Appeal No UKEAT/0149/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 22 August 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

CATERHAM SCHOOL LIMITED — APPELLANT

MRS K ROSE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM WEBB (of Counsel) Instructed by: DAS Law North Quay Temple Back Bristol BS1 6FL
For the Respondent	MS AMY STROUD (of Counsel) Instructed by: Wellers Law Group LLP Tenison House Tweedy Road Bromley Kent BR1 3NF

SUMMARY

SEX DISCRIMINATION – Continuing act

JURISDICTIONAL POINTS – Extension of time: just and equitable

The Claimant in the Employment Tribunal (now the Respondent to this appeal) complained of alleged discriminatory conduct on the part of the Respondent in the Employment Tribunal, during the course of her employment, on various occasions, and in various ways, during 2017. She also complained that this conduct amounted to a cumulative breach of the implied duty of trust and confidence, and led to her resigning on 24 August 2017, in circumstances amounting to a constructive unfair and discriminatory dismissal.

At a Preliminary Hearing the Tribunal correctly found that time began to run in respect of the unfair and discriminatory dismissal claims on 24 August 2017, and that they were presented on a date outside of the primary time limit, as adjusted for the impact of ACAS Early Conciliation. It was not persuaded that it was not reasonably practicable to present the unfair constructive dismissal claim in time, but it did find that it was just and equitable to extend time in respect of the discriminatory constructive dismissal claim. By the time of the Full Hearing in the EAT there was no live challenge to either of those decisions.

The Tribunal had also decided that all of the alleged pre-resignation discriminatory conduct amounted, taken together with the alleged discriminatory constructive dismissal, to conduct extending over a period, so that time in respect of all such complaints also ran from 24 August 2017. It had not merely found that the Claimant had a *prima facie* case to that effect; on a correct reading of its decision, it had decided the point. Then, using that start date, the Tribunal also found that it was just and equitable to extend time in relation to those complaints.

However, the Tribunal erred in making a definitive finding that there was conduct extending over a period, when it had considered no evidence, and made no findings of fact, in relation to that alleged pre-resignation conduct, or which, if any, of the matters complained of, amounted to discriminatory treatment as alleged. Hence it erred in its decision that it was just and equitable to extend time in respect of the complaints of alleged pre-resignation conduct. That was because that decision was based on the premise that this formed part of conduct extending over a period, so that time only began to run in respect of them when the Claimant resigned.

Whether there was any pre-resignation discriminatory conduct; whether, if so, any such conduct formed part of conduct extending over a period, together with any other discriminatory conduct found; hence, when time began to run in respect of any pre-resignation discriminatory conduct found; and whether it was just and equitable to extend time in relation to any conduct so found, will all be for the appreciation of the Tribunal at the Full Merits Hearing.

The Claimant was permitted to enter a late Cross-Appeal, which succeeded, as the Tribunal had proceeded on the erroneous footing that there was no complaint of harassment relating to alleged conduct in 2017 (as opposed to complaints of direct discrimination). On a correct construction of the claim form, there *was* such a complaint in relation to one alleged incident on 17 January 2017 (as an alternative to direct discrimination), which had not been withdrawn.

HIS HONOUR JUDGE AUERBACH

1. I shall refer to the parties as they were in the Employment Tribunal, as Claimant and Respondent.

2. This Hearing in the EAT unfolded in an unusual way. The Respondent appealed against the Judgment of the Tribunal (Employment Judge K Andrews) arising from a Preliminary Hearing held on 8 May 2018. The Judgment was signed by the Judge that day and written Reasons subsequently followed. The terms of the Judgement were as follows:

> **The claims of unfair dismissal, unpaid holiday pay and harassment were submitted out of time and accordingly are dismissed.**
>
> **The claims of direct sex and age discrimination were also submitted out of time but it is just and equitable in all the circumstances to allow them to proceed.**

3. The appeal related to the decision on the time points in relation to the direct discrimination claims. I will set out the specific ground that I had to consider in due course.

4. At the start of Hearing of the appeal, however, Ms Stroud, who appeared for the Claimant, applied for permission to advance a cross-appeal out of time. In the event, I gave an oral decision on the cross-appeal, both as to the permission issue and the merits, first. By that time, however, it had emerged that both counsel actually agreed what the practical outcome of the main appeal should be. However, they disagreed as to the route to that outcome, and so, having heard relevant argument, I also gave a ruling on the main appeal as well.

