Neutral Citation Number: [2023] EAT 114

Case No: EA-2022-000277-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 September 2023

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

MS M FERNANDES **Appellant**

- and -

DEPARTMENT for WORK and PENSIONS **Respondent**

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- -

Mr Spencer Keen (instructed by **Thompsons Solicitors**) for the **Appellant**
Ms Sophie Garner (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 16 June 2023

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

In a reasonable adjustments claim the Employment Judge misdirected himself in finding that it was the ET's function to determine when time begins to run based on when a respondent would be expected to make an adjustments as. The ET should determine when an employer would have made the adjustment, but is then required to consider when an employee, based on the facts known to them, would conclude that the duty would not be complied with. This latter exercise is not a finding of fact as to a claimant's subjective state of mind but an objective view of when an employee with the relevant facts available would have reached that conclusion.

HIS HONOUR JUDGE BEARD:

PRELIMINARIES

1. I shall refer to the parties as they were in the Employment Tribunal as claimant and respondent. This is an appeal against the decision of Employment Judge Burgher, made following a preliminary hearing on 17 March 2022 and promulgated on 1 April 2022, that the claimant's claims of indirect disability discrimination and a failure to make reasonable adjustments were presented outside the time limits for presentation of such claims and that it was not just and equitable to extend time for the presentation of those claims. The claimant was represented at the appeal by Mr Keen and the respondent by Miss Garner, both of counsel. Ms Garner appeared before the Employment Judge at the hearing below the claimant being represented by Miss Twomey.

2. There are four grounds of appeal. The first three related to the duty to make adjustments and ground 4 relates to indirect discrimination. Ground 1 is that the Employment Judge failed to correctly identify when time began to run; Ground 2 argues that there has been an incorrect analysis whereby the Judge has, effectively, found that a duty to make an adjustment has been extinguished; Ground 3 is broken into two parts. The first is a ***Wednesbury*** argument that the Judge failed to take into account a relevant consideration, i.e., that the decision would extinguish the claimant's right to make a reasonable adjustments claim in the future. The second is an argument that a decision based on the reasoning in ***Matuszowicz v Kingston Upon Hull*** [2009] ICR 45 could be distinguished on the facts of this case. Ground 4 is that the Employment Judge failed to note and apply a difference between the

limitation requirements for indirect discrimination in comparison to an adjustments claim.

THE FACTS

3. I take the following factual findings from the decision of the ET. The claimant was disabled by reason of depression and anxiety along with back pain. She was employed as a Universal Credit Agent and remained employed by the respondent. In November 2019, the claimant returned from maternity leave. She had, prior to this leave, been provided with a special chair for back pain, it was not provided upon her return. Occupational Health advised the respondent, in January 2020 that an ergonomic assessment should take place. There was no assessment before the claimant had to take special leave (during Covid Lockdown) to care for her medically vulnerable child.

4. On 22 July 2020, the claimant was to begin working from home and was provided with a laptop; she requested an ergonomic assessment. From 4 August 2020, although the claimant could access the internet and make and receive telephone calls there were issues with a Smart Card (required to access the respondent's IT) which prevented her conducting aspects of her work. In addition, the claimant was a Trade Union Health and Safety Representative and was able to carry out that role (it is not made clear whether this is an appointment under the 1977 regulations or informal).

5. In September, one of the claimant's children was hospitalised. At or about this time the respondent asked the claimant to attend the office to resolve Smart Card issues.

6. The claimant was deemed as working from home from July until 27 November 2020. During this time, she could access the internet and make and receive calls from home, in addition to undertaking some duties as a trade union health and safety representative. From 27 November 2020 until 01 January 2020 the claimant was absent due to severe anxiety and depression. During this sickness absence, she continued to complain that the ergonomic assessment had not been completed; the respondent indicated that the assessment would be completed on her return to work. The claimant returned briefly between 1 and 12 January 2020, followed by a further sickness absence.

7. The Employment Judge finds, it would appear, that, prior to the latter part of 2021, the claimant was unaware of the time limits for bringing Employment Tribunal Claims. Further, that the claimant lacked the knowledge and confidence to commence a claim without assistance. In addition, that the claimant was suffering from depression and anxiety throughout the period at the same time as shielding her child from March 2020. The claimant was also the sole carer of three children, two of school age, who were not attending school because of the pandemic.

