detailed matters, and did not limit its findings to the simple fact of whether there was an investigation and/or a report. However, when it came to reach its conclusions it held:

"Failing to investigate and provide an outcome to her grievance

339. On the issue as set out, the treatment alleged did not occur. There was no failure to investigate the claimant's grievance. Ms Madden did carry out an investigation into that

grievance. Furthermore, there was no failure to provide an outcome to her grievance. She did provide an outcome on 28 August 2015. Therefore, this complaint fails.

340. Had the issue before us been that there was a failure to investigate adequately or to provide an outcome in a timely manner, that treatment would have been made out. We have already found that, in relation to the investigation, there were several important witnesses whom Ms Madden failed to interview and whom she admitted in cross-examination she should have interviewed. Furthermore, the length of time between the grievance being lodged in October 2014 and the outcome in August 2015 was extremely lengthy and not timely. The main reason for the excessive delay was that the respondent ordered that the investigation be put on hold for reasons, connected to TMIs, which were never explained to us.

341. This complaint therefore fails."

54. The cross-appeal challenges the Employment Tribunal's approach at paragraphs 339 and 340 above as in error of law.

55. Mr Jackson contends that issue 7a is plainly a shorthand summary of the criticisms made by the Claimant of the investigation and grievance outcome in her ET1. He accepts that a list of issues cannot enlarge an already pleaded claim and submits that it cannot reduce such a claim either. Here, failing to investigate encompassed the failure to interview relevant individuals and thereby investigate their role in the grievance complaints made. Further, failing to provide an outcome was necessarily limited to doing so by March 2015 (when the complaint was pleaded) and the fact that a grievance outcome was provided on 28 August 2015 could not have cured the detriment that existed at the date of the claim and that continued until then. Furthermore, given the significant change in circumstances, with the production of a grievance outcome shortly before the hearing, it was not open to the Employment Tribunal to read issue 7a as literally as it did. In these circumstances the Employment Tribunal was in error in the restricted approach it adopted at paragraph 339 to the grievance complaint.

56. Mr Gorton resists that challenge. He relies on the fact that the Claimant was represented by counsel at the case management hearing and the List of Issues was agreed. That was a route map to enable the Employment Tribunal to address this case and it was entitled to take the List of Issues at face value. Were it otherwise and if Tribunals are required to cross check each issue against the pleaded case there would be serious ramifications for case management. Moreover, it was open to counsel to amend, update or reformulate the issues in light of developments in the case. The Claimant had that opportunity but failed to take it. Furthermore, she could have applied for a reconsideration on interests of justice grounds. Again she did not do so.

57. It is well established that Employment Tribunals determining a case must determine only those issues advanced by the parties and no other. Where there is an agreed list of issues, then as a general rule, that will limit the issues at the substantive hearing to those set out in the agreed list (even where one party to the agreement is a litigant in person). In general Employment Tribunals cannot be expected to go behind the agreed issues by going through (what are not always clearly set out) complaints in an ET1 or ET3 to determine for themselves what issues are raised. We agree with Mr Gorton that in general that would be unworkable, and it is right as a general rule that Employment Tribunals should be permitted to work to an agreed list of issues as a useful case management tool.

58. However, it is also well established that Tribunals are not required to stick slavishly to an agreed list of issues in circumstances where to do so would prevent them from hearing and determining the case in accordance with the law and the evidence permitted to be adduced. Where it is necessary to do so in order to address and determine the issues that have been properly raised in the evidence and submissions, we consider that Employment Tribunals can be expected to expand on the agreed list, provided that there is no enlargement of the issues beyond those raised by the pleadings.

59. In this case, the first part of issue 7a concerned the failure to investigate. We agree with Mr Jackson that read fairly, implicit within this short summary of the allegation, was an allegation that there was a failure to investigate those aspects of the grievance relating to individuals who were not interviewed but, it was conceded, should have been. That was the Claimant's pleaded case. It was canvassed in evidence and addressed by both sides in closing. In our judgment, the Employment Tribunal took too narrow an approach to this part of issue 7a.

