

Limitation: What type of “conduct” can form part of a “course of conduct” for EqA 2010 limitation purposes?

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South Western Ambulance Service NHS Trust v Mrs King (UKEAT/0056/19/00)

(Decision date: 31st October 2019; Publication date: 21st November 2019)

The Issue

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 (‘EqA’) where that alleged act is found not to be discriminatory.

The Facts

1. C was employed by R from 21 November 1991 until her resignation on 5 October 2017. At the time of her resignation she held the substantive post of Operations Manager North and mid-Devon, although she was on secondment in another post.
2. On 22 October 2016 she lodged a grievance against her managers complaining of, amongst other things, acts of discrimination. Her grievance was the subject of a report produced by an external consultant which was dated 8 March 2017. The report dismissed the grievance. Her grievance and her grievance appeal were dismissed. Dissatisfied with the grievance outcome and R’s failure to take action against one manager in particular, she resigned, claiming that she was constructively dismissed. Her effective date of termination was 5 October 2017.
3. On 11 December 2017 C issued proceedings claiming unfair constructive dismissal and victimisation on the grounds that she had done a protected act under the EqA. C relied upon her grievances as her protected acts for the purposes of s.27(2) EqA. C contended that she had been subjected to a number of detriments due to lodging her

grievance, including inadequate investigation into her complaints by the external consultant, rejection of her grievance on 7 April 2017, R's attempt to persuade C to drop her appeal, the decision to delay C's return from secondment to her substantive post, and the rejection of her grievance appeal on 11 September 2017. Only the rejection of her grievance appeal fell within the 3 month period (plus the conciliation period) prior to the date of issuing her claim. R resisted those claims and raised a jurisdictional issue that any allegations that pre-dated 27 August 2017 (i.e. 3 months and 16 days prior to the receipt of the claim form) were out of time.

The ET (*EJ Matthews at Exeter ET*)

4. The ET rejected the claim of unfair constructive dismissal. In relation to victimisation, it found that the report itself did amount to a detriment (the investigator having approached it as an exercise in determining risk and damage limitation). However, none of the other matters relied upon, including the rejection of her appeal against the grievance decision, were found to amount to a detriment. Nonetheless the ET concluded that there was a course of conduct commencing with the report and which continued to the rejection of C's appeal. On that basis, C's claim was held to be in time. R appealed.

The EAT (*Choudhury P*)

5. Allowing the appeal, the EAT said that the ET had erred in concluding that there was conduct extending over a period within the meaning of s.123 EqA, in circumstances where several of the acts said to be part of that course of conduct were not upheld as acts of victimisation.
6. Choudhury P reiterated that the leading authority as to whether an act can be said to be extending over a period is Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 ('Hendricks')¹.
7. He states that Hendricks demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (or, as it is sometimes called, a "continuing act"). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example is where separate acts of discrimination are linked to one another and are *evidence* of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act

¹ Paragraph 20 of the Judgment.

arises because of the link or connection between otherwise separate acts of discrimination².

8. If the time issue is raised at a preliminary stage, C merely needs to establish a *prima facie* case that there is such a continuing act. However, once a Tribunal has made full findings of fact at a substantive hearing, the conclusion may be that there was no continuing act at all³.
9. Given that the time limits are such as to create a jurisdictional hurdle for C, if, ultimately, the acts relied upon are found not to form part of conduct extending over a period so as to enlarge time, then the claim would fail, unless, that is, the ET considers that it would be just and equitable to extend time in respect of any acts that are proven but out of time⁴.
10. Choudhury P went on to state that in order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, C will usually rely upon a series of acts over time (“constituent acts”) each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If an ET considers several constituent acts taking place over the space of a year and finds only the 1st to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over a year. To hold otherwise would be to render the time limit provisions meaningless. That is because a C could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were not held to be discriminatory⁵.
11. He added that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. C must still establish constituent acts of discrimination or instances of less favourable treatment that *evidence* that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are not found to

² Paragraph 21 of the Judgment.

³ Paragraph 22 of the Judgment.

⁴ Paragraph 23 of the Judgment.

⁵ Paragraph 33 of the Judgment.

be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs⁶.

12. In the appeal, C sought to rely upon 2 EAT decisions in support of the contention that there can be a continuing act even if some of the detriments arising as a result of that protected act are not established: the first was Richmond v Knowsley Metropolitan Borough Council (UKEAT/0047/13/DM). In that case, the EAT, HHJ McMullen QC presiding, held that once the disciplinary process was started, all steps taken in accordance with that process were part of the continuing act; the other was Hale v Brighton & Sussex University NHS Trust (UKEAT/0342/16/LA), where Choudhury P himself held that the decision to initiate a disciplinary procedure created a state of affairs that would continue until the conclusion of the disciplinary process and that there was therefore a continuing act, not merely a one-off act with continuing consequences⁷. However, Choudhury P in King took the view that Hale did not assist C.
13. Accordingly, the EAT substituted a decision that there was no conduct extending over a period. The case was remitted to the ET for it to determine whether time should be extended on just and equitable grounds.

Comment

14. The consequence of King is that there is now conflicting EAT authority on this issue, such that claimants and their representatives might continue to try and rely upon the Richmond and Hale cases and respondents and their representatives upon King. Whilst this conflict should ideally be resolved by the Court of Appeal in order to provide clarity on the issue, the fact that Choudhury P considered the Richmond and Hale cases in King and the fact that King is the most recent case should be indicative that ETs should follow King.



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⁶ Paragraph 36 of the Judgment.

⁷ Paragraph 30 of the Judgment.