THE EMPLOYMENT TRIBUNAL'S CONCLUSIONS

8. The Tribunal described PCPs that the claimant alleged had been applied as: a requirement to work from home without appropriate equipment; not providing the equipment quickly enough and requiring her to attend the office to remedy the problem with smart card access.

9. The Employment Judge, in dealing with PCPs, came to the conclusion that the issue in accessing the respondent's systems, from the 4 August 2020, would have prevented the claimant's ability to work from home. At paragraph 39 of the Judgment, referring to the decision in ***Matuszowicz v Kingston Upon Hull City Council*** [2009] ICR 45, EJ Burgher states:

> *The Tribunal is charged with determining when the respondent might reasonably have been expected to make the necessary reasonable adjustments, and that date should be the start date for bringing the claim.*

And at paragraphs 41and 42

> *41. Reasonable adjustments are adjustments that will enable the claimant to do the job or allow her to remain in employment. It is evident that, from 4 August 2020, the reason the claimant was unable to do her job was the Smart Card access, not lack of suitable furniture. Therefore, the claimant would not have been able to undertake her role at home at the time even had the required furniture been provided for the PCP to be engaged. The Smart Card issue, which was relevant to the section 44 ERA claim was the barrier to employment from 4 August 2020 and as such the furniture PCP claims were academic until the Smart Card computer access was resolved. The claimant's PCP claims therefore, on the face of it, have little reasonable prospects of success.*
>
> *42. The claimant was designated as working from home on 22 July 2020. From 4 August 2020 the claimant was unable to undertake her main duties due to the Smart Card access difficulties which are connected to the claimant's section 44 ERA detriment complaints. The Smart Card access was not resolved before the claimant commenced sick leave on 1 January 2021. In view of the failure to provide an EFA earlier in the year in relation to working in the office, I conclude that the period 22 July 2020 to 4 August 2020 was a reasonable period, for the purposes of section 123(4)(b) EqA, for the respondent to act. I therefore consider that the last act for the time limit in relation to providing furniture and equipment for the claimant ended on 4 August 2020. The claimant therefore should have contacted ACAS by 3 November 2020.*

10. The employment tribunal deals with the question of whether it was just and equitable to extend time indicating that the Judge considered and balanced a number

of items: the length of delay in bringing the claim; the claimant's ill-health, depression and anxiety; her parental responsibilities and poor health of her baby son; her lack of knowledge of ET time limits; her ability to access internet; her role as a Trade Union Health and Safety representative; her emails complaining and reiterating her rights; the contradiction between the PCP requiring the claimant to work from home without equipment against being required to attend the office. The Judge also considered in particular that the claimant had contacted ACAS on two occasions concluding that she should have reasonably known about time limits before she did because she was able to research matters by internet.

THE LAW

11. Section 20 of the Equality Act 2010 imposes a duty on employers to make adjustments for disabled persons in specific circumstances and, so far as is relevant provides:

> **(2) The duty comprises the following three requirements.**
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
> **----------**
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**
> **----------**

12. The duty which would be likely to arise in this case seemed to me to be to provide an auxiliary aid, but it would appear that the case was never approached on that basis. A breach of duty is, in either case, an omission. That it is an omission is of

importance to the issue of time limits and requires a particular approach to the identification of the relevant date where time begins to run. This is governed by section 123 of the Equality Act 2010 which, so far as relevant provides:

> **(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—**
> **----------**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
> **(a) when P does an act inconsistent with doing it, or**
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

13. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194 the question of omission time limits is addressed. Both parties referred me to paragraphs 15 and 16 as significant in this respect. It is worth setting out Leggatt LJ's reasoning in those paragraphs as they show the relationship between that judgment and that in ***Matuszowicz*** (see below) upon which it builds its analysis.

