Appeal No. UKEAT/0124/18/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 February 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MRS S McLEARY APPELLANT

ONE HOUSING GROUP LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR WILLIAM YOUNG (of Counsel) Advocate (formerly Bar Pro Bono Scheme)
For the Respondent	MR JOSEPH BRYAN (of Counsel) Instructed by: Penningtons Manches LLP Apex Plaza Forbury Road Reading RG1 1AX

SUMMARY

JURISDICTIONAL POINTS – Claim in time and effective date of termination

DISABILITY DISCRIMINATION

Following her resignation, the Appellant complained of various types of disability discrimination and of constructive unfair dismissal. At a Preliminary Hearing the Judge determined that all the complaints of discrimination during employment were out of time and that it was not just and equitable to extend time. Accordingly, they were all dismissed. The unfair dismissal claim, which was in time, was not affected.

Held: on the particular facts of this case, where it was plainly being asserted that discriminatory treatment during employment had contributed to the constructive dismissal, the particulars of claim should have been treated as including a complaint of constructive dismissal contrary to section 39 **Equality Act 2010**; and/or the issue should at least have been raised and clarified at the initial Case Management Preliminary Hearing. The Appellant had also raised an argument that her various complaints of treatment contrary to the **2010 Act** amounted, taken together, to conduct extending over a period for time purposes; and the Employment Tribunal had erred in not considering that.

HIS HONOUR JUDGE AUERBACH

Introduction

1. The Respondent in the Tribunal below, and now to this appeal, is a registered social landlord. The Claimant in the Employment Tribunal ("ET"), now the Appellant, was employed by it as a support worker. She started working for a predecessor organisation in 2009 and transferred into the Respondent's employment in 2011.

2. There is no dispute that the Claimant is and was at all relevant times a disabled person by reference to dyslexia. Her case was that, starting in around May 2015, and in various ways and at various times, the Respondent failed to make sufficient reasonable adjustments for her disability, and that there was conduct which amounted to discrimination arising from disability, harassment and/or victimisation.

3. As a matter of fact, after 29 September 2015, she was off sick until her employment eventually ended by her resignation. In between, on 2 February 2016, she presented a formal grievance complaining of discrimination. Following a meeting in March to discuss it and a decision in April, she then appealed, and following an appeal meeting she received a decision on her internal appeal on 28 June 2016. Following this, she resigned with effect on 30 June 2016.

4. Thereafter, she presented a claim form to the ET. It is not disputed that it contained complaints, at least, of unfair constructive dismissal and **Equality Act 2010** ("EqA") complaints of discrimination arising from disability, harassment related to disability, victimisation and

failure to comply with the duty of reasonable adjustment, all said to have occurred during the course of her employment.

5. The claim form gave Miss Lewis as the name of the Claimant's representative. Miss Lewis is in fact the Claimant's sister and she is a lay person. She appeared at a Case Management Preliminary Hearing, but did not in fact appear for the Claimant at a subsequent Preliminary Hearing on time points, the outcome of which has given rise to this appeal. It was accepted by Mr Bryan on behalf of the Respondent that the Claimant was effectively to be treated as a litigant in person, given that her representative, so far as involved, was herself a lay person.

The Tribunal's Decision and the Grounds of Appeal

6. This appeal specifically relates to the decision of the Tribunal, arising from a Preliminary Hearing that took place on 11 August 2017, which had been convened specifically to consider time points. It resulted in the dismissal of all of the complaints that were brought under the **EqA** on the basis that they were out of time and that it was not just and equitable to extend time. The written Judgment and Reasons were promulgated on 21 December 2017.

7. Upon initial consideration of the Notice of Appeal on paper, His Honour Judge Richardson directed that it should receive further consideration at a Preliminary Hearing. At that Preliminary Hearing, at which the Claimant had the advantage of being represented by Mr Young of counsel under the ELAAS scheme, Her Honour Judge Tucker permitted two grounds of appeal to proceed to a Full Hearing. These are identified at paragraph 6 of the amended grounds of appeal that were submitted for the purposes of that Hearing as follows:

> **"6. The learned Judge erred in law:**
>
> **Failed to consider the constructive dismissal claim as part of the discrimination claim**

> **1. in failing to consider that the alleged constructive dismissal, which was based at least in part on alleged conduct by the Respondent that was characterised as discrimination, would itself be an act of discrimination**
>
> **Failed to consider whether there was a continuing act of discrimination**
>
> **2. in finding that the discrimination claims were presented out of time, and/or in failing to exercise its discretion to extent time, without considering whether the Appellant had shown that there was a continuing act of discrimination".**

8. I turn to say a little more about the Decision of the ET. It records at the start of the Reasons that the Claimant presented her claim form on 1 December 2016, her employment, as I said, having ended by resignation on 30 June of that year. The Judge set out his analysis that, taking account of the extension of the three-month time limit referred to in section 123 (1)(a) of the **EqA**, by the period of ACAS early conciliation, in accordance with section 140 of that **Act** "the date when time started to run was 21 June 2016."

9. I interpose that what was plainly meant by that, to spell it out in full, is that any complaint under the **EqA** relating to conduct which fell to be treated as having occurred on or after that date would be in time. However, a complaint relating to conduct which fell to be treated as having occurred before that date would be out of time, unless the ET considered it just and equitable to substitute a longer period for the three-month period, which was long enough so as to cause it to be in time. That analysis, and the identification of the date of 21 June 2016 as the crucial date for these purposes, was not in dispute before the ET nor in this appeal, as such.

10. The Judge went on to identify that there were multiple allegations of discrimination. He identified that these were said to have occurred on various dates during employment or in some cases for the duration of a defined period of time, or a period that could on any view not have extended beyond an identified end date, such as the date on which the Claimant went off sick. He went to conclude that all of the complaints were out of time unless he found that it was just

and equitable to extend time. However, for reasons that he set out, he did not so find, and the complaints under the **EqA** were all dismissed.

