Neutral Citation Number: [2024] EAT 63

Case No: EA-2022-001108-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 April 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

Z **Appellant**

- and -

Y **Respondent**

- -
- -

MR Z (the Appellant's husband) for the **Appellant**
MR ALASTAIR HODGE KC for the **Respondent**

FULL HEARING
Hearing date: Tuesday 23 April 2024
- -

JUDGMENT

SUMMARY

Practice and procedure – disability discrimination – time limits

The claimant's claim had included a complaint of discriminatory constructive dismissal but clarification of her case, focused on the allegations of prohibited conduct, had overlooked this cause of action and the ET had declined to consider such a claim, going on to find that the matters of (pre-constructive dismissal) discrimination it had found were out of time. The claimant appealed.

Held: allowing the appeal

The ET had erred in failing to determine the claim of discriminatory constructive dismissal, which was part of the pleaded case before it; the list of issues had not replaced the pleaded claim and the ET had been wrong to slavishly stick to that list (**Parekh v Brent London Borough Council** [2012] EWCA Civ 1630 applied). Given the ET's findings of fact, the claim of discriminatory constructive dismissal, which was in time, was to be upheld. As a consequence, the question whether the earlier acts of discrimination were part of a course of conducting extending over time, ending with the constructive dismissal, would be remitted to the ET for reconsideration along with the issue of remedy.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. This appeal raises the not uncommon problem of how a pleaded claim of discriminatory constructive dismissal can be overlooked in the drafting of a list of issues in Employment Tribunal ("ET") proceedings, and also gives rise to a question as to the approach to be adopted when determining whether conduct is to be treated as extending over a period.

2. In giving my judgment, I refer to the parties as the claimant and respondent, as below. This is the determination of the claimant's appeal against the judgment of the ET sitting at Bury St Edmunds (Employment Judge Laidler sitting with lay members Ms Costley and Mr Smith on 27 and 28 June 2022, conducted by CVP), sent to the parties on 12 September 2022, by which the ET ruled that the claimant was constructively unfairly dismissed by the respondent, but that her claims under the **Equality Act 2010** ("EqA") had been brought out of time and were to be dismissed. The claimant appeals against the ET's decision on her claims under the **EqA**; the respondent resists the appeal.

Preliminary Issue: Anonymity Order

3. An anonymity order was in place before the ET and has been continued on appeal. In making that order in the EAT proceedings, however, Judge Stout observed as follows:

> "The parties and other individuals were anonymized in the judgment of the Employment Tribunal. The justification for anonymizing the [claimant] because of the information the judgment contains about her health and disability is apparent, but I am concerned about the breadth of the order that has been made and the anonymization of so many individuals."

Having regard to the principle of open public justice, it was thus directed that this matter should be considered afresh at the start of the full hearing of the appeal and the parties were ordered to provide witness statements and/or written representations on this question in advance of the hearing (see Judge Stout's order, seal dated 7 August 2023).

4. Pursuant to Judge Stout's order, the claimant has provided a witness statement explaining why she considers that her identity should continue to be subject to an anonymity order in these proceedings. Essentially, the reasons relied on relate to the fact that otherwise information of a private and personal nature regarding the claimant's health would be available to anyone reading the judgments of the ET and EAT, who would then being able to identify the claimant. In its submissions on this question, the respondent has indicated

that it is neutral on the point but makes the observation that lifting the order in respect of the claimant's employer and former colleagues may enable jigsaw identification of the claimant.

5. In considering the continued application of an anonymity order in these proceedings, the open justice principle must be my starting point: that is, that justice is administered in public, and is open to public scrutiny. Not only is that principle part of the rule of law in a democracy, and a fundamental principle of the common law, it is also inextricably linked to the freedom of the media to report on court and tribunal proceedings; **A v British Broadcasting Corporation (Scotland)** [2015] AC 588 SC; **Ameyaw v Pricewaterhousecoopers Services Ltd** [2019] ICR 976 EAT. The principle can also be seen as an aspect of the right to fair trial protected by article 6(1) **European Convention on Human Rights** ("ECHR") and as reflected in the article 10 right to freedom of expression. Although there can be exceptions to the principle of open justice, where it is necessary in the interests of justice or to protect rights under the **ECHR**, any derogation should represent the minimum necessary to be effect for the purpose for which it is made (**A v BBC** paragraphs 31-32). Whether a departure from the principle of open justice is justified will always depend on the particular facts of the case and will require a fact-specific balancing exercise. Central to that evaluation is the purpose of the open justice principle, the potential value of the information in question in advancing that purpose, and conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others; **A v BBC**, paragraph 41.