The Cross-Appeal

5. The proposed cross-appeal was to the effect that the Judge had, in error, proceeded on the basis that the only claim of harassment in the claim form related to an alleged incident in 2011. It was asserted that she had erroneously failed to recognise that, in relation to various

alleged incidents in 2017, said to involve conduct amounting to direct discrimination, the claim form had *also* asserted alternatively that these were acts of harassment. Hence, she had also failed to determine time points in relation to these harassment claims; or, if the final paragraph of her decision had the effect of dismissing them, that was unintended, and perverse.

6. The proposed cross-appeal was, Ms Stroud was bound to accept, raised significantly out of time. Following the Rule 3(10) Hearing in this case (which happened also to be before me), my Order of 21 May 2019 provided for the lodging of an Answer, including any cross-appeal, within 28 days of the seal date of the Order, which was 30 May. There was then an application for review, which led to some further Orders by me dated 1 July, sealed on 2 July, which extended the time for filing of Answer to 14 days after the seal date of those Orders. Strictly, those Orders did not similarly extend time for a cross-appeal; but, even had they done so, the application to cross-appeal would still have been significantly out of time.

7. Ms Stroud candidly acknowledged that the point that she sought to advance through the proposed cross-appeal only occurred to her when she was preparing for the Hearing of the appeal, and indeed when she read a reference to a harassment claim relating to January 2017 in the skeleton argument for the appeal of Mr Webb, who appeared for the Respondent. She was then only able to raise her intended application for permission to cross-appeal with Mr Webb, at about 8am on the morning of the Hearing of the appeal.

8. Mr Webb opposed permission being granted to introduce the cross-appeal at this late stage. If I did grant permission, he opposed it on its merits.

9. It was common ground, in light of **The Governing Body of Tywyn Primary School v Aplin** UKEAT/0298/17, that the test to be applied in relation to this permission application was

at large under Rule 37 of the **EAT's 1993 Rules of Procedure**, rather than being the very strict test which applies to permission for late presentation of an original Notice of Appeal. Therefore, essentially, it was a matter of me weighing up the balance of prejudice to each side if I did or did not give permission. It was also accepted by Mr Webb that a relevant consideration at the permission stage was the potential merits of the proposed cross-appeal. Both aspects (permission and merits) were fully argued together, and it was agreed that I should then give one decision on whether to give permission and, if so, on the cross-appeal itself.

10. As they are, in any case, relevant to the question of permission, I will start with the merits. To understand what the cross-appeal seeks to add, it is necessary to start with a consideration of the claim and response forms and then to look at Judge Andrews' Decision.

11. The Claimant was employed at a school run by the Respondent until she resigned in August 2017. She presented a claim form with the help of solicitors, on 29 December 2017. In section 8.1 ("Type and details of claim") the boxes were ticked for discrimination on the grounds of age and sex, unfair dismissal, and a claim for holiday pay. The information, given in section 9.2, about compensation or remedy sought, included the statement: "The Claimant also claims injury to her feelings on account of the harassment and discrimination she has suffered at the hands of Mr Tuckett [the head teacher] and the School." The ticking of the boxes in section 8.1 does not assist the reader to know what *type* of sex or age discrimination claim is being pursued – whether, for example, direct, indirect, harassment, some combination, or some other type of claim permitted by the **Equality Act 2010**. However, the information given in section 9 signalled that in this case there was, at least, *some* kind of harassment claim.

12. The attached grounds of claim gave a narrative of events from the Claimant's point of view, including some reference to what she said happened in 2011 and 2012 and since 2012.

But mainly it gave her account of alleged events in 2017, starting on 10 January 2017 and up to the point of her resignation. After setting all of that out, there was a sub-heading: "Unfair Constructive Dismissal", under which the document elaborated on the claim to that effect. It set out the Claimant's case that there was a cumulative breach of the implied duty of trust and confidence, by various conduct starting on 10 January 2017 and up to the date of her resignation. The alleged conduct was set out in nine sub-numbered paragraphs in paragraph 34. The first three referred to the alleged conduct of Mr Tuckett on three different occasions in January 2017. The next three referred to different aspects of an investigation into alleged parental concerns about the Claimant's conduct, which it was her case was contrived. The final three related to aspects of the handling and outcome of a grievance raised by her.