11. Finally, the Judge recorded that the complaint of constructive unfair dismissal was not affected by his decision. I add, again to spell it out, that that was because it was not disputed that it was in time, time running, in that respect, from the date when the resignation took effect.

12. An agreed chronology was helpfully prepared for the hearing before me, which gives agreed dates or periods in respect of most of the individual allegations of discrimination during employment, placing the most recent of these in point of time as having occurred on 25 April 2016. In the course of argument before me today, Mr Young, who appeared on behalf of the Claimant once again, confirmed that it was *not* suggested that the Judge ought to have found that there was any specific allegation of treatment during employment contrary to the **EqA** that was said to have occurred on a more recent date than that.

13. However, as ground 1 of the appeal argues, it is said that the Tribunal erred by not also identifying that there was a complaint that the claimed constructive dismissal was not only unfair but also discriminatory. If so, *that* complaint would itself be in time, since the constructive dismissal would be treated as having occurred when the resignation took effect, just as, for that reason, the constructive unfair dismissal complaint was in time.

14. Ground 2 asserts that the Tribunal also erred by not considering that the Claimant was effectively claiming that the various episodes or incidents about which she complained under the **EqA** amounted, taken together, to conduct extending over a period, so that all of these matters fell to be treated as done at the end of that period pursuant to section 123 (3)(a) **EqA**. It was,

however, accepted that the most recent specific act of discrimination alleged to have occurred during employment was on 25 April 2016, and that a complaint in relation to *that alone* would be out of time. Mr Young accepted during the course of argument that ground 2 was therefore effectively parasitic on ground 1. That is to say: if ground 1 failed, ground 2 would fall away. However, if ground 1 succeeded that opened the door to ground 2 on the basis that it was argued, at its highest, that the Tribunal erred by not considering the possibility that there was conduct extending over a period up to and including the putative discriminatory constructive dismissal, which had the potential then to bring all of the allegations of discrimination in time.

15. I say that it had the potential to do so because, ultimately, if that was the scenario that the Tribunal had before it, or should have considered, it would have to determine individual allegations on their merits in order to see, as it were, how many of them remained standing and how that affected its view of whether those that did remain standing potentially could be treated as forming part of a single piece of conduct extending over a period.

16. In the course of argument, there was also an issue as to whether the second ground of appeal raised within its terms an argument that the Tribunal had erred in its exercise of the just and equitable jurisdiction by failing to consider the continuing act argument. It seems to me that as a matter of construction of the wording of this ground, it does raise that additional point. The reference to failing to exercise its discretion to extend time is clearly a reference to the just and equitable jurisdiction. It is being said that there was an error in failing to consider whether there was a continuing act of discrimination when it came to the exercise of that jurisdiction. However, whether that aspect of ground 2 has any legs is itself parasitic on whether there was an error in failing to consider whether there was a continuing act of discrimination in the first place. If ground 2 succeeds, it may, however, potentially affect the terms of any remission.

The Statutory Framework

17. I turn now to say something about the general framework of the legislation. The **Employment Rights Act 1996** ("ERA") gives employees who are sufficiently qualified the right to claim unfair dismissal. For these purposes, the concept of dismissal is defined in section 95, which includes at 95 (1)(c) a case in which "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct." That is what lawyers, at any rate, generally refer to as constructive dismissal, although that term of art is not used in the legislation.

18. It is well established that an essential element of this concept is that it must be shown that the employer has acted in a manner amounting to a fundamental breach of the contract of employment, although that can come about by breach of the implied duty of trust and confidence, which can itself be established by a series of episodes or events said together cumulatively to amount to such a breach. If that, and the other elements of constructive dismissal, are satisfied, then the employee is treated as dismissed, opening the door to an unfair dismissal claim.

19. However, constructive dismissal and unfair dismissal are not the same thing. A constructive dismissal is just a type of dismissal. The Tribunal must still decide, under section 98 of the **1996 Act**, whether it was for a fair reason, and, if so, whether it was fair in all the circumstances of the case. In practice it is often conceded that, if there *was* a constructive dismissal, it was also unfair. But in some cases, it may be argued that, even if there was a constructive dismissal, it was still for a fair reason and was not, in all the circumstances, unfair.

20. Where there is a constructive dismissal, then the time limit for bringing an unfair dismissal claim runs, in the usual way, from the effective date of termination, being, in such a case, the date

when the resignation took effect, not from the date or dates of the conduct said to amount to a fundamental breach.

21. I turn to the relevant provisions of the **EqA**. A number of sections define various concepts. These include, under the heading in chapter 2 of "prohibited conduct", and then the sub-heading "discrimination": direct discrimination – defined in section 13; discrimination arising from disability – section 15; indirect discrimination – section 19; and the duty to make adjustments and failure to comply with that duty – sections 20 and 21. Further on, section 26 defines the concept of harassment and section 27 the concept of victimisation.

22. All of these provisions, however, merely define concepts. They do not themselves create causes of action. The causes of action in the employment field are created, among other provisions, by sections 39 and 40. That includes provision in section 39(2), including that an employer must not discriminate against an employee by dismissing them, and section 39(4) that an employer must not victimise an employee by dismissing them.

23. Harassment is dealt with separately in section 40, which provides that an employer must not, in relation to employment by them, harass an employee or an applicant for employment.

24. Section 39(7) defines dismissal for the purposes of sections 39(2)(c) and 39(4)(c), as including the giving of notice in circumstances such that the employee is entitled, because of the employer's conduct, to terminate the employment without notice. This is, in its essentials, exactly the same as the definition of constructive dismissal for the purposes of an unfair dismissal claim.