6. In the present case, the anonymity order that is in place protects the claimant's rights under article 8 **ECHR**; removing the anonymity that protects her identity will inevitably mean that details regarding her health, which would otherwise be entirely personal and private to her, would be known to anyone who read the judgments in these proceedings. The order also serves the interests of justice in that, absent such protection, the claimant would be likely to be dissuaded from pursuing her case; before the ET, she would have felt constrained in what she was prepared to disclose and the fear of identification would also be likely to impact on her ability to pursue her appeal. The claimant's witness statement makes clear her continuing fear in this regard and I accept this to be an entirely genuine, and reasonable, concern. In the circumstances, I am satisfied that an anonymity order should continue to be in place in these proceedings prohibiting the publication in this jurisdiction of any matter that would be likely to lead members of the public to identify the claimant. To that end, the claimant will continue to be identified simply as "Z".

7. The question then arises as to whether there is any basis for continuing to anonymise the respondent and other employees who feature in this case. The original justification for the extension of the order was plainly to prevent the jigsaw identification of the claimant. Given the years that have passed, that concern may be less acute, although I accept that the specific nature of the service in which the claimant was formerly employed may mean that this is still more likely to be an issue than in some workplaces. Whilst the position is more evenly balanced than when the order was first made, I consider that the need to protect the claimant's privacy thus justifies the continuation of the anonymity order in the same terms imposed by the ET.

The Factual Background

8. I have largely taken this factual summary from the earlier judgment of the EAT, given in the claimant's first appeal on 25 March 2021.

9. The respondent is a county council; from 2015, the claimant was employed on a permanent full-time contract within the respondent's fire and rescue service and worked as a risk and statistical data advisor. During 2006 the claimant felt she was being bullied at work and this, along with subsequent grievance and counter grievance processes, took a toll on her health and resulted in a prolonged period of sick leave.

10. Having taken over the management of the claimant's sickness, W refused to allow adjustments and indicated that she should not be allowed to return to her work under any circumstances. There were discussions between the parties, and another job was found for the claimant. This was an IT service desk job on a fixed term contract, still with the respondent but no longer within fire and rescue. The claimant commenced this new position on 1 May 2018.

11. The claimant's new employment had been subject to satisfactory references, and it was only when these had been received and her position was confirmed that, on 1 June 2018, the claimant resigned her original permanent contract of employment with the respondent.

The ET Proceedings

12. There had been on-going without prejudice discussions between the parties, which were brought to an end by the respondent on 26 July 2018. On 16 August 2018, the claimant entered into Acas early conciliation. Some 40 days later, on 24 September 2018, Acas issued the early conciliation certificate. On 23 October 2018, the claimant presented her claim to the ET.

13. In completing the form ET1, the claimant ticked the boxes at section 8 to state that she was making claims of unfair dismissal and disability discrimination. In the particulars attached to that form, the claimant set out her case, as follows:

> "The failure of [the respondent] to make reasonable adjustments (even short term) is a breach of the Equality Act 2010. The continuing state of affairs, refusing to allow me to return to work and to seek alternative employment, led to me … resigning my post with [the respondent's fire and rescue service]. I was Constructively Dismissed by [the respondent] on 1st June 2018 – the last act of discrimination.
> …
> 30th May – I received confirmation that my new job was secure, and I resigned my role with [the respondent's fire and rescue service] on 1st June. This was the final act of discrimination by [the respondent] due to my mental health disability. I could and would have returned to my [fire and rescue service] role up to this point had they been willing to make some very small adjustments."

The particulars ended by listing the claimant's claims as:

> "1 Constructive unfair dismissal;
> 2 Failure to make reasonable adjustments in breach of the Equality Act 2010;
> 3 Discrimination arising from disability in breach of the Equality Act 2010;
> 4 Direct and indirect discrimination in breach of the Equality Act 2010;
> 5 Victimisation in breach of the Equality Act."

14. It is helpful to record at this stage that the respondent accepts that, as thus pleaded, the claimant's case included the contention that her resignation was a final act of discrimination.

15. By its response, filed on 17 December 2018, the respondent made clear that it was resisting all the claimant's claims, and raised the question whether the ET had jurisdiction given that a number of the claimant's allegations had been presented out of time. Within the grounds of resistance, the respondent included a request that the claimant be directed to provide a Scott Schedule, setting out (relevantly) whether:

> "… each allegation is an act of direct discrimination, indirect discrimination, failure to make reasonable adjustments or harassment or victimisation."

16. The file in this matter having been referred to an Employment Judge, by letter of 26 January 2019, the ET directed that the respondent prepare a draft list of issues (to be forwarded to the claimant in advance of a case management hearing):

> "… assuming claims of constructive unfair dismissal, failure to make reasonable adjustments, disability related discrimination and direct disability discrimination"

17. The respondent duly created a first draft list of issues, in which it was left for the claimant to identify which allegations fell to be considered as which form of prohibited conduct, as follows: direct discrimination, section 15 discrimination arising in consequence of disability, reasonable adjustments.

