

# What is “conduct extending over a period” and how and when should that question be determined?

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**L v 1) X 2) Z & 3) E UKEAT/0080/20/RN**

*It is not uncommon for claimants in discrimination cases to complain of a number of matters going back in time and, in order to bring all of their complaints within time, to argue that those matters constituted “conduct extending over a period” within the meaning of section 123 of the Equality Act 2010 (section 123). In this appeal, the EAT considered the principles relevant to determining whether there was “conduct extending over a period” (sometimes referred to, by way of shorthand, as a “continuing act”) for the purposes of section 123 and provided a useful summary of the relevant authorities.*

The Honourable Mrs Justice Ellenbogen DBE reviewed the relevant authorities and gave particular consideration to the case of *Caterham*. In *Caterham*, HHJ Auerbach observed that it is important for there to be clarity, when a PH is directed, as to whether the tribunal is considering (or directing to be considered), in respect of a particular complaint, allegation or argument, whether it should be struck out (and/or made the subject of a deposit order), or a substantive determination of the point. The Honourable Mrs Justice Ellenbogen DBE did not agree with HHJ Auerbach that a strike out application in respect of some part of the claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That seemed at odds with the conclusions of Hooper LJ in *Lyfar*, as well as with the way in which such cases proceed in practice and without criticism by the higher courts. In any given case, it may be possible and appropriate to determine a strike-out application by reference to the pleaded case alone, but it cannot be said that that approach *should be* adopted on every occasion. That is not to say that the tribunal is to consider the assertions made by the claimant uncritically, or to disregard any implausible aspects of the claimant’s case, taken at its highest. Save, *possibly*, to highlight any factual basis for asserted

implausibility, one would not expect evidence to be called by a respondent in relation to the existence, or otherwise, of a *prima facie* case.

She considered that the following principles may be derived from the authorities:

1. In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: *Sougrin*;
2. It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination is immaterial: *Robinson*;
3. It is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: *Sridhar*;
4. It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no *prima facie* case can be demonstrated, or (2) substantively to determine the limitation issue: *Caterham*;
5. When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a *prima facie* case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: *Lyfar*;
6. An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: *Aziz, Sridhar*.
7. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive factor: *Aziz*;
8. In an appropriate case, a strike-out application in respect of some part of a claim can be approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that

event, no evidence will be required – the matter will be decided on the claimant’s pleading: *Caterham* (as qualified above);

9. A tribunal hearing a strike-out application should view the claimant’s case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: *Robinson* (and above);
10. If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring the complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: *Caterham*;
11. Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: *Caterham*;
12. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: *Caterham*;
13. If it can be done properly, it may be sensible, and potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However caution should be exercised, having regard to the difficulty of entangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: *Caterham*.

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