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25. Accordingly, anything which falls with the concept of discrimination can form the subject of a section 39 claim that an employee has been discriminated against by being constructively dismissed, and the same is true of anything said to meet the definition of victimisation. Section 25 of the **EqA** defines disability discrimination so as to embrace section 15 – discrimination arising from disability, and discrimination within section 21 – failure to comply with the duty of reasonable adjustment. It follows that claims of treatment of those kinds, as well as of victimisation, can, in principle, be the subject of a claim of unlawful constructive dismissal under the **EqA**.

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26. Mr Bryan pointed out that, apparently repetitively, section 39(5) also states that a duty to make reasonable adjustments applies to an employer. However, he accepted that the provisions to which I have referred clearly mean, in any event, that constructive dismissal by failure to comply with the duty of reasonable adjustment is a cause of action recognised by the **EqA**.

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27. However, what the **EqA** does *not* create is a cause of action for constructive dismissal by harassment. That is because the prohibition on harassment by an employer is found in section 40 and that section includes no provision similar to that found in section 39, defining dismissal so as to include constructive dismissal. This has been confirmed in **Timothy James Consulting v Wilton** [2015] ICR 764.

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28. One issue ventilated in argument before me concerns the nature or type of the discrimination, if so found, in a constructive dismissal case arising under section 39. It may be said that this might not immediately be obvious, since in such a case the employer will not *actually* have dismissed by some particular act of discrimination, or victimisation, that is, actually

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terminated the employment itself by such conduct. Rather, the employee will have resigned in circumstances that are deemed to amount to a dismissal.

29. An analogous problem was considered many years ago in a series of decisions in relation to constructive unfair dismissal, regarding how to characterise the nature of the reason for a constructive dismissal, and whether it is of a potentially fair type. The solution arrived at in **Berriman v Delabole Slate Ltd** CA [1985] 546, was that the reason for dismissal in a constructive unfair dismissal case is to be taken to be the reason for the treatment that amounted to the fundamental breach which influenced the resignation.

30. It seems to me that an analogous approach should be taken in respect of a constructive dismissal claim under section 39, so that, if it arises from a fundamental breach brought about by acts of direct discrimination, then the constructive dismissal itself would be an act of direct discrimination; if the breach involves an act or acts of victimisation, then the constructive dismissal would be by way of victimisation; or, if it was a mixture of the two, with each materially contributing to the cumulative breach, then the dismissal would be both; and so on.

31. I have already referred to the time limit provisions of the **EqA section 123**, the starting point for which (section 123(10(a)) is a three-month time limit but with extension to take account of the early Acas conciliation period (section 140B) and possible further just and equitable extension (section 123(1)(a)), as well as provisions that conduct extending over a period is to be treated as occurring at the end of that period (section 123(3) and (4)). So, where what appear to be a number of discrete acts of discrimination during employment are complained about, the time limit in relation to each will run from the date of that particular act, unless the Tribunal finds that

A one or more of them together form part of conduct extending over a period, in which case it will run, in respect of all of those acts, from the date of the last of them.

B 32. Where it is also said that there has been a discriminatory constructive dismissal then, just as it does in respect of an unfair constructive dismissal complaint, time will run from the date of dismissal, that is to say, the date when the resignation takes effect.

C 33. An individual who claims that one or more individual acts of discrimination during employment have driven them to resign, may argue, as a matter of ordinary principles of causation of loss, that the discrimination during employment therefore caused the loss of that job

D and the loss of earnings and so forth that may go with it. Nevertheless, the presence or not of a discriminatory constructive dismissal claim may make a material difference in a case where that claim would be in time, but where a claim or claims which are dated from the last date of the impugned treatment during employment would be out of time.

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The Litigation in the Employment Tribunal

34. In order to get to grips with both grounds of appeal further, it is necessary now to trace

F through the procedural history of this litigation in the ET, starting with the presentation of the claim form and up to the date of the Preliminary Hearing at which time points were adjudicated.

G 35. As I have already said, the claim form was presented on 1 December 2016. In section 8 the Claimant ticked the boxes labelled "I was unfairly dismissed (including constructive dismissal)" and "I was discriminated against on the grounds of: disability."

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36. I pause to observe that, whilst the unfair dismissal box highlights the constructive dismissal option embedded within it, there is no such equivalent provision in the text of the form to highlight the availability of such a claim where discrimination is being alleged.

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37. Attached to the claim form was a document giving Particulars of Claim over several pages. This began (the bold is in the original): "I am bringing a claim for **Breach of Contract, Constructive Dismissal**, and claims under the **Equality Act 2010** Section 15 - **Discrimination Arising from Disability**, Section 20 - **Duty to Make Adjustments**, Section 26 - **Harassment** and Section 27 - **Victimisation** and any other that may apply."

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38. I pause to observe that, as is in my experience extremely common, there was no specific cross reference to section 39.

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39. A section of this document set out the claimed disability. After further references to the texts of sections 15, 26 and 27, the document continued: "Since May 2015 to the 30th June 2016, I have undergone a serial of events/incidents pertaining to section 15, 26 and 27 of **Equality Act 2010**." After saying a little more about that, it referred to a breach of contract claim. It then went on to refer to section 20, the duty to make adjustments, and after quoting from those provisions in the **EqA**, gave a narrative account in relation to that.

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40. There was then a heading (again, with highlighting in the original) "**Constructive Dismissal** – section 95.1c – **Employment Rights Act 1996**" and that statutory definition was extracted. There were then nine paragraphs beginning: "The Respondent failed to recognise and make reasonable adjustments," then setting out particular allegations referring to conduct said

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variously to be discriminatory, to involve failure to make reasonable adjustments, to involve harassment, and/or to involve disability discrimination.

41. Of these, the sixth paragraph referred to the appeal outcome report as the last straw and referred to the duty of mutual trust and confidence. The seventh paragraph developed that account. It ended with a reference to the manager who determined the appeal, stating: "She was aware of my disability and that I was receiving medication because of the effect the ordeal had on me."

