Whistleblowing time limits: one off acts vs continuing acts

Ikejiaku v British Institute of Technology Ltd [2020] UKEAT 0243_19_0705

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Overview

1. *Ikejiaku* reinforces the distinction between a one-off act and a continuing act in the context of the imposition of a new contract, highlighting that this was a one off act with continuing consequences. Although the case concerned time limits in a whistleblowing detriment claim, the principles will extend across other areas, such as discrimination, in which unlawful detriments form the basis for claims.

2. A further important point was stated regarding the relationship between knowledge of a detriment and when time begins to run. Time begins to run when a detriment occurs, not when a Claimant knows of the detriment.

The Facts

3. The Respondent is a higher education establishment and the Claimant was employed as a senior lecturer in business and law. He made protected disclosures and the day after making his second, he was dismissed. The ET held that the sole reason for his dismissal was his protected disclosure and accordingly the claim of automatic unfair dismissal under s.103A ERA succeeded.

4. The Claimant also brought claims for detriments caused by him making protected disclosures (s.47B ERA), including that he had been "forced/tricked into a purported contract" when asked to sign a new contract. The alleged effect was that this contract purportedly changed his status from an employee to a self-employed consultant.

5. The issue on appeal was how time limits were dictated by the new contract's imposition/introduction. In this note, references in square brackets are to the judgment paragraphs.

When did the time limit start for the imposition/introduction of the new contract?

6. In a departure from common procedure, the issue of time limits for the new contract detriment claim was left over to deal with at the remedy stage. The ET found at the liability stage that the new contract detriment claim could potentially succeed, but was subject to an issue of jurisdiction caused by time limits [12]. This issue "had not been previously identified in the list of issues nor been the subject of submissions from the parties", but having only been spotted latterly the ET concluded that this break from convention should follow and the issue dealt with at the remedy hearing.

7. The need to correctly identify the issues continued at the EAT because the first consideration was how to correctly define the act relied upon as the purported detriment. The EAT agreed that the act complained of was the "introduction/imposition of the new contract" [30] and not, for example, acts related to this detriment but not caused by protected disclosures, "namely non-payment of tax and national insurance, failure to provide pay slips or paid holiday and describing him as a consultant" [29]. Importantly for the time limit, these may have been the consequences of the new contract but they were distinct from the act itself.

8. The heart of the issue for the EAT was whether the imposition of the new contract could be classed as:
   a. a 'once and for all' act with continuing consequences (as the Respondent argued), or
   b. a continuing act, i.e. which extends over the whole period ending with the Claimant's dismissal (as the Claimant argued).

9. This distinction is an important one and despite the clarity of case law emphasising the difference between the two types of act, practitioners will still see many cases that fail to identify the difference. The fact that the EAT once again had to reinforce these principles in *Ikejiaku* demonstrates that the distinction is not universally grasped.

10. The EAT observed that there was already "considerable litigation" [32] that explored the different type of acts[1]. Citing *Barclays*, the EAT explained that a typical example of a

[1] See for example *Barclays Bank Plc v Kapur* [1991] 2 AC 355; *Sougrin v Haringey Health Authority* [1992] ICR

continuing act is one in which the relevant act "constitutes a rule or policy by reference to which decisions are made from time to time", i.e. because the refreshing of that decision effectively reignites the creation and continuation of the act.

11. By contrast, examples of one-off acts were listed including the act of dismissal, the refusal to upgrade (*Sougrin*) and the banning of construction workers from a site (*Okoro*).

12. In this case, the EAT had no hesitation in agreeing with the Respondent and ET that the introduction/imposition of the new contract was a one off act, albeit with continuing consequences. It did not constitute a policy or rule, nor was it an act extending over a period. It was "a plain example" of a one-off act [33].

13. The EAT thus repeated the fundamental distinction between two types of acts that can be very significant to determine jurisdiction and therefore liability. As in this case, a claim can succeed on all other hurdles – including the often tricky question of motivation – but if time limits are not adequately considered until late, a pyrrhic victory may be all that is achieved.

Knowledge and time limits

14. Of further note to practitioners and likely less well known than the above is the application of time limits to knowledge. "Time runs from the date of the 'act', regardless of whether a claimant has any knowledge of the detriment that the act produces" [25].

15. This was not a contested issue in the case but is again a fundamental concept for practitioners to comprehend. It can clearly have dramatic consequences for a Claimant who is ignorant of detriments occurring without their knowledge, suffering the double detriment of the act occurring alongside the time limit commencing without them knowing. This also puts a detriment claim in an inconsistent position compared to a dismissal claim, in which the date of dismissal is defined by the date of knowledge, or at least the date on which the employee had a reasonable opportunity of acquiring knowledge (see the SC in G*isda CYF v Barratt* [2010] IRLR 1073).

16. If delayed knowledge is relevant to a time limit then Claimants may receive assistance from the provisions allowing an extension of time, i.e. the absence of knowledge rendering it not reasonably practicable (as for a whistleblowing claim) or just and equitable (as for a discrimination claim) to extend the time limits. This brings back consistency with a dismissal claim; see for example *Lowri Beck Services Ltd v Brophy* [2019] UKEAT

650 and *Okoro & Anor v Taylor Woodrow Construction Ltd* [2013] ICR 580

0277_18_2503 in which a mistaken belief as to the date of dismissal was sufficient to render it not reasonably practicable for an ET1 to have been presented in time.

Conclusion

17. *Ikejiaku* is a useful reminder of fundamental principles. First and foremost, the correct and comprehensive identification of the issues in a case at an early stage will always be useful and will assist both parties.

18. Whistleblowing and other detriments must be analysed to identify whether they are a one off act or a continuing act and the ubiquitous issue of time limits must be considered. Delayed knowledge of a detriment is unlikely to be sufficient to stop a time limit running but will be relevant to why a time limit should be extended.

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