EMPLOYMENT TRIBUNALS

Claimant: **Mr P Parr**

Respondents: **(1) Moore Stephens LLP**
(2) Mr S Gallagher
(3) Mr P Stockton
(4) Mr S Singh Aulak
(5) Mr S Baylis
(6) Mr T West
(7) Mr R Moore
(8) Mr J Willmont

PRELIMINARY HEARING

Heard at: **London Central** **On: 11 and 12 September 2019**
Before: **Employment Judge Elliott**

Appearances
For the claimant: **Mr J Cohen, one of Her Majesty's counsel**
For the respondent: **Mr D Stilitz, one of Her Majesty's counsel**

RESERVED JUDGMENT

The judgment of the tribunal is that the claim is within time and proceeds to a full merits hearing.

REASONS

1. There are two claims in these proceedings. The first claim 2200196/2019 was presented on 17 January 2019 and is a claim for direct age discrimination by the application of a mandatory retirement age of 60. The claimant's case is that this was not a proportionate means of achieving any legitimate aim. It also concerns the exercise of a discretion that allowed the claimant to remain in employment, but in a demoted role from equity partner to fixed share partner until 30 April 2020. The claimant's case is that this resulted in a reduction of his status and income. The second claim 2200243/2019 was presented on 25 January 2019.

2. The proceedings were consolidated at the last preliminary hearing on 24 May 2019.

3. The claimant Mr Philip Parr was an equity partner of the first respondent. The second respondent Mr Simon Gallagher was the managing partner at the material time. The other respondents were members of the first respondent's Partnership Committee at the material time.

The issues for this preliminary hearing

4. The issues for this preliminary hearing were identified at a telephone preliminary hearing on 24 May 2019 as follows:

   (i) Whether the claim should be struck out under Rule 37(1)(a) as having no reasonable prospect of success.
   (ii) Whether the claim is within time and if not, whether it is just and equitable to extend time.
   (iii) Further case management orders as necessary, including if appropriate, listing a full merits hearing.

5. The timing of the hearing had to be changed for reasons that need not be set out here as it was agreed between the parties. This was originally listed as a 2 day hearing with all evidence and submissions to be concluded on day 1 and tribunal deliberations, a decision on the preliminary issues and further case management on day 2.

6. By agreement between the parties day 1 became a reading day with the parties confirming that on this basis the hearing could be concluded on day 2.

7. At the start of day 2 the respondent took issue with the claimant relying on there being a continuing act of discrimination as this had not appeared in the agreed list of issues from the telephone preliminary hearing on 24 May 2019. The respondent said that as the claimant had not pleaded continuing act, he could not rely upon it and said that the claimant had previously conceded that his claim was out of time. This was the position under the original agreed list of issues.

8. The claimant said the time point was squarely in issue for this hearing and it was a point of law requiring no amendment. A revised list of issues was sent to the respondent on 26 July 2019 so they were on notice to the point being taken. I noted that the respondent objected to this by letter dated 13 August 2019 (bundle page 128).

9. The claimant made a number of points in support of the argument that continuing act was an issue for this hearing, including the submission that before I could determine whether it is just and equitable to extend time, I have to decide when the act of discrimination occurred and this involved consideration of the continuing act point.

10. The claimant reminded the tribunal that the question of time limits is a jurisdictional matter that the tribunal was bound to consider in any event. In support of this the claimant relied upon the decision of the EAT in ***Grange v***

Abellio London Ltd EAT/0304/17 Soole J, citing ***Radakovits v Abbey National plc 2010 IRLR 307 CA***, and which holds (paragraph 41) that once an arguable point has been raised as to whether the tribunal has jurisdiction to entertain the claims before it, the tribunal is bound to consider that question.

11. I consider the issue of continuing act to be jurisdictional and a matter which I am therefore bound to consider.

Witnesses and documents

12. There was an agreed bundle of just over 600 pages.

13. The tribunal heard evidence from the claimant and the second respondent.

14. There were skeleton arguments from both parties which are not replicated here and to which leading counsel spoke. All submissions and case law referred to were fully considered even if not expressly referred to below.

15. I had a chronology from the respondent and a tracked change version from the claimant. There was an agreed reading list and a bundle of authorities on each side.

Findings

16. The first respondent firm, which provides accountancy and advisory services, transferred its business on 1 February 2019 to BDO Services Limited. Since the merger, the firm has been in wind-up mode and no longer carries out any accountancy and advisory services – this is now carried out by BDO. Other than the third and seventh respondents, all personally named respondents are currently equity partners at BDO.

