Appeal No. UKEAT/0238/20/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 23rd March 2021
Judgment Handed Down on 24th June 2021

Before

MATHEW GULLICK QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

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(1) MOORE STEPHENS LLP
(2) SIMON GALLAGHER
(3) PAUL STOCKTON
(4) SUKHJINDER SINGH AULAK
(5) SIMON BAYLIS
(6) TIM WEST
(7) RICHARD MOORE
(8) JEREMY WILLMONT — APPELLANTS

PHILIP PARR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR DANIEL STILITZ (one of Her Majesty's Counsel) Instructed by: Addleshaw Goddard LLP 60 Chiswell Street London EC1Y 7AG
For the Respondent	MR JONATHAN COHEN (one of Her Majesty's Counsel) Instructed by: CM Murray LLP First Floor 36-38 Cornhill London EC3V 3NG

SUMMARY

JURISDICTIONAL / TIME POINTS; AGE DISCRIMINATION

The Claimant was an Equity Partner of the First Respondent, a firm of accountants. The LLP Members' Agreement provided for all Partners to have a normal retirement age of 60 but with the First Respondent having discretion to extend beyond that time, on terms to be determined by the Managing Partner, in the event of there being a business need.

The Claimant wished to stay on after his normal retirement date of 30th April 2018. In October 2017, the First Respondent decided that the Claimant should continue for two years beyond his normal retirement date but only as an ordinary (i.e. non-equity) Partner. An agreement was entered into providing for this change in the Claimant's status, which took effect after 30th April 2018.

In September 2018, the Claimant learned of proposals to sell the First Respondent's business. In December 2018, he was informed that he was not entitled, as a non-equity Partner, to a share in the proceeds of any sale. The Claimant took legal advice and in January 2019 brought a claim for direct age discrimination in the Employment Tribunal, alleging losses including in relation to the proceeds of sale of the First Respondent's business.

At a Preliminary Hearing, the Employment Tribunal held that the Claimant's claim was in relation to a rule which had resulted in his demotion from Equity Partner to ordinary Partner and was "conduct extending over a period" which was continuing at the date of presentation of the claim, so that it had been brought within the statutory time limit set out in section 123 of the Equality Act 2010.

The Respondents appealed, contending that that claim was about the continuing consequences of a one-off act (i.e. the change in the Claimant's status from Equity Partner to ordinary Partner) and was not in respect of the continuing operation of a discriminatory rule or practice. The Employment Tribunal had found that if the Respondents were correct about that then the claim had been brought 5½ months out of time.

The Employment Appeal Tribunal allowed the Respondents' appeal, holding that the Employment Tribunal had erred in finding that the claim was in respect of "conduct extending over a period", because the act of which complaint was made was the one-off exercise of the discretion to continue the Claimant's membership of the LLP after his normal retirement date on inferior terms and the resulting change in the Claimant's status, and not the continuing application of a discriminatory rule or policy. The case was remitted to the Employment Tribunal for it to consider whether to extend time for the presentation of the claim.

MATHEW GULLICK QC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. I shall refer to the parties using their titles from the proceedings before the Employment Tribunal, that is as "the Claimant" and "the Respondents".

2. This is an Appeal by the Respondents against the Reserved Judgment of an Employment Tribunal sitting at London Central (Employment Judge Elliott, sitting alone) following a two-day Preliminary Hearing on 11th and 12th September 2019. The Reserved Judgment and written Reasons were sent to the parties on 13th September 2019.

3. The Employment Judge held that the Claimant had presented his two Claim Forms to the Employment Tribunal within the applicable statutory time limit and that the claims made against the Respondents should, therefore, proceed to a final hearing. The Respondents now appeal against that decision, contending that the Employment Judge erred in law in finding that the Claim Forms had been presented in time. The Appeal is therefore concerned with the jurisdictional question of whether the Claim Forms were presented in time and not with the merits of the Claimant's claim against the Respondents.

4. This Appeal is also not about whether, if the Claim Forms were filed outside the statutory time limit, there should be an extension of time. Although that issue had been the subject of evidence and argument at the Preliminary Hearing, the Employment Judge did not determine whether or not an extension of time should be granted if the Claim Forms had (as the Respondents contended) been presented out of time. It is therefore common ground that if

this Appeal is allowed then there will have to be a remission to the Employment Judge for her to determine whether to grant an extension of time.

5. On the Respondents' Appeal, the Claimant was represented by Mr Jonathan Cohen QC and the Respondents were represented by Mr Daniel Stilitz QC. Both Mr Cohen and Mr Stilitz had appeared before the Employment Judge. I am very grateful to them both for their assistance.

6. The Appeal was heard by way of a remote video hearing using the Microsoft Teams platform, in accordance with the arrangements adopted during the COVID-19 pandemic. I am satisfied that this mode of hearing was appropriate and proportionate in all the circumstances and that there was no prejudice to either the Claimant or the Respondents as a result.

Background

7. The First Respondent is a Limited Liability Partnership ("LLP") which carried on business providing accountancy and advisory services. On 1 February 2019, the First Respondent's business was transferred to another firm, BDO, resulting in the First Respondent going into what the Employment Judge described as "wind-up mode". At about the same time, two parts of the First Respondent's business – its wealth management division and a particular proprietary software product – were also sold to other buyers.

8. At the times material to this Claim, the Second Respondent was the First Respondent's Managing Partner. The Third to Eighth Respondents were the members of the First Respondent's Partnership Committee.

9. The Claimant was born in 1958. He is a Fellow of the Institute of Chartered Accountants of England and Wales, and a member of the Chartered Institute of Taxation. He had a long career at the firm which became the First Respondent, joining in 1982. He was promoted to Salaried Partner in 1988. He became an Equity Partner in 1995. At that point, the firm was a partnership subject to the provisions of the Partnership Act 1890. It became an LLP in 2005, when the Claimant became a Member of the LLP – which is the First Respondent – and retained the status of Equity Partner under the LLP membership agreement ("the Members' Agreement").

10. Clause 1 of the Members' Agreement, as in force at the material time, contained the following definitions, insofar as material:

> **"Accounts Date means 30 April in each year and/or such other date as the Partnership Committee may determine, subject to the approval of a Simple Majority of the Equity Partners**
> **…**
> **Effective Date means 3 October 2005**
> **…**
> **Equity Partners means the persons named in part 1 of schedule 1 and any other person appointed as an Equity Partner after the Effective Date, other than any Retired Member, and for the avoidance of doubt may, pursuant to clause 26.4, in certain cases include some or all of the Fixed Share Partners**
> **…**
> **Fixed Share Partner means the persons named in part 3 of schedule 1 and any other person appointed as a Fixed Share Partner, other than any Retired Member**
> **…**
> **Members means the Equity Partners and Partners**
> **…**
> **Normal Retirement Date has the meaning ascribed to it at clause 29.2**
> **…**
> **Partners means the persons named in part 2 of schedule 1 and any other person appointed as a Partner after the Effective Date, other than any Retired Member**
> **…**
> **Retired Member means a Statutory Member who has in accordance with this Agreement retired or ceased to be a Statutory Member**
> **…**
> **Salaried Partners means those employees of the LLP Business who have been admitted as Statutory Members from time to time and whose rights are governed by their separate contracts of employment, other than any Retired Member**
> **…**
> **Statutory Members means the Equity Partners, Partners, Fixed Share Partners and Salaried Partners"**

11. Clause 29 of the Members' Agreement made provision in relation to retirement of Members (i.e. both Equity Partners and ordinary Partners) who had reached the age of 60:

"29.2 Subject to clause 29.4, each Member shall in any event retire on the Accounts Date next following his 60th birthday (the Normal Retirement Date).