60. Furthermore, in relation to the second aspect of issue 7a, the failure to produce a grievance outcome, this was originally pleaded by reference to the date of the ET1, and issue 7a should reasonably have been understood on that basis. There was however, a significant change of circumstances in the fortnight before the substantive hearing that had a direct impact on this part of issue 7a. Whereas until 28 August 2015 there was no grievance outcome at all and the Claimant could have succeeded on that basis, afterwards she could not do so on a strict literal reading of it.

61. It is clear however, that despite the absence of any formal amendment to the Respondent's pleaded case (that there was no grievance outcome) nor to the List of Issues, both parties proceeded (and were permitted to proceed) on the basis that this part of issue 7a (no grievance outcome) was not to be read literally or taken at face value. Evidence was led by the Respondent from Ms Madden and closing submissions were made on both sides about the nature and quality of the investigation outcome, and the obvious and lengthy delay in producing it. None of that was relevant on a strict literal or face value reading of the issue as formulated. Yet it was permitted and fully canvassed and addressed. If a strict literal approach to issue 7a was to be adopted, there should have been some consideration of its time-frame, and evidence as to the substance of the grievance outcome and delay was irrelevant and the Employment Tribunal should have said so.

62. For these reasons, we have concluded that in the unusual circumstances of this case (given the subsequent materially changed circumstances and the Claimant's pleaded case in relation to the grievance) the Employment Tribunal was in error in sticking slavishly as it did to issue 7a as originally formulated. That approach prevented the Employment Tribunal from discharging its core duty of determining the case in accordance with the evidence permitted to be adduced. It meant that the Employment Tribunal did not do justice between the parties.

63. In those circumstances the cross appeal must be allowed. Although the Employment Tribunal made findings at paragraph 340 about the detrimental acts, it did not deal with the grounds on which they were done. The parties are agreed that this question must be remitted for further consideration.

Disposal

64. For the reasons given above both the appeal and cross-appeal are allowed.

65. Since we have allowed the cross-appeal, the following issues now arise for consideration (or reconsideration):

(i) whether the detrimental acts relating to the grievance found at paragraph 340, were done on the ground of the protected disclosure (or disclosures) made by the Claimant;

(ii) If so, whether there was a series of similar acts for the purposes of s.48(3)(a) ERA so that time is extended, and all detrimental acts found proved are to be treated as in time.

(iii) If not, whether time should be extended under s. 48(3)(b) ERA because it was not reasonably practicable for the Claimant to have made her claim within three months of the period ending 30 March 2014.

66. The parties are agreed that these issues should be remitted to the same Employment Tribunal. Even had they not done so, we would have adopted that course having regard the overriding objective and the criteria set out in Sinclair Roche & Temperley v Heard [2004] IRLR 763. Aside from the obvious questions of cost, convenience and the difficulties presented by the Claimant's ongoing medical position which may make it difficult (or impossible) for her to give evidence again, we consider that looked at overall, the Employment Tribunal has carefully and conscientiously approached its task in this Judgment, faced as it was with a substantial list of issues to work through. We are confident that it will approach the matter afresh on a proper and fair basis.

67. It is common ground that issues (ii) and (iii) afford no scope for further evidence to be adduced. These issues are accordingly remitted to be addressed by the Employment Tribunal on the basis of the evidence already heard. We have no doubt that the Employment Tribunal will wish to receive further submissions on these issues, but leave questions of case management to the Employment Tribunal itself.

68. So far as issue (i) is concerned, it is not clear to us whether this was explored in evidence. If it was, our preliminary view is that there is no reason to take a different approach, and remission should be on the same restricted basis. If not, it may be necessary to permit limited further evidence on this issue. The parties are invited to make any representations on this and any other question of disposal to be lodged with the Employment Appeal Tribunal within 7 days of this Judgment being handed down. Any further representations and/or applications will be determined by judge alone on the papers unless either party seeks an oral hearing.

69. Finally, we are grateful to both counsel for their clear and helpful submissions.