Appeal No. UKEATS/0022/20/SH (V)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 25 May 2021
Judgment handed down on 9th June 2021

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

JANET KERR APPELLANT

FIFE COUNCIL RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant: MR RICHARD OWEN
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For the Respondent: MS JENNIFER CALDWELL
Solicitor
Instructed by:
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KY7 5LT.

SUMMARY

TOPIC NUMBER(S): 12 – DISABILITY DISCRIMINATION; time limits; conduct extending over a period; "just and equitable" extension.

The Appellant has the protected characteristic of disability by virtue of having Parkinson's Disease. In May 2019 she brought a claim of disability discrimination against the Respondent. She alleged two separate failures by the Respondent to make reasonable adjustments in terms of section 20 of the **Equality Act, 2010** ("**EA**") by failing to:

a) adjusting her shift pattern to accommodate the symptoms of fatigue associated with Parkinson's Disease; and

b) re-classify the reason for her absences so that her pay would not be adversely affected.

The Respondent argued that both claims were time-barred under section 123 **EA**. A preliminary hearing was fixed to consider that issue. The Employment Judge concluded that the claims related to decisions which were made by the Respondent in the past and rejected an argument that the claims concerned "conduct extending over a period" in terms of section 123(3)(a) **EA**. He also declined to extend the time limit on "just and equitable" grounds.

Held: The Employment Judge had erred in regarding the claim about the shift pattern as being about an "act" rather than an "omission" of the Respondent consisting of a failure to make an adjustment in terms of section 20 **EA**. That had led to a failure properly to consider and apply the provisions of sections 123(3) and (4) **EA**. The Employment Judge had also erred in concluding that by continuing to pay the Appellant on an un-reclassified basis the Respondent was deemed to have acted in a way that was inconsistent with making the adjustment sought in terms of section 123(4)(a). The case was remitted to a differently constituted Tribunal for a full merits hearing, under reservation of all issues of time-bar.

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THE HONOURABLE LORD FAIRLEY

Introduction

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1. This is an appeal by Janet Kerr ("the Appellant") against a Judgment of the Employment Tribunal (Employment Judge McFatridge, sitting alone) dated 17 October 2019. The Respondent to the appeal is Fife Council ("the Respondent"). The appeal was heard at a sitting of the Employment Appeal Tribunal in Edinburgh on 25 May 2021. Due to Covid restrictions, the hearing was conducted by video conference. The Appellant was represented by Mr Richard Owen of Citizens Advice Gateshead. The Respondent was represented by Ms Jennifer Caldwell, Solicitor.

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Factual Background

2. The Appellant is a primary school teacher. Prior to the events with which this case is concerned, she worked for the Respondent at St. Leonard's Primary School in Dunfermline.

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3. From around 2013, the Appellant became aware of issues with her mobility. This was eventually recognised as the first symptoms of Parkinson's Disease. The Appellant's position is that she was initially allowed to work a shift pattern which assisted her in dealing with the symptoms of fatigue associated with that condition. She contends that the shift pattern was later changed by the Respondent to one which was more difficult for her to manage. Her position is that this led to a breakdown in her health. She had managed to return to work for a time but commenced a period of sickness absence in August 2018 and has been absent from work since then. In November 2018, her union applied to the Respondent to "reclassify" the reason for her absence so that her pay would not be adversely affected. The Respondent did not do so and, in February 2019 the Appellant's pay was reduced to nil on account of the length of her period of absence.

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4. In May 2019, the Appellant presented a claim form (ET1) in which she claimed disability discrimination by the Respondent. The claim of disability discrimination was resisted by the Respondent *inter alia* on the basis of time bar. A preliminary hearing was appointed to consider that issue.

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The Preliminary Hearing

5. The preliminary hearing took place on 3 October 2019. The Appellant gave evidence. The Employment Judge established and recorded in his Reasons that the focus of the Appellant's claims were:

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(i) the revised shift pattern; and

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(ii) her request for reclassification of her pay.

