Appeal No. UKEAT/0056/19/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 October 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

SOUTH WESTERN AMBULANCE SERVICE NHS FOUNDATION TRUST APPELLANT

MRS C KING RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Ms Sheryn Omeri (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS
For the Respondent	Ms Amanda Hart (of Counsel) Instructed by: Thompsons Solicitors Churchill House 17 Churchill Way Cardiff CF10 2HH

SUMMARY

EXTENSION OF TIME: JUST AND EQUITABLE

The Claimant lodged a grievance against her managers complaining of, amongst other matters, acts of discrimination. Her grievance was the subject of a report produced by an external consultant. The report dismissed the grievance. The Claimant's appeal was rejected. Dissatisfied with the grievance outcome and the Trust's failure to take action against one manager in particular, she resigned, claiming she was constructively dismissed. Her effective date of termination was 5 October 2017. On 11 December 2017, the Claimant issued proceedings claiming unfair constructive dismissal and victimisation because of doing a protected act, namely lodging a grievance. The Claimant relied upon a series of detriments

said to be acts of victimisation. These commenced with the report and included the dismissal of her grievance and grievance appeal. Only the rejection of her grievance appeal fell within the three-month period (plus the conciliation period) prior to the date of issuing her claim. The Tribunal rejected the claim of unfair constructive dismissal. In relation to victimisation, it found that the report itself did amount to a detriment. However, none of the other matters relied upon, including the rejection of her appeal against the grievance decision, were found to amount to a detriment. The Tribunal concluded, however, that there was a course of conduct commencing with the report and which continued to the rejection of the Claimant's appeal. On that basis, the Claimant's claim was held to be in time. The Respondent appealed.

Held, allowing the appeal, that the Tribunal had erred in concluding that there was conduct extending over a period within the meaning of s.123 of the **Equality Act 2010**, in circumstances where several of the acts said to be part of that course of conduct were not upheld as acts of victimisation. The EAT would substitute a decision that there was no conduct extending over a period. The case would be remitted to the Tribunal for it to determine whether time should be extended on just and equitable grounds.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. The issue in this appeal is whether an alleged act of discrimination can be said to be part of "conduct extending over a period" within the meaning of s.123 of the **Equality Act 2010** ("the 2010 Act") where that alleged act is found not to be discriminatory.

Factual Background

2. I shall refer to the parties as they were below. The Claimant was employed by the Respondent Trust from 21 November 1991 until her resignation on 5 October 2017. At the time of her resignation she held the substantive post of Operations Manager North and mid-Devon, although she was on secondment in another post.

3. The Claimant considered that throughout her employment, the culture towards female employees was "*pretty terrible*".

4. In 2013, Mr Boucher, Head of Operations West Division, became the Claimant's manager. It seems that up to about December 2014, there were no difficulties between the Claimant and Mr Boucher. However, after December 2014 their working relationship started to deteriorate. Mr Neil Le Chevalier, Director of Operations, became involved at this stage. Mr Le Chevalier, noting there was a problem between the Claimant and Mr Boucher, sought to separate them and established a secondment position for the Claimant. By doing so, the Claimant considered that she was being "*set up to fail*" by the two male managers.

5. The secondment, which was initially due to be for a short period, ended up being extended twice. In fact, the Claimant never returned to her substantive post.

6. By October 2016, the relationship between the Claimant and her managers had deteriorated to the extent that the Claimant lodged a grievance. The grievance raised various complaints about alleged sexist remarks, bullying, harassment, victimisation, allegations about Mr Boucher's treatment of the Claimant and the allegation that she had been set up to fail.

7. The Trust responded by commissioning Ms Ackerley, an external consultant, to investigate. The Tribunal was critical of Ms Ackerley's approach to the grievance; she was found to have approached it as an exercise in determining risk and damage limitation, rather than confining her role to that of a neutral investigator.

8. Ms Ackerley produced her report ("the Report") on 8 March 2017. Ms Ackerley's overall conclusion was that there was no evidence that the Respondent's anti-harassment and bullying policy had been breached. The Tribunal was critical of the Report, not only because of the approach taken in producing it, but of the way that Ms Ackerley had approached the evidence. It concluded that the upshot was that the Report was one that was "*nuanced towards damage control*", and that that cast doubt on whether or not the Report was thorough and fair in key areas.