> *"15 This analysis 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 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. This is further supported by the decision of the Court of Appeal in Kingston upon* Hull City Council v Matuszowicz *[2009] EWHC Civ 22; [2009] ICR 1170. In that case the Court of Appeal considered the effect of the predecessor provision (which was in materially identical terms) to section 123(4) of the Equality Act in relation to a claim based on failure to make reasonable adjustments by finding alternative employment for the claimant. On the facts, the duty (and hence the failure to comply with it) was said to have arisen by, at the latest, August 2005 and to have continued until 1 August 2006, when the claimant's employment ended (see para 25). Although the Court of Appeal did not find it necessary*

> *to reach any conclusion about the date on which time began to run, Lloyd LJ (with whose judgment the other members of the court agreed) considered that the relevant date may have been 28 July 2006 – observing that, at any rate during the period of April to July 2006, the employer was representing to the claimant that the question of his possible redeployment was being taken seriously (see paras 28-29). This illustrates, first of all, that 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 may be different from the date when the breach of duty began. Secondly, the approach of Lloyd LJ supports the view that 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.*
>
> *16 In the present case, although its reasoning might have been more clearly expressed, I think it apparent that the employment tribunal approached the matter correctly in asking itself at what point it became clear or should have become clear to the claimant that the Board was not complying with its duty to make reasonable adjustments by looking for alternative suitable roles to which she could be redeployed-------- Indeed, the tribunal's discussion of the date by which the Board might reasonably have been expected to comply with its duty presupposes that the Board was failing to comply with its duty during the period under consideration. I therefore consider that the first ground of appeal is misconceived."*

14. In ***Hull City Council v Matuszowicz*** [2009] ICR 1170 Lloyd LJ, at paragraph 15 sets out:

> *"In terms of identifying an act of discrimination giving rise to a substantive remedy it is unnecessary to consider whether an omission to comply with the duty to make reasonable adjustments is deliberate or not. Either the duty is complied with or it is not. The classification of the omission, if it is an omission, becomes necessary only for the purposes of the time limit --"*

And at paragraph 19

> *"Paragraph 3(3)(c)supplies this, in terms of deliberate omissions, and takes as the relevant moment the time when the person in question decided upon the omission. However sub-paragraph (4), while it allows for evidence as to when the person in question did decide on the deliberate omission, goes*

> *on to define, in the absence of such evidence, when the person is to be taken as having decided upon the omission. There are two alternatives. The first, when he does an act inconsistent with doing the omitted act, is fairly self explanatory. It may or may not be the case that, by doing the inconsistent act, the person in question realised that he was irrevocably omitting to do the omitted act, but it is fair in that situation to treat him as having made a deliberate omission because it is no longer open to him thereafter to do the omitted act. It is understandable that time should run from that moment."*

Section 123(3)(b) and (4) are the equivalent provisions in the Equality Act 2010 but Lloyd LJ then uses the concept of the "*continuing omission*" where, on the facts, an employer represents to the employee that the adjustment will or may be forthcoming. He then goes on to say that the statutory construction does not allow for this form of analysis. Instead, there must come a point where time begins to run despite the continuation of the omission, or as Sedley LJ puts it:

> *"The point of general importance which emerges from his judgment, and is worth stressing, is that the effect ----- is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment. The evident purpose is to prevent a situation of neglect from dragging on indefinitely, and to do this, where no overtly inconsistent act has set time running, by putting the onus on the claimant to decide when something should have been done about the omission and to bring his or her claim within 3 months of that date."*

Sedley LJ then goes on to make the point that tribunals could be expected to have regard for the difficulties that this creates for Claimants and adopt a sympathetic interpretation. At paragraph 21 Lloyd LJ states:

> *"In the context of this legislation and of the duty to make reasonable adjustments, even if the employer was not deliberately failing to comply with the duty, and the omission to comply with it was due to lack of diligence, or competence, or any reason other than conscious refusal, it is to be treated as having decided upon it at what is in one sense an artificial date. Certainly it may not be a date that is readily apparent either to employer or to employee. The date is imposed for the purposes*

> *of starting time running under the enforcement provisions of the 1995 Act."*

15. I have been referred to the EAT's conclusions in ***Leeds Teaching Hospital NHS Trust v Foster*** UKEAT/0552/10/JOJ. In that case the ET was upheld in deciding that where an adjustment of redeployment had a prospect of alleviating a disadvantage, even where, at a later stage, the employee was unable to be redeployed because too ill that prospect of a successful adjustment was sufficient.

