Appeal No. UKEAT/0182/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2017

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

DR C FANUTTI — APPELLANT

THE UNIVERSITY OF EAST ANGLIA — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Free Representation Unit
For the Respondent	MR DESHPAL PANESAR (of Counsel) Instructed by: Mills & Reeve LLP 1 St James Court Whitefriars Norwich Norfolk NR3 1RU

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

VICTIMISATION DISCRIMINATION - Detriment

An Employment Tribunal did not err in law in holding that a reasonable person faced with the institution of disciplinary proceedings would recognise the requirement for allegations of misconduct to be investigated. The objective test of detriment in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 applied.

Where a Claimant failed to adduce any evidence as to why it would be just and equitable for out of time complaints to proceed, an Employment Tribunal did not err in holding that there was no basis for making such a finding.

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HIS HONOUR JUDGE MARTYN BARKLEM

1. I shall, in this Judgment, refer to the parties as they were below.

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2. Following an initial rejection on the sift by HHJ Peter Clark, this appeal was permitted to proceed to a Full Hearing by Order of Her Honour Judge Eady QC following a Rule 3(10) Hearing; at which Mr Kohanzad, then appearing for the Claimant under the auspices of the ELAAS Scheme, served amended grounds of appeal. Mr Kohanzad appears today under the auspices of the Free Representation Unit. I am most grateful to him, as I am sure the Claimant is. Mr Panesar appears for the Respondent, as he did below. Each counsel has provided me with a helpful skeleton argument and each has made succinct and focused oral submissions today.

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3. The appeal is against a Decision of the Employment Tribunal (Employment Judge Moore sitting with lay members), sitting at Huntingdon between 3 November 2014 and 28 August 2015 (over three separate periods of time). I am told by Mr Panesar that there were about 30 sitting days and some 20 witnesses gave evidence. The Tribunal's Judgment and Reasons were sent to the parties on 10 December 2015 and a Reconsideration Judgment was subsequently served.

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4. The Employment Tribunal had before it three separate claims which had been lodged by the Claimant, an academic employed by the Respondent University. The first in time was lodged in October 2012, the second in July 2013, and a third in February 2014. The allegations dealt with by the Employment Tribunal go back as far as 2004.

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5. The Employment Tribunal set out the details of the relevant allegations and the associated statutory provisions in relation to each of the three claims at paragraphs 9 to 11 of the Reasons. This analysis alone occupies nine pages of the 45-page Reasons, and I shall not rehearse them in this Judgment given the limited nature of this appeal. Suffice it to say that the Tribunal was concerned with multiple allegations of direct race and sex discrimination, victimisation, harassment, as well as a complaint of unfair dismissal.

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6. The conclusion of the Employment Tribunal was that the Claimant was unfairly dismissed. A Remedies Hearing has yet to take place. However, such of the claims of discrimination on grounds of race and sex and of victimisation and harassment as survived, many being dismissed as having been presented out of time, were rejected.

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7. The Claimant's dismissal came about because of a complaint made by Professor Ward. This followed an investigation carried by him into a grievance which had been lodged by the Claimant against certain of her colleagues in April 2013. The Tribunal was to find that the grievance procedure did not follow a proper procedure and that Professor Ward was not even supposed to conduct such an inquiry in accordance with the relevant University statutes. The Employment Tribunal explained what then happened at paragraphs 59 to 64 of the Reasons:

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> **"59. We turn back to Professor Ward's conduct of the grievance procedure. On the 4th June 2013 he met with the Claimant. The notes of the meeting (which are not a verbatim record) are at pages 1456-1480. He met Ms Goodridge the following day (page 1482), Professor Crossman on the 7th June 2013 (page 1505) and Professor Holland on the 11th June 2013 (page 1510). It is significant to note that (notwithstanding the fact that the entirety of his involvement appeared to be unsupported by the University's Statutes or procedures) he had no mandate to investigate complaints made by Professor Crossman, Professor Holland or Ms Goodridge since none had invoked any relevant procedure and as a consequence the Claimant had not been put on notice of any allegations. This flawed position was compounded by the fact that Professor Ward did not appraise the Claimant of the comments made by those individuals since he did not conduct any further meeting with her after meeting them and as we have already noted he neglected to hold any form of hearing at which disputed versions of fact could be explored and determined. He allowed both Professor Crossman and Professor Holland to be … accompanied by Ms Goodridge.**

