

Equality Act claims: causation and limitation

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[Worcestershire Health and Care and NHS Trust v Ms Allen \[2024\] EAT 40](#)

The facts

R undertook a restructuring exercise. It seems that there was a dispute as part of this exercise as to whether an alternative role on a lower grade had in fact been accepted by C. During or following the exercise C became unwell and was in due course dismissed, purportedly for ill health absence.

ET

Post dismissal C submitted a claim to the ET bringing a large number of complaints of age and disability discrimination.

Following a final hearing most of the complaints were dismissed; however some succeeded, namely:

The first age harassment decision

- Ticking a box on R's occupational referral form on 19 February 2017 asking OH to comment upon C's "retirement due to ill health" - harassment related to age;

The second age harassment decision

- Predetermining the outcome of C's grievance on 18 January 2018 - harassment related to age; and

The disability discrimination decision

- Dismissing C on 22 May 2018 - discrimination because of something arising in consequence of disability.

Only the third item was inside the primary limitation period. However, the ET nevertheless found the claims to be within its jurisdiction, in essence on the grounds of forming part of conduct extending over a period.

EAT

The individual claims

By the time of the final hearing at the EAT, there was no live appeal against the first age harassment decision referred to above or the disability discrimination decision.

As to the second age harassment decision, which pertained to the predetermination of the grievance outcome, the focus of the EAT's analysis was on whether that conduct had been "related to age".

On that matter, the ET had stated:

"This is also, in our view, related to age. One of the key complaints C was making was about the age discrimination – it has been a consistent complaint of C throughout. The grievance panel did not even consider that Ms Furlow might have, consciously or unconsciously, discriminated against C because of her age. They simply adopted the assumption that initially came from Nicky Pilgrim that the box on the Referral form was a mistake."

As the EAT had pointed out, the fact that the grievance had been about age did not demonstrate the necessary link:

"It was the prejudgment of the grievance that constituted the "conduct" that had to be "related to" age."

Furthermore, the ET had rejected a direct discrimination claim on the same point; in doing so it had stated:

"We have not heard any evidence from which we could conclude that the approach of the panel was because of age or disability. In our view, it was conducted in the way it was because of R's grievance policy."

In the circumstances the EAT upheld the appeal. As explained by the EAT:

"Nothing has been identified that could establish that the prejudgment of the grievance was related to C's age"

The EAT did not see fit to remit the point. Rather, given that there was only one possible outcome, the EAT substituted a decision rejecting the Complaint.

C cross-appealed in respect of some of the complaints which had been rejected. However, the EAT did not uphold any of those points.

Limitation

That left R's appeal on limitation to be addressed. In light of the EAT's decisions, the claims left standing were:

The first age harassment decision

- Ticking a box on R's occupational referral form on 19 February 2017 asking OH to comment upon C's 'retirement due to ill health' - harassment related to age; and

The disability discrimination decision

- Dismissing C on 22 May 2018 - discrimination because of something arising in consequence of disability.

As part of its appeal R argued that "conduct extending over a period" for the purposes of s123(3) EqA must, as a matter of law, all relate to the same protected characteristic. The EAT did not accept this argument. As explained by the EAT:

"It may be more difficult to establish that there has been discriminatory conduct extending over a period where the acts that are said to be linked relate to different protected characteristics and different types of prohibited conduct, but there is no absolute bar that prevents there being conduct extending over a period in such circumstances."

However, there remained the question of whether the matters did nevertheless fall within s123(3), i.e. conduct extending over a period.

The ET had found:

"However, all of the issues arose from the change management process and the removal or proposed removal of C's job.

.....

Although the incidents are separated in time and we have found most of the intervening events not to be discriminatory, in our view these three incidents are intrinsically linked

with each other. In reality, and from C's perspective, everything from the November 2016 meeting has been linked and a continuation of a process and actions. This culminated in C's discriminatory dismissal.

In our judgment, therefore, all of these actions are part of a continuing course of conduct – there was an ongoing state of affairs relating to the change management, the ill health retirement question and C's illness and latterly disability. All of these issues were inextricably linked.”

The EAT referred to the leading authority on the issue, namely *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686, [2003] ICR 530 and pointed out the need to show “an ongoing situation or a continuing state of affairs that was discriminatory”.

The EAT took the view that the ET had not identified any “continuing discriminatory conduct”.

The EAT acknowledged that the differing decision makers for the two matters in question, the significant gap of time in between and the differing protected characteristics involved did not necessarily prevent there being “conduct extending over a period” for the purposes of s123(3).

However, the EAT went on to point out that the ET had not identified “anything that could establish a continuing discriminatory state of affairs”. The EAT substituted a decision that there was no conduct extending over a period.

The matter was remitted to address whether or not time should be extended for the first claim on just and equitable grounds.

Comment

It is not at all uncommon for complaints of discrimination, harassment and/or victimisation to be made on the basis of a grievance outcome, especially when the subject matter of the grievance itself concerns alleged discrimination. However, such claims are often pursued without proper foundation.

This decision constitutes a useful authority for employers to rely on to ensure that the key causation issue in such claims is approached by focusing on the conduct of the employer in handling the grievance, rather than the subject matter of the grievance itself.

The decision also assists employers on the issue of limitation. A regular scenario for employers to face is that of Equality Act claims based on multiple allegations going back years.

Such claims routinely adopt the argument that they are all based on conduct extending over a period.

In *Hendricks* the Court of Appeal concluded that the ET had not erred in permitting the claimant's claim to continue. However that was in the circumstances of the limitation point having been addressed as a preliminary issue. i.e. with C's claim being taken at its highest. In contrast the instant decision was made within the context of full findings of fact having been made.

Employers will be able to use the instant case to highlight that it is not enough for a claimant's various EqA claims to be based on matters all falling within a linked factual background; rather an ET must be able to identify "continuing discriminatory conduct", which is something different.

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