29.3 In agreeing to the Normal Retirement Date, the Members have given careful consideration to the requirements of the Equality Act 2010. It has been agreed between them that the default retirement age is objectively justified and is a proportionate and reasonable means of achieving the legitimate aims of enabling proper succession planning for both the LLP Business and the Members. It also contributes to achieving a number of other benefits including:

(a) ensuring the sustainability of the LLP by seeking to ensure that there are Members in all areas of expertise, by strategically planning the size and shape of the LLP's membership;
(b) providing room to grow the membership of the LLP, fulfilling recruitment needs and promotion expectations;
(c) developing a collegiate and supportive culture within the LLP and seeking to avoid the compulsory retirement of senior Members for other reasons; and
(d) enabling Members to plan their retirements and execute them successfully in terms of handing over Clients and preparing themselves for the opportunities of retirement

29.4 Subject to the approval of the Partnership Committee, the Managing Partner may extend the Normal Retirement Date of an individual Member in circumstances where that Member indicates he wishes to continue as a Member or if the Managing Partner asks the Member to continue as a Member. The Managing Partner may only agree to such an extension where he objectively considers that there is a valid business case for so doing, having reference to the on-going contribution to the LLP Business by the Member concerned and the matters set out at clause 29.3. Any agreed extension shall be for a specific period of time, the conclusion of which will represent the Member's Normal Retirement Date and shall be on such terms as to remuneration and otherwise the Managing Partner may determine. The Managing Partner may alternatively agree that any retired Member may be employed by the LLP on such terms as the Managing Partner shall determine."

12. In February 2018, the Claimant reached the age of 60. This was the First Respondent's normal retirement age for members of the LLP under Clause 29 of the Members' Agreement. The Claimant's Normal Retirement Date, calculated in accordance with Clause 29.2, was 30th April 2018.

13. Several months prior to his 60th birthday, the Claimant prepared a proposal that he should continue with the firm and not retire, on the basis that there was a business case for him to do so. The Second Respondent considered that proposal and recommended to the First Respondent's Partnership Committee that the Claimant be permitted to remain as a Partner for two years beyond his Normal Retirement Date, i.e. until 30th April 2020, but not as an Equity Partner. The Second Respondent's evidence regarding the reason for this was that although he considered that there was a case for the Claimant to continue with the firm beyond

his Normal Retirement Date, he did not consider that the Claimant was contributing to the business as an Equity Partner should. The Committee accepted the Second Respondent's recommendation. That decision was communicated to the Claimant by the Second Respondent on 10th October 2017.

14. On 13th October 2017, the Claimant and the First Respondent entered into a Deed, referred to as a De-Equitisation Agreement, setting out the terms upon which the Claimant would remain after 30th April 2018. The De-Equitisation Agreement provided that after that date, he would cease to be an Equity Partner under the Members' Agreement and would become an ordinary Partner. Clauses 1 and 2 of the Deed provided:

> **"1. Any capitalised terms used in this Deed and not defined shall have the meanings ascribed to them in the Members' Agreement.**
>
> **2. The Relevant Member** [i.e. the Claimant] **shall cease to be an Equity Partner and become a Partner with effect from the Transition Date."**

15. The Employment Judge found that the Claimant had faced a choice between remaining as an ordinary Partner or leaving the firm completely. He was not given the option to remain as an Equity Partner. In those circumstances, he chose to remain as an ordinary Partner. The evidence of the Second Respondent, with which the Claimant himself agreed and which was accepted by the Employment Judge, was that in at least three previous instances the discretion had been exercised differently so as to permit Equity Partners to continue as Equity Partners after what would have been their Normal Retirement Date.

16. The Claimant was dissatisfied at not being offered a further period as an Equity Partner. However, he took the view that the difference between his earnings as an Equity Partner and his future earnings as an ordinary Partner was not so significant as to cause him to take legal advice on his position. At around the time that the De-Equitisation Agreement was entered

into, the Claimant believed that his loss would be in the region of a reduction in his income of £31,000 in the subsequent financial year. He considered, with that figure in mind, that any legal action he might take would cost a considerable amount of money in legal fees in comparison to the possible benefit from it. The Employment Judge accepted the Claimant's evidence that when he entered into the De-Equitisation Agreement he knew that he would lose out but he did not anticipate the full extent of his potential losses, which were dependent on future events.

17. The Claimant's status therefore changed at the end of April 2018 from that of Equity Partner to ordinary Partner, in accordance with the De-Equitisation Agreement that had been entered into in October 2017. This resulted in the Claimant being repaid the capital sum which he had invested in the business. He was not thereafter required to make any further capital contributions and did not have the potential liabilities that he would have had as an Equity Partner. The Claimant accepted in his evidence to the Employment Judge that he knew the effect of the De-Equitisation Agreement was that he would also be losing any right to distribution of capital profits.

18. On 13th September 2018, the Claimant learned at a Partners' meeting that the First Respondent was planning to sell parts of its business. This was not something about which the Claimant had been aware when he entered into the De-Equitisation Agreement in October 2017. The Second Respondent's evidence, accepted by the Employment Judge, was that the First Respondent's Management Board had made the decision to sell those parts of the business on 14th February 2018, i.e. several months after the Claimant's De-Equitisation Agreement. Separately, a prospective merger with BDO was also initially explored at a meeting between the key personnel from both firms on 1st March 2018. The merger took place on 1st February

2019. The Claimant is now an Equity Partner at BDO, albeit on terms that he contends are worse, as a result of the change in his status at the end of April 2018, than those which he would now have with BDO if he had been an Equity Partner of the First Respondent at the time of the merger.

19. In December 2018, the Claimant raised the issue of whether he would benefit from the proceeds of the forthcoming disposal of the First Respondent's business, believing (unrealistically, as the Employment Judge found) that he would receive a share despite having ceased to be an Equity Partner as a consequence of the De-Equitisation Agreement. He was told that he would not do so.

20. The Claimant first contacted Solicitors on 17th December 2018. ACAS Early Conciliation was commenced on 10th January 2019. Early Conciliation Certificates were issued in relation to the First, Second, Third, Fifth, Sixth and Seventh Respondents on 14th January 2019, and for the Fourth and Eighth Respondents on 17th January 2019. The ET1 Claim Form against the First Respondent was issued on 17th January 2019 and a second ET1 Claim Form against the remaining Respondents was issued on 25th January 2019. Nothing turns, for present purposes, on the period of time between the issue of the first and second Claim Forms. As there is no material difference in the matters raised then I shall refer to them in the singular as "the Claim".

21. The Claimant's Claim against the Respondents is for direct age discrimination, contrary to section 13 of the Equality Act 2010, arising from his ceasing to be an Equity Partner of the First Respondent. His claimed losses, in the sum of just under £4 million, resulting from such discrimination include what he contends would have been his share in the proceeds of the sale of the First Respondent's business and the losses he says have been caused by the lower level

of his remuneration at BDO than would have been the case had he continued as an Equity Partner of the First Respondent. The precise amount of any loss is disputed by the Respondents. So too is liability for age discrimination, the Respondents contending that any *prima facie* discriminatory action by them was justified under section 13(2) of the Equality Act as being a proportionate means of achieving a legitimate aim (see *Seldon v Clarkson Wright & Jakes*, [2012] UKSC 16, [2012] ICR 716 and *Seldon v Clarkson Wright & Jakes (No.2)* [2014] ICR 1275), and so was lawful.

