Appeal No. UKEAT/0018/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 April 2018
Judgment handed down on 4 July 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR P W WATKINS — APPELLANT

HSBC BANK PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTHONY ENGEL (Representative)
For the Respondent	MISS IRIS FERBER (of Counsel) Instructed by: Eversheds LLP Solicitors Kett House Station Road Cambridge CB1 2YJ

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

JURISDICTIONAL POINTS - Claim in time and effective date of termination

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Claimant, who was taken to be a disabled person by reason of epilepsy, made an in-time complaint of failure by the Respondent to make reasonable adjustments for his disability by monitoring his work activity and work-flow (so that he was not taking on too much). The Employment Judge struck out this complaint. Held: he ought not to have done so. Monitoring work activity and work-flow was capable of being a "step" for the purposes of section 20(3) of the **Equality Act 2010**. **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 considered. It could be a preventative measure which it was reasonable for the Respondent to have to take before the Claimant got into further difficulty.

The Employment Judge held that earlier complaints - including earlier complaints of failure to make reasonable adjustments by monitoring work activity and work-flow - were out of time and that it was not just and equitable to extend time. In deciding that the complaints were out of time he considered section 120(3)(a) of the **Equality Act 2010**. Held: if the Employment Judge had been correct to apply section 120(3)(a), his reasoning would have been incorrect - he ought to have concentrated on the question whether the Respondent's conduct extended over a period. However, in any event, it appears that the Employment Judge ought to have applied section 120(3)(b) - **Kingston upon Hull City Council v Matuszowicz** [2009] ICR 1170 considered. All aspects of time limits - including whether there should be a just and equitable extension of time - remitted for reconsideration.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Paul Watkins ("the Claimant") against a Judgment of Employment Judge Dimbylow sitting in the Birmingham Employment Tribunal dated 21 March 2016 following a Preliminary Hearing on 18 March 2016. By his Judgment he dismissed a claim of disability discrimination brought by the Claimant against HSBC Bank plc ("the Respondent"). Some complaints were dismissed on time limit grounds. Others were dismissed because the Employment Judge found that they had no reasonable prospects of success.

2. The appeal proceeds on amended grounds which Supperstone J identified and permitted to proceed at a Rule 3(10) Hearing on 6 October 2016. There has been a year's delay because the Claimant did not pay the substantial fee then required before the Full Hearing. That fee was abolished by the decision of the Supreme Court; the appeal has been re-instated.

The Background Facts

3. The Claimant was born on 21 November 1958. He began to work for the Respondent on 19 September 1977. He is still an employee of the Respondent 40 years later. At the time when proceedings were commenced he was a senior customer services officer at the Respondent's Warwick branch.

4. The Claimant has suffered from epilepsy since he was a child. The Respondent has always known about it. The hearing proceeded on the basis that he was at all material times a disabled person. Usually it has been possible to control the condition with medication and a careful lifestyle. There have, however, sometimes been seizures. There was a seizure in 2003, the first for many years since 1986. From 2010 onwards the Claimant became conscious of

diminished quality of sleep. It is his case that he was struggling to avoid seizures. In 2013 he had night-time seizures. In the summer of 2014 he had a daytime seizure, the first since 2003. He associates this with a 5-week period when the branch where he was working was understaffed. Shortly thereafter he went off work.

5. Two reports were prepared upon the Claimant while he was off work. These reports were before the Employment Judge. The first is a report dated 26 March 2015 prepared principally by Dr Susie Ward, a chartered occupational psychologist.

6. This report explains and accepts the link between the Claimant's epilepsy and the sleep deprivation of which he had been complaining. She said:

> **"For people with Epilepsy sleep problems are a double edged sword: Epilepsy can disturb sleep and sleep deprivation aggravates Epilepsy. Medication used to treat Epilepsy may also disturb sleep. As a lack of sleep can trigger a seizure, healthy sleep on a nightly basis is essential for people with Epilepsy. Sleep disturbance can lead to mood disorders but equally mood disorders can lead to sleep disturbance. Sleep disturbance as evident with Mr Watkins results in concentration and memory problems, lowered mood and an impaired quality of life."**

7. The report also indicates that the Claimant was unfit for work at the time it was written. It is difficult to do justice to quite a long report; but she found that he was highly distressed by tiredness and frustration, struggling to concentrate, finding it difficult to stop crying, upset and disturbed by his own emotions. At the same time, however, in terms of cognitive ability he had high average or superior scores; and he was in a clinically normal range for depression anxiety and stress.