17. The claimant Mr Philip Parr has had a long career with the first respondent firm. He joined the first respondent firm in 1982 and by May 1988 was promoted to salaried partner. He was promoted to equity partner in May 1995 and in 2003 he was promoted to Group Head of Business Tax. He held that post until May 2012.

18. On 1 May 2018 he was demoted to fixed share profit partner because he had reached the firm's normal retirement age equity partners being age 60. His date of birth, relevant to this claim for age discrimination, is 23 February 1958.

<u>Normal retirement age and the Members' Agreement</u>

19. The firm's normal retirement age for an equity partner, as set out at clause 29.2 of the first respondent's Members' Agreement in force from 1 May 2015 (bundle page 183) is the accounts date next following his 60th birthday. The accounts date according to the definitions clause (on page 163) is 30 April in each year. These provisions were replicated within the Members' Agreement in force from 1 May 2016 (bundle page 397).

20. The version of the Members' Agreement which first contained the current retirement provisions was the version with effect from 1 May 2015.

21. The claimant reached his 60th birthday on 23 February 2018 and on 1 May 2018 he was demoted to fixed share partner. The claimant was told by the second respondent Mr Simon Gallagher, the managing partner, that he could stay on as a non-equity partner. The claimant was not given an option to remain as an equity partner. I find that the only other alternative open to him was to leave the firm, which he did not want.

22. There is a discretion set out in the Members' Agreement whereby subject to the approval of the Partnership Executive Committee (PEC) , the managing partner can extend the normal retirement date where that person indicates he wishes to continue and if there is a valid business case for so doing.

23. The respondents' case is that the claimant as an equity partner had the opportunity to comment upon and discuss proposed amendments to the Members' Agreement.

24. The process leading to the adoption of the Members' Agreement of 1 May 2015 commenced in late 2014. The first respondent arranged roundtable meetings to take place with the equity partners on a number of dates in December 2014 and the claimant attended such a meeting on 22 December 2014 (page 128).

25. The second respondent accepted in evidence that following the round table meetings, some changes were made to the provisions relating to restrictive covenants and retirement. Those changes were not envisaged at the round table meetings.

26. On 19 April 2015 the seventh respondent, who at that time was the chairman of the PEC, sent an email to the equity partners with an updated version of the agreement. He gave an opportunity for discussion of any issues but made clear that it was not to revisit the paper they had previously agreed, but to pick up any points arising from the drafting (page 137).

27. On 20 May 2015 the proposed amendments were put to the members the formal approval. This was done by seeking email consent by voting on a resolution to agree to the changes. At 10:24 hours on 21 May 2015 the claimant said yes to that resolution by way of the voting button embedded in the email. None of the equity partners asked to discuss the retirement provisions within the agreement.

28. There were more detailed changes to the Members' Agreement in 2016. The claimant attended a forum entitled "restrictive covenants presentation" on 18 March 2016 to discuss the proposed changes (page 152 list of attendees). The first respondent's solicitors were also in attendance at the meetings to take account of any concerns raised by the equity partners and to note matters for drafting. The claimant approved the amended members agreement effective from 1 May 2016.

29. Amendments were approved by a special majority of the equity partners requiring 75% approval of the equity partners who voted (clause 45 of the agreement, page 197). The claimant signed the 2016 agreement.

The material terms of the Members' Agreement

30. Clause 29.3 of the Members' Agreement states that the normal retirement date was agreed by the Members "*having given careful consideration to the requirements of the Equality Act 2010".* It said that it was agreed that having a default retirement age was a proportionate and reasonable means of achieving the legitimate aims of enabling proper succession planning for both the firm and its Members. The Agreement said that the retirement date contributes to achieving a number of other benefits including:

    a. *ensuring the sustainability of the LLP by seeking to ensure that there are Members in all areas of expertise, by strategically planning the size and shape of the LLP's membership;*

    b. *providing room to grow the membership of the LLP, fulfilling recruitment needs and promotion expectations;*

    c. *developing a collegiate and supportive culture within the LLP and seeking to avoid the compulsory retirement of senior Members for other reasons; and*

    d. *enabling Members to plan their retirements and execute them successfully in terms of handing over Clients and preparing themselves for the opportunities of retirement.*

31. Clause 29.4 sets out circumstances in which the managing partner may, with the approval of the PEC, extend the normal retirement date either following a request by the individual member, or if the managing partner asks the member to continue (page 184).