18. The preliminary hearing took place before the ET (EJ Laidler sitting alone) on 7 February 2019. The claimant appeared in person; the respondent was represented by Mr Hodge. In seeking to clarify the issues arising in this case, it was recorded that the claimant's reference to "*victimisation*" was not such as to fall within section 27 **EqA**. Otherwise the claimant was ordered to provide:

> "2.1 completion of all the detail required in relation to each head of claim in the respondent's draft list of issues.
> 2.2. This must include clarification of the case the claimant brings with regard to her sick pay and the loss of earnings element in her schedule of loss."

19. From the further information provided by the claimant the respondent then re-drafted the list of issues and there was further discussion around this list at the outset of the full merits hearing, which took place over four days in September and October 2019 and at which the claimant was represented by her husband and the respondent by Mr Hodge. What I understand to be the final understanding of the agreed issues is recorded at paragraph 4 of the ET's first liability decision, sent out to the parties on 15 January 2020. The ET's record of the agreed issue follows the same format as the respondent's earlier list, setting out the various allegations under different sub-headings relating to the different forms of prohibited conduct; like the respondent, at no stage did the ET seek to further clarify the particular cause/s of action relied on by the claimant pursuant to section 39 **EqA**.

20. By that first liability decision, the ET set out its conclusions on the claimant's claims as follows:

> "1. The claimant was not dismissed contrary to section 95(1)(c) Employment Rights Act 1996 ('ERA') and her claim of constructive dismissal must fail and is dismissed.
> 2. The tribunal does not have jurisdiction to determine the complaints of disability discrimination as they were submitted outside the statutory time period laid down in section 123 Equality Act 2010 ('EA') and it is not just and equitable to extend time
> 3. If the tribunal had found the claims in time all disability discrimination claims would have been dismissed as not well founded save for the following:
>
> > 3.1 That the claimant was treated unfavourably because of something arising in consequence of her disability contrary to section 15 EA and the respondent has not shown the treatment to be a proportionate means of achieving a legitimate aim when W on 31 January 2018 informed the claimant that he would no longer allow the possibility of her returning to her role under any circumstances,
> > 3.2 That the respondent failed to make reasonable adjustments contrary to section 20 EA when W enforced a practice that all members of the team need to be co-located at a specific desk location in E H for operational reasons."

21. Relevant to the claim of constructive unfair dismissal, the ET had, however, found:

> "128. … that it was discrimination arising from disability to advise the claimant on 31 January that she could not return to her role. That and the failure to make reasonable adjustments … [by W failing to allow a period of time within the phased return to work of the claimant sitting elsewhere] must therefore amount to a breach of the implied term of trust and confidence."

The First EAT Appeal and the ET's Decision on Remission

22. The claimant appealed against the ET's rejection of her claims. At the final hearing of that appeal before John Bowers KC, sitting as a Deputy Judge of the High Court, the claimant was successful, the EAT holding that the matter would need to be remitted to the ET to determine the following questions: (1) accepting that, at least in part, the claimant had resigned in response to the respondent's fundamental breach of contract (as found by the ET at paragraph 128), did she waive the breach of the contract or affirm the contract notwithstanding the breach? (2) having failed to address the question whether any of the claimant's allegations amounted to a continuing act (a matter that had been expressly identified in the list of issues): whether or not there were continuing acts in respect of the breaches identified at paragraphs 3.1 and 3.2 of the ET's decision?

23. Considering these questions at the remitted hearing, the ET heard further evidence from the claimant and submissions from the parties, before concluding that:

> "1. The claimant was constructively unfairly dismissed by the respondent.
> 2. There was no continuing act in relation to the Equality Act claims which were submitted out of time. The tribunal having no jurisdiction to determine them they are dismissed."

24. In reaching its decision on the question of constructive unfair dismissal, applying the authority of **Hogg v Dover College** [1990] ICR 39 EAT, the ET reasoned (so far as relevant for present purposes) that:

