When does time start to run in a failure to make reasonable adjustments or other omissions claim?

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Fernandes v Department of Work and Pensions [2023] EAT 114

Limitation arguments are often tricky in cases which deal with an omission on the part of an employer, particularly where there is no deliberate decision on the part of an employer not to make reasonable adjustments, for example. From a simple reading of s.123 Equality Act 2010 ("EqA") you would be forgiven for thinking that the purely objective focus is on the employer, but the EAT have made clear, in ***Fernandes v DWP***, that there is a factual analysis which includes a focus from the employee's perspective too. The case gives practical guidance on what questions it is relevant for the ET to ask itself to determine when time starts to run in an omissions case.

The relevant facts

The Claimant was statutorily disabled due to back pain, depression and anxiety. She had been provided with a special chair for her back pain, she went on maternity leave, and then was not provided with the chair on her return to work. Despite OH advising that she should have been provided with an ergonomic assessment, she was not. She began special leave during Covid.

On 22nd July 2020 she began working from home but was not provided with an ergonomic assessment. From 4th August 2020, the Claimant could not fully access the Respondent's IT system, which meant she could not undertake all of her duties. The ET found that the reason she was unable to do her main duties from 4th August was because of this lack of access, rather than a lack of a special chair. In September, the Respondent asked her to attend work to resolve the IT access issues but her child was hospitalised and she could not attend the office in person. The Claimant was working from home between July 2020 and 27th November 2020 when she began sick leave until 1st January 2021. She continued to complain that her ergonomic assessment had not been done. The Respondent indicated that the assessment would be done on her return to

work. She returned to work briefly from 1st – 12th January 2021 but she was off sick again thereafter. She was still in employment at the time of the claim.

The question was, in light of the fact that she had not been provided with a special chair, whether the claim had been issued in time, and if not, whether it was just and equitable to extend time.

The legal framework and the findings of the ET

Employment lawyers will be familiar with s.123 EqA, which relevantly states:

> *(1) … proceedings on a complaint within section 120 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—…*
>
> *(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."* (my emphasis)

The ET stated, referring to s.123 EqA and the well-known case of ***Matuszowicz v Kingston Upon Hull City Council*** [2009] ICR 45, that it had to determine when the Respondent might reasonably have been expected to make the necessary reasonable adjustments, and that is when time should run. It went on to find that:

> *"In view of the failure to provide an* (ergonomic assessment) *earlier in the year in relation to working in the office, I conclude that the period 22 July 2020 to 4 August 2020 was a*

reasonable period, for the purposes of section 123(4)(b) EqA, for the respondent to act. I therefore consider that the last act for the time limit in relation to providing furniture and equipment for the claimant ended on 4 August 2020. The claimant therefore should have contacted ACAS by 3 November 2020".

The EAT judgment

The EAT (HHJ Beard) helpfully summarised the applicable case law and found that the following principles should be followed when computing limitation periods in omissions cases (at paragraph 16):

> *"a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to <u>have</u> to make the adjustment.*
>
> *b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.*
>
> *c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.*
>
> *d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee."*

HHJ Beard went on to say (at paragraph 34):

> *"In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage there must be judicial analysis to identify the notional date. It appears to me that this analysis must begin with the identification of the feature which causes disadvantage. This could be a PCP but could also be a physical feature or auxiliary aid. This will be a fact which dates the start of disadvantage. The next element to be considered is when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This is a factual finding and will vary. For instance, the date by which it would be reasonable to have to provide a chair could depend on whether a chair is already commercially available or the chair in question must be purpose built. That date*

would also amount to a finding of fact as to when a breach occurred. As such it would also assist the judge in identifying the notional date. The ET would then have to ask if there are facts which would allow it to conclude that the employer has acted inconsistently with the duty to make adjustments, if there are, then the notional date would arise at that point. Finally, if there is no inconsistent act, there will come a time when it would be reasonable for the employee, on the facts known to them, to conclude that the employer is not going to comply with the duty."

The practical implications of the judgment:

What this means is, to find the point at which time starts to run for jurisdictional purposes, the ET must conduct an objective analysis of facts known to the claimant, which is then considered on the basis of what a reasonable person would conclude, from those facts, about the respondent's intentions to comply with the duty. The ET would then be entitled to consider the claimant's subjective state of mind when considering the discretionary question of whether time should be extended on a just and equitable basis.

The ET therefore made an error and two of the grounds of the appeal were upheld. Although it was appropriate to determine when the reasonable employer would have made the adjustment, the ET should have gone on to consider when the reasonable employee, based on the facts known to the claimant, would conclude that the duty would not be complied with.

It is also worth bearing in mind that this is another case where s.20(3) EqA was pleaded and therefore the parties had to grapple with questions of identifying PCPs and disadvantages, when s.20(5) EqA (where an auxiliary aid is not provided) would have been easier and clearer.

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