8. The report also makes recommendations for the future when he would return to work. There were eight bullet points. Some related to his re-introduction to work. Others, however, were ongoing:

> **"• Time to discuss work concerns and his ability to self-pace with a manager on an ongoing basis.**
>
> **• For his work activity and work-flow to be monitored so that he is not taking on too much.**
>
> **• For Mr Watkins to ensure he is not exceeding limitations and if unsure of what work tasks to prioritise to agree with Manager.**
>
> **• The consideration of streamlining tasks attached to his job role that require less intense new learning and change if possible so that there is less breadth in terms of tasks. Alternatively, if possible to specialise in fewer core tasks."**

9. As we shall see, the phrase "for his work activity and work-flow to be monitored" was to assume considerable importance at the hearing before Employment Judge Dimbylow.

10. A further report by Dr Mikuliszyn dated 27 May 2015 found that the Claimant's prognosis was guarded. He was still unfit for work. His sleep pattern had begun to affect his psychological well-being. He was in need of psychological support.

11. The Claimant returned to work in August 2015. There was a return to work meeting on 13 August. The Claimant was accompanied by Mr Engel, a family friend. He says there was no discussion of the recommendations in the report of Dr Ward. The Claimant's case is that he did not receive the kind of support which that report recommended.

Statutory Provisions

12. At this point it is convenient to have relevant statutory provisions in mind.

13. The duty to make reasonable adjustments originally derives from the **Disability Discrimination Act 1995**. The duty is now defined by the **Equality Act 2010**. It applies as between employer and employee: see section 39(5). It is sufficient to quote section 20(2) and (3):

"(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

14. Section 123 of the **Equality Act 2010** contains the following relevant provisions about time limits:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of -

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purpose of this section -

(a) conduct extending over a period is to be treated as done at the end of the period;

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something -

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

15. There are supplementary provisions which allow additional time for complying with requirements to engage in early conciliation through ACAS before commencing proceedings. It is not necessary to set those out in this Judgment.

The Employment Tribunal Proceedings

16. The Claimant commended proceedings on 18 January 2016. Calculating backwards and allowing for early conciliation, events on and after 15 August would be within the three-month time limit and in time.

17. The Claimant had prepared his own claim form. He claimed under what he called the **Disability Act**. He set out a detailed narrative but it did not structure his complaints by reference to any statutory or other legal definition. He was asked for further and better particulars. He produced a further statement again essentially in narrative form. The proceedings were listed for three matters to be considered: whether to strike out all or part of the claim as having no reasonable prospect of success; whether to order a deposit; and whether the claim was time barred.

18. The Claimant attended the hearing with his family friend Mr Engel, who was a retired barrister and part-time Tribunal Judge though not in any sense a specialist in the area of disability discrimination law. The Employment Judge asked the Claimant to distil from the narratives the claims he was making. Mr Engel helped him to distil eight specific items of claim. They are set out in the ET's Reasons at paragraphs 9.1 to 9.8. He said that "they formed the basis of our analysis".

19. For the most part the allegations made were allegations of failure to make reasonable adjustment. Several of them were closely linked; they were allegations that the Respondent ought to have monitored the Claimant's workflow. That phrase, as we have seen, appears as part of the recommendations of Dr Ward. It was consciously taken from those recommendations.

20. Item 1 was an allegation that workplace monitoring should have been done in 2003 (when the Claimant had a seizure). Item 2 was an allegation that it should have been done from 2003 to date. Item 3 can be ignored, since it relates to a time before the **1995 Act** came into force; but took the same point. Item 4 relied in part on workplace monitoring, concentrating on

the week commencing 30 June 2014, when the Claimant says he was overworking. Item 7 again referred to workplace monitoring, arguing that it should have been done following up on the return to work meeting on 13 August 2015.

21. There were other complaints. Item 4 also contained a direct discrimination claim concerned with what was said to be undue pressure and bullying. Item 5 concerned a specific reasonable adjustment; during the period when he was overworked in 2014 training in a mortgage role should have been delayed. Item 6 alleged as an adjustment that there should be a general policy to deal with disability. Items 7 and 8 also included an allegation that the Respondent ought, as a reasonable adjustment, to have informed his line manager that he had epilepsy.