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> **60. The meeting with the Claimant lasted for approximately two and a half hours. The Claimant had been offered a break but did not need one. Her complaint at (xxiii) again contains two quite separate matters. The first appears little more than a statement of fact. She avers that she found the meeting stressful. That of itself denotes nothing sinister,**

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grievances are often quite emotive for those concerned and it is the Tribunal's experience that most parties (on both sides) involved in workplace processes find them stressful to a certain degree. Again the Claimant has given very little detail in her evidence. She has said that she was subjected to a harsh interrogation but has not expanded her evidence beyond that assertion. She has not taken us to any particular point in the notes but we have read them and they indicate no more than the type of question and answer process that is commonplace. She has said that it proceeded without a Union Representative. That [was] not attributable to the Respondent; her representative had withdrawn from acting for her. We are not able to accept that she was forced by the Respondent to proceed with the meeting without representation. At page 1429 we can see that the Claimant e-mailed requesting a postponement and asking Mrs Forder (HR) to arrange a suitable date with her representative. She contacted the union and their reply at page 1432 shows that they, as a Union, were no longer acting for the Claimant and that they would not be sending an official to the grievance meeting. Ms Piper wrote to the Claimant neither refusing nor agreeing to the postponement request but stating that the meeting had been arranged for some time, had already been cancelled by the Claimant on one occasion and asking whether it was possible for her to arrange another representative. The Claimant's reply was that she would attend alone.

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61. The second part of the complaint is a matter which we find to be without substance. It is a complaint that Professor Ward informed both the Claimant and those against whom she had brought the grievance of his decision. He was of course obliged to do so. The Respondent's procedures require that the decision shall be sent to all parties. Across the wide spectrum of employment generally it is the accepted norm to inform both parties. The evidence discloses no less favourable treatment or detriment. A reasonable employee in these circumstances would conclude that notification to all concerned parties was both normal and appropriate and did not amount to a disadvantage. We dismiss this complaint.

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62. Professor Ward did not in fact uphold the grievance and following his determination of it took certain steps that ultimately resulted in the Claimant's dismissal. Our findings of fact at this juncture are pertinent to both the claim of unfair dismissal and the remaining allegations of discrimination.

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63. During the course of his engagement with the Claimant's grievance complaint Professor Ward formed the opinion that the Claimant had been bullying her superiors; indeed it was a line of questioning he initiated and put to Professor Holland in his interview with him. He has given evidence that he found her behaviour shocking; he formed the opinion that her correspondence to Professor Crossman, Professor Holland and Mrs Goodridge had a threatening tone. On the basis of his own evidence (illustrated at paragraph 21 of his Witness Statement) we find him to have been influenced by his view that the Claimant was a 'junior academic corresponding with very senior colleagues'. Whilst he has acknowledged the Claimant's right to lodge complaints he has not in his evidence reconciled his opinion that they were 'highly accusatory' within the nature of grievance procedures, (one of the principal objectives of which is to remove the influence of rank from mechanism of resolution) or the Respondent's policies and procedures. At page 125 we have the Respondent's definition of harassment '*... any behaviour that appears offensive intimidating or hostile which interferes with an individual's academic working or social environment or which induces anxiety, fear or sickness on the part of the harassed person*'; that the perception of the individual, their subjective interpretation of the events in question or the symptoms that they experience are sufficient for the individual to invoke examination under the grievance procedure. Bullying is defined on page 126 as '*... being shouted at or subjected to sarcasm, being told off in front of colleagues or other people, being criticised in an inappropriate manner or belittled about your work personality or personal appearance, being persistently ignored or talked down, being punished with trivial tasks constant criticism or the removal of responsibilities, being set up for failure with impossible workloads and deadlines*'. We find that the matters complained of by the Claimant in her grievance of the 14th April 2013, in substance reflect her concerns throughout the period of the underlying dispute and fall within the Respondent's definitions of unacceptable behaviour.