42. The next paragraph continues: "Given this and the way I have been treated, this left me with no alternative but to resign. it was not my expectation that an organisation whom provides support to vulnerable people would treat an employee or an human being like this. It was received as a contradictory to the facts."

43. Finally, the document referred to the outcome of the appeal being received on the 29th, "leaving me no other option but to resign on the 30th June 2016," and concluded with a further reference to the duty of mutual trust and confidence.

44. A response form was put in defending the claims on their merits but asserting that they were not sufficiently particularised. At this point no specific time points were raised.

45. On 31 January 2017 there was a Case Management Preliminary Hearing. Prior to that, in the usual way, the parties were sent agenda forms to complete. The Respondent, in its agenda form, indicated that there were potential jurisdictional issues in respect of time but did not further elaborate.

46. The Claimant, in her agenda form, in describing her complaints, included the following: "The claimant encountered continuing state of affairs **Equality Act 2010** section 123, 3 & 4." She set out the text of sub-sections (3) and (4) of section 123, referring to conduct extending over a period. Further on, referring to constructive dismissal, she wrote "Constructive dismissal - The claimant raised a grievance and the outcome prejudiced the claimant and dismissed her disability." A little further on she wrote:

> **"Nothing was put in place to safeguard the claimant from discrimination, victimisation and harassment. Not even mediation. Nothing to restore the relationship and trust with the organization knowingly that the claimant had a disability and that she needed to be supported. This had been made clear in the claimant grievance and appeal."**

47. In my bundle was a minute of the Preliminary Hearing itself that took place on 31 January 2017. Miss Lewis represented the Claimant, although she is not, as erroneously recorded there, a barrister. The Respondent was represented by a solicitor.

48. It was noted that the Respondent accepted that the Claimant had dyslexia. However, it was also noted that there might be an issue as to whether she was seeking to rely on some other disability that, if so, might be contentious. Directions were given for her to produce a statement identifying any claim to disability and its impact, and for the Respondent then to respond indicating whether any such disabled status was admitted or not. The Claimant was also directed to provide additional information in relation to her disability claims under each of sections 15, 26 and 27 and the duty of reasonable adjustments. Other directions were given.

49. In a section concerning time estimate for a trial, the following appeared:

> **"This case is as yet unlisted for hearing. Upon the Claimant providing the Additional Information referred to above the file will be referred to an Employment Judge to consider whether all or any of the disability claims have been brought in time, whether a further Preliminary Hearing should take place or whether any time limit points should simply be addressed at a final hearing."**

50. There was then appended to the minute, a list of claims and issues, identifying that the Claimant claimed constructive unfair dismissal and disability discrimination under sections 15, 20 and 21, 26 and 27, and noting that breach of contract was not pursued as a separate claim.

51. Under "constructive unfair dismissal", it was identified that the Claimant relied on the "following conduct" on the part of the Respondent. Among the matters then listed were included "failure to make reasonable adjustments" and "harassment", as well as other matters, and the outcome of the appeal being claimed as the last straw. Under the heading "Disability claims" it was noted that these needed to be more precisely pleaded but that it "seems possible" that all or some of the claims were presented outside the time limit.

52. I pause again to observe that, while the Claimant was ordered to provide Further Particulars of her claims, no provision was made either ordering or permitting the Respondent to then provide a further particularised response.

53. On 21 February 2017 the Claimant sent to the Tribunal a document described as a statement of incidents/events. It appears that she had not fully appreciated that this document should be confined to particularising any disability and its impact. As well as confirming that she relied on dyslexia as a disability and why, she also set out, over several pages, further information about her various disability discrimination claims. This included at page 5 the following: "I would ask that the judge sees this period as a Continuing State of Affairs under the **Equality Act 2010** Section 123, and a build-up to my deterioration under the equal **Act** section 6 & section 15." In relation to the various types of discrimination, a date or a start date or a period was identified for each one, and the individual or individuals said specifically to be responsible.

54. After setting all of this out over several pages, the Claimant concluded: "I no longer had any confidence in the organisation, and could no longer stand the mistreatment they were installing on me, and therefore was left no alternative but to resign."

55. It appears that the Claimant believed or asserted that she had also sent this document to the Respondent, but the Respondent, for whatever reason, did not receive it from her. However, at some point, either at or before the Preliminary Hearing that considered time points, a copy was made available to them. However, in an email sent to the parties later, the Judge indicated that this document had not been considered at the Preliminary Hearing, as such.

56. On 9 March 2017 the Claimant submitted a document described as a statement of disability claims, again, seeking to act in accordance with the direction that had been made at the Case Management Hearing. This included, again, material identifying different episodes, dates or periods covered by those episodes, who was involved and what was said to have happened. However, it also included, under the heading "Discrimination arising from disability", near the start of the document the following:

> **"In addition with the symptoms of claimant's disability claimant believe has resulted in respondent, seeing her as a problem/difficult member of staff, which in return has caused her to experience unfavourable treatment in the form of Harassment and Victimisation sustaining a decrease in her disability impairment and Constructive Dismissal."**

57. This document *was* considered by the Judge at the subsequent Preliminary Hearing concerned with time points. That hearing came about in the following way.

58. Following receipt of that document, the Respondent's solicitor wrote asserting that the various conduct complained of under the **EqA** all appeared to be out of time and asked for a Preliminary Hearing on that issue. On 13 March, Miss Lewis, on the Claimant's behalf, sent in a document objecting to that request including the following, "We disagree with the respondent's

claim that we are out of time. We view the incidents as continuous acts up until the time the claimant left the respondents establishment."