13. There was then a sub-heading: "Direct Age Discrimination and Harassment." Paragraph 35 then referred to an alleged incident on 27 May 2011, on which occasion Mr Tuckett was alleged to have made certain remarks directed at older, female, staff members. This was certainly relied on as evidential or factual background for the other claims the Claimant sought to bring. But it was also construed by EJ Andrews as amounting to a free-standing claim of harassment. However, she found that particular claim to be out of time, that the alleged incident was a stand-alone incident, which could not form part of any later continuing act in 2017; and that it was not something in respect of which it was just and equitable to extend time. There is no live appeal in relation to those particular determinations relating to the 2011 matter.

14. Returning to the particulars of claim, they continued, in paragraph 36, by giving an account of one of the alleged incidents in 2017, involving certain remarks alleged to have been made by Mr Tuckett at a staff meeting on 17 January 2017. That paragraph concluded by asserting that he was thereby engaging in unwanted conduct related to the Claimant's age and

sex, which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her. I interpose that Mr Webb, sensibly, accepted that that, on its face, *was* a complaint of harassment within the meaning of section 26 **Equality Act 2010**, as the particulars plainly used language taken directly from that section.

15. Paragraph 37 stated that the Claimant averred that the School's breaches of trust and confidence, culminating in her dismissal, "were tainted by discrimination in that the School treated her less favourably than others because she was an older female." Mr Webb's position was that that did not point to any further claim of harassment contrary to Section 26, as opposed to direct discrimination contrary to Section 13. Ms Stroud's position was that this was capable, in principle, of being construed as an alternative claim of harassment, going more widely than the 17 January 2017 incident. That was possible, she said, having regard to the banner heading of "direct age discrimination and harassment" under which this paragraph fell. The grounds of resistance did not take matters any further, in terms of what the Respondent apprehended was the particular type of discrimination being asserted in relation to each of these matters.

16. Mr Webb and Ms Stroud, both of whom appeared at the Hearing before EJ Andrews, both confirmed to me that there had been no list of claims and issues drawn up by either of the parties, or discussed or produced by the Tribunal itself, whether prior to, or at, the Hearing before EJ Andrews.

17. The Hearing before EJ Andrews was concerned with time points. In her Reasons, in paragraph one, after referring to the unfair dismissal and holiday pay claims, the Judge wrote:

> **"…She also says that she was directly discriminated against because of her sex and age and that she was subjected to harassment in May 2011 related to her sex and age."**

18. In paragraph 2 the Judge said:

> **"This preliminary hearing was listed to determine whether the Tribunal has jurisdiction to consider the whole or part of the claims taking into account the statutory time limits for presentation of claims."**

19. The Judge's findings of fact were focussed on issues to do with why the claim form was not presented sooner than it was. Paragraph 15, in describing the contents of the claim form, stated:

> **"…A number of breaches of the contract of employment from 10 January 2017 to the conclusion of an investigation in July 2017 were set out as breaches relied upon in the constructive dismissal claim and also as allegations of direct age and sex discrimination. In addition a discrete act of age and sex harassment on 27 May 2011 was relied upon."**

20. Then, in the course of those findings, the Judge also touched upon the question of when time began to run and said, at paragraph 19:

> **"Time expired on all claims (except harassment – see below) on 23 December 2017."**

That gives rise to issues in relation to the main appeal, to which I will come; but I was not concerned with those in relation to the proposed cross-appeal.

21. After the findings of fact, there was a sub-heading: "Conclusions." In paragraph 25, the Judge began:

> **"The claimant says that the act of direct discrimination relied upon was a continuing act which continued until her resignation."**

In paragraph 27 the Judge also referred to direct discrimination in relation to the matters concerning what did or did not happen in 2017. In paragraph 28, she then said:

> **"As far as the claim of harassment arising from the incident in May 2011 is concerned, however…"**

That was all in the lead up to her conclusion that that particular claim was out of time and that it was not just and equitable to extend time in relation to it.

22. Pausing there, it is absolutely clear, from all those passages, that the Judge wrote them on the premise, assumption, or understanding, that the *only* claim for harassment in the claim

form was, if at all (and if it was not merely background), in relation to the alleged incident of May 2011; and that all of the **Equality Act** claims relating to alleged conduct in 2017 were only claims of direct discrimination.