6. Although the ET1 is not well focussed, it is sufficiently clear that these two matters are each claims that the Respondent applied a provision, criterion or practice to the Appellant and thereafter failed in its duty to make reasonable adjustments for her disability as required by section 20 **EA**. In the Hearing before me, Mr Owen confirmed that the Appellant's case was indeed brought under section 20 **EA** and was confined to the two matters identified above. A third issue noted by the Employment Judge – described as a failure by the Respondent to reimburse fees paid by the Appellant for counselling – was not relied upon as alleged discrimination, but might be relevant as a head of loss. A fourth issue noted by the Employment Judge – described as a failure to investigate the Appellant's stress – was again not relied upon as discrimination but was evidential background.

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7. The Employment Judge noted (at paragraph 7) that there were some factual disputes in relation to the steps taken by the Respondent in the period after August 2018 in order to try to resolve matters between the parties. He expressly declined to make any finding of fact to resolve

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those factual disputes. He noted, however, that it was undisputed that the Appellant had instructed solicitors through her union in the autumn of 2018, and that the solicitors had at some point sent a settlement proposal to the Respondent which the Respondent accepted. The Appellant's union had then sent an e mail to her on 21 November 2018 to advise her that the deadline for raising proceedings before the Employment Tribunal was about to expire, and that they (and presumably also the solicitors) would not be raising proceedings on her behalf. The Appellant disputes that she gave instructions to settle her claims.

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8. The Employment Judge recorded his findings in fact at paragraphs 4 to 21 of his Reasons. The issues of the change of shift pattern and reclassification of the reason for absence receive little or no attention in those findings in fact. Shift pattern is mentioned only indirectly in quotations from the Appellant's medical records dated 13 August and 10 September 2018. The former entry recorded that on 13 August 2018 the Appellant advised her GP that the "*working pattern which allows her to continue to work will only be extended until October*". The entry on 10 September 2018 refers to "*problems at work due to shift / work pattern changes.*" The Employment Judge made no finding in fact about when the decision to alter the Appellant's shift pattern was made by the Respondent or when that decision was put into effect. He made no findings in fact about any request for reclassification or the outcome of any such request.

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9. At paragraph 27 of his Reasons the Employment Judge stated:

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> **"In order to come to a decision on time bar the first matter which I had to consider is the date of the act to which the complaint relates. It is clear that the focus of the claimant's claim is on the decisions of her Head Teacher in relation to her work pattern, the last of which occurred in 2018 and the reclassification of her pay which her union asked for in November 2018."**

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10. The basis for the conclusion about the timing of the decision in relation to work pattern is not apparent from the findings in fact. The Employment Judge also stated (at paragraph 27) that he was unclear on the evidence when reclassification of the reason for the Appellant's absence

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was refused but had applied the presumption in section 123(4)(a) **EA** to find that since the Respondent had continued to pay the Appellant on an un-reclassified basis after November 2018, that decision must be taken to be deemed to have happened in November / December 2018 at the latest.

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11. Towards the end of paragraph 27 of his Reasons the Employment Judge stated:

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> **"It therefore seems to me to be absolutely clear that...the matters referred to in the [Appellant's] claim were fully complete by around November / December 2018. The claim form was not submitted until 14 May 2019 and was therefore submitted outwith the primary three month period. It should be noted that I considered but rejected the argument that the claimant is still subject to an ongoing continuous act. It is clear that what the claimant complains of are various decisions which were made in the past."**

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12. Having determined that the claims were presented outside the primary time limit, the Employment Judge went on to consider – under reference to **Robertson v. Bexley Community Centre** [2003] IRLR 434 – whether or not he should exercise a discretion to extend the primary time limit under section 123(1)(b) **EA**. He declined to do so, describing the balance of prejudice between the parties as "a fine one". He took account of the Appellant's evidence that during the period in question the Appellant had suffered from serious ill health, including problems with her mental health. He noted, however, that her mental health had improved from January 2019 onwards. He took into account that, at least until November 2018, she was represented by her union and by experienced solicitors. He stated that the period of time by which the claims were late was at least four months, that her husband had drafted the claim form on her behalf and that there was no evidence as to why he could not have done so before May 2019. He expressed concern as to the effect which the delay would have had upon the cogency of the evidence in relation to matters which had happened during 2017 and 2018. The two particular factors which ultimately tipped the balance in favour of the Respondent were (i) the fact that the Appellant had been advised in November 2018 that her union / solicitors were not proceeding with a Tribunal

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claim on her behalf; and (ii) that the Respondent would have been entitled to believe by November 2018 that matters between it and the Appellant had been resolved.