59. A Judge then considered that correspondence and decided to list the matter for a Preliminary Hearing on time points.

60. There was then a further email from the Respondent applying also for strike out and deposit Orders. That drew a reply on 4 August 2017 from the Claimant including a reference to sections 123(3) and (4) of the **EqA** and stating:

> **"Claimant has stated on documents/information instructed by Judge's Court Order issued the 1st February 17, that Claimant Event of Incidents be seen as a Continuous Act and not individual incidents, as Respondent seemed to be doing in order to reflect incidents as being out of the time span."**

61. On 11 August 2017, the Preliminary Hearing took place. I have already described the main points of the Decision. It was followed by an email from the Tribunal, partly referring to practical difficulties with the Judge being able to produce his Decision, but also explaining which documents had been considered for the purpose of that hearing.

The Arguments

62. I turn to the principal arguments on this appeal. I am grateful to Mr Young, who, as I have noted, appeared for the Claimant, and Mr Bryan of counsel who appeared for the Respondent, both for their written skeletons and the way they have presented their oral arguments before me this morning.

63. The starting point in relation to ground 1 is to consider whether the claim form, read or not with other relevant documents, should have been treated as advancing a claim of constructive

dismissal pursuant to section 39 **EqA**. I have noted that box 8.1 in the claim form was ticked as to both unfair dismissal, including constructive dismissal, and disability discrimination. The Claimant's Particulars of claim refer to constructive dismissal and also cited section 95(1)(c) of the **ERA**. However, they also complained of discrimination said to have occurred up to 30 June, being the date on which she resigned.

64. Certainly, it is clear, and accepted by Mr Bryan, that she was claiming that a number of episodes or incidents of treatment that she said amounted to discriminatory treatment, or were otherwise contrary to the **Equality Act** contributed, along with other episodes and incidents, to what she said was the overall breach of the implied duty of trust and confidence, which in turn founded her assertion that she had been constructively dismissed.

65. Mr Young accepted, for his part, that there was no express or explicit pleading to the effect that the Claimant had been the victim of a discriminatory constructive dismissal, as well as an unfair constructive dismissal, whether in this document or in the Particulars later supplied in March or indeed in February. However, he submitted that such a complaint follows inevitably from the logic of everything that she *had* pleaded. Her factual case was, absolutely plainly, that various episodes and acts of discrimination had contributed to her feeling driven to resign and losing her job, in circumstances which she said therefore amounted to constructive dismissal.

66. The Further Particulars provided in March also gave more details of the alleged discriminatory treatment which, in her claim form, she was saying contributed to the constructive dismissal and the loss of her job. It was not essential, submitted Mr Young, to refer to section 39 as such, if the substance of the complaint in terms of the facts, and the contribution that

discrimination was said to have made to the constructive dismissal and loss of the job, were all set out.

67. Mr Bryan submitted that, even on a generous construction, this complaint simply could not be discerned in the Particulars of claim. He referred to the fact that that could not be discerned from the way box 8 had been completed. Further, in the attachment giving more details of the claim, the Claimant began by referring (in this order) to a claim for breach of contract, constructive dismissal and claims under the **EqA** citing the various sections, and therefore, he said, logically those **EqA** claims were referred to as a distinct matter from the matter of constructive dismissal.

68. Further, said Mr Bryan, the further page headed "Constructive dismissal" referred to section 95(1)(c) of the **ERA,** but not to the corresponding provision in section 39(7) **EqA**. Although succeeding paragraphs referred to a number of episodes of alleged ill treatment of various sorts, he suggested that the overall emphasis, in terms of disability discrimination, was on the alleged failure to comply with the duty of reasonable adjustment. However, when, towards the end of the page, it said, "Given this, and the way I have been treated, this left me no alternative but resign" the reference to "the way I have been treated", could not, he said, be construed as referring back to the immediately preceding paragraphs, because an alleged failure to comply with the duty of reasonable adjustment would not involve a positive act of treatment. In addition, he relied on the fact that there was no express assertion anywhere here that the claimed constructive dismissal was, as well as unfair, also a discriminatory dismissal.

69. A further potential issue under ground 1 was whether the Tribunal ought to have raised or sought clarification of this issue, if it was not abundantly clear that such a complaint was

included in the Particulars of Claim. Mr Young submitted that the Tribunal ought to have done so, particularly where it was clear that the Claimant was saying that there were a number of acts of discrimination and saying that these had contributed to her being constructively dismissed, and bearing in mind that she was a litigant in person.

70. One point relied on by Mr Bryan drew on a passage in the Judge's Decision arising from the time PH at paragraph 27 in which he said, "After some further comments by Mrs McLeary about her various complaints I intervened and explained that I was at that stage concerned about the time issue. Mrs McLeary agreed that all the claims were made out of time." Mr Young, however, said that this could not be safely or properly relied upon by the Judge as a concession that no claim of discriminatory constructive dismissal was being advanced.

71. Mr Bryan said that the onus was on the Claimant to raise the claim if she wanted. She did not, and he relied on what he said was indeed a concession at this point in the hearing, and the fact that she did not expressly argue at any point in the hearing that she was seeking to claim that there had been a discriminatory dismissal. He said that the ET was not under a duty to be proactive even when dealing with a litigant in person. He referred, in particular, to **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531.

72. He said that, in any event, the Tribunal had assisted the Claimant during the hearing, by encouraging her to focus on the time points when she strayed into arguing about the merits of her claims. Further, her pleadings had been lengthy and diffuse. There was an onus on her to put forward the claims clearly if she wanted to. In addition, although she was a litigant in person appearing at that hearing, she was perfectly able to make submissions on other points, to cite provisions of the legislation in her documents, and so forth. Therefore, he concluded, even if the

claim form should have been construed as including a possible complaint of discriminatory constructive dismissal, the Tribunal was not obliged to raise it or deal with it at the Preliminary Hearing if she chose not to pursue it, particularly in circumstances where she conceded during the course of the hearing that her **EqA** claims were out of time.