23. Again, one can see that from paragraph 34 where the Judge said:

> **"Turning to whether the claims of direct age and sex discrimination should be allowed to proceed on the basis that it would in all the circumstances be just and equitable…"**

24. In the final paragraph of the Reasons, paragraph 36, the Judge said:

> **"Accordingly, the claims of direct age and sex discrimination shall proceed but the others shall not."**

25. The cross-appeal, if permitted to be considered, sought to argue that the Judge erred, at least, because she had not recognised that there was a claim of harassment in relation to 17 January 2017, apart from any such claim in relation to May 2011. Additionally, putting Ms Stroud's case at its highest, the Judge should have discerned that harassment was being asserted as an alternative in relation to the other matters in 2017 as well. The Judge's assumption that the only possible harassment claim related to 2011 was erroneous. Further, if she had, by a side wind, as it were, in paragraph 36 of her Decision, dismissed any such claim relating to 2017, then she had again erred, as that would be inconsistent with the Judge's own prior assumptions.

26. As I have said, it was common ground, between counsel who both dealt with this matter entirely professionally and candidly before me, that there was no analysis by anyone, of the claims and issues in this case, prior to the Hearing before EJ Andrews. Specifically, no-one had addressed the question of whether the claim form contained any claim of harassment in relation to any of the alleged conduct in 2017.

27. As to what occurred at the Hearing before EJ Andrews itself, Mr Webb very fairly said, doing the best he could from recollection, that he did not positively recall this question being ventilated. However, he did not feel able, from recollection, entirely to rule out the possibility that there might have been some discussion, at least, of there being a claim of harassment in respect of 17 January 2017. I fully accept that that was as far as he felt able to go from his own recollection. But Ms Stroud's recollection was better, and she was confident in saying that she was quite sure that there had been no discussion of whether there were any claims of harassment in the claim form relating to 2017. She was certainly sure that there was no question of it somehow having been indicated on the Claimant's part that there *had* been such a claim in the claim form, but that it was not now being pursued and was withdrawn.

28. I am sure I can rely on Ms Stroud's professionalism, and also on her recollection. Indeed, it would have been surprising if such a claim had been specifically mentioned, and she had, at that Hearing, withdrawn it, but yet she was not able, now, to recollect that having happened. It would also be surprising if something like that had happened at the Hearing, and yet it was not recorded in the Judge's Decision. The withdrawal of a complaint must be communicated clearly and unambiguously. Further, where there is a withdrawal, one would expect the Judge then to consider whether to dismiss the claim upon withdrawal; but there was no sign of that. Further, given how specifically worded the pleading was, it is not obvious why the 17 January 2017 harassment claim *would* be withdrawn, unless somehow the Claimant had thought better of her own recollection of the episode. But again, if the Tribunal had been told something like that, one would have expected either or both counsel to have remembered that.

29. I did not think, therefore, that this was a case where there was any need to make further enquiries of the Judge or to seek the Judge's notes. Ms Stroud was confident in her

recollection, and it all fitted together. It is very hard to see how the Decision would read as it did, if Ms Stroud was mistaken in her recollection, and such a claim had been withdrawn.

30. Pausing there, I concluded that the claim form contained a claim of harassment relating to the alleged 17 January 2017 remarks (in the alternative to direct discrimination) and that that claim was not withdrawn (before or) at the Hearing before Judge Andrews. Indeed, it was not specifically drawn to her attention at all, and she did not take cognisance of it.

31. I turn to the question of whether there was any further harassment claim in the original claim form, relating to any other alleged episodes in 2017. It was agreed before me that that was a question of pure construction of the claim form, which I was in as good a position as the Judge would have been to determine. In fact, I think there can only be one right answer. But even if not, both counsel were agreed that, as necessary to the disposal of the proposed cross-appeal, I could and should deal with it. It is all part of the merits, which in turn informs the question of permission.

32. My conclusion was that, as a matter of construction, this claim form does not include a claim for harassment in relation to alleged events in 2017 other than 17 January 2017. The only place where such a claim could conceivably come from is paragraph 37 of the grounds of claim. But, just as the language of paragraph 36 replicates the language of Section 26 of the **Equality Act 2010**, so the language of paragraph 37 replicates the language of Section 13, referring to the School having allegedly treated the Claimant less favourably than others, because she was an older female. That is a direct lift from the language of Section 13, and it cannot be properly construed as including, or including in the alternative, a claim of harassment.