9. On 10 April 2017, Mr Wenman, Chief Executive of the Trust, wrote to the Claimant summarising the outcome of a meeting that he had had with the Claimant about the Report. Mr Wenman's focus was on the way forward.

10. The Claimant appealed against the grievance outcome on the grounds that the investigation was inadequate. She also alleged that Mr Wenman was trying to persuade her against pursuing the appeal. The Tribunal rejected that contention, and found that Mr Wenman was making genuine efforts to save the employment relationship. The Claimant's desired outcome, however, was disciplinary action against Mr Boucher, including removal from his post.

11. The grievance appeal hearing took place on 18 July 2017. A Non-Executive Director of the Trust, Mr Hood, chaired the appeal. On 11 September 2017, Mr Hood wrote to the Claimant dismissing her appeal. He found, amongst other things, that there was no evidence that there was any discrimination behind Mr Boucher's actions. The Claimant was encouraged to engage in mediation so as to bring about a return to her substantive role.

12. On 4 October 2017, the Claimant sent a letter of resignation to Mr Wenman. The Claimant continued to want something visible done about Mr Boucher and did not accept that Mr Hood

had shown that the Trust was successfully tackling any sex discrimination, bullying or harassment in the workplace.

13. On 11 December 2017, the Claimant brought proceedings in the Employment Tribunal alleging unfair constructive dismissal and victimisation on the grounds that she had done a protected act under the 2010 Act. The Claimant relied upon her grievances as her protected acts for the purposes of s.27(2) of the 2010 Act. She contended that she been subjected to a number of detriments due to those protected acts, including the inadequate investigation into her complaints by Ms Ackerley and the rejection of her grievance and grievance appeal. The Respondent resisted those claims. The Respondent also raised a jurisdictional issue that any allegations that predated 27 August 2017 (i.e. 3 months and 16 days prior to the receipt of the claim form) were out of time.

The Tribunal's Judgment

14. The matter was heard in the Exeter Employment Tribunal, Employment Judge Matthews presiding, over several days in September 2018. Both parties were represented by Counsel. In a clearly structured judgment, the Tribunal's conclusions on victimisation commenced at paragraph 93. As to that claim, the Tribunal dealt first with the time issue. Its conclusions were as follows:

> **"95. Time issues**
>
> **96.The issue identified by Employment Judge O'Rourke was this. Of the alleged detriments set out in paragraph 3 above the first four pre-date the presentation of the claim by more than three months. Those aspects of the claim are, therefore, out of time unless they are part of a continuing act by reference to section 123(3)(a) EA or time is extended under section 123(1)(b) EA.**
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> **97. In our view the alleged detriments were part of a course of conduct extending over a period. They were not a succession of unconnected events. The Trust was responsible for a continuing series of events stemming from the grievance dated 22 October 2016 and including the rejection of the grievance on 11 September 2017. The claim form was received by the Employment Tribunals on 11 December 2017. Ignoring any extension for any conciliation, the complaint about the rejection of the grievance appeal was in time. As the first four acts complained of were part of the course of conduct extending to the rejection of the grievance appeal, the complaints about them are also in time."**

15. The Tribunal then proceeded to consider the protected acts and the alleged detriments in question. It concluded that the Claimant's allegations contained in her grievance did amount to protected acts. As to the alleged detriments, of which there were several, the Tribunal found that the Report produced by Mr Ackerley did give rise to clear detriments. It said as follows:

> **"111. In applying the test, we must look at the report and decide whether or not its findings were objectively honest and reasonable. In doing so we have in mind that an omission can amount to a detriment. Applying this test, we find that there were clear detriments within the report. These are the issues we set out in paragraph 53 – 59. Those, and the nuancing (see paragraph 59) taint the report as a whole. We do not suggest that Ms Ackerley produced a dishonest report but for the reasons we have set out, our conclusion is that it was not, judged objectively, reasonable.**
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> **112. Ms Hart raised a considerable number of criticisms of Ms Ackerley's report that we have not dealt with. In our view, some appear to have some substance and others not. We do not list or address those here because we believe that the assessment we have made of Ms Ackerley's report is sufficient to establish detriment."**