22. At the Preliminary Hearing, which had been listed to determine whether the Claim was filed out of time and if so whether an extension of time should be granted, it was contended by Mr Cohen that the Claim was about "conduct extending over a period" and that such conduct had been ongoing when the Claim was filed. Although the Respondents argued that the Claimant's case had not been put in those terms prior to the Preliminary Hearing, the Employment Judge permitted the Claimant to advance this argument on the basis that it went to the jurisdiction of the Employment Tribunal. The Respondents do not challenge her decision in this respect.

23. The primary issue determined by the Employment Judge was whether the Claimant's Claim had been presented outside the statutory time limit, in which case it could only be considered if an extension of time was granted. This required the Employment Judge to determine whether or not Mr Cohen's argument was correct, i.e. whether the Claim was in respect of "conduct extending over a period" for the purposes of section 123(3)(a) of the Equality Act 2010. Section 123 provides, relevantly:

> **"(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 purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it."

24. It was agreed between the parties that if there was no such "conduct extending over a period" then the Claim Forms had been filed out of time, albeit they differed on the length of the period by which they would be out of time. The Employment Judge, having considered both sides' arguments on this secondary issue, held that if there was no "conduct extending over a period" then the Claim was out of time by 5½ months. This Appeal is not concerned with the Employment Judge's conclusion on that issue. Rather, it raises the question of whether the Employment Judge erred in law in her primary finding that the Claim was in respect of "conduct extending over a period", ongoing at the date of the presentation of the Claim, so that the Claim was brought in time.

25. At paragraphs 69-77 of the written Reasons, the Employment Judge dealt with this issue as follows:

"69. The respondents' submission was that there was no continuing act because everything flowed from the De-Equitisation Agreement of 13 October 2017. The respondents submitted that if the claimant was right, he could bring his claim two or five years after the De-Equitisation agreement, say in 2023 and still be within time it was submitted that this could not be right because everything flowed from the loss of equity status in 2018 when the claimant cased [sic] to be an equity partner once and for all. It was submitted that there was no continuing act thereafter. It was submitted that the fact that the claimant became an equity partner of BDO was "neither here nor there", it was a matter that could not have been anticipated.

70. The claimant relies on his de-equitisation as a demotion. There is no doubt in my mind, and I find that it was a demotion, to a fixed share partner. It was not what the claimant wanted, but he accepted it as the only alternative open to him was the unattractive option of leaving the firm for which he had worked for 36 years.

71. Both parties made submissions on the leading authority of *Seldon v Clarkson Wright & Jakes 2012 ICR 716*, Supreme Court. I take the view that it is not appropriate at this preliminary hearing to express view [sic] on the full merits case, although both parties made submissions on the strengths of their positions at full merits.

72. In relation to the continuing act point, it was suggested that this was not a case of a mandatory retirement age because there was a discretion by which an equity partner could stay on beyond 60 as had happened in the three cases mentioned by the second respondent. The claimant took the tribunal to the relevant clause in Seldon, judgment paragraph 7, which said "Any partner who attains the age of 65 years shall retire from such partnership on 31 December next following his attainment of such age (or such later date as the partners shall from time to time and for the time being determine). I agree with the claimant that the Seldon case contained a discretion, albeit not as detailed as in the present case.

73. In terms of a continuing act, the claimant was not dismissed on 30 April 2018, he was demoted. If he had been dismissed, I agree that time would have run from that date. However, he continued in a demoted role.

74. In *Hendricks* at paragraph 52, Mummery LJ said that the concepts of policy, rule, practice scheme or regime should not treated as a complete and constricting statement of what is an act extending over a period. The focus should be on whether there was an ongoing situation or a continuing state of affairs in which those affected were treated less favourably.

75. In this case there was a rule, contained in the Members' Agreement at clause 29, that the member shall retire on the accounts date next following his 60th birthday. In common with *Seldon*, it had provision for discretionary relief, which was not granted and as a result the claimant was demoted to fixed share partner. I find that whilst this rule continued, it was a continuing act and a continuing state of affairs which resulted in less favourable treatment because the claimant had reached the age of 60.

76. I find that as held in *Amies* and approved by the House of Lords in *Kapur*, while the respondents operated a rule that resulted in demotion at age 60, being less favourable treatment because of age, time would only begin to run from when the rule was abrogated. The reason why the claimant was not in the role that he wanted to be in, that of equity partner rather than fixed share partner, was because of the existence of the rule in clause 29. I see no difference as in the scenario set out in *Amies* between a failure to appoint, leaving a person in a lesser role than the one for which they applied and a demotion, placing this claimant in a lesser role.

77. I therefore agree with the claimant that there was a continuing act of discrimination which existed at the date upon which he presented his claims and as a result his claims are with in [sic] time. As I have found that there was a continuing act and the claim is within time, it was not necessary to consider the just and equitable extension or the balance of prejudice in that respect."

The Decided Cases

26. There are a number of decided cases on what is, and what is not, "conduct extending over a period" for the purposes of this analysis to which I was referred during the course of argument; as is apparent from the passage of the Reasons which I have set out above, not all of these were cited to the Employment Judge. Before dealing with the parties' arguments on the correct approach to the issue in this particular case, I shall summarise the basis upon which the most important of those cases were decided. Although several were decided under the legislation which preceded the Equality Act 2010, it is not suggested that anything turns on the differences in wording between the old and new legislation.

27. In *Amies v Inner London Education Authority* [1977] ICR 308, this Appeal Tribunal in a judgment given by Bristow J dismissed the claimant's appeal against the Industrial Tribunal's finding that the claim had been presented out of time. The claimant was deputy head of the art department at a school in West London. She applied for the position of head of department but was unsuccessful. On 13th October 1975, a male applicant was appointed to the role. The relevant parts of the Sex Discrimination Act 1975 (the applicable legislation prior to the Equality Act 2010) were not then in force but came into effect on 29th December 1975. The claimant presented her complaint of sex discrimination to the Industrial Tribunal on 1st January 1976. The issue was whether the complaint was about the single act of the appointment of the male applicant on 13th October 1975, prior to the commencement of the relevant part of the 1975 Act, or whether there was a continuing state of affairs at the date of the presentation of the claim. This Appeal Tribunal held at page 311 of the report that the complaint was in respect of a single act:

> **"1.** ***Was the discrimination a single act, or an "act extending over a period," a continuous act?***
>
> **There is nothing in the definition section of the Sex Discrimination Act 1975 or the sections to which that refers to require us to give any other than the ordinary common sense meaning to the provisions of the Act. The applicant's complaint here is that by not appointing her, and by appointing a man with lesser qualifications, the employers have unlawfully discriminated against her. She herself has in our judgment given the right definition of the "act of discrimination" of which she complained to the tribunal under section 63 (1).**
>
> **Like any other discrimination by act or omission, the failure to appoint her, and the appointment of him, must have continuing consequences. She is not head of the department; he has been ever since October 13, 1975. But it is the consequences of the appointment which are the continuing element in the situation, not the appointment itself.**
>
> **That there may be discrimination by an act "extending over a period," that is, a continuing act, is clear from section 76 (6) (b). This provides that for the purpose of calculating the period within which a complaint must be presented to the industrial tribunal "any act extending over a period shall be treated as done at the end of that period." An illustration of what the legislature had in mind as an act extending over a period can be seen in the provisions of section 6 (1), which makes it:**
>
> > **"unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman — (a) in the arrangements he makes for the purpose of determining who should be offered that employment …"**
>
> **So, if the employers operated a rule that the position of head of department was open to men only, for as long as the rule was in operation there would be a continuing discrimination and anyone considering herself to have been discriminated against because of the rule would have three months from the time when the rule was abrogated within which to bring the complaint. In contrast, in the applicant's case clearly the time runs from the date of appointment of her male rival. There was no continuing rule which prevented her**

appointment. It is the omission to appoint her and the appointment of him which is the subject of her complaint."