13. The Employment Judge accordingly dismissed the Appellant's claims on the basis that they were submitted out of time and the Tribunal accordingly had no jurisdiction to hear them.

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The Grounds of Appeal

14. On 19 November 2019, the Appellant presented a Notice of Appeal containing two Grounds of Appeal in the following terms:

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> **"Ground 1**
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> **It was an error of law for the Tribunal to fail to exercise its discretion to extend time on the "just and equitable" basis, in particular, by failing to carry out a proper balance of prejudice exercise.**
>
> **Ground 2**
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> **It was an error of law for the Tribunal to give too much weight to the potential prejudice to the Respondent and too little weight to the reason for the lateness of the claim namely the Claimant's serious mental health condition at the time."**

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15. After consideration under Rule 3(7) of the EAT Rules, neither of those Grounds was allowed to proceed. A Rule 3(10) Hearing was sought. At that Hearing, the Appellant sought and was granted permission to amend the Notice of Appeal by adding a new Ground of Appeal 1 in the following terms:

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> **"The Tribunal erred in law in failing to find that the Claimant had shown an arguable case that the alleged failures by the Respondent to make reasonable adjustments for the Claimant's disability consisting of (a) adjustments to her work pattern; and (b) reclassification of her pay were allegations of "conduct extending over a period" in terms of section 123(3)(a) of the Equality Act, 2010, continuing up to the date when the claim form was presented on 14 May 2019."**

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and renumbering the remaining Grounds as Grounds 2 and 3. In that amended form, all three Grounds of Appeal were allowed to proceed to a full Hearing.

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16. In advance of the full Hearing, both parties lodged Skeleton Arguments, a Core Bundle and a joint list of authorities. Prior to the Hearing, I requested that parties consider and be in a position to make submissions on the following authorities which were not on their joint list, *viz* **Kingston upon Hull City Council v. Matuszowicz** [2009] ICR 1170; **Olenloa v. North West London Hospitals** EAT 0599/11; **Abertawe Health Board v Morgan** [2018] ICR 1194; and **Mears Group v. Vassall** EAT 0101/13.

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Submissions

17. For the Appellant, Mr Owen submitted (Ground 1) that although the Appellant's claim was of two particular alleged failures to make reasonable adjustments – in relation respectively to her shift pattern and the requested re-classification of her pay – the Employment Judge had failed properly to address the issue of "conduct extending over a period" under section 123(3) and 123(4) **EA**. He had failed to recognise that the claims of failures to make reasonable adjustments were claims of omissions rather than of acts. When considering the issue raised by section 123(3)(a), an act was a different thing from an omission (**Kingston upon Hull City Council v. Matuszowicz)**. It was clear from the terms in which the Employment Judge had expressed himself at paragraph 27 that he had considered only the issue of whether each claim related to what he described as an "ongoing continuous act". He had not considered the issue of omissions, and had not properly considered or made findings in fact about the date of the relevant decision by the Respondent not to make the adjustments in question. That approach was erroneous. Instead, he should have considered – as the court had done in **Matuszowicz** at paragraph 25 – that the alleged failures to make the particular adjustments in question were allegations of *omissions* extending over a period. Had he correctly recognised that he would then have recognised the need to make specific findings about when that period ended. The Employment Judge had simply not considered those issues.

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18. In relation to Grounds 2 and 3, Mr Owen submitted that, in any event, the Employment Judge had erred in placing any reliance upon the possible effect of delay upon the cogency of evidence where there had been no evidence about that issue (**Szmidt v. AC Produce Imports Limited** UKEAT/0291/14 at paragraph 5). The concerns expressed by the Employment Judge in that regard were entirely speculative. If the claims were indeed made outside the primary time limit, the error in reaching a conclusion for which there was no evidence tainted the Employment Judge's approach to the material issue of the balance of prejudice (**Pathan v. South London Islamic Centre** UKEAT/0312/13), particularly where that balance was expressly noted to be a "fine one". In any event, it was clear that the Employment Judge had failed to give sufficient weight to the effects of the Appellant's recognised ill health at the time when her legal advisors ceased acting for her in late 2018, and had attached excessive weight to the prejudice said to arise from the Respondent's belief at that time that matters had been resolved.