16. Thus, the Tribunal accepted that the Claimant's first alleged detriment was made out. However, it rejected each of the other detriments relied upon. Its reasons for doing so can be summarised as follows;

a. The Respondent's rejection of the Claimant's grievance on 7 April 2017 – The Tribunal found that this did not amount to a detriment, or if it did, Mr Wenman acted as he did because he wanted to move matters forward and not because the Claimant had done a protected act (paragraph 115);

b. The Respondent's attempt to persuade the Claimant to drop her appeal – This was rejected as there was no such attempt (paragraph 117);

c. The decision to delay the Claimant's return from secondment to her substantive post - This was rejected as the relevant decision had been made with the agreement of the Claimant's welfare officer and was sensible (paragraph 119);

d. The rejection of the Claimant's grievance appeal on 11 September 2017 – The Tribunal found that there was no detriment (paragraph 121);

e. The Respondent's continuing failure to discipline Mr Boucher – The Tribunal found that there was no detriment here as there was no evidence with which the Respondent could sensibly have charged Mr Boucher with any disciplinary offence (paragraph 123).

17. Accordingly, the only claim of victimisation which succeeded was that in relation to the inadequacy of Mr Ackerley's report. That was some 7 months before the Claimant's claim was lodged with the Tribunal.

18. The Claimant's claim of constructive unfair dismissal was dismissed. The only breach of contract found was a breach of the implied term of trust and confidence in producing Ms Ackerley's report. Thereafter the Claimant had left it too long to resign. The delay of 7 months led the Tribunal to conclude that the contract had been affirmed within a few weeks of receiving Ms Ackerley's report.

Legal framework

19. Section 123 of the 2010 Act, so far as relevant, provides:

> **"123 Time limits**
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> **(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of –**
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> **(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.**
>
> …"

20. The leading authority as to whether an act can be said to be extending over a period is **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530 ("**Hendricks**"). In that case, the complainant, a police officer in the Metropolitan Police Service, presented a claim

complaining of race and sex discrimination going back over a period of 11 years. The employment tribunal considered that there was a *prima facie* case on the basis of the Claimant's untested allegations, that there was a policy, rule or practice that could be detected as a result of which female officers and officers from ethnic minorities were treated less favourably than white male officers. The Employment Appeal Tribunal upheld the Commissioner's appeal against that ruling. On Ms Hendricks' appeal to the Court of Appeal, the employment tribunal's decision was restored. As to the issue of continuing act, Mummery LJ held as follows:

> **"47. On the crucial issue whether this is a case of "an act extending over a period" within the meaning of the time limits provisions of the 1975 Act and the 1976 Act, I am satisfied that there was no error of law on the part of the Employment Tribunal.**
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> **48. On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the Commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed form (*sic*) the Service. She remains a serving officer entitled to the protection of Part II of the Discrimination Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the Service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period." I regard this as a legally more precise way of characterising her case than the use of expressions such as "institutionalised racism," "a prevailing way of life," a "generalised policy of discrimination", or "climate" or "culture" of unlawful discrimination.**
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> **49. At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no "act extending over a period" for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.**
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> **50. I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that the ground of the less favourable treatment is race or sex**
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> **51. In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on "continuing acts" was too literal. They concentrated on whether the concepts of a policy, rule, scheme,**

> **regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see *Owusu v. London Fire & Civil Defence Authority* [1995] IRLR 574 at paragraphs 21-23; *Rovenska v. General Medical Council* [1998] ICR 85 at p.96; *Cast v. Croydon College* [1998] ICR 500 at p. 509. (cf the approach of the Appeal Tribunal in *Derby Specialist Fabrication Ltd v. Burton* [2001] ICR 833 at p. 841 where there was an "accumulation of events over a period of time" and a finding of a "climate of racial abuse" of which the employers were aware, but had done nothing. That was treated as "continuing conduct" and a "continuing failure" on the part of the employers to prevent racial abuse and discrimination, and as amounting to "other detriment" within section 4 (2) (c) of the 1976 Act).**
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> **52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

21. **Hendricks** demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (or, as it is sometimes called, a "continuing act"). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in paragraph 48 of **Hendricks** is where separate acts of discrimination are linked to one another and are *evidence* of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination.

22. If the time issue is raised at a preliminary stage, the Claimant merely needs to establish a *prima facie* case that there is such a continuing act. That was the situation in **Hendricks**. However, as Mummery LJ makes clear at paragraph 49 of the judgment, once the Tribunal has made full findings of fact at a substantive hearing, the conclusion may be that there was no continuing act at all.

23. Given that the time limits are such as to create a jurisdictional hurdle for the Claimant, if, ultimately, the acts relied upon are found not to form part of conduct extending over a period so

as to enlarge time, then the claim would fail, unless, that is, the Tribunal considers that it would be just and equitable to extend time in respect of any acts that are proven but out of time.