16. The principles set out in the existing authorities amount to the following propositions:

a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.

b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.

c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.

d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee.

SUBMISSIONS

17. Mr Keen began by discussing grounds 1 and 2 together. Referring to ***Abertawe***. He contended that this shows that when the cause of action accrues is not the relevant date for the purposes of limitation. Instead, the date when an employer might reasonably have been expected to comply with a duty to make adjustments provides limitation. However, importantly, that must be connected to the facts as known to the employee. It is when the employee would reasonably conclude that the employer will not comply that provides the relevant date for limitation. Mr Keen contended that the Judge, at paragraph 39, describes the law incorrectly. The Employment Judge, relying on ***Matuszowicz***, indicates that it is the ET which determines when it would be reasonable to have made the adjustment. This approach is wrong in the light of the refinement of the principles set out in ***Abertawe***.

18. Further, Mr Keen contends that in paragraph 41 the Employment Judge took the wrong approach. Instead of applying the statutory wording the Judge stated that adjustments were to allow a person to do or remain in a job. Relying on ***Griffiths v Secretary of State for Work and Pensions*** [2017] ICR 160 which demonstrates that once a PCP is established the next step is to establish the particular disadvantage. It is not until the disadvantage is identified that it is possible to identify the steps which would alleviate the disadvantage. The case also indicates that there is no reason to narrow the statutory concept of a "step." He argued that this in conjunction with the decision in ***Leeds*** means that the requirement is that only a prospect of alleviating the disadvantage is required. If an adjustment had a prospect of alleviating disadvantage at some past point but could no longer, that would be relevant to remedy not liability. The duty arises once a person is placed at a disadvantage, it is

not an anticipatory duty, but is not extinguished as a cause of action. When the Judge found that the absence of the smart card was the start point for limitation to run, he was, in essence, equating an extinction of the duty with limitation.

19. The Employment Judge concludes that the reasonable period for the employer to make the adjustment ends on 4 August 2020. Mr Keen argues that the Employment Judge makes no reference as to which aspects of the claimant's knowledge of circumstances would mean that it would be reasonable for her to conclude that 4 August 2020 was time for the adjustment to be made. Firstly, he should not have concluded that the absence of the smart card ended the need for the adjustment, secondly he should not have treated that as a time when the claimant would have the relevant knowledge to consider that the employer would not comply with the duty.

20. Mr Keen raised an argument that the analysis of disadvantage can make a significant difference comparing the cases of ***Lancaster*** and ***Noor***. As an example, he referred to the person with dyslexia who requires a particular font and who sits a written test. An omission to alleviate the disadvantage could be analysed in two ways in this example. The first disadvantage is not being able to compete, the second disadvantage is failing to be promoted. If there are three years in question the missing font omission occurs over all three years. Hypothetically, he argued, in the first two years the disadvantage is being able to compete, however in the third year the actual result is a failure to be promoted a different disadvantage. Mr Keen argued that this shows the context in which the adjustment is sought should not be considered in a vacuum. The two disadvantages, although requiring the same adjustment, are distinct. There should not be a "lumping together" of disadvantages

for time limit purposes. He argues that this sort of approach makes it unsuitable for analysis in the narrow confines of a preliminary hearing.

21. Ground 3 is advanced as two alternatives. In respect of the first Mr Keen submitted that, if the respondent is correct that the adjustment is simply providing the chair, then the question of when the chair should be provided has become settled by the ET judgment. That would amount a bar on the claimant's ability to take a claim for this adjustment in the future. That, he argues, is not a factor which the Judge has considered in his conclusions; it is a factor that must be both relevant and crucial to a time limits question. Where there is an ongoing disadvantage which weighs more heavily on the claimant because of a PCP and where a decision not to exercise just and equitable discretion to extend time would condemn the claimant to continue to suffer that disadvantage; this must be a matter taken into account.