28. In *Calder v James Finlay Corporation Ltd* [1989] IRLR 55, Mrs Calder's application to her employer's mortgage subsidy scheme was refused in May 1981. She left employment on 2nd October 1981 and complained of sex discrimination on the basis that the refusal to pay the mortgage subsidy, which was provided to male employees, was because she was female. This Appeal Tribunal, in a judgment given by Browne-Wilkinson J, held that Mrs Calder's claim was brought in time:

> **"10. The complaint presented by Mrs Calder to the Industrial Tribunal does not limit her claim to a claim that the employers had refused or deliberately omitted to afford her access to the mortgage subsidy scheme. In our view, on the facts as found by the Industrial Tribunal it was open to them to hold that the unlawful act in this case lay in discriminating against Mrs Calder 'in the way [the employer] affords her access ... to any other benefits, facilities or services'. Although we agree with the Industrial Tribunal that discrimination consisting in a refusal or deliberate omission to afford her access to the scheme last occurred in May 1981, in our view there was also continuing discrimination in the way in which the employers afforded her access to those benefits. The evidence established that it was a requirement of the mortgage subsidy scheme that the applicant should be a male and not a female. She was told that she was not 'eligible' for the scheme; to our minds this denotes that it was a requirement of the scheme as a whole that the applicant should be male. By constituting a scheme under the rules of which a female could not obtain the benefit of the mortgage subsidy in our judgment the employers were discriminating against Mrs Calder in the way they afforded her access to the scheme. If follows, in our judgment, that so long as Mrs Calder remained in the employment of these employers there was a continuing discrimination against her. Alternatively, it could be said that so long as her employment continued, the employers were subjecting her to 'any other detriment' within s.6(2)(b).**
>
> **11. Once this conclusion is reached, in our judgment it follows that the case does fall within s.76(6)(b). The rule of the scheme constituted a discriminatory act extending over the period of her employment and is therefore to be treated as having been done at the end of her employment. Accordingly, her application was within time.**
>
> **12. We receive support for this view from the dictum of the Employment Appeal Tribunal in *Amies v Inner London Education Authority* (1977) 2 AER 100. In that case this Tribunal expressed the view (obiter at p.102h) that there would be continuing discrimination within s.6(1) of the Act if there was a rule that the appointment in question should be open to men only. In our view the same position obtains under s.6(2)."**

29. In *Barclays Bank Plc v Kapur & Others* [1991] ICR 208, the House of Lords held that the Industrial Tribunal did have jurisdiction to consider a claim for race discrimination arising from the bank's failure to credit for pension purposes the claimants' periods of service in East Africa, prior to coming to the United Kingdom. It was held that the failure to credit the claimants' pensions was an act extending over a period, i.e. the claimants' employment with

A the bank. At page 215 of the report, Lord Griffiths held, having set out the reasoning in this Appeal Tribunal's decisions in *Amies* and *Calder*:

> **"In the present case the Court of Appeal were in my view right to approve these two decisions and to classify the pension provisions as a continuing act lasting throughout the period of employment and so governed by subsection (7)(b). The matter can be further tested by taking the case of an employer who before the Act was passed paid lower wages to his coloured employees than to his white employees. Once the Act came into force the employer would be guilty of racial discrimination if he did not pay the same wages to both coloured and white employees. If he continued to pay lower wages to the coloured employees, it would be a continuing act lasting throughout the period of a coloured employee's employment within the meaning of subsection (7)(b). A man works not only for his current wage but also for his pension and to require him to work on less favourable terms as to pension is as much a continuing act as to require him to work for lower current wages.**"

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C

30. In *Sougrin v Haringey Health Authority*, the claimant and her comparator, Miss Mobey, were both subject to regrading as a part of a wider exercise in the National Health Service. Initially in October 1988 they were both graded at level E on the new pay scale, but on appeal the

D claimant's comparator was placed at the higher-level F. The claimant's appeal against her grading at level E was dismissed on 13th November 1988. She complained of race discrimination. Her appeal was dismissed both by this Appeal Tribunal, [1991] ICR 791, and

E by the Court of Appeal, [1992] ICR 650. Giving the judgment of this Appeal Tribunal, Wood J stated at page 796D-F of the former report, after considering the decisions in *Amies*, *Calder* and *Kapur*:

> **"Thus, "a continuing act" should be approached as being a rule or regulatory scheme which during**

F **its currency continues to have a discriminatory effect on the grounds of sex or race.**

> **Applying these principles to the present case we agree with this Industrial Tribunal that it falls on the *Amies* rather than the *Calder* side of the line, in that the "rule" if it can be considered such is that the Applicant is paid according to her grade and that her complaint is that on 13th November 1989 she was not upgraded to Grade 'F'. The fact that she continues to be paid less than Miss Mobey is a consequence of the decision on appeal and is not of itself a continuing act of discrimination."**

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31. In the Court of Appeal, Balcombe LJ held at pages 656H to 657C of the latter report:

> **"I have quoted from Lord Griffiths's speech in *Kapur* [1989] IRLR 387 in some detail because Mr Allen, for the applicant, relied heavily upon certain passages in support of her claim that she was being subjected to a continuing act of discrimination in that she was being paid less at grade E than Ms Mobey at grade F. In my judgment a careful analysis of Lord Griffiths's speech shows that**

H **submission was not well-founded. In the passage last cited Lord Griffiths was clearly referring to the case of an employer who has a policy of paying coloured employees less than their white counterparts.**

> **In the present case the complaint made, and on the facts correctly made, by the applicant was that was she was graded E while her white comparator was graded F. This was a 'one-off' act. The**

continuing consequence of that act is that the applicant is paid less than Ms Mobey. This is precisely what the Industrial Tribunal said:

> **'We find that the discriminatory act complained of was the decision to dismiss the appeal. This was not a continuing act, but its consequence was that the applicant was paid wages at grade E, some £2,000 a year less than grade F.'**

That finding contains no error of law."