22. The Employment Judge, in addition to clarifying the issues in this way, heard evidence from the Claimant and Mr Engel. He then heard submissions from Miss Ferber, counsel for the Respondent. Finally he heard submissions from both the Claimant and Mr Engel who supported the Claimant's case that he was too unwell to commence proceedings earlier than he did.

Striking Out

The Employment Judge's Reasons

23. On any view items 7 and 8 of the list which the Employment Judge made were brought in time. As we have seen, they comprised two allegations of breach of the duty to make reasonable adjustments. Firstly, that the Respondent ought to have monitored his workload; secondly, that the Respondent ought to have informed his local manager of his epilepsy.

24. The Employment Judge found that these claims had no reasonable prospect of success. He gave what appear to me to be essentially two reasons. They are both found in paragraph 18 of his reasons. I will separate them out:

> (1) **"In relation to item 7, as at 13 to 17 August 2015, the day the claimant returned to work, there were no reasonable adjustments to be made and that was evidenced by the claimant himself (page 38): "So at that point in time I did not feel a need for reasonable adjustments … The concern I raised was that what if I needed reasonable adjustments in the future? … A general risk assessment was carried out … During this she did ask me if there was anything else they should be aware of. The word epilepsy was not used though I took this to refer to my disability. I replied that at this point in time there was nothing [further] to be considered …"**
>
> (2) **"Furthermore, the way in which the claimant [was arguing] his case, the PCP proposed was simply not workable. The claimant was arguing that there was a failure to carry out a disability risk assessment, and this was a common thread to much of his complaints about the respondent. On the facts before me I find that this particular claim has no reasonable prospects of success. As I pointed out, the case of *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 EAT is authority for the proposition that it is not a failure to make a reasonable adjustment by not making such an assessment. If an employer does what is required of it, the fact of failing to consult about it is irrelevant. I would point out that the actual evidence I received was different to the submissions that were put to me."**

25. The Employment Judge found that the complaint that the Respondent ought to have informed his manager of his epilepsy was somewhat artificial. The Claimant had no reasonable prospect of establishing any substantial disadvantage because he could and did tell his manager himself.

Submissions

26. On behalf of the Claimant Mr Engel submitted that the Claimant's case concerning workload cannot be said to have no reasonable prospects of success. This adjustment was proposed by the Respondent's own occupational psychologist. It was this reasonable adjustment which was put before the Employment Judge, as his own Reasons show. The reasonable adjustment proposed was not merely a risk assessment; the Employment Judge was wrong to characterise it in this way; rather it was a proposal for active workload monitoring by the local manager. This reasonable adjustment was preventative in nature; the fact that the Claimant might not actually need his workload adjusted when he returned was not the point; he

was concerned that steps should be taken to monitor his workload so he did not have problems in the future. As to informing the Claimant's manager, he pointed out that, given the nature of the Claimant's condition, it was important that the local manager should know. The consequences could be dire if the line manager did not know of his condition.

27. On behalf of the Respondent, Miss Ferber submitted that the Employment Judge's Reasons contained no error of law. No workable PCP was established; the Employment Judge was entitled to conclude that the proposed adjustment was no more than a form of assessment, not in itself an adjustment; and he was entitled to conclude that no form of adjustment was required at the moment when the Claimant returned to work; in this respect the Claimant's evidence was not the same as the case put forward on his behalf by Mr Engel (see paragraph 18 of the Employment Judge's Reasons); and the Employment Judge was entitled to base himself on the Claimant's evidence. As to allegation 8, the Claimant was able to inform his manager of his condition himself.

Discussion and Conclusions

28. In my judgment the Employment Judge erred in law in striking out allegation 7.

29. It is well established law that the concept of a reasonable adjustment is not to be narrowly applied. Any modification to a PCP which would or might remove the substantial disadvantage caused by the PCP in principle may amount to a relevant step for the purposes of section 20(1): see, for a proposition which I do not believe to be in doubt, **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 at paragraph 45.