> "9. As stated in Hogg the question is whether the claimant accepted the employer's conduct as a repudiation or whether by conduct she could be said to have accepted it. The court posed the question 'acceptance of what'. It could only be of a totally different contract.
> 10. Applying that to the case before this tribunal where the breach was of the implied term of trust and confidence by not making the recommended reasonable adjustments it would be the continuation of that contract on that basis whereas in fact the claimant made it clear throughout that those adjustments were required.
> 11. The meeting of 31 January 2018 followed up with a letter of 6 February 2018 which made it clear to the claimant that the respondent was not going to be bound by her contract related to her current role. She was given the option of placing herself on the redeployment register or choosing a without prejudice conversation. From the tribunal's original findings, we know that the claimant elected the without prejudice conversation which continued past the date of her resignation on 1 June 2018.
> …
> 19. When the claimant chose the option to embark upon without prejudice discussions, she still made it clear that she considered the respondent to be in breach of its obligations to make reasonable adjustments for her to enable her to resume her existing role.
> 20. The tribunal does not find that by engaging in those without prejudice discussions the claimant affirmed the contract. When the negotiations were continuing but not coming to fruition the claimant felt in limbo and was entitled to start looking for employment which she did. The case law is clear that an employee can still be given

> time to do so where there has been a fundamental breach and that the time taken to do so does not necessarily amount to having waived the breach.
> 21. Taking into account the EAT guidance given to us in this matter and all of the above circumstances the tribunal has concluded that the claimant did not delay unduly in her acceptance of the repudiatory breach of contract and that she was when she resigned resigning within the meaning of the Employment Rights Act section 95(1) (c) by reason of the employer's conduct."

25. For the claimant, it was urged that the ET should proceed to consider whether the constructive dismissal was itself discriminatory, referring to the case of **Lauren de Lacey v Wechseln Ltd t/as The Andrew Hill Salon** UKEAT/0038/20. The ET, however, rejected that suggestion, stating:

> "22. … it was never one of the tribunal's issues that this was a discriminatory constructive dismissal."

26. On the question of continuing act, the ET noted that, pursuant to section 123 **EqA** (and following the guidance in **Kingston Upon Hull City Council v Matuszowicz** [2009] IRLR 288 CA), a failure to make a reasonable adjustment is not a continuing act. In respect of the two matters it had found amounted to unlawful discrimination, the ET reasoned:

> "28. …
> 3.1 Unfavourable treatment because of something arising in consequence of disability when the claimant was told on 31 January 2018 that she would not be returning to her existing role and any circumstances.
> The tribunal has to accept the respondent's submissions that this was a one-off act albeit with continuing consequences. Time ran from 31 January 2018 and the claim submitted on the 23 October 2018, following a period of ACAS Early Conciliation between the 16 August and 24 September 2018 was consequently submitted out of time
> 29. 3.2 That the respondent failed to make reasonable adjustments when it enforced a practice that all members of the team needed to be co-located at specific desks for operational reasons
> It is clear from the minutes of the meetings of both the 19 and 27 December 2017 (pages 822 and 824c) that the respondent's position in this respect was made clear at those dates. The claimant would have to return to the bank of desks where she had worked and near to the person she had raised a grievance about. The respondent refused from 27 December at the latest to make any reasonable adjustments to that requirement."

27. The ET thus found that it did not have jurisdiction to determine the complaints of disability discrimination.

The Grounds of Appeal and the Claimant's Submissions in Support

28. The appeal is put on two bases: (1) that it was perverse for the ET to find that the claim did not include a case of discriminatory dismissal, and thus to exclude that matter when considering the question of continuing act for the purpose of determining whether the **EqA** claims had been brought out of time; (2) that the ET erred

in its approach to the determination of whether there had been a "*continuing act*", considering each of the found instances of discrimination in isolation, when it ought to have adopted a holistic approach.

29. Addressing the first ground, the claimant says the conclusion that discriminatory constructive dismissal was not an issue before the ET was perverse given its earlier finding that acts of disability discrimination upheld by the ET "*must therefore amount to a breach of the implied term of trust and confidence*", and the finding, on remission, of constructive dismissal, in circumstances in which the claimant's resignation being a "*final act of discrimination*" was pleaded in the ET1 in two places. As for whether this was envisaged in the list of issues, the claimant observes that the respondent's draft list referred to sections 13, 15 and 20 **EqA**; there was no suggestion that it was necessary to expressly refer to section 39. In any event, the ET was not required to "*stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence*", **Parekh v Brent LBC** [2012], EWCA Civ 1630, as applied in **Mervyn v BW Controls Ltd** [2020] EWCA Civ 393.

30. Given the ET's findings, and its ultimate conclusion on constructive dismissal, the claimant says that the appeal on this ground passes the **Yeboah** test (**Yeboah v Crofton** [2002] IRLR 635). Moreover, *per* Cavanagh J in **Lauren de Lacey v Wechseln Ltd t/as The Andrew Hill Salon** UKEAT/0038/20, the ET had been bound to go on to consider whether the constructive dismissal was itself discriminatory; applying the guidance provided in **Lauren de Lacey**, the claimant says there can only be one possible outcome: the ET had found the two acts complained of were discriminatory and led to a breach of the implied term and were a factor in the claimant's resignation (which was in time).