32. Lord Donaldson MR rejected the submission made on the claimant's behalf, relying on the decision in *Kapur*, that her claim was in time because, following the re-grading, she had been and continued to be paid lower wages than her comparator. He held, at page 661A-C of the report:

> **"The fallacy in this submission lies in failing to identify and differentiate between the discriminatory acts relied upon by Mrs Sougrin and by Lord Griffiths's hypothetical claimant. In Lord Griffiths's example it was the employer's policy not to pay the same wages to the coloured and white employees. It was that policy which constituted the discriminatory act. In the present case it has never been suggested that the health authority had any such policy. Its policy was quite clearly to pay the same wages to every employee in the same grade regardless of racial distinctions. Mrs Sougrin's complaint was quite different; namely, that she had been refused an 'F' regrading for racially discriminatory reasons."**

33. In *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574, the claimant complained that failing to allow his frequent and repeated applications for regrading and failures to give him opportunities to 'act up' in the higher grade when they arose amounted to a continuing act for the purposes of time running. This Appeal Tribunal, in a judgment given by the then President, Mummery J, allowed the claimant's appeal against the conclusion of the Industrial Tribunal that there was no continuing act. It held:

> **"20. We do, however, agree with Mr Kibling** [Counsel for Mr Owusu] **that in this case the tribunal erred in law in failing to treat the acts complained of on regrading and failure to give the opportunity to act up as continuing acts. We emphasise that all these matters are matters of allegation only. Nothing has been proved. But in our view the allegations amount to a prima facie case that there was a continuing act. The continuing act was in the form of maintaining a practice which, when followed or applied, excluded Mr Owusu from regrading or opportunities to act up.**
>
> **21. The position is that an act does not extend over a period simply because the doing of the act has continuing consequences. A specific decision not to upgrade may be a specific act with continuing consequences. The continuing consequences do not make it a continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken from time to time. What is continuing is alleged in this case to be a practice which results in consistent decisions discriminatory of Mr Owusu.**
>
> **22. It would be a matter of evidence for the tribunal as to whether such a practice as is alleged in Mr Kibling's argument in fact exists. It may be that, when explanations are given by the respondents, it**

will be shown that there is no link between one instance and another, no linking practice but a matter of one-off decisions with different explanations which cannot constitute a practice.

23. We emphasise that, even if it was established that there were some practice built up of denying Mr Owusu upgrading or the opportunity to act up, it would still have to be proved that it was a discriminatory practice. It may be that the respondents can satisfy the tribunal, when they hear the case on the merits, that there are alternative explanations for the treatment of which Mr Owusu makes complaint. But those are all matters for investigation on the merits. We are satisfied that this tribunal erred in law in failing to appreciate that a succession of specific instances could indicate the existence of a practice, which in turn could constitute an act extending over a period which is a continuing act.

34. In *Cast v Croydon College* [1998] ICR 500, the Court of Appeal allowed the claimant's appeal against the finding that her claim of sex discrimination was out of time. The claimant had made several job-sharing and part-time working requests to her employer, all of which had been refused. Her appeal was allowed on the basis this amounted to a complaint of an act extending up until the termination of her employment: see at page 515B-C of the report. Auld LJ set out the law at pages 507H-509B:

"The authorities distinguish between a complaint of a "one-off" discriminatory decision whether or not it has a long term effect, which is governed by the general provision in section 76(1), and one of the application of a discriminatory policy or regime pursuant to which decisions may be taken from time to time, "an act extending over a period" for which section 76(6)(6) provides."

Lord Griffiths in *Barclays Bank Plc. v. Kapur* [1991] I.C.R. 208, 213G, referred to the difference between a "one-off" decision and "the continuing state of affairs which is governed by section 68(7)(b)" (the equivalent in the Race Relations Act 1976 of section 76(6)(b) of the Act of 1975). In *Owusu's* case [1995] I.R.L.R. 574, 576, a complaint of an employer's failure to regrade the complainant on a number of occasions, Mummery J., giving the judgment of the Employment Appeal Tribunal, made the same distinction:

> **"the tribunal erred in law in failing to treat the acts complained of on regrading and failure to give the opportunity to act up as continuing acts …. in our view the allegations amount to a prima facie case that there was a continuing act. *The continuing act was in the form of maintaining a practice which, when followed or applied, excluded Mr. Owusu from regrading or opportunities to act up.***
>
> **"The position is that an act does not extend over a period simply because the doing of the act has continuing consequences. A specific decision not to upgrade may be a specific act with continuing consequences. The continuing consequences do not make it a continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken from time to time. *What is continuing is alleged in this case to be a practice which results in consistent decisions discriminatory of Mr. Owusu.***
>
> **"It would be a matter of evidence for the tribunal as to whether such a practice … in fact exists. It may be that, when explanations are given by the respondents, it will be shown that there is no link between one instance and another, no linking practice but a matter of one-off decisions with different explanations which cannot constitute a practice." (Emphasis added.)**

As to a "one-off" discriminatory act, it is important to keep in mind that it may be an application of an established discriminatory policy or it may be inherently discriminatory regardless of any such policy. If the complaint is of a specific discriminatory act the fact that it may have been an application of an established policy adds nothing for this purpose. The starting point is, therefore, to determine what is the specific act of which complaint is made.

The fact that a specific act out of time may have continuing consequences within time does not make it an act extending over a period: see *Amies v. Inner London Education Authority* [1977] I.C.R. 308 — failure to appoint to a position; and *Sougrin v. Haringey Health Authority* [1992] I.C.R. 650 — refusal to upgrade an employee.

As to an act extending over a period, the authorities make clear — at least in the case of discrimination in the field of employment under section 6 of the Act of 1975 and section 4 of the Race Relations Act 1976 (see Brooke L.J. in *Rovenska v. General Medical Council* [1998] I.C.R. 85, in particular at pp. 92D–H, 94G–95C and 95F–H) — that it is the existence of a policy or regime, not a specific act of an employer triggering its application to the complainant, that matters. A moment's consideration of the concluding words of section 76(6)(b) of the Act of 1975 — "any act extending over a period shall be treated as done *at the end of that period*" (my emphasis) — shows that that must be so. If the "act extending over a period" required a specific act by an employer to give it effect there would be no need or room to "treat … it as done at the end of the period." See, as examples of claimed continuing acts of discrimination: *Calder v. James Finlay Corporation Ltd. (Note)* [1989] I.C.R. 157 — refusal of benefit of employment — and *Barclays Bank Plc. v. Kapur* [1991] I.C.R. 208 — employer's refusal to take previous pensionable employment into account in calculating pension entitlement."

35. In *Hendricks v Commissioner of Police of the Metropolis* [2002] EWCA Civ 1686, [2003] ICR 530, the claimant complained of a course of conduct involving 60 or more incidents extending over several years, amounting to sex and race discrimination and harassment (see at [22-23]). At [47-52], Mummery LJ stated:

"47. On the crucial issue whether this is a case of "an act extending over a period" within the meaning of the time limits provisions of the 1975 Act and the 1976 Act, I am satisfied that there was no error of law on the part of the Employment Tribunal.

48. On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the Commissioner may be held legally responsible. Miss Hendricks has not resigned, nor has she been dismissed form the Service. She remains a serving officer entitled to the protection of Part II of the Discrimination Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the Service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period." I regard this as a legally more precise way of characterising her case than the use of expressions such as "institutionalised racism," "a prevailing way of life," a "generalised policy of discrimination", or "climate" or "culture" of unlawful discrimination.

49. At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less

favourable treatment by different people in different places over a long period and that there was no "act extending over a period" for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.

50. I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that the ground of the less favourable treatment is race or sex

51. In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on "continuing acts" was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see *Owusu v. London Fire & Civil Defence Authority* [1995] IRLR 574 at paragraphs 21-23; *Rovenska v. General Medical Council* [1998] ICR 85 at p.96; *Cast v. Croydon College* [1998] ICR 500 at p. 509. (cf the approach of the Appeal Tribunal in *Derby Specialist Fabrication Ltd v. Burton* [2001] ICR 833 at p. 841 where there was an "accumulation of events over a period of time" and a finding of a "climate of racial abuse" of which the employers were aware, but had done nothing. That was treated as "continuing conduct" and a "continuing failure" on the part of the employers to prevent racial abuse and discrimination, and as amounting to "other detriment" within section 4 (2) (c) of the 1976 Act).