The Grounds of Appeal

24. There are two grounds of appeal:

    a. Ground 1 - The Tribunal erred in concluding that there was a continuing act in circumstances where several of the allegations of detriment relied upon did not succeed;

    b. Ground 2 – The Tribunal erred in failing to dismiss the claim in the absence of evidence in support of the conclusion that it would be just and equitable to extend time.

25. Permission to proceed to a full hearing was granted by HHJ Auerbach on the sift.

26. I shall deal with each ground of appeal in turn.

Ground 1 – Was the Tribunal correct to find that there was a continuing act?

Submissions

27. Ms Omeri, who appears on behalf of the Respondent as she did below, submits that the Tribunal, having rejected several of the acts of detriment upon which the Claimant relied, erred in concluding that these acts were nonetheless part of a course of conduct extending over a period of time. She submits that only matters which give rise to an actionable act can conceivably form part of conduct extending over a period. If that were not the case then time limits would be rendered effectively meaningless as complainants could rely upon any act regardless of whether it actually occurred or whether it is actionable as an act of discrimination or victimisation, in order to bring earlier acts within time. If there were no acts of victimisation after the first one on 7 April 2017, then there is no evidence of a continuing discriminatory state of affairs within the meaning of **Hendricks**. Ms Omeri also relies upon the judgment of Simler P (as she then was) in

Jhuti v Royal Mail UKEAT/0020/16/RN ("Jhuti"), where the issue was whether the Claimant established that her claims of whistleblowing detriment were in time in circumstances where she had failed to prove that there were any actionable detrimental acts that were within time so as to be capable of enlarging time under s.48(3)(a) of the **Employment Rights Act 1996 Act** ("the 1996 Act"). It was held:

> **"41. We have concluded that Mr Gorton's submissions are plainly correct on this issue. A claimant must prove a contravention of s.47B in order to have a claim (s. 48(1A)). In other words, a claimant must prove that he or she was subjected to a detriment by an act or failure to act that the employer does not show to have been done on grounds other than a protected disclosure. If no contravening (or actionable) detrimental act is proven then the issue of time is irrelevant. The reference to "the act or failure to act to which the complaint relates" in s. 48(3)(a) must be to a complaint related to a right under s.47B and this must therefore relate to an actionable act. Further, as s. 49(1A) makes clear an award of compensation may be made in respect of "the act or failure to act to which the complaint relates" and again that must be a reference to an act that contravenes s.47B (and not to any unproven act or failure to act). In other words, it is a reference to an actionable act and a uniform interpretation must apply. In each case, the act or failure to act must be proven.**
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> **42. The harshness of the strict three month time limit is mitigated by s.48(3)(a) (and (b)), recognising (as Mummery LJ explained) that some forms of detrimental treatment can extend over lengthy periods and vulnerable workers may put up with such treatment for a long time before making a complaint to an Employment Tribunal. Inevitably in those circumstances there may be acts of detriment both inside and outside the three-month period with a connection between the two. It seems to us to be implicit in the passages cited from Arthur that in order to count for time purposes there must be at least an in time actionable act established.**
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> **43. Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes.**
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> **44. Were the proper construction to be as Mr Jackson contends, the time limits set out in s. 48(3) for detriment complaints would be rendered meaningless since claimants could rely on any act (regardless of its merits, actionability or whether it was rejected as a matter of fact) as rendering the claim a claim in time. Claims would never be time-barred on this basis. Recognising this difficulty, Mr Jackson submitted that where the final act in the series is relied on solely for the purposes of extending time and not for genuine motivations, then it cannot be treated as an act within the meaning of s.48(3)(a). That is to import a test based on sincerity of intention. There is no warrant for that in the statute and in our judgment it would be unworkable.**
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> **45. That does not mean that a claimant must succeed in establishing as actionable each and every act relied on as part of a series. In this regard**