32. Clause 29.4 states that the managing partner may only agree to such an extension "*where he objectively considers that there is a valid business case for so doing, having reference to the Member's on-going contribution to the LLP Business by the Member concerned and the matters set out in Clause 29.3*". Any agreed extension is to be for a specific period of time and on terms as to remuneration and otherwise as the managing partner may determine. This gives the managing partner a discretion (with PEC approval) to agree an extension of the normal retirement date.

33. The claimant was aware that this discretion had been exercised in the past and I find that it had. He accepted that the examples given of MB, MT and RM all continued as Equity Partners past the normal retirement age, as set out in Mr Gallagher's witness statement (paragraph 28).

The claimant's request to continue beyond the normal retirement age

34. When it came towards the claimant's 60th birthday, he considered that he had a business case under the retirement provisions. He prepared proposal to continue beyond normal retirement age and gave this to the second respondent (pages 258-260). The second respondent prepared a document dated 28 September 2017, bundle page 263, which set out his recommendation on the claimant's proposal, on the basis that the claimant stay on as a partner but not an equity partner, for two years until 30 April 2020. The second respondent

made the recommendation to the Management Committee who accepted his recommendation.

35. On 10 October 2017 second respondent sent the claimant an email, page 268, setting out the approval for an extension for him to remain as a partner (not an equity partner) until 30 April 2020. His remuneration was fixed with a discretionary indicative bonus depending upon performance.

The De-equitisation Agreement

36. On 13 October 2017 the parties entered into a Deed, referred to as a DeEquitisation Agreement, setting out the terms upon which the claimant would remain with the firm as a partner but not an equity partner (page 272 – 275). The Deed states at clause B that he has agreed to the change of status. The claimant in evidence said (statement paragraph 17) that he agreed because he had no choice because it was either a change of status or leave the firm which he did not want.

37. The claimant accepted that when his status changed on 1 May 2018, he was repaid a sum of capital that he had invested in the business. He accepted in evidence that he knew that as a result of that agreement that he was losing any right to the distribution of capital profits. He said there were none known about at the time. He accepted that in his capacity as an Equity Partner, not only was he entitled to the distribution of any capital profits but he also had the potential to incur losses as a result of liabilities if the fortunes of the firm changed due to adverse events or perhaps litigation. He also accepted that he was no longer required to make any capital contributions.

38. The claimant chose not to challenge the arrangements at the time. When he entered into the deed, he took the view that the difference in earnings was not large enough to prompt him to take legal advice. He did not do so. His evidence was that around September/October 2017 he thought the loss to him would be around £31,000 per annum (statement paragraph 20). He compared this with the cost of instructing solicitors, which I find on his evidence he clearly considered and decided against. The claimant accepted and I find that he knew when he entered in to the agreement that he would lose out. He did not at the time anticipate the full extent of how he might lose out. This is understandable as it depended on future events. He also accepted that although he assessed his potential loss in the next financial year as £31,000, he knew at the time that it could have been more in subsequent years.

39. The claimant gave further evidence in his statement as to why he did not take action against the decision to "de-equitise" him in October 2017 (statement paragraph 39). He knew that he would suffer a financial loss but it was not enough to persuade him to seek legal advice. He said he knew little about the law of discrimination or how it might apply to professional partnerships. This is in common with most litigants prior to seeking legal advice. He accepts that he could have carried out his own research, or as he said was more probable, sought professional advice as to whether he had a possible claim. He said in his statement "*I simply could not see a purpose in it*". In oral evidence he said that he did not think it worthwhile.

40. Based on his 2015/2016 figures he considered that any loss to him was not large enough to justify the cost of instructing a lawyer and he thought he would "*end up spending a great deal of money on legal fees for not very much recovery*". He also took the view that he did not wish to complain when his position after two years was not guaranteed and was subject to the discretion of the same people about whom he would be complaining. He said he now understands that the law protects against victimisation but he did not know that until he took legal advice. Again this is in common with a huge majority of litigants who are not legally qualified.

41. In oral evidence he accepted that he could have brought a claim in October 2017 when he entered into the agreement, but it looked comparatively expensive at the time.

42. When on 19 November 2017 and 20 November 2018 he saw the firm's results for the years ending 30 April 2017 and 30 April 2018 he saw that the difference in remuneration had greatly increased. He said (statement paragraph 21) "*As at 30 April 2018 I was unaware that my de-equitisation was to have a further, and very substantial, impact on me*".

Projects Lex and Palace and the merger

43. On 13 September 2018 the claimant learned at a partners' meeting about the first respondent's decision to sell two parts of its business. It is not necessary at this preliminary hearing to go into the detail of those transactions, save to say that they were called Project Lex and Project Palace. When he entered into the Deed on 13 October 2017 there was no mention of these projects.