31. As regards the second ground, the claimant contends that the ET erred in considering each act of discrimination in isolation, rather than approaching its task holistically and having regard to the links between the acts in issue in this case (including the link provided by the common personality of W; see **Southern Cross Healthcare v Owolabi** UKEAT/0056/11 and **Veolia Environmental Services UK v Gumbs** UKEAT/0487/12). Moreover, the respondent's treatment of the claimant was akin to that in **Hale v Brighton and Sussex NHS Trust** UKEAT/0342/16, whereby from time to time she was subjected to a number of further steps subsequent to the two acts of discrimination found by the ET. Those steps had included forcing the claimant to choose between placing herself on the redeployment register (leading to dismissal if a role was not found) or choosing without prejudice discussions; the continuing state of affairs (*per* **Hendricks v MPC** [2003] IRLR 96 CA) only ended when the claimant resigned and was constructively dismissed.

The Case for the Respondent

32. On the first ground of appeal, the respondent, contends that the ET:

> "… gave the Claimant every opportunity to confirm that she was alleging a discriminatory dismissal. She did not do so." (skeleton argument paragraph 13)

Moreover, it had followed the guidance of HHJ Auerbach in **McLeary v One Housing Group Ltd** UKEAT/0124/18, and had sought meticulous clarification of the claimant's claims at the outset of the full hearing. It was therefore entitled to conclude that there was no discriminatory dismissal.

33. In oral argument, Mr Hodge very fairly accepted that at no stage had the ET specifically asked the claimant whether she had intended not to pursue her pleaded claim of discriminatory (constructive) dismissal, still less how she put her case under section 39 **EqA**. He says, however, that the claimant could still reasonably have been expected to have identified the act of constructive dismissal as an allegation she was making, and as an issue for the ET to determine, under each of the relevant forms of prohibited conduct.

34. As for the second ground of challenge and the question of continuing act, as the EAT had observed on the first appeal, that was a conclusion from the facts previously found and required an "*application of judgment by the Tribunal*" (EAT judgment, paragraph 38).

35. In respect of the first act of discrimination found – W informing the claimant on 31 January 2018 that he would no longer allow the possibility of her returning to her role under any circumstances – the ET had correctly concluded that was a one-off act with continuing consequences for the claimant; the act crystalised on 31 January 2018 and did not continue beyond that date. In any event, even if the ET was wrong in its conclusion and there was a continuing act, such act could only continue until 1 May 2018 at the latest – the date on which the claimant commenced her new role; the claim would still be out of time.

36. As for the second act of discrimination, as the Court of Appeal had confirmed in (the pre-**EqA** case of) **Matuszowicz**, a failure to make a reasonable adjustment is not a continuing act but an omission, with the consequence that (what is now) section 123(4) **EqA** applies; that was so, whether the omission to adjust was a deliberate failure – the result of a decision not to make the adjustment – or was an inadvertent admission (see *per* HHJ Beard in **Fernandes v Department for Work and Pensions** EA-2022-000277). Considering the ET's finding of fact, it had correctly concluded that the case fell the remit of section 123(3)(b). The decision to enforce the practice that all members of the team need to be co-located at a specific desk location was taken

on 19, alternatively, 27 December 2017 (at the latest); time therefore began to run from one of those dates and the ET was right to so find.

The Legal Framework

37. The powers of the ET are contained within schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules") which makes clear that an ET has a broad discretion when it comes to the case management of proceedings before it; thus by rule 29 **ET Rules** it is provided:

> "The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice …"

38. The creation of a list of issues at an early stage in ET proceedings is a useful case management tool; as the Mummery LJ observed in **Parekh v Brent London Borough Council** [2012] EWCA Civ 1630:

> "31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: …"

39. As with all powers under the **ET Rules**, an ET is, however, required to exercise its case management discretion in accordance with the overriding objective, set out in rule 2 as follows:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."

40. Consistent with the requirement to deal with a case fairly and justly, in **Parekh**, Mummery LJ went on to emphasise that:

> "31. … As the employment tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence …"

41. The use of a list of issues in ET proceedings was again considered by the Court of Appeal in **Mervyn v BW Controls Ltd** [2020] ICR 1363, in which Bean LJ provided the following guidance when considering whether it might be appropriate to depart from the terms of a list of issues (and thus

vary an earlier case management order pursuant to rule 29 **ET Rules**):

> "38. … what is 'necessary in the interests of justice' in the context of the tribunal's powers under rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it."

And further advised:

> "43. It is good practice for an employment tribunal, at the start of a substantive hearing, with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the employment tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice."