22. The second way this is advanced is to distinguish this case from that in ***Matuszowicz***. Mr Keen argued that there is a requirement for separation of various omissions. The touchstone is to ask the question of the claims made before it, which in this case involved separate and not continuous disadvantages to the claimant. This meant engaging in a complex assessment, but the Employment Judge did not grapple with those complexities. The case law recognises that there are specific difficulties in time limits related to omissions which require a claimant's perspective to be considered. Mr Keen argues that the Employment Judge did not engage with the claimant's standpoint because he ties the times when remedy of disadvantage should be made to when the omission occurred. He argued that the ET1 deals with the provision of and then the loss of a chair and desk. The Judge's conclusion that the

smart card is not working does not mean that the claimant had not suffered varied disadvantages prior to that event. Paragraph 36 of the judgment demonstrates that the claimant still seeks adjustments at or around 3 March 2020. Mr Keen asks, "is it right that the claimant loses all rights to complain about what was supposed to be provided a year earlier?" He contends that there is a different disadvantage by August 2020 of the claimant being placed on special leave and that this cannot be the same disadvantage as that of a year earlier as the context is entirely different.

23. Dealing with Ground 4 Mr Keen argues that the employment tribunal wrongly concluded that time expired for the indirect discrimination claim because it applied the same test for limitation as it did to the reasonable adjustments claim. Mr Keen argues that the indirect discrimination claim was not based upon an omission. The argument is that indirect discrimination requires an employer to apply a PCP generally and is anticipatory because it requires the positive application of a PCP. That is a PCP which does or would place disabled persons, and does place the complainant, at a particular disadvantage. Such a policy would, he contends, strongly suggest that there is an ongoing state of affairs. Mr Keen argues that no separate reasons were given to explain the Employment Judge's analysis of time limits for the indirect discrimination claim. Further, the Judge made no findings which were specific to when time started to run in that claim. The employment tribunal did not address whether the relevant PCP constituted a continuing act of discrimination.

24. Miss Garner on behalf of the respondent argued that the claimant's submission viewed the meaning of the judgment from the wrong direction. She referred to the

case pleadings, which she argued narrows the claim to working from home in July 2020 and does not relate to earlier alleged breaches, pointing to paragraph 26 (pg. 82). That complaint is based on a failure to deliver furniture to the claimant's home. What the Employment Judge is considering, in the exercise around section 123 EA 2010, is anything that indicates that a decision was made or there was an inconsistent act which the claimant would be aware of. It was also argued that the claimant was quite clearly aware that she was able to bring a claim by 26 November 2020 as could be seen in her communication at p. 179 of the bundle.

25. The respondent relies on paragraph 15 in ***Abertawe*** to argue that the section 123 period in these circumstances requires a judge to have regard to the facts known generally at the time. Miss Garner contended that the Judge is not engaged in an exercise as to what the claimant specifically concluded. Instead the Judge should engage in a hypothetical exercise as to when time ought to begin to run for the purposes of limitation. She argues that, in effect, this is a test where an objective analysis of what a person in the claimant's position would subjectively know from the facts.

26. Miss Garner contends that the claimant had not put forward a clear case on dates and that the ET was entitled to look at the case before it and did so basing its decision on the information from the claimant. She refers to paragraph 16 of the judgment which shows the limitations in evidence that the claimant gave as to her condition of anxiety. Miss Garner contends that paragraph 42 of the Judgment shows an application of the law to the evidence and facts found. She contends that the

Employment Judge reasonably concluded that 4 August 2020 was the date when it was reasonable for the claimant to be aware that the furniture would not be provided.

27. Miss Garner argues that the ET decision making does not involve the application of a formula, this is not an exact science as can be seen from paragraph 21 of ***Matuszowicz***. The Judge treated the respondent as having to provide this furniture by a specific date in order to decide what is, after all, a jurisdictional issue.

28. Whilst Miss Garner agreed that a prospect of adjustment is what must be considered in the light of the ***Leeds*** decision, she argues the claimant is misconstruing the nature of the exercise. The question of whether the adjustment would or might impact on removing a disadvantage is not relevant when the disadvantage no longer exists in the factual circumstances. Miss Garner used the analogy of a burst water main at an office. This would prevent anyone working at the office. In those circumstances making an adjustment for a disabled employee in order for them to be able to work at the office could only alleviate a disadvantage in a hypothetical sense because there would no longer be a disadvantage. She argued that the duty to adjust is not extinguished because the disadvantage is removed and argued that a claim could, factually, be brought once the water main is repaired. This is because that would be a new occasion of disadvantage. The right is to complain of the new breach of duty and the employee would only lose the right to complain about the earlier breach of duty based on a factual disadvantage. Miss Garner argued that any further consideration by an employer could lead to a new claim so that if an employee asked for a review of circumstances that would permit a new claim based on a new decision.