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64. Page 127 of the policy informed her that <u>if she felt</u> ([the Tribunal's] emphasis illustrating the subjective) she was being subjected to harassment she was not to feel that it was her fault or that she had to tolerate it. If it was possible she should '*make it clear to the person causing the offence that such behaviour was unacceptable*'. As a matter of fact that is what the Claimant was doing. The question of whether an act is culpable is a different issue to the question of the commission of that act. The Claimant did make her allegations (in both the grievance and earlier correspondence). The reasonable employer recognises circumstances in which that is not culpable and investigates them; (for example if the allegations are true or if the employee holds a genuine but mistaken belief that they are true). On the evidence before

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us we are not satisfied that Professor Ward attempted to investigate or explore these issues and that he was influenced by his own opinion that the Claimant, as junior academic, was obliged to show deference to her managers and since she, in his opinion had not, was culpable. Although it is right to note that she has in her written complaints expressed her allegations in a straightforward manner we find as a fact that she did not use gratuitously offensive language."

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8. There was no further inquiry due to limitations in the Respondent's statutes, which, though not compliant with the ACAS Code, are seemingly not capable of being amended. Thus it was that although the disciplinary hearing was chaired by a former solicitor (who prior to taking up an academic post had practiced employment law) and the appeal conducted by an independent Queen's Counsel (a practising employment lawyer), no further investigation was carried out beyond Professor Ward's investigation. The Tribunal held the dismissal to be unfair, invoking the well-known principles in **British Home Stores Ltd v Burchell** [1980] ICR 303 and finding that there had been no fair and reasonable investigation.

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9. A number of allegations against Professor Ward flowed from his investigation of the Claimant's grievance and its outcome:

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"84. The Claimant's grievance and its transition into a disciplinary complaint feature in complaint (xxiv). This again is a multifaceted complaint. She complains that her grievance was turned into a disciplinary matter, that she was accused of bullying her managers, that she was suspended, barred from entering University grounds and denied access to her e-mail account. It is significant to note that the Claimant has not identified an alleged culprit in respect of each alleged act. Professor Ward chose at the conclusion of his involvement with the grievance process to make a complaint against the Claimant under the University Statutes. He did not suspend the Claimant; that was the decision and action of the Vice Chancellor. The effect of the suspension was (as is customary) to exclude the Claimant from the workplace. We do not have clear evidence on the subject of the e-mail account. The complaints are all put in the alternatives of Direct Race Discrimination, Victimisation and Harassment. No comparator is identified. Professor Acton's evidence that he suspended the Claimant because of the allegations made by Professor Ward has not been challenged. Professor Ward's action in making the complaint has been challenged in general terms but the specific allegations and elements of Direct Race Discrimination, Victimisation and Harassment have not been and are not being addressed by the Claimant in her evidence in chief. As we have indicated above he was shocked by the Claimant's behaviour. It is not a point that has been explored in detailed cross examination and it is not for us to enter the forum. Having heard him give evidence it is clear that Professor Ward was driven to a large extent by his own subjective opinion. He clearly considers hierarchy to be important and he clearly considers the Claimant's actions to be insubordinate. In respect of the complaint of Direct Race Discrimination we need to apply the statutory comparison between the Claimant (and since she does not rely on an actual comparator) a hypothetical comparator in order to ascertain whether there was less favourable treatment. The hypothetical comparator would be someone in the same position in the University hierarchy as the Claimant and with a similar history of disputes but of a different race. We can find nothing in the evidence before us from which we could conclude they would be treated differently by Professor Ward. And thus this element of the complaint fails. Turning to the allegation of harassment, the first