73. Mr Young submitted that **Mensah** was distinguishable, because that was a case where there were two distinct complaints relating to two distinct job vacancies. However, at the trial in that case, the claimant simply did not adduce any evidence or argument whatsoever in relation to one of those complaints, and the Tribunal was not obliged to deal with it in those circumstances. This, however, was a case in which there was no trial, and no failure to adduce evidence in support of a distinct complaint at a trial, but, rather, a Preliminary Hearing. Further, this was a case in which the putative discriminatory constructive dismissal complaint, and the other complaints and issues were *not* factually distinct, but wholly overlapped.

74. Turning to ground 2, again, the starting point was to consider whether, on a fair construction of the relevant documents, the Claimant was claiming overall, as it were as an umbrella proposition, that the various alleged acts of discrimination, taken together at its highest from start to finish, formed part of conduct extending over a period and, therefore, fell to be treated as done at the end of that period. Mr Young, on this point, referred to the reference in the Particulars of Claim to a "serial of events/ incidents", and to the Particulars of 21 February referring to a continuing state of affairs and to the email of 4 August referring to a continuing act and not individual incidents.

75. Again, he said, given all of that, the putative concession made during the course of the hearing was not sufficient to be safely relied upon, bearing in mind that the Claimant was a litigant

in person, and was, at that point in the hearing, responding to a question or a point at any rate being put to her by the Judge. It would appear, he suggested, that she was not asked if she was withdrawing such a claim of continuous act, or if there was one. It appeared that the Judge had in fact overlooked the various references to it. Further, it was noted that it was said on behalf of the Claimant that the conduct *extended until 30 June*, which was the date of her resignation.

76. Mr Bryan submitted that, on consideration of the relevant documents, the Claimant had not expressly claimed overarching conduct extending over a period. In her Particulars of Claim she had put particular dates on certain events or particular time windows or lengths of time for some other particular events. She had not purported to argue that *all of them together* formed a continuing act from start to finish. Nor should reliance, he said, be placed on the 21 February document, which was not actually supposed to be providing particulars of her claims but only of her disabled status, nor on the correspondence that did not form part of the pleadings.

77. The document that *could* potentially be relied upon, he said, was the one tabled in March. He made the same points about that as about the Particulars of Claim. Again, he relied on what he said was the concession made during the course of the PH on time. Again, he said, there was no obligation on the Tribunal to consider a point which was not at any stage live.

78. Alternatively, even if there was, the Tribunal had done enough. At the start of the Reasons, the Tribunal gave itself a self-direction in law as to the time limit, including the statement: "If there is conduct extending over a period then time starts from the end of that period." It also referred at various points to different allegations being said to extend over a certain period. It was, he said, clear overall that the Claimant lost because, taken as a whole, the complaints were found to be out of time and it was found not just and equitable to extend time.

Discussion and Conclusions

Ground 1

79. True it is, as Mr Young accepted, that there is no express statement in the Particulars of Claim that the Claimant wished to claim constructive dismissal contrary to section 39 or discriminatory constructive dismissal, or something express of that sort. However, he is in my view right to say that all of the factual elements of that claim were there.

80. It was clearly the Claimant's case, reading her claim form and Particulars of Claim as a whole, that various acts of what she said was discrimination of various sorts, including discrimination arising from disability, failure to comply with a duty of reasonable adjustment and victimisation (all of which, I note again, are within scope of section 39) had, according to her, contributed to the fundamental breach of trust and confidence that founded her claim that she had been constructively dismissed; and specifically that these, along with other acts, cumulatively caused her to resign and hence to lose her job.

81. Furthermore, I did not agree with Mr Bryan that the summary of the elements of the treatment said to amount to a breach of the implied duty of trust and confidence appearing on the last page of her Particulars of Claim, could not be taken to include the allegations of failure to comply with the duty of reasonable adjustment. It is clear on any natural reading of that document that the closing paragraphs, when they talk about acts and about treatment, are referring to all of the allegations that precede them on the rest of that page.

82. Further, even though it may be said that the Claimant was not claiming in terms that what she described as the last straw, namely the outcome of her appeal, was itself in terms of the appeal manager, Ms Foley's, decision an act of discrimination, it was clearly, on her case, all bound up

with her allegations of discrimination, which were the subject of her grievance. In addition, she asserted that Ms Foley was aware of her disability and that she was receiving medication.

83. The Claimant is a litigant in person. Although plainly articulate and having some grasp of the law, she could not be expected to set out her Particulars of Claim with the degree of finesse that should be expected of a lawyer in the field. Further, a claim of discriminatory dismissal was, like her other **EqA** claims, a claim of disability discrimination, which drew entirely on them for its essential elements, and it did not involve the assertion of any additional facts.

84. Furthermore, it seems to me that the Particulars document tabled in March, in the opening statement, which I have cited, in the section dealing with discrimination arising from disability, comes extremely close to supplying the missing ingredient of getting across expressly that her constructive dismissal is being said by her to have been the product of discrimination, if not getting in fact entirely there.

85. Should this point, or at least the possibility that this was what the Claimant was arguing, in any event have been picked up and raised or addressed in some way at the Case Management Preliminary Hearing; or, given that it was not picked up then, should it have been picked up by the Judge who presided at the Preliminary Hearing on time?

86. I was referred in submissions to **Drysdale v The Department of Transport (The Maritime and Coastguard Agency)** [2014] EWCA Civ 1083. This contains important guidance from the Court of Appeal on the difficult balance that sometimes has to be struck by Employment Judges, particularly in cases involving litigants in person, between making due and fair allowance

for their status as such and not, as it were, descending into the arena and being proactive on their part. I refer to the various numbered points in terms of general principles set out in the headnote.

87. I am mindful that the thrust of this authority is that, in the context of an appeal, a significant margin of appreciation should be allowed to the Judge, as it were, on the ground, who will have the feel of the case. However, it is worth bearing in mind the facts of **Drysdale**. They involved a claimant represented by his wife, a lay person, and she, on his behalf, during the course of a hearing saying in terms that his claim was being withdrawn, being asked to confirm whether she was making an application for her husband's claim to be withdrawn, and replying that she was. That was a case of an unequivocal withdrawal, confirmed after express inquiry by the ET. In my judgment the putative "concession" on the time point made in the exchanges at the PH on time in this case involves an exchange of a quite different nature.

