Consideration of acts, omissions and conduct extending over a period, for the purposes of calculating time in a reasonable adjustments case

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Janet Kerr v Fife Council UKEATS/0022/20/SH

1. The Honourable Lord Fairley, sitting in the EAT in Edinburgh, considered an employment tribunal's decision that a reasonable adjustments claim, under **s.20 Equality Act 2010**, was time-barred because there was no "conduct extending over a period" under **s.123(3)(a) EqA 2010** and it was not just and equitable to extend time under **s.123(1)(b) EqA 2010**. Judgment was handed down on 9th June 2021.

2. As employment practitioners know, **section 123 EqA 2010** states in relation to time limits:

"(1) …Proceedings on a complaint [of discrimination in employment] 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...

(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."

The relevant facts

3. The Claimant (also the Appellant), Ms Kerr, is a teacher who has Parkinson's Disease ("PD"), She brought a disability discrimination claim against her employer for an alleged failure to make reasonable adjustments by failing to:

   a) adjust her shift pattern to accommodate the symptoms of fatigue associated with PD; and
   b) re-classify the reason for her absences from work so that her pay would not be adversely affected.

4. The Claimant (C) argued before the ET that her pattern of work was changed by the Respondent (R) and became unmanageable due to her PD symptoms. Her health suffered as a result.

5. The evidence, mainly noted in the ET's judgment, suggested the following relevant dates for the purposes of calculating time:

13 Aug 2018	C advised her GP that the *"working pattern which allows her to continue to work will only be extended until October".*
Aug 2018	Sickness absence commenced.
10 Sept 2018	C told her GP *"problems at work due to shift / work pattern changes".*
Nov 2018	Union asked the Respondent to reclassify the reason for her absence so that her pay would not be adversely affected. Discussions about the proposed adjustments were on-going between the parties until Jan 2019.
Feb 2019	Pay reduced to nil.
May 2019	ET1 presented.

6. The EJ made no findings of fact about (1) when the decision to alter the C's shift pattern was made by the R; or (2) when that decision was put into effect; or (3) any request by the C for reclassification; or (4) the outcome of any such request.

The ET judgment

7. The EJ stated:

> *"In order to come to a decision on time bar the first matter which I had to consider is the date of the act to which the complaint relates. It is clear that the focus of the claimant's claim is on the decisions of her Head Teacher in relation to her work pattern, the last of which occurred in 2018 and the reclassification of her pay which her union asked for in November 2018… It therefore seems to me to be absolutely clear that...the matters referred to in the [Appellant's] claim were fully complete by around November / December 2018. The claim form was not submitted until 14 May 2019 and was therefore submitted outwith the primary three month period. It should be noted that I considered but rejected the argument that the claimant is still subject to an ongoing continuous act. It is clear that what the claimant complains of are various decisions which were made in the past."*

8. The EJ also stated he was unclear on the evidence about when reclassification of the reason for the Appellant's absence was refused but had applied the presumption in **section 123(4)(a) EqA 2010** to find that since the Respondent had continued to pay the Appellant on an un-reclassified basis after November 2018, that decision must be taken to be deemed to have happened in November / December 2018 at the latest. The EJ then determined that it was not just and equitable to extend time to enable the C to claim in May 2019 when the claims were issued.

The decision of the Scottish EAT

9. Lord Fairley examined the authorities in relation to "conduct extending over a period", including ***Kingston upon Hull City Council v Matuszowicz*** [2009] ICR 1170; ***Olenloa v North West London Hospitals*** EAT 0599/11***; Abertawe Health Board v Morgan*** [2018] ICR 1194 and ***Mears Group v Vassall*** EAT 0101/13.

10. Lord Fairley then concluded that the EJ had erred at law by treating the claim regarding the shift pattern as relating to an "act" instead of an omission to make a reasonable

adjustment. This meant that he failed to consider whether there was conduct extending over a period. The EJ found that time should run from the unspecified date "in 2018" when the revised shift pattern was introduced. According to ***Abertawe Health Board,*** it was an error of law to assume that the date when the PCP first came into being was necessarily the same date from which limitation ran. In this claim, the relevant start date for the purposes of limitation was the date by which the R, having introduced the PCP, positively decided not to make an adjustment to it or, in the absence of evidence about such a decision, the date of either (as specified in **s.123(4)):** when R did an act inconsistent with deciding to make an adjustment, or on the expiry of the period in which R might reasonably have been expected to make an adjustment.

11. The factors under **s.123(4)** should be viewed from the perspective of the claimant. Lord Fairley considered the injustice of determining from the employer's point of view, for example, the period in which R might reasonably have been expected to make an adjustment. The C might not be aware that the R is doing nothing about a request for an adjustment, but instead C might be thinking that the R is still considering the proposal or working towards implementing the adjustment. If it were the case that the tribunal could determine that it would have been reasonable to expect the employer to make the adjustment within one month of the request, and time should therefore run from then, the claim could be out of time before the employee appreciated that the employer was doing nothing about her request for adjustments. The same applies to the "inconsistent act" default under **s.123(4**) – it must be what the employee would or should have appreciated as an inconsistent act, not what the tribunal determines would have been an inconsistent act from the employer's perspective.

12. In relation to the issue of reclassification of pay, Lord Fairley assumed that the EJ had made a finding of fact that there was a union request for the reclassification of pay, and that the R's maintenance of the status quo (continuing to pay the C on a non-reclassified basis) was inconsistent with the making of the desired adjustment. Lord Fairley observed, however, that determining that the maintenance of the status quo was inconsistent with making the adjustment, could lead to the very type of prejudice identified in ***Abertawe Health Board.*** The Claimant might not become aware that the request for an adjustment has been refused in circumstances where the status quo is maintained. The EJ's Reasons were silent on the ongoing discussions up to January 2019 before the pay was reduced in February 2019. There was no attempt by the EJ to identify what facts the C knew or ought reasonably to have known at the relevant time, and therefore no assessment, from the C's

point of view, of when C would have appreciated that an act on the part of the R was inconsistent with the making of an adjustment.

13. Given that the EJ did not determine the precise start of the limitation period, the appeal based on whether it was just and equitable to extend time, also succeeded. According to ***Olenloa,*** it is an essential pre-requisite to consideration of whether or not to allow a just and equitable extension of the primary time limit, to determine the date from which time started to run.

Learning points for practitioners

14. Practitioners dealing with time bar points in discrimination cases should be mindful of this case in the Scottish EAT, in order to guide the tribunal not to fall into error. It is important that the **s.123(4)** default positions are assessed from a claimant's point of view, so findings of fact will need to be made about what a claimant knew or ought to have known at various points. In any case considering a just and equitable extension under **s.123(1)(b)**, the tribunal must also make a determination about when time started to run. These might be difficult determinations to make at a preliminary stage, but representatives should encourage tribunals to tread this course carefully to avoid successful appeals in future.

15. This authority should also be a salutary reminder to be careful when pleading dates of acts / omissions in **s.20** claims. It is a good idea to make clear, at the pleadings stage if possible, that the date when the PCP first came into being is not necessarily the same date from which limitation runs, and the date when time starts to run must be assessed from the employee's perspective. If this is made clear at an early stage, strike-out applications related to limitation may be avoided.

9 August 2021

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