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element of the definition relates to the question of whether Professor Ward had the purpose of violating the Claimant's dignity or creating a hostile degrading or offensive environment for the Claimant. This is a very specific point and as such it needed to be specifically put to Professor Ward. It was not put and the Claimant has not adduced or pointed to evidence capable of establishing that he did have the requisite purpose. We turn then to the alternate part of the definition namely whether his conduct had that effect. There is no doubt that the Claimant was distressed by this turn of events but we have to take account of more than her perception; we have to have regard to the other circumstances of the case and whether it was reasonable for the conduct to have the requisite effect on the Claimant. Although recognizably subjective, Professor Ward has not been challenged on the ground that his opinion was not genuinely held. The course he took was to invoke a legitimate process and thus put his concerns in the hands of others. In these circumstances we conclude that a reasonable employee would recognise the right of others to raise their complaints in an appropriate manner and would not reasonably consider that, of itself, to be harassment (indeed we note that on a number of occasions the Claimant had herself raised complaints against others). We dismiss the complaint of harassment.

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85. Turning to the complaint of victimisation. There can be no doubt that Professor Ward considered the fact that the Claimant had accused others of discrimination to be part of the behaviour that he found objectionable since he said so in his evidence in chief. However he drew a significant distinction by explaining that he believed the Claimant's allegations to be false and he has not been challenged on this point. We have concluded therefore that a reasonable employee in the circumstances would recognise the need for complaints to be resolved in the appropriate manner and thus in referring his complaint through the proper channels Professor Ward did not subject the Claimant to a detriment."

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10. The first ground of appeal relates to paragraph 85 of the Reasons. It reads as follows:

"<u>Ground 1</u>

(i) In dismissing the Claimant's victimisation complaint at paragraph 85 of the Reasons, the Employment Tribunal erred in concluding that the Claimant had not suffered a detriment by Professor Ward lodging a complaint against her. The correct test is whether the Claimant reasonably viewed Professor Ward's conduct as being to her detriment, not whether a reasonable employee in Professor Ward's circumstances would have lodged a complaint about her.

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(ii) The ET further erred at paragraph 85 by failing to ask whether the reason why Professor Ward had lodged a complaint about the Claimant was because she had done a protected act. That failing was particularly important given that the Tribunal found "that Professor Ward considered the fact that the Claimant had accused others of discrimination to be part of the behaviour that he found objectionable". The fact that Professor Ward believed that the Claimant's allegations were false is not an answer to the question of whether the protected acts were the reason for the detriment, particularly as the Tribunal found that the Claimant's complaints about her colleagues were made in good faith [paragraph 46 of the Reasons]."

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11. In his skeleton argument, Mr Kohanzad refers to the well-known tests set out by Lord Hope in **<u>Shamoon v Chief Constable of the Royal Ulster Constabulary</u>** [2003] ICR 337 at paragraph 34, where it was said as to whether an employee had suffered a detriment:

"34. … the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."

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He also points to what Elias LJ said in **Deer v University of Oxford** [2015] IRLR 481 at paragraph 25, namely:

> **"25. The concept of detriment is determined from the point of view of the claimant: a detriment exists if a reasonable person would or might take the view that the employer's conduct had in all the circumstances been to her detriment; but an unjustified sense of grievance cannot amount to a detriment …"**

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12. For the Respondent, Mr Panesar does not disagree with those statements of the law. However, he said that the Tribunal had correctly directed itself on the law at paragraph 16 of the Reasons, in terms which mirror the two authorities cited above. It is appropriate to cite both paragraphs 15 and 16:

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> **"15. Victimisation is a concept defined in S:27(1) of the 2010 Act in these terms;-**
>
> ***A person (A) victimises another person (B) if (A) subjects (B) to a detriment because***
>
> ***a) B does a protected act or***
>
> ***b) A believes that B has done or may do a protected act.***
>
> **By virtue of S:27(1) the protected acts are as follows:-**
>
> **Bringing proceedings under the Equality Act,**
>
> **Giving evidence or information in connection with proceedings under the Equality Act,**
>
> **Doing any other thing for the purposes or in connection with the Equality Act or,**
>
> **Making an allegation (whether or not express) that A or another person has contravened the Equality Act.**
>
> **Given that a large number of the complaints in the present case are brought as alternatives and are alleged to be Race Discrimination, Sex Discrimination, Victimisation, and Harassment, it is perhaps important to emphasise that this definition is satisfied by different evidence to complaints of Harassment. There is not a requirement for the Claimant to show that the treatment relied upon was less favourable and thus there is no need for a comparator. What has to be shown is that the Claimant suffered a detriment. Whilst the ever crucial '*because of*' question remains present and crucial (as it does in all discrimination claims) it is not addressed by proof of a protected characteristic; it is addressed by proof that the Claimant has done a protected act. Detriment exists where in all the circumstances a reasonable employee might take the view that the treatment was to his disadvantage (Shamoon ante).**
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> **16. To a certain extent anyone individual [sic] who experiences something contrary to their wishes or desires might consider themselves to have suffered a detriment but perhaps not surprisingly the definition that falls to be satisfied is not as wide as that. In the first instance there is S:212(a) of the 2010 Act which excludes from the definition conduct which amounts to harassment. Such a claim must be brought under S:26 of the Act (The Harassment Provisions). The accepted definition of a detriment is 'anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage'. The requirement of reasonableness is an important distinction since it moves the matter from a subjective view (as illustrated in the first two lines of this paragraph) to an objective view. An unjustified sense of grievance would not be enough to establish a detriment."**

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It is beyond question, therefore, that the Employment Tribunal was fully seized of the relevant law.

13. Mr Panesar argues that the second paragraph of ground 1 is factually wrong. The Tribunal had clearly found that Professor Ward had acted in good faith in making the complaint but that, in any event, the only live issue is whether the Claimant's belief that she had suffered the detriment was objectively reasonable. He argues that the Tribunal simply did not apply the wrong test set out in ground 1, namely whether a reasonable employee in Professor Ward's position would have lodged a complaint about her.

14. Where the Tribunal says in paragraph 85 that "*We have concluded therefore that a reasonable employee in the circumstances would recognise the need for complaints to be resolved in the appropriate manner*", Mr Kohanzad accepts that the reasonable employee which is being referred to is the Claimant. However, he points to the second sentence of paragraph 85, which makes clear that one of the aspects of the Claimant's behaviour, which Professor Ward found objectionable, was the fact that the Claimant had accused others of discrimination; the protected act. He submits that a Claimant does not have to show that the protected act was a sole or main reason for the conduct said to amount to a detriment. He also submits that when looking at how a "reasonable worker" would react to being subject to a disciplinary process, the fact that it flowed from the doing of the protected act would have a bearing on how such a reasonable person would view matters. He argues that it is not a correct approach to look at whether what an employer did in reaction to certain acts was objectively justifiable. Rather the focus must be on gauging the reasonableness of the employee's reaction given the factual situation.

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15. Whilst I see the force of those submissions, it seems to me the task of the Employment Tribunal, following **Shamoon**, requires an objective approach to the determination of reasonableness, and to do as Mr Kohanzad submits would impose a degree of subjectivity. Given the reasons for the finding that there was no detriment, it is unnecessary to deal separately with the second limb of ground 1 in any great detail. The Employment Tribunal did not, in terms, make any quantitative assessment as to the extent to which the raising of the grievance caused Professor Ward to make the complaint which he did, although it is plain that his concerns were wide ranging.