33. The more generic reference, in paragraph 37 of the grounds, to the cumulative treatment complained of being "tainted by discrimination" does not assist, because the particulars go on

to explain what is meant by "discrimination" in the context of that paragraph, again using the language associated with a complaint of direct discrimination. Nor does the fact that these paragraphs appear under the sub-heading: "Direct age discrimination and harassment" assist to spell out further harassment claims relating to 2017, because that is a generic sub-heading for paragraphs 35, 36 and 37, taken as a whole. Therefore, nothing more can be inferred from that sub-heading, than that there is a harassment claim *somewhere* to come in that next group of paragraphs. Such a claim does indeed then come in paragraph 36. There is no reason to infer that there must also be a further such claim or claims in paragraph 37.

34. Mr Webb submitted that the effect of what the Judge said in paragraph 36 of her Decision – specifically the words "the others shall not" – was that the Judge had dismissed not only the claim of harassment, which she detected was a free standing claim in respect of May 2011, but *also* the claim of harassment, which, he acknowledged (and I have found) *was* in the claim form in relation to 17 January 2017. (She had also, he said, thereby dismissed any *other* claim for harassment, which might, contrary to his submission (and now my conclusion), be found to have been made in relation to any other matters said to have occurred in 2017.)

35. I did not accept that submission. That is because it is clear, as I have said, from everything else that the Judge said, that she was proceeding on the belief, assumption, or understanding, that the *only* potential or actual claim of harassment related to May 2011. Paragraph 36 was simply a statement of overall outcome, which flowed entirely from the conclusions she had already reached in paragraphs 1 to 35, and was premised on the same basis. It cannot possibly be read as meaning that she intended there to dismiss, *other* claims of harassment, when she had not appreciated or determined that there were any other such claims.

36. Pausing there, it seems to me therefore clear, firstly that there was a claim for harassment, apart from any in relation to 2011, in relation, but *only* in relation, to the alleged events of 17 January 2017. Secondly, that harassment claim was not withdrawn or abandoned whether prior to, or at, the Hearing before EJ Andrews. Thirdly, EJ Andrews did not have drawn to her attention, or take cognisance of, the existence of that claim. She proceeded on the erroneous assumption that there was no harassment claim in relation to 2017 at all. Fourthly, she did not actually dismiss that claim as being out of time (or if she did, she did so in error).

37. Had this cross-appeal been presented in time, it would therefore properly have been allowed, in order to reflect that there *was* a harassment claim in respect of 17 January 2017, which had not been specifically considered, and had not been dismissed as out of time.

38. However, I now turn back to the question of whether permission should be given. It is a question of balance of prejudice. Mr Webb said this case was not like **Aplin**, where a litigant in person slipped up on a difficult technical point about whether the extension of time for an Answer included an extension of time for a cross-appeal. Further, again by contrast with that case, in this case the Claimant has been represented by solicitors throughout, and there had been opportunities to raise this point all along, much sooner than it in fact was.

39. Ms Stroud had to acknowledge that the proposed cross-appeal had been raised just about as late as it could have been. I accepted that, as a matter of fact, this happened because the point only occurred to her when she was preparing for this Hearing. Nevertheless, it should have been spotted and raised by the Claimant's legal team far sooner than it was.

40. However, ultimately this comes down to a question of balance of prejudice. True it is that Mr Webb had to deal with this matter on the hoof at the Hearing before me. However, the fact is that he was able, during the course of the day, to give it all consideration, including

looking at **Aplin**, and to make full submissions on the issue. I cannot see (nor did he envisage that there might be) any material point that he could or might have raised, had he been more on notice, or any other material investigations that would have been carried out. As I have said, this is not a case where reference back needed to be made to the Judge or for the Judge's notes. True it is that a Hearing listed for half a day ran into the afternoon; but in any event, the hearing of the main appeal, including my decision, might have gone on into the afternoon.

41. Mr Webb said that the effect of allowing the cross-appeal would be to broaden the underlying claim. If I gave permission, and then allowed it, the Respondent would then have to defend a claim of harassment that it would not otherwise have to defend. But I observe that in any event it would still have to defend the same factual allegation as a claim of direct discrimination. After toying with the submission that it might make a difference to the time point, Mr Webb sensibly abandoned that. The prejudice to the Respondent of having to deal with the claim as harassment in the alternative to direct discrimination, is minimal in terms of the extra time and effort which would have to be devoted to it at the Full Hearing in the Tribunal. Subject to where matters were headed on the wider time point, evidence was going to have to be heard about it. There would have to be a small amount of additional legal argument.