42. In allowing the claimant's appeal in **Mervyn**, it was ruled that, even where the claimant had expressly stated (during case management discussions) that she had not resigned but had been dismissed, the ET should have considered the claim as encompassing an allegation of constructive dismissal: that, it was held, was the claim that "s*houted out*" from the pleadings.

43. A similar approach had been adopted by His Honour Judge Auerbach in **McLeary v One Housing Group Ltd** UKEAT/0124/18, in which it was found that the particulars of claim ought properly to have been treated as including a complaint of discriminatory dismissal, and in which HHJ Auerbach observed:

> "89. … where it is clear from a claim form and/or particulars of claim, that a lay claimant is saying, factually, I was subjected to discrimination in my employment and this drove me to resign, it is both proper, and incumbent on the Tribunal, to seek clarification of whether such a claim is intended."

44. Indeed, as Laing J stated in **Mervyn** when that case was before her at the EAT ([2019] UKEAT/0140/18):

> "84. … the ET … [has] a duty, if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim, to ensure that the litigant in person does understand the nature of that claim. In addition, if the ET decides that the litigant in person has decided not to advance that claim, the ET should be confident that the litigant in person has withdrawn that claim advertently."

45. In the present case, the question raised by this appeal is whether the ET erred by failing to consider a claim of discriminatory constructive dismissal on the basis that "*it was never one of the tribunal's issues*" (ET, paragraph 22). There is no dispute that a constructive dismissal can give rise to a cause of action under the **EqA** (see section 39(2)(c) and (7)(b)), and that may be the case where the employee has resigned in response

to a "*last straw*", even if that final straw is not itself an act of discrimination: it is sufficient that discriminatory conduct materially influenced the conduct found to have amounted to a repudiatory breach, see per HHJ Auerbach at paragraph 89 **Williams v Governing Body of Alderman Davies Church in Wales Primary School** [2020] IRLR 589. As Cavanagh J observed in **Lauren de Lacey v Wechseln Ltd t/as The Andrew Hill Salon** UKEAT/0038/20:

> "69. ... Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue."

46. The claimant relies on the decision in **Lauren de Lacey** in support of her argument that the ET erred in law in her case in failing to address a claim of discriminatory constructive dismissal. While, however, it is correct that the EAT in **Lauren de Lacey** found it had been an error of law for the ET in that case to fail to deal with such a claim, that failure arose because the ET made the mistake of thinking that the fact that there was no discriminatory course of conduct was determinative of a complaint of discriminatory constructive dismissal; the issue in the present appeal is whether the ET erred in taking the view that such a claim was not before it. **Lauren de Lacey** is, however, relevant to the second ground of challenge in this appeal, on the question of how a finding of discriminatory constructive dismissal (assuming the claimant to be successful on her first ground of appeal) might impact on the question of time limits.

47. Before turning to the legal principles relevant to the second ground of appeal, it is finally helpful to make what might seem to be an obvious point, that identifying the prohibited conduct in issue for the purposes of Chapter 2 of the **EqA** will not stipulate the cause of action relied on for the purposes of (relevantly) section 39 (see per Judge Clarke in **Wytrzyszczewski v British Airways plc** [2023] EAT 7 at paragraphs 9-10).

48. As for the approach to time limits under the **EqA**, the starting point is provided by section 123, which states (relevantly):

> "(1) … proceedings on a complaint … 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.
> (2) …
> (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 (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

49. Where the act to which the complaint relates is a discriminatory constructive dismissal, time runs from the date of the acceptance of the repudiatory breach, not (if earlier) from the date or dates of the discriminatory events that are relied upon as giving rise to, or materially influencing, that breach; see **Nottinghamshire County Council v Meikle** [2004] EWCA Civ 859, at paragraphs 49-53; **Lauren de Lacey** at paragraph 72. As Cavanagh J observed in **Lauren de Lacey**, this may well have the consequence that:

> "72. … a discrimination claim arising out of a constructive dismissal may be in time even if the discriminatory events that render the dismissal discriminatory are themselves out of time. …"

50. Whether or not the earlier events are out of time will inevitably depend upon a fact-specific assessment in the particular case. Where, for instance, the complainant leaves their employment in response to a continuing discriminatory state of affairs, the constructive dismissal will be the final act of conduct extending over a period pursuant to section 123(3) **EqA**. That might be contrasted with the case in which the claim of discriminatory constructive dismissal relies on a succession of earlier, unconnected or isolated, specific acts (albeit those acts might have had continuing consequences), which would not give rise to an act "*extending over a period*" for these purposes; see **Hendricks v Metropolitan Police Commissioner** [2003] EWCA Civ 1686; [2003] IRLR 96 CA, *per* Mummery LJ at paragraph 52.