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16. At paragraph 65 of the Reasons, the Employment Tribunal quoted from his witness statement as follows:

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> **"65. …**
>
> **'*I thought Dr Fanutti's behaviour was a disgrace. In all of my years working in academia, I had never come across a member of staff behaving in this manner for this period of time. I was surprised that Professor Crossman and Professor Holland had not previously lodged a formal complaint under Statute 7 … In my view Dr Fanutti's behaviour potentially constituted good cause for dismissal or removal from office under statute 7*'."**

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17. Self-evidently, those concerns are matters of substance going beyond the mere making of the grievance. Although Mr Kohanzad submits that the reason for the institution of proceedings is a relevant factor which has to be borne in mind when considering the question of reasonableness, I disagree. The final sentence at paragraph 85 suggests that even had a significant causal link been found between the making of the grievance and the institution of this disciplinary proceedings, a reasonable employee in Dr Fanutti's position would have recognised that the genuine concerns on Professor Ward's part had to be investigated through the proper channels.

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18. I turn to the second ground of appeal. This reads as follows:

> **"Ground 2**
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> **In concluding at paragraph 20 of the Reasons that it was not just and equitable to extend time to allow the Claimant to bring her otherwise out of time discrimination complaints, the Employment Tribunal erred. The Tribunal considered that because the Claimant had not adduced evidence or argument of any factor which made it just and equitable for the out of time complaints to proceed, nor any matter which impeded her ability to present her complaints, that it was not just and equitable to extend time. The correct approach was for the Tribunal to take all of the relevant considerations into account in deciding whether it was just and equitable to extend time, which it failed to do. In particular, the Tribunal failed to consider the relative prejudice to the parties in allowing or refusing the claims to proceed."**

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19. The Employment Tribunal headed the section of its Reasons running from paragraphs 19 to 47 as "*The Time points*". It was concerned with finding a "*scheme, regime or ongoing state of affairs*" and made detailed findings about each of the points raised. Paragraphs 19 and 20 set the scene so far as the law is concerned, and the absence of any explanation by the Claimant to give explanation for her failure to bring what were held to be freestanding complaints:

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> **"19. The Time points: S:76(1)a of The Sex Discrimination Act 1975, S:68(1) of the Race Relations Act 1976 and latterly S:123 of the Equality Act 2010 make common provision in respect of the period within which proceedings have to be brought. It is significant to note that a failure to comply defeats the Tribunal's jurisdiction to consider the claim. The relevant sections of the 1975 and 1976 Acts provide that '*A Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end of (a) the period of three months beginning when the act complained of was done*'. The 2010 Act phrases the point differently but with the same effect '*Proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates*'. Each of the Acts contains the provision that we may extend the time period if it is just and equitable to do so. (S:76(5) in the 1975 Act, S:68(6) in the 1976 Act and S:123(1)b in the 2010 Act.) The question of extending time falls to be considered in the context of the circumstances of the case. It has been trite law since the case of *Hutchison v Westward Television Ltd* (1977) ICR 279 EAT that the circumstances of the case are essentially the circumstances of why the claim was presented late and not the whole circumstances of the substantive claim.**
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> **20. The incidents relied upon by Mrs Fanutti span the best part of a decade and it is only the incidents set out at x, xi, xii, xxii, xxiii, xxiv, xxv, xvi and the complaints of unfair dismissal, direct discrimination and victimisation within Case 3 that have been presented within the statutory time limits. Although it is right to note that in her written submissions (which she supplemented with oral argument) she expresses as a sentiment that it would be just and equitable to allow each particular complaint to proceed she has not adduced any evidence or argument of any factor which make it just and equitable for these out of time complaints to proceed or of any factor which impeded or influenced her ability to present her complaints within the relevant time limit."**

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20. It is argued on the Claimant's behalf that the Employment Tribunal was implicitly and inappropriately placing the burden of proof on the Claimant and that the Tribunal must

determine whether "in all the circumstances" it was just and equitable to extend time. In **Accurist Watches Ltd v Wadher** UKEAT/0102/09, Underhill J (President, as he then was) was dealing with an appeal against the decision made by an Employment Tribunal to extend time on the just and equitable ground in a case in which the Claimant had not given evidence, despite warnings as to the risks this posed by the Tribunal. It was in that context that Underhill J said as follows at paragraph 15:

> **"15. … it is always necessary, in the exercise of the discretion to extend time on the basis that it is just and equitable to do so, for a tribunal to identify the cause of the claimant's failure to bring the claim within the primary limit. …"**

21. He went on to reject the submission that this must be based on witness evidence. However, Underhill J made two further points, which, though perhaps self-evident, are worthy of repetition. At paragraph 16, having pointed out that it was always good practice to produce evidence in the form of a witness statement, he said:

> **"16. … Parties who fail to take that course will run the risk that they are simply unable to prove matters on the basis of which the tribunal could be invited to exercise the discretion in question. …"**

At paragraph 18, he pointed to a wish not to encourage a relaxed approach to these matters and added:

> **"18. … On the contrary, I repeat that the submission of a witness statement will always be good practice; and it may often, depending on the nature of the matters to be relied on, be essential. Tribunals may rightly be unwilling to draw inferences as to the cause of, or justification for, any delay in circumstances where direct evidence could and should have been supplied."**

22. Mr Kohanzad also referred me to the decision of this Tribunal in **Doherty v The Training and Development Agency for Schools** UKEAT/0394/09, in which Cox J cited at paragraph 242 the **Accurist** case, and, so far as I can see, simply restated it in terms more relevant to the facts of the case which was before her. In any event, I note that she went on (see paragraphs 245 to 246) to identify specific matters which had been before the Employment

Tribunal, other than in the form of witness statements, to which the Employment Tribunal had had regard when reaching its decision.

23. There is nothing of that in this case beyond the Claimant's lack of awareness of Tribunal practice, and it seems to be that there are documents of some sophistication which have found their way into the bundle, although not referred to, which were put before the Tribunal in the forms of schedules prepared by her, which make reference to "continuing acts", thus demonstrating that she was aware of the need to deal with this point.

24. In my judgment, Mr Panesar is right when he submits that the Employment Tribunal was simply focusing on the issues which had been raised before it. It is trite that the question of prejudice is almost invariably a factor in considering whether it is just and equitable that an allegation made out of time should be permitted to be heard, and these Reasons make no express mention of that.

25. On the other hand, this was not, as was **Accurist**, an interlocutory application, but the Full Hearing. The obvious prejudice to a Claimant in a claim not being permitted to be heard is self-evident. An obvious prejudice is cases where the delay in presenting a self-standing claim, which took place several years ago and is not just, therefore, weeks or months out of time, is that it will be harder to provide evidence in rebuttal. Memories will have dimmed and possibly witnesses not available. However, in this case, the Tribunal heard evidence on all the issues before it, albeit in the context of seeking to find a continuing act, and noting on a number of occasions the difficulty in recollection that certain witnesses had. It also noted a three-year gap between allegations made in 2007 and 2010.

26. There is a danger in any critical examination of a Tribunal's decision of seeking ticks in checkboxes. Mr Panesar submits that it is not incumbent on a Tribunal to set out every possible factor, whether raised by the Claimant or not, and that having heard all the evidence over a long period and having directly connected itself as to the law, the Tribunal made no error of law. He relied on the well-known dictum in **ASLEF v Brady** [2006] IRLR 576 in which, at paragraph 55, Elias J held as follows:

> **"55. … The EAT must respect the factual findings of the employment tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine tooth comb' to subject the reasons of the employment tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially properly directed itself on the relevant law."**

27. I accept Mr Panesar's submissions. It seems to me that the issue of prejudice must have been considered a relatively important one in this case, given that evidence was called on both sides, but it is only one aspect of the much wider issue. It is not for the Employment Tribunal to conduct its own inquiry beyond the facts and circumstances before it. It is clear to me from the papers as a whole that the Claimant was dealing with a procedurally difficult set of claims but with a high degree of sophistication. This is not a case, in my judgment, where she simply omitted to deal with the point.

28. I therefore conclude that there is no error of law on the part of the Tribunal on either of the grounds advanced, and dismiss this appeal.