52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

36. In *South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168 at [21], the President of this Appeal Tribunal, Choudhury J, having referred to this passage of Mummery LJ's judgment in *Hendricks*, stated:

"*Hendricks* demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (or, as it is sometimes called, a "continuing act"). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in para [48] of *Hendricks* is where separate acts of discrimination are linked to one another and are *evidence* of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination."

Choudhury J went on to state at [33]:

"In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the Claimant will usually rely upon a series of acts over time (I refer to these for convenience as the "constituent acts") each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing

> **act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be, as Ms Omeri submits, to render the time limit provisions meaningless. That is because a claimant could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were not held to be discriminatory."**

37. There are a number of distinctions to be made between the situations dealt with in the authorities. There was no discriminatory rule or policy either in *Amies* (see at page 311F of the report) or in *Sougrin* (see at page 654H of the report); and the employer's imposition of a new contract in *Ikejiaku v British Institute of Technology Ltd*, UKEAT/0243/19/VP, to which I was also referred, was also not pursuant to any policy or rule (see at [33]). By contrast, there was held to be a discriminatory rule or policy in *Calder*, *Kapur, Owusu* (albeit on a *prima facie* basis given the preliminary stage the proceedings had reached) and in *Cast*.

38. In *Chaudhary v Royal College of Surgeons* [2003] EWCA Civ 645, [2003] ICR 1510, Mummery LJ addressed the latter line of cases in the following way at [67]:

> **"As for the authorities cited, this case is covered by the reasoning of this court in *Rovenska v. General Medical Council* [1998] ICR 85, 94 based on the wording of section 1(1)(b) of the 1976 Act that indirect discrimination occurs when a person "applies" to another a discriminatory requirement or condition to his or her detriment. Cases such as *Rovenska* and the instant case, in which applications are made for registration by regulatory authorities and are rejected, are distinguishable from the cases in which an employer continuously applies a requirement or condition, in the form of a policy, rule, scheme or practice operated by him in respect of his employees throughout their employment: see *Barclays Bank plc v. Kapur* [1991] ICR 208; *Cast v. Croydon College* [1998] ICR 500, 515B; *Owusu v. London Fire and Civil Defence Authority* [1995] IRLR 574."**

The Parties' Submissions

39. For the Respondents, Mr Stilitz submitted that this was a straightforward case of a one-off act with continuing consequences. The Claimant had asked for his equity partnership to be extended. That request had been refused. The fact that he remained as a non-equity Partner had nothing to do with the alleged discrimination. Mr Stilitz submitted that what had occurred was more accurately described as termination following by re-engagement rather than the Employment Judge's reference to the Claimant's "demotion", but that this was not ultimately

significant to the outcome. He submitted that it was the termination of the Claimant's equity partnership (which was the consequence of the refusal to exercise the discretion to continue it under Clause 29 of the Members' Agreement) that was the basis for the Claim; that the Claimant continued to have a different relationship with the First Respondent, as an ordinary Partner, was not relevant in terms of the discrimination about which complaint was made. The losses about which the Claimant complained were directly consequential on the decision that he should cease to be an Equity Partner; any policy had not continued to operate against the Claimant after the De-Equitisation Agreement had become effective.

40. For the Claimant, Mr Cohen submitted that three things had to be established: (i) whether the matter complained of was attributable to a rule or policy; (ii) whether that rule or policy continued to a point within 3 months of the issue of the Claim; and (iii) whether the Claimant's employment was also continuing at such a point. He submitted that the Employment Judge had correctly found that there was a rule or policy in operation (i.e. the normal retirement age in Clause 29 of the Members' Agreement) and that the discretion in Clause 29.4 permitted the First Respondent not to apply the rule at all, or to apply it in its entirety, or to apply it in part. All these options were however consequent upon the application of Clause 29.2. The fact that the rule had been applied to the Claimant in part (because he was permitted to remain beyond normal retirement age, but not as an Equity Partner) made no material difference. He submitted that Mr Stilitz's analysis of what happened as amounting to a termination and re-engagement was wrong: the Claimant had remained a member of the LLP throughout and what had changed was the benefits to which he was entitled under the Members' Agreement due to the difference in status between those designated as Equity Partners and ordinary Partners. Mr Cohen submitted that because the rule in Clause 29.2 of the Members' Agreement had continued to apply throughout and the Claimant's membership

of the LLP had also continued, there was no issue in relation to limitation until either the abrogation of the rule or the ending of the Claimant's membership, neither of which had taken place prior to the Claim being issued. Mr Cohen accepted that if there had been no extension of the Claimant's membership of the LLP in accordance with Clause 29.4 then time would have begun to run from the date of termination; however, as the Claimant's membership had been continued on inferior terms then it was open to the Claimant to bring his claim at any point during the fixed term of two years provided for in the De-Equitisation Agreement, as he had in fact done.

41. Mr Cohen submitted that a number of the cases relied on by Mr Stilitz were of no relevance to the outcome of the present case, because they dealt with very different scenarios. Mr Cohen sought in particular to distinguish from the present case both what he termed the 'non-employment cases', i.e. those cases in which there was no ongoing relationship between the parties, and the cases in which there had been no application of a 'rule or policy', such as *Sougrin* and *Ikejiaku*.

Discussion

42. This is not a case, such as *Hendricks*, in which it is alleged that there are a series of connected acts of discrimination which can be aggregated so as to amount to "conduct extending over a period". Rather, it is contended that there is, as the Employment Judge held at paragraph 76 of the written Reasons, a continuing discriminatory rule or policy. The authorities to which I have already made reference demonstrate that close attention must be paid to the particular circumstances of the individual case. The judgments show that the distinctions that are capable of being drawn in these circumstances can be fine ones.

43. What Auld LJ said in *Cast v Croydon College* at page 508F of the report is of importance:

> **"As to a "one-off" discriminatory act, it is important to keep in mind that it may be an application of an established discriminatory policy or it may be inherently discriminatory regardless of any such policy. If the complaint is of a specific discriminatory act the fact that it may have been an application of an established policy adds nothing for this purpose. The starting point is, therefore, to determine what is the specific act of which complaint is made."**

In the present case, the specific act of which complaint is made is the Claimant's demotion (as the Employment Judge described it), i.e. the change in his status from Equity Partner to ordinary Partner which became effective after 30th April 2018. That is clear from paragraphs 9 and 12 of the Claimant's Grounds of Complaint in the Employment Tribunal:

> **"9. The "*Accounts Date next following his 60th Birthday*" was in Mr Parr's case 30 April 2018. As a result, on 30 April 2018, Mr Parr was removed as an** [Equity Partner] **from the LLP. This was less favourable treatment because of Mr Parr's age. It was, as is any application of a mandatory retirement age, direct discrimination within the meaning of Section 13(1) of the Equality Act."**
>
> **"12. De-equitisation was direct discrimination within the meaning of Section 13(1) of the Equality Act. It was less favourable treatment because of Mr Parr's age. It was not justified pursuant to Section 13(2) of the Equality Act…"**

44. I start my analysis by rejecting Mr Stilitz's submission that the implementation of the De-Equitisation Agreement is properly to be described as a termination followed by a re-engagement. As Mr Cohen correctly submitted, the Claimant remained a member of the First Respondent throughout; his membership of the LLP was never terminated. This situation is not, in my judgment, the same in factual terms as those cases in which the present issue has been raised in the context of either a dismissal or there being no ongoing relationship between the parties, such as *Okoro v Taylor Woodrow Construction Ltd* [2012] EWCA Civ 1590, [2013] ICR 580 (see at [36-37]). Rather, two important things happened after 30th April 2018, consequent upon the De-Equitisation Agreement. Firstly, the Claimant remained a member of the LLP but his status as a member changed from that of Equity Partner to that of ordinary Partner. Secondly, the future period of the Claimant's membership of the LLP as an ordinary Partner, prior to retirement, was fixed at two years. The Employment Judge's reference to what happened as a demotion captures the essence of what occurred: it is clear that the

Claimant viewed the change in status from Equity Partner to ordinary Partner with a fixed term of two years as both undesirable and unwelcome.

