

Is a policy-based decision a one-off event or conduct extending over a period?

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Mr Parr v MSR Partners LLP [2022] EWCA Civ 24

The facts

C had enjoyed a long career at R. He had been a salaried partner since 1998; and he later became an equity partner. In 2005 R changed from being a partnership to a LLP. C continued in his position as equity partner.

There was a Membership Agreement pertaining to the LLP. As part of the Membership Agreement a “Normal Retirement Date” was specified (for equity partners and others), subject to clause 29.4, which stated:

“Subject to the approval of the partnership committee, the Managing Partner may extend the Normal Retirement Date of an individual Member in circumstances where that Member indicates he wishes to continue as a Member or if the Managing Partner asks the Member to continue as a Member. The Managing Partner may only agree to such an extension where he objectively considers that there is a valid business case for so doing, having reference to the on-going contribution to the LLP Business by the Member concerned and the matters set out at clause 29.5. Any agreed extension shall be for a specific period of time, the conclusion of which will represent the Member's Normal Retirement Date and shall be on such terms as to remuneration and otherwise the Managing Partner may determine. The Managing Partner may alternatively agree that any retired Member may be employed by the LLP on such terms as the Managing Partner shall determine.”

In at least three instances (other than C’s case) the discretion set out within clause 29.4 had been utilised. On those occasions the decision had been taken to permit equity partners to continue beyond their normal retirement date (and to do so as equity partners).

The NRD for C would have been 30 April 2018 (soon after his 60th birthday). In advance of that date, he proposed to R that he should continue.

The Managing Partner recommended to the Partnership Committee that he should be permitted to do so, but not as an equity partner (he did not consider that C was contributing to the business as an equity partner should). The Committee accepted the Managing Partner's recommendation.

In accordance with that decision, on 13 October 2017 the parties entered into what has been referred to as a "De-equitization Agreement". In essence, by virtue of this agreement, C would not retire on 30 April 2018. Rather he would continue, albeit not as an equity partner but rather as an ordinary partner.

It seems that, although C entered into the De-equitization Agreement, he did so despite being discontent with the matter. That said he was not, at the time, aware of the financial impact which his loss of equity status at that juncture would in fact lead to.

A few months after the "De-equitisation Agreement" date, but prior to C's change of status at end of April 2018, a decision was made by R to sell parts of the business and a potential merger was considered. Further to that, in or around February 2019 R was transferred to BDO and certain parts of R were sold to other buyers.

C later asserted at ET that, if he had been permitted to retain his equity partner status, he would have been the recipient upon the sale of the business of just short of £3 million.

The ET

C presented a claim to the ET in January 2019. He complained of direct age discrimination.

A preliminary hearing was listed to determine whether or not the act/s complained of amounted to conduct extending over a period and whether the claim had been issued in time.

The ET took the view that the "de-equitisation" of C had in essence been a demotion. C had been demoted from equity partner to fixed share partner, a role in which he thereafter continued, suffering ongoing loss.

The ET viewed clause 29 of the Membership Agreement as a "rule". Further the ET took the view that, whilst the rule (clause 29) continued, it was a continuing act and a continuing state of affairs which resulted in less favourable treatment given that C had reached the age of age of 60.

The ET was alive to the fact that discretion appeared within clause 29. However, that did not alter the ETs' view of the matter.

The ET explained that as follows:

- “while the respondent operated a rule that resulted in demotion at age 60, being less favourable treatment because of age, time would only begin to run from when the rule was abrogated. The reason why the claimant was not in the role that he wanted to be in, that of equity partner rather than fixed share partner, was because of the existence of the rule in clause 29.”

It seems that the ET was influenced in that regard by *Amies v. Inner London Education Authority* [1977] I.C.R. 308 (and *Barclays Bank plc v Kapur* [1991] 2 AC 355). In *Amies* it had been stated:

- “So, if the employers operated a rule that the position of head of department was open to men only, for as long as the rule was in operation there would be a continuing discrimination and anyone considering herself to have been discriminated against because of the rule would have three months from the time when the rule was abrogated within which to bring the complaint.”

The Employment Appeal Tribunal

R appealed to the Employment Appeal Tribunal. The appeal was upheld.

The Court of Appeal

C appealed to the Court of Appeal. C sought to argue that, for as long as clause 29 was in place, the discrimination continued.

By way of contrast R argued that the “Deequitisation Agreement” was a one-off act. Loss may thereafter flow from that act but the act itself did not constitute conduct extending over a period; or at least not beyond the date of demotion in April 2018.

The Court dismissed the appeal. The Court accepted what was termed as R’s central argument, i.e. that clause 29.2 could only be applied once to any individual. In C’s case it was applied on 30 April 2018, i.e. the date of demotion.

Whether one treats the conduct as having occurred upon the De-equitisation Agreement of October 2017 or upon the date of demotion of 30 April 2018, or whether the conduct fell to be treated as extending over a period between those two dates, either way the claim was out of time.

The Court found it useful to compare the situation with the dismissal. If the dismissal had taken

effect on 30 April 2018 time would have started to run. That is despite ongoing loss. The Court could see no good reason to treat the demotion differently.

The Court was unwilling to view the ongoing existence of clause 29 as a discriminatory act. A key factor in that regard was clause 29.4, which allowed for discretion, and the fact that such discretion had been applied in various cases.

It was held that a distinction had to be drawn between a rule which inevitably leads to the rejection of a claimant and one which involves the exercise of discretion. The former would constitute a continuing act or conduct extending over a period, but in the case of the latter the same does not apply.

The matter was remitted to the employment tribunal. The ET had not on the first occasion dealt with the question of just and equitable extension; as such that matter remains to be addressed.

Comment

There are various authorities addressing the question of whether a rule or policy constitutes a continuing act or conduct extending over a period; and in what scenarios there is instead a one-off act. They are fact specific. Seeking to advise as to how an ET is likely to approach such a point in any particular case, depending on the facts, can be difficult. Indeed, ET will sometimes find themselves taking a wrong turn in such areas, as occurred in this case.

This Court of Appeal authority provides considerable assistance to practitioners in this regard.

The Judgement is not long. It nevertheless references and analyses the key authorities in this area.

It sets out, within a relatively clear and straightforward factual scenario, the significant distinction to be drawn between a rule which allows for discretion when the relevant decision is made and a rule which has an inevitable result on those affected.

Any practitioner seeking to advise on the issue of limitation within the context of a rule/policy - based decision is likely to find this authority of considerable assistance.

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