> **we agree with and adopt, with one important caveat, the observations of HHJ Hand QC in *Ekwelem v Excel Passenger Service Ltd* UKEAT/0438/12. At paragraph 31 he said in the context of a series of unlawful deductions from wages, some of which had been held to be lawful deductions: "A series does not cease to be a series because on analysis and on judgment it is concluded that some part of it is not unlawful. This was asserted to be a continuing act, and, in my judgment, it was a continuing act. The fact that the claimant cannot succeed on some part of it does not mean that the case was time-barred." 1 The caveat we add is that there must be at least one in-time proven act that infringes the relevant provision.**
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> **46. In the circumstances, we have concluded that since the Claimant failed to prove that there were any actionable detrimental acts that post-dated 30 March 2014, there were no ongoing similar acts or failures to act that could form part of a series for the purposes of enlarging time under s.48(3)(a).**
>
> **47. The Employment Tribunal's reasoning at paragraph 349 of the Judgment in relation to a "continuum" is also in error because it confuses detriments with acts. It was not open to the Tribunal to find that there was a connection or continuum between the established and proven acts that gave rise to detriments, occurring no later than 30 March 2014, and the subsequent act relied on by the Claimant in relation to the grievance that was not proven. The proven acts that occurred no later than 30 March 2014 may have had continuing consequences in terms of the detriment experienced by the Claimant but on any view, there were no further proven acts after that date. The Employment Tribunal could not have been referring to further acts or conduct in those circumstances. That the earlier acts had continuing detrimental consequences is irrelevant for time purposes, and we are satisfied accordingly, that the Employment Tribunal erred in this regard too."**

28. Although that case deals with the slightly different time limit provisions under the 1996 Act, Ms Omeri submits that the relevant principles are the same and directly applicable in the present case.

29. Ms Hart, who appears for the Claimant as she also did below, submits that there was no error of law. She submits that if paragraph 97 of the Tribunal's judgment is read in its proper context, it is clear that its conclusion was that the alleged detriments were part of a course of conduct of which each act individually (if proven) was a part. As such submits Ms Hart, the fact that some of the acts allegedly committed pursuant to that course of conduct were not established does not undermine the fact that there was still a course of conduct. In other words, there was a continuing discriminatory state of affairs commencing with the initial grievance report and continuing right up to the rejection of the grievance appeal.

30. Ms Hart further submits that the decision in **Jhuti** is of limited assistance given the different nature of the provisions that were being considered there, namely whether there had been a "*series of similar acts or failures*" within the meaning of s.48(3)(a) of the 1996 Act. The reasoning relating to a series of acts does not undermine the analysis of the Tribunal here, which found that there was conduct extending over a period. Ms Hart relies upon two decisions in support of her contention that there can be a continuing act even if some of the detriments arising as a result of that continuing act are not established: the first is **Richmond v Knowsley Metropolitan Borough Council** UK EAT/0047/13/DM. In that case, the EAT, HHJ McMullen QC presiding, held that once the disciplinary process was started, all steps taken in accordance with that process were part of the continuing act; the other was **Hale v Brighton and Sussex University Hospitals NHS Trust** UKEAT/0342/16/LA, where I held that the decision to initiate a disciplinary procedure created a state of affairs that would continue until the conclusion of the disciplinary process and that there was therefore a continuing act, not merely a one-off act with continuing consequences.

31. The parties also made reference to the case of **Koku v South London and Maudsley NHS Foundation Trust** (2013) UKEAT/2294/12/LA. Ms Hart submits that that case should be distinguished on the facts as there was no prior discriminatory act which had been upheld by the Tribunal.

Discussion

32. In my judgment, Ms Omeri's submissions are to be preferred. Section 123 of the 2010 Act provides that conduct extending over a period is to be treated as done at the end of the period. The question therefore is whether the Tribunal was entitled, on the facts here, to conclude that there was conduct extending over a period. It must be borne in mind, of course, that the Tribunal here was not conducting a preliminary analysis as to whether or not there was a *prima facie* case, but a final analysis based on concluded findings of fact. Those findings were that there were no

acts of unlawful discrimination or victimisation after 7 April 2017. Indeed, none of the specific acts of alleged victimisation after that date were upheld. Is it open to the Tribunal nevertheless to conclude that there was a continuing act right up to the last of those *alleged* acts of discrimination? In my judgment, the answer must clearly be no.

33. In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the Claimant will usually rely upon a series of acts over time (I refer to these for convenience as the "constituent acts") each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be, as Ms Omeri submits, to render the time limit provisions meaningless. That is because a claimant could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were not held to be discriminatory.