30. To this general principle there is a qualification about consultation. Consultation may be a precursor to the taking of a step for the purposes of section 20(1) but it is not a step in itself; for it does not of itself remove any disadvantage: see **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 at paragraphs 65 to 74. In principle the same will be true of making an assessment; it will not of itself remove any disadvantage. On the other hand, the provision of managerial support to a disabled person may amount to the taking of a step: thus in **Tarbuck** a failure to provide support to a disabled employee in a job search was found to be a breach of the duty to make reasonable adjustments (see paragraphs 24 and 52 to 53). Providing a mentor or enhanced supervision are examples in the *Code of Practice on Employment (2011)* of steps which it might be reasonable for an employer to have to take (see paragraph 6.33).

31. Dr Ward's report itself may be described as an assessment; but her proposals appear to me to be more than proposals for further assessment. They were a package of "workplace recommendations to support a sustained attendance and performance at work". She was saying that the Claimant's disability required active steps to be taken by a manager in the workplace to ensure that he was not taking on too much. As I have explained, the provision of enhanced support, supervision or monitoring may be a step which it is reasonable for the Respondent to undertake; Dr Ward's report appears to suggest that this was appropriate in the Claimant's case. I do not think it was open to the Employment Judge to strike out the allegation by reference to **Tarbuck**. A contention can only be struck out if there are no reasonable prospects of success; at the very least the point was reasonably arguable.

32. Nor do I think it was open to the Employment Judge to conclude that the step recommended by Dr Ward was not one which it was reasonable for the Respondent to have to take because, at the moment of returning to work, the Claimant's condition had improved and

A he did not see the need for what he described in his ET1 form as a "specific adjustment". He remained a disabled person. An adjustment may of course be aimed at alleviating a current difficulty; but it may also be aimed at preventing the recurrence of a difficulty. That was the point the Claimant was making about his return to work in August 2015. His concern was for the risk of deterioration in the future. Dr Ward's recommendations for active management support were to prevent recurrence.

C 33. Those seem to me to have been the Employment Judge's main reasons for striking out allegation 7; but he also criticised the PCP which the Claimant put forward - having no policy to deal with disability generally or in his case. I see no inherent reason why that PCP should be D unworkable; whether it existed would be a matter of fact. But in any case it is plain from Dr Ward's report that the demands of the workplace were capable of being a PCP causing disadvantage to the Claimant. The PCP was not the real issue.

E 34. I do not think the Employment Judge erred in law in striking out allegation 8. The Claimant could and did himself inform his manager of his condition. The key issue is not whether the manager knew about the disability but what she did about it.

F

The Time Limit Issues

The Employment Judge's Reasons

G 35. It was argued for the Claimant before the Employment Judge that the Claimant was alleging conduct extending over a period: hence it was to be treated as done at the end of the period; since items 7 and 8 were in time the whole period was in time. The Employment Judge H had summarised the law relating to conduct extending over a period in paragraph 3.2 of his Reasons. He said that the question was whether the acts complained of by the Claimant

amounted to an act extending over a period as distinct from a succession of unconnected or isolated specific acts. Mr Engel had referred the Employment Judge to **Kingston upon Hull City Council v Matuszowicz** [2009] ICR 1170, apparently in support of this submission (see paragraph 13 of the Employment Judge's Reasons).

36. The Employment Judge said:

> **"14. … I deal with the out of time point first. In relation to items 1 to 6 they span a considerable period of time from 2003 to November 2014 at the latest. For the purposes of this analysis I make an assumption here that the claimant's assertions are correct and they are potentially claims that are viable, although I must say that it is hard to see many of them. I remind myself that the claimant went off sick for a year from the summer of 2014 and returned to work on 17 August 2015. Whilst he was off sick he decided to engage in correspondence with the respondent starting in October or November 2014. I am not assisted by the fact that I have no copy of such correspondence. The claimant complained to me that Mr Bagga had failed to deal with his correspondence and I reminded myself of what Mr Engel said about it being the claimant's intention to put HSBC to rights.**
>
> **15. By the time of the claimant's return to work and basing my findings on the claimant's evidence at page 38, where the claimant stated that there were no adjustments that were then needed, I found there is plain evidence of a very clear gap in the factual narrative. I find therefore, that there is no act extending over a period to bridge the gap between items 6 and 7, or 6 and 8. There is no continuing state of affairs at the time of items 7 and 8."**

37. On the question of just and equitable extension, the Employment Judge made important findings of fact. He found that the Claimant did not become aware of his rights under the **Equality Act 2010** until about November 2014 when he was off ill. He wrote a letter to the Respondent, which neither he nor the Respondent could now trace, enquiring of the Respondent's procedure for completing what he called a "Disability Risk Assessment". By January 2015 he had spoken to the Health and Safety Executive and become aware of the term "reasonable adjustments". He spoke to ACAS and then, in about April went on the ACAS web site. He did not consult a solicitor with specialist knowledge or the CAB. The Employment Judge noted his evidence that he was not aware of the three-month time limit until August 2015 when he carried out some further research. The Employment Judge expressed surprise that he had not learned of it from speaking to ACAS or visiting the ACAS web site.