51. In determining whether the acts complained of in any particular case amount to conduct extending over a period for the purposes of section 123 **EqA**, or whether they are properly to be understood as isolated and separate acts, each giving rise to its own time limit, it can be relevant to ask whether there is a common thread that links the matters relied on – for example, a common personality - such as might demonstrate a discriminatory campaign or regime; see **Southern Cross Healthcare v Owolabi** UKEAT/0056/11 and **Veolia Environmental Services UK v Gumbs** UKEAT/0487/12. Alternatively, it might be necessary to consider whether the initial act or decision was such as to initiate a process of further acts, which cannot then be seen

(*per* Hendricks) as "*a succession of unconnected or isolated specific acts*"; see **Hale v Brighton and Sussex University Hospitals NHS Trust** UKEAT/342/16.

52. Where, however, the complaint relates to a failure to make reasonable adjustments, that is to be treated as falling within section 123(3)(b) **EqA** and, therefore, to have occurred when the relevant person decided on it (and see, under the legacy statute, **Kingston Upon Hull City Council v Matuszowicz** [2009] IRLR 288 CA). The decision to thus fail to make reasonable adjustments is, in the absence of evidence to the contrary, to be deemed to have occurred either when the decision-taker does an act inconsistent with that duty, or at the end of the period during which they might reasonably have been expected to undertake an act consistent with it (section 123(4) **EqA**). Unpacking those provisions, in the light of the nature of the duty to make reasonable adjustments as laid down by section 20 **EqA**, in **Fernandes v Department for Work and Pensions** EA-2022-000277, His Honour Judge Beard observed as follows:

> "16. …a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled person arising from a [provision criterion or practice] (presuming the knowledge requirements are met) and failure to make the adjustment is a breach 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 the 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."

53. As with the determination of continuing act, answering the questions posed by section 123(4) requires a fact-specific assessment by the ET, with which the EAT should not interfere save where there is an error of principle in the approach, or where the ET has failed to have regard to a relevant matter or has taken account of that which is irrelevant, or has reached a conclusion that is properly to be described as perverse. More generally, in considering the ET's decision for the purposes of both grounds of appeal, I keep in mind the principles summarised by Popplewell LJ at paragraphs 57-58 **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672.

Analysis and Conclusions

54. In considering the first ground of appeal, it is helpful to start with what is not in dispute. First, as part of her pleaded case, the claimant had made clear that her claims of disability discrimination

under the **EqA** included a complaint of discriminatory constructive dismissal, relied on as "*the last act of discrimination*" and "*the final act of discrimination … due to my mental health disability*". Second, although the claimant was directed to provide further clarification of how her case was put, that was in relation to the various forms of prohibited conduct on which she relied; at no stage was she asked to clarify the particular cause of action engaged under section 39 **EqA**. Third, in responding to the respondent's draft list of issues, the claimant had included the various matters she relied on as giving rise to the constructive dismissal; thus, the particulars provided under the heading "*Unfair Constructive Dismissal*" had included allegations that were also relied on as acts of disability discrimination under the various headings for the different forms of prohibited conduct that were said to be in play. Fourth, although the claimant had not then repeated her complaint of constructive dismissal under each of the different prohibited conduct headings, at no stage was she asked whether she had withdrawn that claim, which had been made plain (one might say (*per* **Mervyn** and **McLeary**) "*shouted out*") from the case she had originally pleaded.

55. In his carefully balanced submissions for the respondent, Mr Hodge contended that, notwithstanding the apparent failure to clarify with the claimant whether she had in fact intended to withdraw her pleaded claim of discriminatory constructive dismissal, the ET was entitled to proceed on the basis that, had this remained a live cause of action, the claimant could reasonably have been expected to have identified the act of constructive dismissal under each relevant prohibited conduct heading. In my judgement, however, this would be to elevate the list of issues to the status of a pleading. Instead of being a useful tool of case management, it would become a formal replacement for the claim; that is neither its function nor its purpose. As the Court of Appeal made plain in **Parekh**, an ET should not stick slavishly to the agreed list of issues where to do so would impair its core duty to hear and determine the case before it. In the present proceedings, that case had included a claim of discriminatory constructive dismissal, which had never been withdrawn. Moreover, the fact that this claim had been missed from the list of issues was entirely explicable from the focus on the different forms of prohibited conduct and the apparent failure to also ask the claimant to clarify (to the extent that that would have been considered necessary) the specific way/s she was putting her case under section 39. Whether the ET's failure to recognise that this was an issue in the case is characterised as "*perverse*", or as a straightforward error of law in failing to address a claim that it was required to

determine, I am satisfied that it was wrong in law for the ET to decline to determine the claim of constructive discriminatory dismissal that was before it. I therefore uphold the claimant's first ground of appeal.