88. I have also considered whether it might be said that it would not be appropriate for the Tribunal, as it were, to invite a claimant to add a wholly new complaint. Indeed, it would not. However, what was necessary here, starting with the Case Management Hearing, was simply to *clarify* the substance of what the Claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the Judge below, as to how such matters are managed; but when, as in this case in my judgement, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign. and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought.

89. I have, I stress again, paused for reflection as to whether that would place too heavy a burden on Employment Judges conducting such hearings. However, I do not believe so, nor that this approach goes contrary to the spirit of the **Drysdale** guidance. In short, where it is clear from a claim form and/or particulars of claim, that a lay claimant is saying, factually, I was subjected to discrimination in my employment and this drove me to resign, it is both proper, and incumbent on the Tribunal, to seek clarification of whether such a claim is intended.

90. I am fortified in my approach by consideration of two authorities that were included in my bundle and referred to in argument. They are **Meikle v Nottinghamshire County Council** [2005] ICR 1 and **Williams v J Walter Thompson Group** [2005] EWCA Civ 133. Both those authorities date from a period when the **Disability Discrimination Act 1995** ("DDA") did not contain any express provision defining dismissal so as to include constructive dismissal.

91. One of the issues in **Meikle** was whether it should be inferred that the concept of constructive dismissal was, nevertheless, included in the concept of dismissal found within the **DDA** at that time. In the course of discussion of that point, Keene LJ, with whom Bennett J and Thorpe LJ agreed, said this at paragraph 49:

> **"…There are relatively short limitation periods operating in discrimination law, normally three months from the act complained of, and on the face of it there could be great significance attaching to whether the act is the dismissal, with time running from the termination of employment by resignation, or the employer's earlier discriminatory act."**

92. Further on at paragraph 53, distinguishing an earlier authority, he said:

> **"…It follows that it can make a significant difference whether or not "dismissal" includes constructive dismissal in these discrimination cases, including those brought under the DDA. When one arrives at that position, an interpretation which acknowledges that not merely has the employer acted in a discriminatory way but also that this has led to the employee's loss of his or her job is appropriate. For all these reasons I conclude that the appeal tribunal was right to regard the constructive dismissal of Mrs Meikle as being in itself a discriminatory act under the DDA."**

93. Pausing there, I observe that if those policy considerations, including relating to the possible significance of time limits, were sufficient to cause a statute to be construed as including a possible claim of discriminatory constructive dismissal, they also ought equally to tell in favour of construing a pleading which supplies all the building blocks as including such a claim.

94. I turn to the **Williams** case. There, it is apparent from the headnote and other references, a claimant who resigned claimed constructive unfair dismissal and disability discrimination. See paragraph 1 of the Judgment of Mummery LJ (with whom Chadwick LJ and Tuckey LJ agreed) and also paragraphs 5 and 9. At paragraph 14 Mummery LJ said:

> **"Ms Williams also seeks a ruling, which both the employment tribunal and the appeal tribunal declined to make, that her constructive unfair dismissal was itself an act of disability discrimination within s 4(2)(d) of the 1995 Act, as recently interpreted by this court in *Nottingham CC v. Meikle* [2004] IRLR 703."**

95. He noted that the **Act** had since been amended in that respect. After considering other arguments about whether there should have been a finding of constructive dismissal or not – which, he concluded, there should have been – Mummery LJ ended with this:

> **"On the facts found by the employment tribunal it was entitled to hold that JWT was liable for the constructive unfair dismissal of Ms Williams. As was held by this court in *Meikle* (see paragraph 11 above), which was decided after the hearing in the Employment Appeal Tribunal, constructive dismissal falls within the scope of 'dismissal' in s 4(2)(d) of the 1995 Act. It ought to have been concluded on the facts found by the employment tribunal that the detriment to Ms Williams occasioned by the discriminatory conduct was the effective cause of her resignation and that her constructive unfair dismissal was itself a discriminatory act relating to her disability.**
>
> **I would allow the appeal by Ms Williams and reinstate the decision of the employment tribunal, adding a declaration that the unfair constructive dismissal of Ms Williams was a further act of disability discrimination within s4(2)(d) of the 1995 Act. The employment tribunal's finding of constructive unfair dismissal stands."**

96. Those authorities therefore, again emphasise that the starting point is to consider the substance of the factual complaint; and they recognise the potential injustice to a claimant, because of the time point that *may* make all the difference, notwithstanding that, in a case where time is *not* a problem in relation to the claimed discrimination during employment itself, that may itself (if so found) be said, at the remedy stage, to have caused the loss of the job.

97. Drawing all the threads together, I stress that every case will turn on its particular circumstances, the contents of the documents, the attributes and capabilities of the litigant, and the Judge's appreciation of how best to manage things, in order to make due allowance for a litigant in person, while not intervening to take their side. Generally, it must be left to the appreciation of the Employment Judge, whether, or how, a point of this sort needs to be proactively raised or addressed. The EAT should be slow to second guess the Judge's approach, and a wide margin of appreciation should be allowed. The **Drysdale** guidance is the touchstone.

98. However, the starting point is a fair reading of the pleadings. It seems to me that in this case, on a fair reading, the Claimant's original Particulars of Claim and/or her original Particulars of Claim and her subsequent March pleading, should have been read as sufficient to include a claim of constructive dismissal contrary to section 39; or, at the very least, their content was such that the matter should have been proactively raised by the Judge at the Case Management Preliminary Hearing and clarified, given how the point, it seems to me, jumped out from the claim form and Particulars of Claim; and/or given that it was not in this case, raised at the case management hearing, it should have been raised prior to or at the Preliminary Hearing on time.