29. Miss Garner argued that Ground 2 is a perversity complaint and should have to overcome the usual high hurdle placed before such a complaint. She contends that there is no suggestion here of a lack of evidence. The argument from the claimant as to the basis of appeal is much broader contending that it should have been obvious to the judge that there was a continuing state of affairs.

30. Miss Garner pointed out that Ground 3 also raised perversity. This was a challenge in relation to a decision on whether an extension of time based on a just and equitable test. Her contention was that the Employment Judge had addressed all the relevant issues and that there is nothing that indicates missing matters in the application of the test. She referred me to the ET Judgment at paragraphs 44 to 47 to demonstrate that the Judge had considered all matters. She argued that the claimant's submissions minimised the disadvantage to the respondent of dealing with a claim with facts going back as far as 2009. The claimant's argument was flawed because the claimant would be able to bring a further claim based on a failure to make reasonable adjustments. This would be because of the arguments advanced above on occasions where new claims arise. The claimant has lost the right to claim for this period only. This would not extinguish her rights if a new occasion of duty arose; this is a jurisdictional question and not a "no reasonable prospect" case.

31. In respect of ground 4 Miss Garner submitted that there had been no new decisions made by the employer not to provide the equipment. She contended that the policies remained the same and were applied in the same way and not policies which meant that decisions were taken from time to time referring me to ***Owusu v London Fire***

and Civil Defence Authority [1995] IRLR 574, EAT. The claimant relied on the same PCPs for the section 19 claim and based on those there would be an earlier limitation in July 2020.

Discussion

32. I should record, in passing, that I raised with counsel why, in this case, where the subject matter was the provision of equipment, the ET was not dealing with the "auxiliary aid" requirement where the complications inherent in seeking to identify a relevant PCP could be avoided. Neither was certain as to the reason. It appeared to me that it is often forgotten that there are three requirements within the legislation and that complaints are not limited to cases where a provision criterion or practice creates a disadvantage. It is incumbent on parties to consider which of the requirements has created the duty to make adjustments as this may impact on whether it is reasonable for the employer to have to make a particular adjustment.

33. Ground 1 of the appeal contends that the Judge did not correctly identify the notional date from which limitation was to run. Mr Keen is correct to say that the notional date (as I shall refer to it) for the commencement of limitation, where there is an omission, may be independent of the date of a breach of duty. However, it must be borne in mind that the date of the breach of duty is one of the factual matters which is likely to inform the notional date.

34. In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage there must be judicial analysis to identify the notional date. It appears to me that this analysis must begin with the identification of the feature

which causes disadvantage. This could be a PCP but could also be a physical feature or auxiliary aid. This will be a fact which dates the start of disadvantage. The next element to be considered is when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This is a factual finding and will vary. For instance, the date by which it would be reasonable to have to provide a chair could depend on whether a chair is already commercially available or the chair in question must be purpose built. That date would also amount to a finding of fact as to when a breach occurred. As such it would also assist the judge in identifying the notional date. The ET would then have to ask if there are facts which would allow it to conclude that the employer has acted inconsistently with the duty to make adjustments, if there are, then the notional date would arise at that point. Finally, if there is no inconsistent act, there will come a time when it would be reasonable for the employee, on the facts known to them, to conclude that the employer is not going to comply with the duty.

35. What can be seen from the above is that there could be considerable overlap between factors that inform the notional date (which is jurisdictional) and those which would be factors to put in the balance in considering whether there ought to be a just and equitable extension of time (which engages discretion). It appears to me that, given the statutory language and the authorities which have dealt with its construction, this is an inevitable result. That being the case it appears to me that Miss Garner's submission that it is not the actual subjective conclusions of the claimant that will identify the notional date has considerable force. The Jurisdictional question is one where there should be an objective analysis of facts known to the claimant, which is then considered on the basis of what a reasonable person would conclude, from

those facts, about the respondent's intentions to comply with the duty. That will identify the notional date. However, the ET would then be entitled to consider the claimant's subjective state of mind when considering the discretionary question of whether time should be extended on a just and equitable basis.