34. Ms Hart's first point as to the proper interpretation of paragraph 97 of the Judgment does not assist her. There the Tribunal considered the *alleged* detriments to be part of "a course of conduct". That suggests that the Tribunal concluded that there were constituent acts that could evidence a continuing discriminatory state of affairs. The Claimant might thereby have established a *prima facie* case if this were a preliminary assessment as to whether there was jurisdiction to hear the claim. However, this was not a preliminary assessment. The Tribunal appeared to disregard its own subsequent findings that several of those "alleged detriments" were not made out. All that the Claimant was left with was a single act of victimisation occurring on 7 April 2017. The Tribunal ought to have conducted its analysis of the time issue with those findings in mind. Had it done so, it would inevitably have been driven to the conclusion that there

cannot be a continuing act extending up to the rejection of the grievance appeal. The fact that the Tribunal chose to refer to 'a course of conduct' rather than conduct extending over a period does not change the position. A course of conduct will also usually involve two or more discrete acts. If all but the first of those discrete acts is not made out then there will only be a single, isolated act, and not a 'course of conduct'.

35. Ms Hart identified the continuing act in this case as the effect of Ms Ackerley's Report which was found to be an act of victimisation and therefore tainted. That had the effect, says Ms Hart, of tainting the grievance process thereafter until its conclusion. Having identified the continuing act thus, it was, she submits, not necessary for each alleged detriment to be made out because the discriminatory state of affairs instigated by the Report continued regardless. That submission is to the effect that there can be a continuing act covering the whole period over which there are constituent acts of discrimination even though many of those constituent acts are not made out. In my judgment, that does not take account of the following passages in Hendricks:

> **"48. … She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that <u>the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs</u> covered by the concept of "an act extending over a period." …**
>
> **"52. … Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an <u>ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably</u>…" (Emphasis added)**

36. What these underlined passages make clear is that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that *evidence* that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs.

37. That analysis seems to me to be supported by the conclusions reached by the EAT in the **Jhuti** case where it was held that:

> **"43. Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes." (Emphasis added)**

38. I do not consider that the fact that Simler P (as she then was) was focusing on s.48(3)(a) of the 1996 Act, which deals with the situation where is "*a series of similar acts or failures*" and not one where there is conduct extending over a period, renders that decision any less relevant. Where the allegation is one of conduct extending over a period, there will, as described above, usually be a series of constituent acts relied upon. It will be necessary, in my judgment, for at least the last of the constituent acts relied upon to be in time and proven to be an act of discrimination in order for time to be enlarged. A similar conclusion was reached by Singh J (as he then was) in the case of **Koku v South London & Maudsley NHS Foundation Trust** UKEAT/0294/12/LA in which it was held that a tribunal was not obliged to consider whether there was a continuing act in circumstances where the final act of dismissal was found not to have been discriminatory: see [19] of **Koku**. Ms Hart submitted that that case could readily be distinguished as it was not dealing with a situation where the discriminatory state of affairs arose out of a grievance or disciplinary process. It is right that the background facts in **Koku** are dissimilar. However, it seems to me that in relation to the issue at hand, which is whether there can be a continuing act where some of the constituent acts, including the last of the constituent acts which is in time, is not proved to be discriminatory, the decision in **Koku** is relevant.

39. The judgments in **Richmond** and **Hale** do not support Ms Hart's contention. She submits that in those cases there was a continuing discriminatory state of affairs by reason of the instigation of a disciplinary procedure by the employer with various steps taken from time to time

in accordance with that procedure. Ms Hart says that the same should apply in respect of a grievance procedure notwithstanding the fact that it is the employee who instigates that by lodging a grievance. The difficulty with that submission is that in neither **Richmond** nor **Hale** was the EAT dealing with the precise issue here of whether there can be a continuing act regardless of some of the constituent acts, including those that are in time, not being proven.

40. In **Richman**, the Tribunal raised the time issue of its own volition, and, having decided that the claim was out of time, stopped proceedings. There was no analysis by the EAT in that case of the kind of situation dealt with here.