42. Of course, the Respondent would be at risk that this claim might succeed as harassment, but would not have succeeded as one of direct discrimination. However, it would still have the chance to defend that claim, whereas, if I did not permit, and then allow, the cross-appeal, the Claimant would potentially, subject to the wider time point, lose the chance to assert it at all. Even that was not the direct issue of prejudice for me, but a sub-issue, because the main issue of prejudice before me was the balance of prejudice arising from the *late raising* of the proposed

cross-appeal. If I did not grant permission, the Claimant would lose the chance to run a valid cross-appeal, which ought to succeed, in order to put right a mistake or oversight by the Judge.

43. Late though it was, and poor though the excuse was, the balance of prejudice was clearly, in my view, on the side of the Claimant. I therefore granted permission to advance the cross-appeal. I found that there was a claim of harassment in the claim form, relating to the alleged incident of 17 January 2017 (additional to the claim of direct discrimination relating to it). I concluded that paragraph 36 of the Judge's decision could not properly be construed as dismissing that claim, since she did not have it in mind; but, if it did, contrary to my view, have that effect, then it could not stand in that respect. Accordingly, the cross-appeal was allowed, on the basis that there is a claim of harassment in relation to the alleged treatment on 17 January 2017, which remains live. That was subject, however, to the fact that there may also be a live time point in relation to it. That, in turn, depended on the outcome of the main appeal.

The Appeal

44. The basis of the appeal was that, as part of her decision, the Judge determined that the treatment complained of during 2017, up to and including the claimed constructive dismissal, all formed part of "conduct extending over a period" for the purposes of section 123(3)(a) **Equality Act 2010**, which provides that such conduct "is to be treated as done at the end of that period." The ground of appeal that had proceeded to this Hearing contended that the Judge erred in law, in definitively deciding that question at this Preliminary Hearing, without the Tribunal having yet determined, in respect of those allegations, what factually occurred, and whether any of it, subject to the time point, involved discriminatory treatment as alleged.

45. It appeared to me, when I read into the appeal, that the point of dispute was as to whether it was indeed an error of law to have made such a definitive determination. However,

during the course of the Hearing before me, it became clear that the point of dispute was, in fact, a different one. Ms Stroud's contention was that, on a correct reading of her Reasons, the Judge had *not* found definitively that there was conduct extending over a period. She had merely found that there was a *prima facie* case made out to that effect, leaving substantive determination of the issue, either way, for the Full Merits Hearing. However, Ms Stroud *agreed* that if (contrary to that submission) I concluded that the Judge *had* made a definitive finding, then it *was* an error of law for her to have done so.

46. It having emerged that the battle lines were drawn in that way, I put it to counsel that, whichever of them was right, the effect, in terms of the practical outcome of this appeal for the case going forward in the Tribunal, was the same. It was only the route to that outcome about which they disagreed. If Mr Webb was right, I would allow the appeal, on the basis that the question had been determined, and it was an error to do so. If Ms Stroud was right, I would dismiss the appeal, on the basis that the Judge had not finally determined the issue. But, either way, whether there was conduct extending over a period during 2017, and hence that of whether any of the non-dismissal 2017 complaints had been raised in time, would, when the matter returned to the Tribunal, remain live issues to be determined at the Full Merits Hearing.

47. Both counsel agreed with me about that. I therefore invited them to consider whether they might be able to agree proposed terms for the disposal of the appeal. However, they were unable to do so, and I therefore gave a ruling on the question of whether the Judge *did* make a determination that there was conduct extending over a period.

48. I concluded that, on a correct reading of her Decision, the Judge did not merely decide that there was a *prima facie* case in that regard, leaving the matter to be definitively determined either way at the Full Merits Hearing. Rather, she gave a definitive judgment that there was

A conduct extending over a period, that time therefore ran in respect of *all* of the 2017 complaints from 24 August 2017, and that, from that start date, it was just and equitable to extend time in respect of them all to the date of presentation of the claim form.