36. It appears to me that this is the approach endorsed both in ***Matuszowicz*** and ***Abertawe*** as is evident in the latter from Leggat LJ's phrasing "*that 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*", reasonableness in that sense connecting with the way facts would appear to an employee.

37. I conclude that the Employment Judge did misdirect himself as to the law when he indicated that it was the ET's function to determine when the respondent might reasonably have been expected to make the adjustments as the start date for bringing the claim. It was appropriate for him to determine when the reasonable employer would have made the adjustment, however the ET would need to go on to consider when the reasonable employee, based on the facts known to the claimant, would conclude that the duty would not be complied with.

38. One issue which I ought to address at this stage is whether this duty to make adjustments is extinguished by a decision that a claim is out of time. Mr Keen's argument is that where a duty to adjust arises and a breach by omission follows, a limitation finding will extinguish the right to an adjustment in the future. In contrast Miss Garner contends that there can be a new breach where there are changed

circumstances. As has already been indicated section 123 EqA is jurisdictional. As such any claim outside its parameters cannot continue to be pursued. The principle of *res judicata* will apply so that where a claim of a failure to make adjustments (subject to time limits) is complete, because of this jurisdictional limitation, that specific claim cannot be pursued a second time. The question then becomes in what circumstances will a new cause of action arise?

39. It can be imagined that all the elements required to establish a failure to make adjustments are changeable. A claim based on sufficiently changed circumstances would be a new claim and not an attempt to revive the earlier claim. For example, a move to a different building would be a notable change which might mean a new cause of action has arisen. The purpose of the legislation is to remove barriers so that a disabled person may work. If there is no sufficient change in circumstances that would make it difficult to argue that there is the basis for a new claim. A judge considering such circumstances would be applying the principles set out in **Bon Groundwork Ltd v Foster** [2012] IRLR 517 where Elias LJ summarised *res judicata* as:

> **"where an issue has been litigated before a judicial body and determined as between the parties it cannot be reopened. It is binding as between them, and the parties are estopped from reopening it. The issue may be one of fact or of law. However, the parties are only bound by an issue which it was necessary for the court to determine in the earlier claim"**

40. One element of a complete claim is the existence of a disadvantage and in this case the respondent argues the disadvantage ended because the claimant was unable to conduct the main part of her duties. It is easy, considering Miss Garner's analogy of a flooded office, to conclude that, where there is no requirement to work at all, the

disadvantage has ended. Where it would be more difficult to draw that conclusion are circumstances which exist temporarily. For example, it is not likely that a holiday, even a long one, would be considered to end the disadvantage so that, on return, the same disadvantage would create a new date for limitation. Miss Garner also argued that a request by the claimant for a review would, in effect, revive the consideration of an adjustment so as to create the basis for a new claim. I am sceptical that this would be the case, although I do not rule it out as a possibility in the right circumstances. With all of these factors in mind, it appears to me that the decision whether any change in circumstances amounts to a new cause of action is an entirely factual consideration of the position before and after the change.

41. This aspect of the appeal relates to both grounds 1 and 2 in that Mr Keen contends that the Employment Judge was equating extinction of a duty with limitation. Miss Garner is correct to say that there is no formulaic approach to this, as I have indicated above the factors involved are equally applicable to discretion. The Employment Judge was entitled to identify an extinction of a duty to make an adjustment as a fact which related to the findings necessary for limitation. This he does as a factual finding that the claimant could not work from home once the smartcard could not be provided which was known by 4 August 2020. I am not permitted to interfere with that finding unless it is perverse. There were facts from which the Judge could reach this conclusion. That finding could mean that the omission to comply with the duty had come to its end. It appears to me, further, that the Judge was entitled to take account of this factor in finding, objectively, that a reasonable employee would not expect the duty to be complied with from a date which related to that extinction of the duty and the concomitant end of the omission.