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19. For the Respondent, Ms Caldwell very fairly accepted that the Employment Judge did appear to have misdirected himself in his consideration of section 123(3) **EA**. In particular, she accepted that his reference at paragraph 27 to having considered whether the Appellant was subject to an "ongoing continuous act" did not reflect the words of the subsection and did not expressly recognise the distinction drawn in **Matuszowicz** (at paragraph 25) between acts and omissions.

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20. In the context both of "conduct extending over a period" (section 123(3)(a)) and the "just and equitable" extension of the primary time limit (section 123(2)(b)) Ms Caldwell referred to the existence of evidence of ongoing discussions between parties between September and November 2018 and into January 2019. She recognised, however, that none of that evidence was reflected in the findings in fact made by the Employment Judge. With particular reference to the issue of just and equitable extension of the primary time limit, she directed me those parts of the

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Employment Judge's findings which suggested a level of improvement in the Appellant's health from January 2019. She submitted that as the ET1 form had ultimately been completed and submitted by the Appellant's husband in May 2019, it was not clear why that could not have been done sooner. She submitted the issue of the effect on the cogency of evidence was not a significant part of the Employment Judge's reasons and that I should be slow to interfere with the exercise of a discretion exercised under section 123(2)(b) to refuse to extend the primary time limit. The Employment Judge was correct to give weight to the Respondent's belief that matters had been resolved in November 2018, and it was clear that he had also taken account of the guidance in **Robertson v. Bexley Community Centre t/a Leisure Links** [2013] IRLR 434 in considering whether or not to exercise his discretion under section 123(2)(b).

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Relevant law

21. So far as material to this appeal, section 123 of the **Equality Act, 2010** is in the following terms:

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> **123 Time limits**
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> **(1) …Proceedings on a complaint [of discrimination in employment] 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.**
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> **…**
>
> **(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.**
>
> **(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**

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

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22. That provision has been in force since 1st October 2010. The reference to "conduct extending over a period" in section 123(3)(a) represented a change to the predecessor time limit provision in cases of disability discrimination. The former provision, in Schedule 3 to the **Disability Discrimination Act, 1995**, referred to "any act extending over a period". As was recognised in **Kingston upon Hull City Council v. Matuszowicz** [2009] ICR 1170, however, the concept of disability discrimination by failure to make a reasonable adjustment was not one that was readily recognisable as an "act" of discrimination.

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23. In **Matuszowicz**, the claimant was a teacher who worked in a prison. His disability made it difficult for him to open and close the prison's heavy security doors. He claimed that it would have been a reasonable adjustment for his employer to have transferred him to a different place of work without heavy doors. He first applied for a transfer in August 2015. Although put on lighter duties, by August 2016 he was still employed at the prison. On 1 August 2016, his employment transferred under **TUPE** to a different employer. He nevertheless brought a claim of disability discrimination against the former employer, maintaining its failure to transfer him was "an act extending over a period" which had continued over the whole of the period from August 2015 to the date of the transfer. An employment tribunal held that his claim was indeed one of an "act extending over a period". The Employment Appeal Tribunal disagreed, and held that his complaint was about a one-off act of omitting to make a reasonable adjustment which happened in August 2005. On a further appeal, the Court of Appeal, considered those competing conclusions and preferred neither. Delivering the Judgment of the Court, Lloyd LJ stated (at paragraph 25):

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I would respectfully differ…from the approach of the employment tribunal, that the allegation was of a continuing act. Likewise, and with equal respect, I disagree with [the EAT's] analysis

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> **of the claim as act of omitting to make the reasonable adjustment to transfer him to employment away from the prison, made in August 2005. I agree… that it is an omission but I do not read the allegation as being of a one-off act of omission done in August 2005. Rather, it seems to me that the allegation is of a continuing omission, and one which continued until 1 August 2006. The relevance of August 2005 is that that is said to be the date, or the latest date, by which the duty to make the reasonable adjustments by way of finding alternative employment arose. However, the duty and the failure are alleged to have continued up to and including 1 August 2006."**