56. To the extent that the claimant succeeds on her first ground of appeal, it is common ground between the parties that the findings made by the ET would allow for only one conclusion: that (*per* **Lauren de Lacey**) the claim of discriminatory constructive dismissal must be upheld. It is equally accepted by both sides that, as a consequence, in place of the ET's ruling that it had no jurisdiction to determine the claimant's **EqA** claims because they were submitted out of time, I must substitute a finding that the claim of discriminatory constructive dismissal, brought under sections 15, 21 and 39(2)(c) **EqA**, was brought in time and is upheld. In those circumstances, it is further agreed that this matter must be remitted so that the question of remedy may be revisited; in this regard, I am told that there has been a remedy hearing in this case and an award was made in respect of the claim of constructive unfair dismissal but that: (i) was subject to the statutory cap, which would not apply to a successful dismissal claim under the **EqA**; (ii) included no sum for injury to feelings

57. Given that outcome, the answer to the second ground of appeal might seem to be rather academic. As, however, the question whether the two earlier acts of discrimination were part of an in-time continuing act might arguably still be relevant to issues of remedy, I have, in any event, gone on to consider this as well.

58. If taken seen in isolation, I do not consider that the ET's approach to the two discriminatory acts in issue reveals any error of analysis under section 123 **EqA**. The first in time was the respondent's failure to make a reasonable adjustment in relation to the seating arrangements at the claimant's workplace. In that regard, as the ET found, the respondent's position was made clear at meetings on 19 and 27 December 2017. Applying section 123, the ET was entitled to find that the latest possible date was 27 December 2017, whether that was taken to be the date of the respondent's decision (section 123(3)(b)), or the date of an act inconsistent with its section 20 duty (section 123(4)). As for the second matter, I can see that there might be some circumstances whereby telling an employee that they will not be returning to their role might, *per* **Hale**, be the start of a process that then leads to a number of connected steps, all of which is properly to be considered as conduct extending over a period for the purposes of section 123 **EqA**. Whether or not that is so, however, must

be a matter of fact for the ET to assess, and I am unable to say that the factual matrix in the present case was such that it can properly be said that it was not open to the ET to determine that this was in fact a one-off act with continuing consequences.

59. As Mr Hodge acknowledged in argument, however, the position potentially changes once it is allowed that there was a discriminatory constructive dismissal. The claimant says that, adopting a holistic approach, that must lead to the conclusion that that was the last act in a course of discriminatory conduct, which had extended over a period, in particular given that the different steps involved (the failure to make the workplace adjustment; telling the claimant she could not return; the constructive dismissal) all involved the same person, W (*per* **Southern Cross** and **Veolia**).

60. Accepting the potential relevance of the points made by the claimant, I am, however, unable to see that this is a matter that is only capable of one answer. As the EAT observed in **Lauren de Lacey**, an **EqA** claim of constructive dismissal may be in time even if the discriminatory events that mean that the dismissal is also an act of discrimination are out of time. Applying **Jafri v Lincoln College** [2014] ICR 920 CA, I consider this is a question that is properly to be answered by the ET.

Disposal

61. For the reasons explained above, I therefore allow this appeal and, in place of the ET's ruling that the claimant's **EqA** claims were to be dismissed, I substitute a finding that the claim of discriminatory constructive dismissal, brought under sections 15, 21 and 39(2)(c) **EqA**, was brought in time and is upheld.

62. In those circumstances, I further direct that this matter be remitted to the ET for re-hearing as follows:

(1) On the question whether the two acts of discrimination recorded at paragraph 3 of the original liability judgment (promulgated 15 January 2020) are properly to be considered as falling within section 123(3)(a) **EqA**, as amounting to conduct extending over a period ending with the claimant's constructive dismissal, and, therefore, as being in time.

(2) On the question of remedy.

63. The claimant has submitted that remission should be to a differently constituted ET, having now lost confidence in the original ET. The respondent is neutral on this question.

64. Accepting that the claimant may feel that she has not been well-served by the process, I bear in mind that this is a case where an ET has made a number of findings of fact that will inform the conclusion reached on the first of the remitted issues. Moreover, although I have not been provided with a copy of the remedy judgment, the ET will necessarily also have made various assessments relevant to the question of loss that will be relevant to the second remitted issue. Allowing that some time has passed, I still take the view that the same ET will be better placed to determine the questions raised on remission. Furthermore, this is not a case where there can be any suggestion of bias or pre-judgement; indeed, on the first remission, the ET demonstrated its professionalism in revisiting the question of dismissal and arriving at a different decision. Having regard to the guidance provided in **Sinclair Roche & Temperley v Heard and anr** [2004] IRLR 763 EAT, I therefore direct that, to the extent that it remains practicable, this matter should be remitted to the same ET.