41. In **Hale**, the issue was whether the Tribunal had been correct to focus only on the first stage of a disciplinary procedure and finding that that was a one-off act with continuing consequences rather than part of a continuing act. In concluding that the Tribunal had erred in treating the instigation of disciplinary procedures as a one-off act, I said this:

> **"41. It was not suggested by the Claimant, in this case, that there was some policy, rule, practice, scheme or regime in place as a result of which he was subjected to less favourable treatment. Instead, it was said that there was an ongoing state of affairs; namely being subjected to disciplinary procedures, which culminated in dismissal. The question is whether there was, as the Tribunal found, a one-off act which had continuing consequences; namely being subjected to further stages in the disciplinary process, or whether this was part of an act extending over a period.**
>
> **42. By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "*a succession of unconnected or isolated specific acts*" as per the decision in Hendricks, paragraph 52.**
>
> **43. In my judgment, the Tribunal erred in treating the first stage of the process as a one-off act. Mr Kibling submits that this is a clear finding of fact and notes that the decision is not challenged on the basis of perversity. However, the Tribunal here, for reasons already set out, lost sight of the substance of the complaint as defined by the agreed issue. Having done so, it then incorrectly treated the subdivided issue as a one-off, when it undoubtedly formed part of an ongoing state of affairs created by the initial decision.**
>
> **44. That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be**

> **confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision. It seems to me that that provision can encompass situations such as the one in question."**

42. Ms Hart places heavy reliance on these passages. She submits that, as in **Hale**, there was here a process (albeit a grievance process) that amounted to a state of affairs that would continue until its conclusion. Ms Hart also submits that, as in **Hale**, to conclude otherwise in this case would place a heavy burden on Claimants who seek to avail themselves of a grievance process.

43. In my judgment, **Hale** is not authority for the proposition that there is a continuing discriminatory state of affairs whenever a disciplinary process is instigated regardless of whether any subsequent constituent acts are proven. As is evident from the passages above, the primary issue in **Hale** was whether the Tribunal was correct to focus on the initial instigation of the disciplinary procedure without properly considering the pleaded case that that was merely the start of a process that led ultimately to dismissal. What is said in paragraph 44 of my judgment in **Hale** was in relation to "*situations such as this*", i.e. those that prevailed in that case. In any event, there was no analysis in **Hale** of the specific circumstances arising in the present case, whereby the Tribunal concluded that there was a continuing act extending to the final constituent act notwithstanding the fact that the last four of the constituent acts relied upon were not proven to be discriminatory.

44. For these reasons Ground 1 of the Appeal is upheld.

Ground 2 - Did the Tribunal err in failing to dismiss the claim in the absence of any evidence to show that it would have been just and equitable to extend time?

45. This ground, which only arises because Ground 1 succeeds, is really directed to the proper disposal of the matter.

Submissions

46. Ms Omeri submits that as the Tribunal made no alternative finding that it would be just and equitable to extend time in respect of the victimisation claim that was made out, there is no basis on which that claim could be said to be in time. She notes (and it is not in dispute) that the Claimant adduced no evidence on the just and equitable issue, and it can be inferred that the Tribunal did not determine the issue because it considered that the claimant had effectively abandoned the point. She submits that in the absence of any cross-appeal against the Tribunal's failure to determine the just and equitable issue, it would not be appropriate to remit the matter to the Tribunal as that would, in effect, give the Claimant a 'second bite at the cherry'. Ms Omeri said that to remit would be to give the Claimant the opportunity to make good her evidential deficit on the first occasion and that it would be contrary to the principle set out in **Kingston v British Railways Board** [1984] ICR 781:

> **"…In my experience, however, the appeal tribunal has never remitted a case to an industrial tribunal to enable a party to call a witness on an issue which was clearly relevant to the first hearing before the tribunal, and who could have been called at that hearing, where such evidence is not within the principles of *Ladd v. Marshall* [1954] 1 W.L.R. 1489. If the evidence is not admissible before the appeal tribunal on appeal, then I can see no justification for remitting the case to the industrial tribunal for a rehearing solely to achieve the same result. There may be good reasons to justify remission in other cases, but, where this is the sole reason, I do not think that a case should be remitted." Per May LJ at 796B.**

47. Given the lack of evidence, there is only one possible outcome and that is that the grounds for extension are not made out. The appropriate course in these circumstances, submits Ms Omeri, is for the EAT to determine the point.

48. Ms Hart submits that if Ground 1 succeeds, then the appropriate course would be to remit the matter to the Tribunal to determine whether or not time should be extended on just and equitable grounds. That is because the just and equitable issue was clearly before the Tribunal, and the matter was dealt with in closing submissions made by Counsel on the Claimant's behalf. In those circumstances, the fact that the Claimant did not specifically address the issue in evidence is not fatal; the Tribunal could have drawn appropriate inferences from statements in the pleadings and other documents as to the reasons for delay. It can be inferred in these circumstances, that the reason that the Tribunal did not determine the issue was that once the

Tribunal was satisfied that there was a continuing act within the meaning of s.123 of the 2010 Act, it did not consider it necessary to consider the alternative case that time should be extended. If the Tribunal erred in that regard, then the matter should be remitted for the Tribunal to consider the just and equitable issue. It is not an issue to which there is only one inevitable answer such that the EAT could determine the issue itself.

