

# Equality Act 2010 time limits – a question for the Full Merits Hearing?

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[ ] paragraph number of EAT judgment

It is well established that the ET should be conscious of the difficulties associated with determining time limit issues under s.123 Equality Act 2010 at a Preliminary Hearing ('PH'): discrimination claims are fact-sensitive; it may be difficult to disentangle time points from other issues in a case and, if matters held to be out of time may be relied on as background evidence in any event, it is likely to be disproportionate to hold a PH.

Notwithstanding the above, in some cases there are sound reasons for seeking to address time limits at a PH rather than a Full Merits Hearing. However, lessons should be learned from the following two EAT judgments. The first considered the correct approach at a PH to determining whether it is just and equitable extend time (s.123(1)(b) Equality Act 2010). The second dealt with what must be established in order for a Claimant to bring his claim in time by relying on 'conduct extending over a period' (s.123(3)(a) Equality Act 2010).

## ***Caterham School Limited v Rose* UKEAT/0149/19/RN**

In *Caterham School Limited v Rose*, the ET held a PH to determine whether it had jurisdiction to consider the claim (in whole or in part) in light of the statutory time limit. In the EAT there was a dispute about what the ET had actually determined at the PH: on behalf of the Claimant it was argued that the ET had only concluded that there was a *prima facie* case that there was conduct extending over a period (such that a final determination would have to be made at the Full Merits Hearing). The EAT disagreed; the ET had in fact made a final determination to the effect that there was conduct extending over a period and that it was just and equitable to extend time. In light of the EAT's conclusion on this point, it was agreed

that the ET had erred in law because it had not heard any evidence [para 45]. The appeal was therefore allowed with the consequence that the question of whether there was conduct extending over a period and/or whether it would be just and equitable to extend time was a live issue to be determined at the Full Merits Hearing.

In the judgment, His Honour Judge Auerbach emphasised the need for clarity when time limit issues are considered at a PH: is the ET considering whether the claim should be struck out (or made the subject of a deposit order), or is it making a substantive determination? Where the PH is to determine a strike out/deposit order application, matters may be dealt with on the basis of the pleadings alone, but where a substantive determination is being made, such that the matter cannot be revisited at the Full Merits Hearing, evidence is required [paras 58-65].

### ***South Western Ambulance Service NHS Trust v King*** **UKEAT/0056/19/OO**

In *South Western Ambulance Service NHS Trust v King*, the issue was whether ‘an alleged act of discrimination can be said to be part of “conduct extending over a period” within the meaning of s.123 of the Equality Act 2010 (“the 2010 Act”) where that alleged act is found not to be discriminatory’ [para 1].

In short, the Claimant lodged a grievance complaining of, inter alia, discrimination; her ET claim was that she had, thereafter, been subjected to various acts of detriment because of that grievance (including the consequent grievance report and various steps which followed it). Accordingly, the Claimant argued that she had been subjected to unlawful victimisation (section 27 Equality Act 2010). The grievance report was dated 8/3/17. The Claimant resigned with an EDT of 5/10/2017. The claim was presented to the ET on 11/12/2017.

While the ET found that the grievance report itself was a detriment, none of the later acts relied on by the Claimant were found to amount to amount to unlawful conduct. Therefore, taken on its own, the complaint in respect of the 8/3/17 grievance report was significantly out of time. However, the ET concluded that there was conduct extending over a period and that the claim was therefore in time.

The Respondent appealed against the ET’s decision on the time limit point. The appeal was allowed: an individual act complained of cannot constitute conduct extending over a period

unless it is both established on the facts *and* found to be discriminatory [para 36]. The EAT substituted a finding that there was not conducting extending over a period; the case involved a single act of victimisation.

However, the ET had not addressed the question of whether, in the circumstances, it would be just and equitable to extend time (a matter which had been included in the list of issues). Although there was no direct evidence on the point, it was held that the ET would be entitled to consider the issue in light of the ‘full panoply’ of evidence before it, from which inferences might be drawn [para 53]. The case was therefore remitted back to the same ET to consider the question of whether time should be extended, on just and equitable grounds, in respect of the sole act of victimisation established.

### ***Comment***

While it clear from *Caterham School Limited v Rose* that an ET may, in appropriate cases, substantively determine whether it is just and equitable to extend time at a PH, provided that it hears evidence, it appears to follow from the judgment in *South Western Ambulance Service NHS Trust v King* that it will rarely (if ever) be appropriate for the question of whether a particular act is in time, by reason of it being part of conduct extending over a period, to be determined at a PH. This is because such a determination necessarily requires a final conclusion to be reached as to whether the acts complained of amount to unlawful discrimination. It therefore appears that, in practice, where it is argued that a claim is in time by reason of s.123(3)(a) Equality Act 2010, a final hearing is unavoidable unless the ‘no reasonable prospect of success’ (strike out) test can be satisfied at a PH.



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