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24. **Matuszowicz** was applied in **Olenloa v. North West London Hospitals** EAT 0599/11. There, the claimant identified his job description and duties and the staffing levels at the unit where he worked as "provisions, criteria and practices" which placed him at a substantial disadvantage as a disabled person. He identified eight separate alleged failures by his employer to make reasonable adjustments. These included alleged *inter alia* alleged failures to provide him with a mentor, counselling or other therapeutic assistance, a failure to re-allocate his duties to other employees, and a failure to redeploy him or offer him a sabbatical. An employment tribunal held that the alleged failures all ceased when the claimant commenced a period of extended sick leave. The Employment Appeal Tribunal disagreed, noting that:

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> **"…the Claimant was alleging an omission by the Respondent to make reasonable adjustments which continued after he went on sick leave."**

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25. These cases illustrate that, in considering whether or not a claim is about "conduct extending over a period" for the purposes of section 123(3)(a) **EA**, it will generally be necessary to consider the nature of the claim in question to determine whether it is about an act or, alternatively, an omission. A claim about a failure to make a reasonable adjustment is usually more readily recognisable as being an omission than an act.

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26. In **Abertawe Health Board v Morgan** [2018] ICR 1194 the Court of Appeal considered the relationship between section 123(3)(a) and the deeming provisions of section 123(4). At paragraph 14, Leggatt LJ (with whom Bean LJ agreed) explained the position thus:

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"Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20(3) of the Equality Act 2010, the duty [to make a reasonable adjustment]… begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."

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27. In relation to the deeming provision of section 123(4)(b), he noted:

"[A]nalysis of the mischief which section 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time."

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28. Thus, he noted that the circumstances and ultimate decision in **Matuszowicz** were illustrations of these principles, demonstrating that:

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"…the date by which the employer might reasonably have been expected to comply with a duty to make reasonable adjustments for the purpose of the test in what is now section 123(4)(b) of the Equality Act 2010 may be different from the date when the breach of duty began…[and]…the date by which the employer might reasonably have been expected to comply with the duty should be determined in the light of the facts as they would reasonably have appeared to the claimant including in that case what the claimant was told by his employer."

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29. As The Honourable Mrs Justice Slade DBE observed in **Olenloa**, correct determination of the start of the limitation period is a necessary pre-requisite to consideration of whether or not to allow a "just and equitable" extension of the primary time limit under section 123(2)(b) because the length of any delay in presentation of a complaint is material to the exercise of discretion whether to extend time. As noted in **Olenloa**, that can be difficult without considering all the relevant evidence and making necessary findings of fact about the date when an employer

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is to be treated as having failed to comply with a duty to make reasonable adjustments for the purpose deciding when time starts to run.

Analysis and Decision

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30. Applying these principles to the decision of the Employment Judge in this case, I have concluded that he erred in law.

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31. In relation to the issue of the shift pattern, the Employment Judge erred in treating the claim made by the Appellant as relating to an "act" of the Respondent rather than to an alleged failure (or omission) to make a reasonable adjustment. The significance of that error was that it led him to conclude that the particular complaint could not be about conduct extending over a period for the purposes of section 123(3)(a). The Employment Judge made no finding in fact about when the provision, criterion or practice ("PCP") of the revised shift pattern was introduced. He nevertheless concluded (at paragraph 27) that the Appellant became subject to the revised shift pattern on an unspecified date "in 2018" (paragraph 27), and further concluded that the limitation period ran from the same unspecified date. As can be seen from the quoted passages from **Abertawe Health Board**, however, it was an error of law to assume that the date when the PCP first came into being was necessarily the same date from which limitation ran. In the case of a failure to make a reasonable adjustment to the shift pattern, the relevant start date for the purposes of sections 123(3) and 123(4) was the date by which the Respondent, having introduced the PCP, positively decided not to make an adjustment to it for the Appellant or, in the absence of evidence about such a decision, the date of one of the two default options in section 123(4). Those matters required to be viewed from the perspective of the Appellant. The Employment Judge did not consider them because he treated the claim as one which related to an act rather than to an omission.