99. I agree with Mr Young that **Mensah** is distinguishable, for the reasons that he submitted. The pleadings in this case may indeed have been fairly described in many respects initially as diffuse. However, the general thrust that discrimination had contributed to the breach of trust and confidence, the resignation and the loss of the job was always clear from the outset.

100. Nor do I accept that the putative concession made during the course of the time Preliminary Hearing made the point go away. The Reasons record that the Judge intervened when the Claimant was, as it were, going off-piste, by starting to develop her arguments about

A the *merits* of the claims. The Judge, rightly as such, intervened in order to steer her back to the time point. It was in that context that she then "agreed" that her claims were out of time. We do not have a full account of the exchanges, but from that brief passage, and the word "agreed", it would appear that it was put to her that her claims were out of time, and she then agreed with that suggestion. Certainly, the minute does not convey that there was any detailed discussion of the Respondent's case or the different aspects of the time point, nor any attempt by the Judge to seek confirmation as to whether the Claimant was making a formal concession of a point that she might previously, until then, have been running. This exchange is, in my view, not factually comparable at all to what happened in the **Drysdale** case.

D 101. Therefore, I conclude that ground 1 succeeds on the basis that the Particulars of claim should have been treated as including a complaint of constructive dismissal contrary to section 39 or at the very least the matter should have been raised for clarification at the Case Management Preliminary Hearing. That complaint, as I have explained, would be capable of embracing what was said to be the contributions of the alleged discrimination arising from disability, failure to comply with a duty of reasonable adjustment and victimisation, though not the alleged contributions of conduct said to amount to harassment related to disability.

102. The matter will therefore be remitted to the Tribunal so that it can consider and adjudicate the complaint of discriminatory constructive dismissal. I am told that because of this appeal the unfair constructive dismissal claim has not yet come to a Full Merits Hearing. Therefore, both complaints should no doubt be considered as part of the overall Full Merits Hearing in this case.

Ground 2

103. As ground 1 has succeeded, ground 2 remains live. I see some force in Mr Bryan's submission that, in much of her documentation, the Claimant identified particular dates for incidents, or particular time periods covered by particular episodes, rather than setting out in those passages that she was saying that all of the different episodes or incidents were, as it were, joined up together in a seamless line of conduct. However, *other* documents submitted by her or on her behalf, to which I have referred, made it clear that she *was* also claiming that there was, as it were, umbrella continuing conduct covering all of these events from start to finish.

104. I do not agree with Mr Bryan that the only documents that should be considered are the Particulars of Claim and the March pleading document. That is given that formal amendment of the Claimant's pleadings was not ordered, but merely the provision of further Particulars, and given that the time point itself emerged piecemeal and was not itself the subject of a direction for formal pleadings. Further, the documents relied upon by the Claimant included the 4 August document, which in terms unambiguously says that she is claiming a continuing act of discrimination and cites the relevant subsection of section 123 and was itself tabled in response to the Respondent raising a time point in correspondence and seeking a Preliminary Hearing in relation to it. I cannot see how it could have been right or fair for that document to be disregarded or overlooked. Further, in more than one of her documents, she asserted that the period of treatment extended to 30 June, which was, again, consistent with an umbrella-type argument.

105. The matter might have had a different complexion, and called for a different approach, had formal pleadings of the time points been directed, and had the Claimant then failed to plead reliance on section 123(3)(a), or otherwise asserted in one form of words or another the "umbrella" continuing conduct point. Where a point such as a time point emerges as the litigation

unfolds, the best course is always to direct that this, in some way or another, be properly pleaded and responded to, so that the battle lines are clearly drawn and understood. Certainly, where this is not formally done in that way, the Tribunal needs, in any event, to take care to ensure that there is clarity about how each side puts its case, and what issues are raised, and particularly what time points will be considered at any hearing where they will be substantively determined.

106. For the reasons I have already given, what is said to have been the concession made by the Claimant at the Preliminary Hearing is not a sufficient answer to this point, particularly indeed given that the time points had not been expressly pleaded, or teased out by the Tribunal itself, in any detail. Nor does the fact that the Tribunal gave a self-direction in law about continuing acts, by itself demonstrate that in the substance of its decision, it gave sufficient attention to the possibility of an umbrella continuing act argument. Indeed, the various references to continuing acts made during the course of the Reasons, seem to me clearly to be to the continuing acts alleged on occasions where conduct is said to have lasted for a certain period, from one date to another, rather than to the overarching "umbrella" point.

107. Given that I have allowed the appeal on ground 1, the discriminatory constructive dismissal complaint should also have been treated as in play. Therefore, the Tribunal ought to have recognised that the continuing act issue came into play and could not be severed from a consideration of the merits. Given that I have found on ground 2 that the Tribunal did err in not considering the argument about what I have called umbrella conduct extending over a period, I have to recognise that it is at least possible that, had it done so, this could have had some impact on its appreciation also of whether, if needed, it was just and equitable for time to be extended.

108. Whether that is a matter that specifically needs to be addressed will depend on how the Tribunal's further decision falls out. However, it seems to me, therefore, that ground 2 must succeed and be remitted in respect of the just and equitable aspect as well, leaving open the possibility of some interaction between these points to be considered by the Tribunal. Further all of it, it seems to me, will need to form part of the issues that go forward together for consideration at the overall Full Merits Hearing in the case, as I cannot see how any of these time points can be determined properly as a discrete preliminary point. I will give a remission direction accordingly.

Outcome

109. Therefore, grounds 1 and 2 both fully succeed; and the matter is accordingly remitted to the ET for further consideration on the basis that the complaints include a complaint of constructive dismissal contrary to section 39 of the **EqA**, and an assertion that there was conduct extending over a period for the purposes of section 123(3)(a) of the **EqA** up to and including the claimed constructive dismissal contrary to section 39, and embracing all of the **EqA** claims.