Discussion and Conclusions on Ground 2

49. In my judgment, on this issue, Ms Hart's submission prevails.

50. The just and equitable issue was raised in the pleaded case. Moreover, it was expressly stated as an issue to be determined in paragraph 4.3 of the issues identified at the preliminary hearing. There were closing submissions made on the point. It cannot be said, in these circumstances, that the issue was abandoned by the Claimant notwithstanding her failure to adduce evidence specifically about it. It is, therefore, an issue on which the Tribunal could have made a determination in the alternative.

51. Whilst it is correct that the Claimant has not cross-appealed against the Tribunal's failure to reach a determination on this issue, I do not regard that as being determinative of the question of disposal. Where a ground of appeal is upheld, the EAT:

> **"…must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result is lawful as if it had not been made; or (b) without the error the result would have been different, but the appeal tribunal is able to conclude what it must have been. In neither case is the appeal tribunal to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the employment tribunal, supplemented (if at all) only by undisputed or indisputable facts. Otherwise there must be a remittal." Per Underhill LJ in Jafri v Lincoln College [2014] ICR 921 at [21].**

52. On the question of whether there is a continuing act, it seems to me that the result which flows from the findings made by the Tribunal is that there is no such continuing act so as to render the sole established act of victimisation in time. However, on a proper application of s.123 of the 2010 Act, and where the issue is squarely before the Tribunal, it would have been better if the

Tribunal had proceeded to determine the just and equitable issue in the alternative. That was not done. There is therefore a gap in the judgment which must be filled irrespective of any cross-appeal as to the failure to make a determination on the issue. In my judgment, it is not a gap that this Appeal Tribunal can fill. It is a matter for the Tribunal to determine in the exercise of discretion. The absence of direct evidence from the Claimant on this issue does not mean that only one outcome is possible. Even in the absence of direct evidence, the Tribunal is, in the usual way, able to draw inferences from the range of evidential material before it, as well as from the pleaded case. As stated by Underhill P (as he then was) in **Accurist Watches Ltd v Wadher** UKEAT/0102/09/MAA:

> **"In my view a tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question – that is, in a case like the present, as to the explanation for the delay. Such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents." at [16]**

53. Ms Omeri submits that the range of evidential material there described does not include assertions in submissions, which cannot on any view amount to evidence. That is correct. However, the Tribunal in this case would have the full panoply of other evidential material from which to draw inferences and would not be considering submissions alone. Given the existence of that material, this is not a case where the Appeal Tribunal can say unequivocally what the result would be. The continuation of the grievance process might itself be a factor considered by the Tribunal to be relevant in determining whether it would be just and equitable to extend time. As such, the case must be remitted for the Tribunal to consider the just and equitable extension issue.

54. This would not involve a breach of the principle in **Kingston**. In that case, the remission, if it had taken place, would have been for the sole purpose of enabling a party to call a witness on an issue which was clearly relevant to the first hearing and who could have been called before. The remittal in this case would not be for the purposes of enabling the Claimant to adduce further evidence. Rather it would be for the purpose of enabling the Tribunal to determine an issue which

it could have determined first time round. Ms Hart has stated that the Claimant would not seek to adduce further evidence on the issue and would rely only upon material already presented to the Tribunal. As such the principle in **Kingston** would not be engaged in any event.

55. Returning to the issue of whether there is an error of law, it seems to me that in reality there was no separate error here; there was simply a failure to determine an issue in the alternative. Whilst it would have been preferable for the Tribunal to have determined that alternative issue, it was not bound to do so given its (albeit now erroneous) conclusion as to conduct extending over a period. The just and equitable issue must, however, be remitted as a consequence of upholding Ground 1.

Conclusion

56. For all these reasons, Ground 1 of the appeal is upheld. I substitute a decision that there was no conduct extending over a period. The result is that the single act of victimisation which was found to be proved is out of time. The matter shall be remitted to the Tribunal to determine whether, nevertheless, time should be extended on just and equitable grounds for that sole act of victimisation.

57. Finally, I would like to express my thanks to both Counsel for their helpful submissions.