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32. In relation to the issue of re-classification of pay, the Employment Judge again made no findings in fact either about any request by the Appellant for pay reclassification or about the outcome of any such request. He nevertheless determined within the analysis section of his Reasons that a request was made by the Appellant's union in November 2018 (paragraph 27). I will assume for present purposes that he intended that to be a finding in fact. He stated that he was unable to come to any conclusion about when the request had been considered or decided upon by the Respondent, but again he referred within the analysis section of his Reasons to the request having been refused (paragraph 26). He relied upon the deeming provision of section 123(4)(a), noting that the "*respondent continued to pay the claimant on an un-reclassified basis*". Again, the basis for that determination is not evident in his findings in fact. Again, however, I will assume that he intended that to be a finding in fact. He concluded that the maintenance of the *status quo* in relation to the classification of the Appellant's pay was an act of the Respondent that was inconsistent with the making of the desired adjustment.

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33. I doubt that the mere maintenance of the *status quo* was what Parliament had in mind when it used the expression "an act inconsistent with doing it" in the context of a claim of a failure to make a reasonable adjustment. Such an interpretation could lead to the very type of prejudice identified by Leggatt LJ in **Abertawe Health Board** at paragraph 14. A claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If there was a section 123(4)(a) "act" in this case, it seems to me that it was probably the reduction of the Appellant's pay to nil in February 2019. It is not, however, necessary to reach a concluded view on these matters as there is another difficulty with the Employment Judge's analysis of this point. The observations made in **Abertawe Health Board** about the mischief which section 123(4) seeks to address apply with equal force to section 123(4)(a) as to section 123(4)(b). It follows that any assessment of whether or not an act was "inconsistent" with the making of the desired adjustment ought, in

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principle, to be assessed from the claimant's point of view having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. In this case, the Employment Judge merely recorded that the Appellant continued to receive pay from the

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Respondent on an un-reclassified basis. He did not assess that from the Appellant's point of view, and expressly declined to resolve disputed issues of fact in relation to matters which occurred after August 2018 (paragraph 22). It is clear from the limited findings in fact that the Employment Judge made and from the submissions made to me during this appeal that discussions continued

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between the parties at least into January 2019 before pay was reduced to nil in February 2019. The Employment Judge's Reasons are completely silent on those matters and make no attempt to assess the deeming provision of section 123(4)(a) from the Appellant's point of view. Again,

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this was an error of law.

34. In light of these conclusions in relation to Ground of Appeal 1, it is not strictly necessary for me to decide Grounds 2 and 3 relating to the Employment Judge's refusal to extend the

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primary time limit on "just and equitable" grounds. I do, however, endorse the observations made in **Olenloa**, about correct determination of the start of the limitation period being an essential pre-requisite to consideration of whether or not to allow a "just and equitable" extension of the

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primary time limit. To that extent, there is an overlap between Ground 1 and Grounds 2 and 3. For the avoidance of doubt, therefore, the appeal is also allowed on Grounds 2 and 3.

35. Whilst I have found that the Employment Judge erred in law, it seems to me that he was

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placed in a very difficult position by being asked to determine the issue of time bar as a discrete preliminary point in a case where the facts that are relevant to time bar are so very closely tied up with the underlying merits of the claims of failure to make reasonable adjustments. Although that difficulty will not arise in every case where section 123 **EA** is being considered, it does arise

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in this case.

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Disposal

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36. For these reasons, I will set aside the Judgment of 17 October 2019. Given that more than two years have now passed since the ET1 was presented, having regard to the point made in the preceding paragraph, and in light of the overriding objective it seems to me that this case should now be remitted for a single full merits hearing under reservation of all issues of time bar. I accordingly so direct. Such a hearing is unlikely to take much longer than a separate preliminary hearing confined only to the issue of time bar, and will have the advantage of allowing all relevant evidence to be heard and all issues resolved within a single hearing. To allow the Tribunal which hears the case a completely clean slate, and to leave open to parties the possibility of seeking a full panel, I direct that the remitted hearing should be to a different Tribunal.