45. The De-Equitisation Agreement was itself the product of the operation of Clause 29 of the Members' Agreement. That provided for the norm to be the retirement of all Partners (i.e. not just Equity Partners) on the 30th April immediately following their 60th birthday. However, that was subject to a discretion on the part of the Managing Partner (subject to Partnership Committee approval) to disapply what would otherwise be the case, i.e. mandatory retirement as a Partner shortly after reaching the age of 60.

46. I accept Mr Stilitz's submission that Clause 29.4 of the Members' Agreement is important because it provides an express discretion permitting Equity Partners to continue beyond what would be their Normal Retirement Date. The evidence before the Employment Judge, which she accepted, was that the discretion had previously been exercised to permit Equity Partners to remain at the firm in that capacity after they had reached what would have been their normal retirement age. This is not, therefore, a case in which there was a rule that no-one could continue as an Equity Partner after reaching what would otherwise be their normal retirement age. There was a genuine discretion, which had been exercised in a different way in other cases. As Mr Stilitz correctly submitted, on the Employment Judge's findings of fact the matter was looked at on a case-by-case basis; in other instances the Equity Partner had continued as such beyond the age of 60.

47. In my judgment, the existence and operation of the discretion in Clause 29.4 of the Members' Agreement results in the present case being distinguishable from the scenario initially described in the *obiter* comments of this Appeal Tribunal in *Amies*, namely the application of a general discriminatory rule or policy to the individual claimant. What occurred in this case

was not, in my judgment, the application of a rule of the type referred to in those observations or a situation such as that in the cases of *Calder* or *Kapur* where such a rule continues to apply against a claimant with a resulting continuing discriminatory effect. There is a distinction between the continuing application of a discriminatory rule or policy to a claimant (such as in *Calder* and *Kapur*) and the continued existence of such a rule or policy and its one-off application to a claimant. The effect of the De-Equitisation Agreement in this case was to make a one-off and permanent change to the Claimant's status as a member of the LLP. The losses about which complaint is made in this Claim are derived not from the ongoing application of a general discriminatory rule relating to the payment of remuneration to a group of workers with a particular protected characteristic such as that seen in *Calder* or *Kapur*, but from the specific decision taken in the Claimant's particular case to effect the one-off and permanent change in status brought about by the De-Equitisation Agreement. The Claim is based upon the change in the Claimant's status from Equity Partner to ordinary Partner, and the alleged losses derive from that event. That took place with effect from 30th April 2018 and which was the product of the way in which the discretion in Clause 29.4 of the Members' Agreement was exercised in the Claimant's individual case.

48. I reject Mr Cohen's submission that the Claimant's reduction in status was brought about by the operation of a rule which continued to have effect after the De-Equitisation Agreement came into force; rather, it was brought about by the one-off act of the Respondents exercising the discretion in Clause 29.4 in a particular manner and the resulting De-Equitisation Agreement. That the discretion in Clause 29.4 itself resulted from and was exercised because of the existence of the underlying normal retirement age does not, in my judgment, result in there having been a discriminatory rule in operation throughout so that any discriminatory conduct consequent upon the exercise of that discretion, insofar as the Claimant's change in status was concerned, would have extended throughout the entire period of two years from

30th April 2018 when (but for the merger with BDO in 2019) the Claimant would have continued to have the lesser status of ordinary Partner.

49. I do not accept Mr Cohen's submission that the fact that Clause 29 of the Members' Agreement provides for a default or starting point of retirement at 60 means there was throughout the remainder of the Claimant's period as an ordinary Partner of the First Respondent the operation of a rule which constitutes "conduct extending over a period". That the change in the Claimant's status after 30th April 2018 may ultimately have derived from the operation of Clause 29 of the Members' Agreement is not a material distinction because that Clause, properly construed and in light of the evidence as to its operation in practice, did not constitute a rule that Equity Partners could not continue as such after reaching the age of 60 and, in any event, the Claim is about the application of an allegedly discriminatory rule to the Claimant on a single occasion (i.e. through the De-Equitisation Agreement) rather than on a continuing basis. What is in issue for present purposes is not, therefore, the continuing application of a rule, but the operation of the discretion in the particular circumstances of the Claimant's case.

50. In my judgment, the Employment Judge erred in her approach at paragraphs 75 and 76 of the written Reasons when she found that the Claimant's demotion from Equity Partner to ordinary Partner was the result of the operation of a discriminatory rule which continued, and which amounted to continuing conduct for the purpose of section 123(3)(a) of the Equality Act 2010, whilst Clause 29 of the Members' Agreement remained in effect. The Respondents did not operate a rule resulting in demotion at age 60; the Claimant's demotion was the product of the one-off exercise of discretion under Clause 29.4 of the Members' Agreement in the Claimant's particular case. The Claimant might, permissibly under Clause 29, have been offered an extension to the period of his Equity Partnership (as had, on the evidence before

the Employment Judge, other Equity Partners who had reached the age of 60) – but, in the event, he was not. There was, however, contrary to the Employment Judge's finding at paragraph 76 of the written Reasons, no rule in operation preventing the Claimant's continuation as an Equity Partner after 30th April 2018. That the discretion itself derives from the presence of the normal retirement age in Clause 29.2 does not result in there being a discriminatory rule in operation beyond the date at which the change in the Claimant's status from Equity Partner to ordinary Partner took effect.

51. Mr Cohen placed considerable reliance on the *obiter* passage at page 311E of the report of *Amies*, approved by the House of Lords in *Kapur*, regarding there being actionable discrimination for as long as a discriminatory rule was in operation. But, as Mr Stilitz pointed out, the significance of that passage in *Amies* was explained by the Court of Appeal in *Tyagi v BBC World Service* [2001] EWCA Civ 549, [2001] IRLR 465 at [14-18], *per* Brooke LJ, as being in relation to claims under what were then section 6(2) of the Sex Discrimination Act 1975 and section 4(2) of the Race Relations Act 1976, in respect of employees being discriminated against by an employer in relation to "access to opportunities for promotion, transfer or training" (wording replicated in section 39(2) of the Equality Act 2010):

> **"14. Mr Tyagi founds his complaint on a passage in the judgment of Mr Justice Bristow in *Amies v Inner London Education Authority* [1977] ICR 308 which subsequently received the approval of the House of Lords. It is necessary to look quite carefully at that decision. It was a decision made shortly after the Sex Discrimination Act 1975 came into force. The applicant was a female art teacher and deputy department head who applied in 1975 for a job as department head at the school at which she taught. In September 1975, a man was appointed instead. The relevant provisions of the Sex Discrimination Act 1975 came into force on 29 December. On 1 January 1976, the applicant made a complaint to the industrial tribunal on the basis that by appointing a man the employers discriminated against her by reason of her sex contrary to ss.1(1)(a), 4(1) and 6(1)(c) and (2)(a) of the Act. For all material purposes s.6(1) and s.6(2) of the Sex Discrimination Act can be compared with s.4(1) and s.4(2) of the Race Relations Act. On p.311 Mr Justice Bristow posed the question -**
>
> **'Was the discrimination a single act, or an "act extending over a period", a continuous act?'**
>
> **He said:**
>
> **'There is nothing in the definition section of the Sex Discrimination Act 1975 or the sections to which that refers to require us to give any other than the ordinary common sense meaning**

to the provisions of the Act. The applicant's complaint here is that by not appointing her, and by appointing a man with lesser qualifications, the employers have unlawfully discriminated against her. She herself has in our judgment given the right definition of the "act of discrimination" of which she complained to the tribunal under s.63(1).