38. The Employment Judge set out his conclusions at paragraphs 16 and 17:

> **"16. … The claimant started thinking generally about taking steps against the respondent in October or November 2014. He was advised in January 2015; and continued to investigate through ACAS and on the internet. Surprisingly, he did not seek any expert advice from a solicitor who was qualified in this area or even from the CAB who can give some specialist advice. What did the claimant do? He did not do anything until August 2015, when he made enquiries about time limits. It is a surprise that he made no previous enquiries about them. I am further surprised that he did not hear anything from ACAS on the subject of time or found it during his investigations through the internet or from the HSE. By the time of his knowledge, the early claims were many years old, going back to 2003. As a result, cogency of the evidence will be affected with the passage of time.**
>
> **17. Unfortunately, the claimant failed to act promptly and he failed to obtain appropriate professional advice. The medical evidence before me did not demonstrate any physical or mental impairment preventing the claimant issuing proceedings sooner and in time. I found the claimant to be articulate and intelligent; he chose not to make enquiries and take sooner action. Therefore, I conclude that the claimant has failed to convince me that it is just and equitable to extend the time. …"**

Submissions

39. On the question whether there was "conduct extending over a period" Mr Engel submitted that there was a common theme underlying the allegations of failure to make a reasonable adjustment; it was that the Claimant required, but did not receive, assistance to monitor his workflow so that his condition did not deteriorate. Hence sometimes his condition did deteriorate, as it did in 2014. His case was that he did not receive the help he needed in this respect either before he went off work in 2014 or after his return in 2015. The relevant state of affairs did not change; and the fact that at one point his condition deteriorated to the extent that he was off work does not mean that the state of affairs changed. This is not a case of a succession of unconnected or isolated acts; the complaint was essentially the same throughout. In any event the Employment Judge's conclusion was vitiated by his misunderstanding of the Claimant's case about the need for adjustments when he returned to work in 2015. At the very least he had not given adequate reasons.

40. Miss Ferber submitted that there was no error of law in the Employment Judge's reasoning. The Employment Judge gave reasons which cannot be described as perverse. He took full account of the evidence before him - including the evidence of the Claimant himself

and the medical evidence. He was entitled to reach the conclusion that there was "a very clear gap in the factual narrative".

41. Although I was referred to **Matuszowicz** in the course of submissions, I hope will be forgiven if I say that neither advocate summoned up much enthusiasm for addressing its implications. Mr Engel submitted rather faintly that it supported his case; Miss Ferber submitted the Employment Judge was entitled to address the matter in the way that he did.

42. On the question of just and equitable extension, Mr Engel submitted that the key passage of time for consideration was from November 2014, when the Claimant first heard of his rights, to August 2015, from which time the claim was in time. The Employment Judge said that "the medical evidence … did not demonstrate any physical or mental impairment preventing the Claimant issuing proceedings sooner and in time". This was a perverse conclusion. The medical evidence did demonstrate such an impairment, and it was supported by Mr Engel's own evidence. In any event there was no rounded consideration of the matter, especially the balance of prejudice, as required by the **Keeble** principles (**British Coal Corporation v Keeble** [1997] IRLR 336, which the Employment Judge had correctly cited in paragraph 3.3 of his Reasons).

43. Miss Ferber submitted that the medical evidence was entirely compatible with the Employment Judge's conclusion. She took me through the evidence, emphasising that the Claimant was not clinically depressed and was of above average intelligence. She submitted that the Employment Judge did not err in law and applied the correct test.

Discussion and Conclusions

44. The Employment Judge dealt with the case on the footing that the applicable law was to be found in section 123(3)(a) of the **2010 Act** - in other words, that the Claimant was alleging conduct extending over a period. His key reasoning was two-fold: firstly, that there was a "clear gap in the factual narrative" while the Claimant was off work; secondly, that by the time of the Claimant's return to work there were "no adjustments that were then needed".