However the Employment Judge did not consider when the reasonable employee would have considered that to be the position. Further, the Judge did not approach the question of whether this was simply a temporary position.

42. As to the first argument in ground 3 I am considering issues of perversity in a ***Wednesbury*** sense. In particular I have to consider whether the Employment Judge failed to take into account the fact that the claimant's claim could not be pursued in future. The Employment Judge concluded that the duty to make an adjustment had ended because there was no requirement to work as the claimant could not perform her substantive duties. Given what I have indicated above, this could be a change in circumstances which would extinguish the duty or could be temporary. The factual finding would inform the *res judicata* decision to be made. However, the Employment Judge has not addressed whether this change in circumstances has extinguished the duty. It appears to me that this would require factual findings to be made on this issue which are not apparent from the ET Judgment. I am not in a position to state that the decision on whether there should be a just and equitable extension was perverse because the Judge has not approached the question at all.

43. The second way in which ground 3 is put is on the basis that there are separate omissions to be considered. I found this argument difficult to understand on the facts of this case. The claimant's case was that she was at a disadvantage because of the failure to provide equipment, the omission was not providing the equipment. Mr Keen's example of two different disadvantages does not seem to apply. It seems to me that this would add complexity that is unnecessary. If there is more than one disadvantage arising from disability, because of one or more PCP etc., there might

well be separate time limits and this might require the question to be dealt with at a substantive rather than preliminary hearing, that does not appear to be the case here.

44. As to ground 4, I am of the view that the submissions made by Miss Garner express the position succinctly. Based on the PCPs which were advanced any policy of not providing furniture would have crystallised by 21 July 2020, which would make this claim even later. The just and equitable question was fully dealt with in respect of this claim. I would add, as an aside, that section 19 EqA does not appear to me to be a suitable vehicle to pursue a complaint which is about provision of specific equipment without evidence that there is a general state of affairs where such equipment is not provided to disabled employees when required.

45. On the basis of this approach I am of the view that grounds 1 and 2 of the appeal should succeed. Grounds 3 and 4 are dismissed.

46. Upon providing the parties with a draft of this Judgment I asked the parties to confirm whether they considered a further hearing was required to consider disposal. Both parties submitted that I could make a decision based on their written submissions.

47. Mr Keen, on behalf of the claimant submitted that I should not only order the matter to be dealt with by a differently constituted tribunal but, further, that I should order that this is a decision to made at a substantive rather than preliminary hearing. The argument is that the factual decisions that are required should only be considered upon hearing all the evidence. In contrast Miss Garner submits that this case should

be remitted to the same Employment Judge to be dealt with at a preliminary hearing. Her argument is that the issues to be dealt with following this judgment, although factual, are limited to facts which are not disputed or not disputable. I am afraid both Counsel ask me to overreach the powers of this appeal tribunal. Statute provides that Employment Tribunals establish facts and, crucially, decide upon their own procedure for doing so within the ET rules. I would be usurping the powers of the Employment Tribunal to order a particular form of hearing. Those submissions, if they are to be made should be advanced before the Judge or Tribunal that hears this case.

48. The conclusions I have reached on the appeal will require further fact finding by the Employment Tribunal. That means the matter is one that must be remitted to the Employment Tribunal see **Jafri v Lincoln College** [2014] ICR 920 and **Kuznetsov v The Royal Bank of Scotland** [2017] EWCA Civ 43. The question as to whether this should be remitted to the same or a differently constituted tribunal are governed by the approach set out in **Sinclair Roche & Temperley v Heard & Another** [2004] IRLR 763. There is nothing to indicate that the Employment Judge in this case approached matters in anything other than a professional manner and it can be seen that he would be in a position to approach the matter with an open mind. The Judge has already dealt with much of the fact finding and it would be a proportionate use of resources that it be remitted to the same Judge. However, on a practical basis, I note that it is now Regional Employment Judge Burgher to whom the case would be remitted. As a Regional Employment Judge he will have considerably broader duties and more limited availability to hear cases. In those circumstances I remit the

case to Regional Employment Judge Burgher to allocate to himself or to any other Employment Judge or Tribunal to consider the case.