Like any other discrimination by act or omission, the failure to appoint her, and the appointment of him, must have continuing consequences. She is not head of the department; he has been ever since 13 October 1975. But it is the consequences of the appointment which are the continuing element in the situation, not the appointment itself.

That there may be discrimination by an act "extending over a period", that is, a continuing act, is clear from s.76(6)(b). This provides that for the purpose of calculating the period within which a complaint must be presented to the industrial tribunal "any act extending over a period shall be treated as done at the end of that period." An illustration of what the legislature had in mind as an act extending over a period can be seen in the provisions of s.6(1), which makes it: "unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman - (a) in the arrangements he makes for the purpose of determining who should be offered that employment ...'

So, if the employers operated a rule that the position of head of department was open to men only, for as long as the rule was in operation there would be a continuing discrimination and anyone considering herself to have been discriminated against because of the rule would have three months from the time when the rule was abrogated within which to bring the complaint. In contrast, in the applicant's case clearly the time runs from the date of appointment of her male rival. There was no continuing rule which prevented her appointment. It is the omission to appoint her and the appointment of him which is the subject of her complaint.'

15. It is to be noted that in this passage Mr Justice Bristow makes no distinction between s.6(1) and s.6(2) of the Act. Of course, in relation to the particular employment the discrimination would be a single act of which anybody - whether a prospective employee in-house or a prospective employee not previously employed by the school - could make complaint provided that complaint was made within three months of the discriminatory act. The language of what is s.4(1) in a Race Relations Act context makes that clear, because what is being complained about is the unlawfulness of discrimination in the arrangements which the person makes for the purpose of determining who should be offered that employment. This does not refer to employment generally but to the particular employment that is being offered. What Mr Justice Bristow then goes on to discuss is the position of the deputy head of a department who is unable - because there is a continuing discriminatory rule - ever to have the prospect of promotion to be head of her department. That, in the context of the Race Relations Act, is a s.4(2) complaint, namely that she is being denied access to opportunities for promotion which would be available.

16. In the early days of the Sex Discrimination Act, Mr Justice Bristow did not think it necessary to spell out the continuing rule which would be prejudicing her. It would be a rule prejudicing her because of the fact that she was employed in that establishment and she was denied the opportunity of promotion. When the post of head of department next came up on the open market and if the school continued with that discriminatory rule, then anybody who was denied the appointment on that occasion would have just grounds of complaint if the complaint was made within three months.

17. Mr Tyagi has shown us how in *Calder v James Finlay Corporation Ltd* [1989] IRLR 55 Mr Justice Browne-Wilkinson, giving the judgment of the Employment Appeal Tribunal, made a similar ruling in relation to the denial of access to a female employee of a preferential mortgage subsidy scheme which favoured male employees. It was held that so long as the applicant remained in the employment of these employers there was a continuing discrimination against her. Applying the same logic as applied by Mr Justice Bristow in *Amies*, it said:

'The rule of the scheme constituted a discriminatory act extending over the period of her employment and is therefore to be treated as having been done at the end of her employment. Accordingly, her application was within time.

> **We receive support for this view from the dictum of the Employment Appeal Tribunal in *Amies v Inner London Education Authority* [1977] 2 AER 100. In that case this tribunal expressed the view (obiter at p.102h) that there would be continuing discrimination within s.6(1) of the Act if there was a rule that the appointment in question should be open to men only. In our view the same position obtains under s.6(2).'**
>
> **18. In my judgment, what Mr Justice Browne-Wilkinson has not paid attention to is that in the main paragraph on which Mr Tyagi relies no distinction is made between s.6(1) and s.6(2). In my judgment, the relevant passage in *Amies* refers to the potential of a complaint available to an employee in the school of being denied access to opportunities for promotion. Although the House of Lords in *Barclays Bank plc v Kapur* [1991] IRLR 136 referred with approval to both the dictum in *Amies* and this dictum in *Calder* [1989] IRLR 55 without referring, in particular, to the passage in Mr Justice Browne-Wilkinson's case which I have just cited, in my judgment, that approval takes the matter no further, because there was no specific concentration on the particular issues now before us."**

Whilst it is right to point out that *Tyagi* was a 'non-employment' case in which the claimant was complaining about an allegedly discriminatory recruitment policy, I do not consider that Brooke LJ's explanation of the meaning of the *obiter* passage in *Amies* is limited for that reason. Brooke LJ went on to refer at [26] to the need for the allegedly discriminatory practice to be "in action" in relation to the particular claimant, which it was not on the facts of *Tyagi*. In the present case, the Claimant's complaint is not (unlike the scenario discussed in the *obiter* passage in *Amies*, as explained in *Tyagi*) that he was continually denied access to opportunities for promotion to Equity Partner after 30th April 2018. The Claimant's demotion from Equity Partner to ordinary Partner, which is the matter about which he complains, was a one-off event resulting in a permanent change in the status of his membership of the LLP.

52. In my judgment, there was no "conduct extending over a period" in respect of the complaint raised in this case, beyond the date at which the De-Equitisation Agreement took effect, for the purpose of section 123 of the Equality Act. What occurred was a one-off act which after 30th April 2018 fundamentally and permanently changed the nature of the relationship between the Claimant and the First Respondent. That is properly to be considered an act which had continuing consequences, rather than conduct which extended over a period. It was a specific one-off decision on the particular facts of the Claimant's case, not the application of a rule in accordance with which multiple decisions were taken from time to time (see *Owusu*

at [21]) or the continuous application of a policy, rule, scheme or practice (see *Chaudhary* at [67]).

53. I should add that I have not found it necessary to rely, in coming to my conclusion on the correct approach in this particular case, on Mr Stilitz's submission that the Employment Judge's finding, if upheld, would result in undesirable consequences for LLPs with similar normal retirement age provisions, and for their members, because it would discourage arrangements similar to the De-Equitisation Agreement in the present case from being entered into at all and so result in the termination of relationships sooner than might otherwise have been the case. I agree with Mr Cohen that this would not have been a sufficient reason to reject the Employment Judge's approach to the question of whether there was "conduct extending over a period", had it otherwise been correct. For the reasons that I have given, however, I do not consider that it was.

Conclusion

54. The Respondents' Appeal is allowed. The Employment Tribunal's Judgment will be set aside. The case will be remitted to the Employment Judge for her to determine whether or not to grant the necessary extension of time for the presentation of the Claim.