45. I do not think that the first of the reasons really addresses the question which section 123(3)(a) requires the Employment Judge to address. The focus must be on the alleged conduct of the Respondent: did that conduct extend over a period? Having identified, as he did, that the Claimant's case related primarily to a failure to monitor his workload, the Employment Judge ought to have asked whether that conduct extended over a period. On the Claimant's account it did; no support was provided for him with his epilepsy either before or after his return to work and it was the lack of such support which led to his absence in 2014 to 2015. If this was so the fact that the Claimant was off work as a result was neither here nor there; the conduct never changed.

46. It may be that the Employment Judge was influenced in anticipation by the finding he was to make later in his Reasons that allegations 7 and 8 ought to be struck out; but I have already explained that the Employment Judge was not entitled to strike out allegation 7. It was in truth closely connected with the earlier allegations; and the Employment Judge's reliance on the Claimant's evidence that no specific adjustments were needed at the time of his return to work was, as I have explained, a misunderstanding of the Claimant's case at the hearing based on the report of Dr Ward.

47. For these reasons the Employment Judge's reasoning in respect of section 123(3)(a) cannot stand.

48. There is a further point which I should mention here. As far as I can see it was common ground that the Employment Judge should apply section 123(3)(a); but it is far from obvious that this was correct. On the face of it the allegation was of a continuing omission to make a reasonable adjustment, in which case section 123(3)(b) and (4) would be in play - see **Matuszowicz** especially at paragraphs 21 to 22 and 35 to 38. I do not think section 123(3)(b) and (4) are easy to apply; as Sedley LJ explained in **Matuszowicz**, the provisions may result in time running at an unexpectedly early date and may require "sympathetic regard" to the point when an Employment Tribunal decides whether it is just and equitable to extend time.

49. I turn finally to the question of just and equitable extension of time. In my judgment this must in any event be reconsidered in the light of the fact that allegation 7 will not be struck out and in the light of any conclusions the Employment Judge reaches on reconsideration about the application of section 123(3) and (4). I do not think that the Employment Judge's conclusion about just and equitable extension can be read in isolation from his other conclusions. It is one thing for a Judge to hold that it is not just and equitable to extend time where he finds no extant in-time allegation and no link between an in-time allegation and the earlier allegations; another to reach that conclusion where there is an in-time allegation which is linked to at least some of the out-of-time allegations.

50. If the Employment Judge's conclusion is read strictly to mean what it says, he was entitled to say that the medical evidence did not demonstrate any physical or mental impairment which "prevented" the Claimant issuing proceedings sooner and in time. Experience shows that

some litigants with quite serious impairments manage to issue proceedings even when they are not fit to work; and the Claimant was a man of intelligence. But as I read the medical evidence, most people would say that the Claimant's mental impairment was a relevant factor; a man who is highly distressed by tiredness and frustration, struggling to concentrate, finding it difficult to stop crying, upset and disturbed by his own emotions, is at a significant disadvantage in deciding whether to take legal action and in researching that action. It is a factor the Employment Judge was bound to take into account. Moreover there is no balancing of prejudice at all in the Employment Judge's Reasons.

51. For these reasons I consider that the appeal must also be allowed in respect of time issues. I do not think it is possible for the Employment Appeal Tribunal to decide time issues itself: they involve factual assessments of the kind which must be remitted: see **Jafri v Lincoln College** [2014] ICR 920. Whether remission is to the same or a different Judge is decided by applying the overriding objective and criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In this case I have no doubt about the professionalism of the Employment Judge or his willingness to look afresh at the case: he took conspicuous care when he sought to identify the issues about which the Claimant sought to complain. But it was a relatively short hearing more than a year ago; and I think that a fresh start is best.

Postscript

52. I would add one postscript to this Judgment. This seems to me to be a case where the parties ought to give particular attention to the possibility of conciliation. The Claimant has worked for the Respondent for many years. His concerns about workload and the danger of recurrence of his symptoms were addressed sympathetically in the report of Dr Ward which the Respondent commissioned. If, as appears to be his case, the report of Dr Ward was not

discussed with him or addressed when he returned to work, there would seem to be room for discussion, if it has not already taken place, as to how his concerns might be addressed. If they have been addressed, then again, given his long-standing working relationship with the Respondent, one would hope that conciliation might assist.