B 49. I so conclude because that is, in terms, what the Decision says. It is true that, when considering the law, in paragraph 10 of her Reasons, the Judge said:

> **"At the preliminary stage, the test to apply to determine whether the claims has established a prima facie case and the Tribunal must ask itself if the complaints are capable of being part of an act extending over a period."**

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50. However, the Judgment states: "The claims of direct sex and age discrimination were also submitted out of time but it is just and equitable in all the circumstances to allow them to D proceed." That is a determination. In the Reasons, paragraph 2, the Judge states that the Hearing was to determine "whether the Tribunal has jurisdiction to consider the whole or part of the claims, taking into account the statutory time limit for the presentation of claims." In paragraph 27, the Judge says, of the unfair dismissal, holiday pay *and* direct discrimination E claims, that time started to run on 24 August 2017, the date of the resignation. She does not say there that it is *arguable* that time started to run then. She says that it is "…clearly the correct position in relation to the claims of constructive dismissal & holiday pay…" but adds that "on a F proper reading of the claim form [that] is also correct for direct discrimination, as the acts complained of continued through to the end of employment." The Judge does not say: "arguably correct" but "correct". She does not say they "arguably continued" to the end of G employment, but that they "continued."

51. Further, when she considered the question of just and equitable extension of time in H respect of these claims, the Judge did so on the premise that time began to run, for *all* these claims, only on 24 August 2017. That is clear from paragraph 35 where, for example, the first

sentence refers to the length of the delay (caused by an erroneous initial attempt to submit the claim to a local Tribunal office) not being excessive. The reason why the Judge regard the delay as not excessive was, plainly, because she considered that time had only began to run on 24 August 2017, and so the delay was only a matter of a few days. But, if any of the episodes from January 2017 did not form part of a continuing act, the delay in presentation would then, in relation to such an episode, be much greater than just a few days.

52. While the Judge referred, as I have noted, to the test at a Preliminary Hearing being a *prima facie* case test (which, as I will discuss, would have been a fair shorthand for the correct approach to a decision as to whether to strike out the complaints on the basis of the time points), I cannot read these passages other than as a definitive determination that all of the alleged conduct, from January 2017 up to and including the claimed constructive dismissal, formed part of a single piece of conduct extending over a period.

53. That was an error of law, in short, because, at this Preliminary Hearing, the Judge did not have any evidence before her, at all, on the continuing conduct issue; and she did not make, indeed could not have made, any finding of fact at all, relevant to that issue, nor any finding about whether any of that alleged conduct involved (subject to the time point) conduct amounting to discrimination, as alleged. Absent such findings she could not properly have determined, definitively, whether any of the matters complained of involved something which, taken together with other matters complained of (some or all of them), formed part of conduct extending over a period.

54. Rather, as is apparent in particular from paragraph 28, she reached her conclusion – in respect of the conduct extending over a period issue relating to these claims – solely on the basis of a consideration of the contents of the claim form. That, indeed, may be contrasted with

the Tribunal's conclusion on the question of just and equitable extension, which proceeded from the facts found (in paragraphs 12 to 23 of the Reasons) regarding the date of the resignation, the ACAS Early Conciliation process, the defective initial attempt to present the claim form, and the successful second attempt to do so.

55. Ms Stroud submitted that the Judge was fully entitled to take the view, that there was a *prima facie* or reasonably arguable case that the nine alleged matters relied upon in relation to 2017 did indeed together form part of conduct extending over a period, given their alleged nature, what was said to have been the role of Mr Tuckett at various points, and relying, at least in relation to those which together related to different stages of the same internal process, on the approach in **Hale v Brighton and Sussex University Hospitals NHS Trust**, UKEAT/0342/16.

56. But even if (which I did not, I think, have to decide), the Judge did, and was entitled to, take that view, that could only have led to the conclusion that the claims in question should not be *struck out* as being out of time. They would then proceed to a Full Hearing on the basis that the continuing conduct issue, and all of the time points attendant upon it, remained live. I have reflected on whether, given that the Judge indeed did, on this aspect, solely consider the pleading, and did not make any findings of fact, it might be inferred that she could not have meant to make a definitive determination; but, I repeat, given the language of the various passages in the Judgement and Reasons to which I have referred, I am unable to read the Decision in any other way. (To repeat also, however, even if Ms Stroud was, contrary to my view, right about that, the practical outcome going forward would have been the same).

57. The skeleton arguments referred to a number of authorities, including **Lindsay v Ironsides Ray & Vials** [1994] IRLR 318 (EAT), **Hendricks v Commissioner of Police for the Metropolis** [2003] ICR 530, **Pugh v The National Assembly of Wales**, UKEAT/0251/06,

Allen v Secretary of State UKEAT/0498/08, **Aziz v FDA** [2010] EWCA Civ 304, **City of Edinburgh Council v Kaur** [2013] CSIH 32, and **Hale** (above). Given, in particular, the common ground that there was as to the substantive legal position, it is not necessary for me to analyse each of these decisions (or the other authorities mentioned) closely in turn; but I make the following general observations.

58. First, it is always important for there to be clarity, when a Preliminary Hearing is directed, at such a Hearing, and in the Tribunal's decision arising from it, 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.

59. The differences, in particular, between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, are generally well understood, but still worth restating. A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. 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 that complaint to an end. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be.

60. By contrast, definitive determination of an issue which is factually disputed requires preparation and presentation of evidence, to be considered at the Preliminary Hearing, findings

A 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 of the case.

B 61. All of that applies equally where the issue is whether there has been conduct extending over a period for the purposes of the section 123 time limit. If the 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
C conduct together with other incidents, such as to make it in time, that complaint may be struck out. But if it is not struck out on that basis, that time point remains live. If, however, the Tribunal decides at a Preliminary Hearing, that the claim does relate to something that is part of continuing conduct, and so is in time, then the issue has been decided and cannot be revisited.

D 62. Some of the authorities do, I think, need to be read with some care in this regard, because it is not always apparent, without a close and careful reading, whether the Tribunal's
E decision under challenge was by way, effectively, of a decision whether or not to strike out a complaint by reference to a time point, or by way of definitive determination of that point. That is, sometimes, because the authorities do not always use the express language of "strike out", or refer to the strike-out Rule, or use the language of "no reasonable prospect of success". But, on
F a careful reading, it is clear that a number of these authorities are, indeed, concerned with whether a particular complaint or complaints should have been struck out, on the basis that there was no reasonable prospect of success of establishing that they were in time because they
G formed part of conduct extending over a period; and that these authorities (properly) use the "*prima facie* case" test as a synonym or shorthand for the strike-out test.

H 63. So, in short, the *prima facie* case test is appropriate, as shorthand for the "no reasonable prospects of success" test, where the Tribunal is persuaded that the matter is suitable for

consideration at a Preliminary Hearing, of whether a particular complaint or complaints should be struck out on the basis that it is, in isolation, out of time, and there is no reasonable prospect of success, on the pleaded case, of it being found in time as forming part of continuing conduct.

64. But a determination of whether, substantively, there is conduct continuing over a period, cannot be reached at a Preliminary Hearing on the basis merely of consideration of whether there is a *prima facie* case on the pleading. Were it otherwise, it would mean that there was actually a lower threshold for establishing conduct extending over a period, if the matter were considered at a Preliminary Hearing, than if it were considered at a Full Hearing. That cannot be right. Read as a whole, and with care, none of the previous authorities so holds.

65. The authorities do indicate that it is not *necessarily* in every case an error of law for an Employment Tribunal to consider a time point of this sort at a Preliminary Hearing, either on the basis of a strike out application, or, possibly even, in an appropriate case, substantively. *If* that can be done properly, it may be sensible and, potentially, beneficial, so that time and resource is not taken up preparing, and considering at a full merits hearing, what may be properly found to be truly stale complaints that ought not properly to be so considered.

66. But, as is well-known, the authorities also repeatedly urge caution – having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; because there may be no appreciable saving of preparation or hearing time in any event, if episodes that could potentially be severed as out of time, are in any case relied upon as background to more recent complaints; because of the acute fact-sensitivity of discrimination claims, and the high strike-out threshold; and because of the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue.

Outcome

67. For all of these reasons, therefore, I allowed both the cross-appeal (to the extent I have described) and the appeal. The consequence is that what occurred on the disputed occasions in 2017, whether any of the disputed episodes involved an act of direct discrimination, and/or, in the case of the 17 January 2017 alleged incident, an act of harassment, and/or whether any of them form part, together with any other unlawful act, of an act extending over a period, hence when time began to run in respect of any such complaint and/or whether it is just and equitable to extend time in relation to it, all remain live issues to be determined by the Tribunal that will be seized of the Full Merits Hearing in this case.