44. The second respondent's evidence was that the management board made the decision on 14 February 2018 to try to sell those parts of the business, four months after the claimant entered into his agreement. The claimant does not go so far as to say that he has been in any way misled by the first respondent (submissions paragraph 24(c)). I therefore accept and find that the dates and circumstances of these two Projects were as stated by the second respondent.

45. The prospective merger with BDO was first explored at a meeting on 1 March 2018 between the key personnel of the two firms. The completion of the merger took place on 1 February 2019 , having been reported in the press in November 2018. The claimant now works for BDO as an equity partner. His terms as an equity partner of that firm are based on his position under the Deed signed in October 2017 as a result of which he says he is at a disadvantage. He was invited to become an equity partner with BDO on his reduced terms as at 1 May 2018 and not based on his previous terms as an equity partner with the first respondent.

46. The claimant had expectations that he would receive a profit share from Projects Lex and Palace. He talked to equity partners who told him they "*thought"* that those who had been equity partners and were still working as partners would share in the capital proceeds. He said at paragraph 27 of his statement that he was "*under the impression*" that he would receive a share. He referred to this is as being what he and other colleagues, who were partners and had been equity partners, "*hoped and expected to be the case*". He was dealing in hopes and

expectations rather than confirmed facts. He based his expectations on what had happened 40 years previously in 1987. In 40 years, as could reasonably be expected, the firm had changed enormously with a huge turnover of partners, a change to LLP status, significant changes in the firm's governance arrangements and growth to a significantly larger organisation. I find it was unrealistically optimistic to expect that what took place in 1987 would be the blueprint for what was to happen in 2017. He accepted in evidence that he knew the consequences of ceasing to be an equity partner went beyond the losses he anticipated in 2017.

The December 2018 meetings

47. It was put to the claimant that he could have taken legal advice in September 2018 in relation to these projects. He accepted that he could have done, but said he was waiting for the position to be clarified and this happened in his meetings with the second respondent in December 2018.

48. On 10 December 2018 the claimant received his Equity Partner Pack in relation to the first year at BDO. This told him that his earnings as a salaried partner of the first respondent would result in a significant reduction in his post-merger remuneration at BDO.

49. The claimant had a meeting with the second respondent on 11 December 2018 at which he asked to benefit from the Project Lex and Project Palace proceeds as well as having his BDO earnings based upon his 2017/2018 profit share as an equity partner of the first respondent. He was told at a follow up meeting on 17 December 2017 that the decision would not change. He said by December 2018 he realised the impact upon him of the De-Equitisation Agreement of October 2017 (statement paragraph 35).

The timing of the presentation of the claim

50. The claimant said at paragraph 40 of his witness statement that "*as soon as he became aware of the significant losses*" the decision of the first respondent had caused him, he sought "*immediate*" legal advice and promptly submitted a claim to this tribunal. He first contacted solicitors on 17 December 2018, the same day as the follow up meeting with the second respondent. The claimant said that due to the Christmas period he was "*unable to progress matters meaningfully until the New Year*".

51. He instructed his solicitors to commence Early Conciliation which was done on 10 January 2019. The EC certificates were issued for respondents 1, 2, 3, 5, 6 and 7 on 14 January 2019 and for respondents 4 and 8 on 17 January 2019. The ET1 was issued against the first respondent on 17 January 2019 one month after he had first contacted solicitors and against the other respondents on 25 January 2019.

52. From his schedule of loss, bundle page 103, the claimant quantifies his losses in the region of £3.75 million.

The relevant law

53. Section 123 of the Equality Act 2010 provides that:

> *(1) …… proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*
>
> *(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.*

54. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend time and the tribunal has a wide discretion. There is no presumption that the tribunal should exercise that discretion in favour of the claimant - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

55. Time begins to run from the act of discrimination and not from the date upon which the claimant becomes aware of it, although this is relevant to the discretion to extend time, see for example ***Virdi v Commissioner of Police of the Metropolis 2007 IRLR 24, EAT.***

56. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

57. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

58. There is a distinction between a discriminatory act and the continuing consequences of a discriminatory act. In ***Amies v Inner London Education Authority 1977 ICR 308*** the EAT decided that a female school teacher who was not promoted to the role of head of department could not argue that there was conduct extending over a period simply because the consequences of the non-promotion continued. Bristow J commented in relation to a continuing act (at page 311F):

> *So, if the employers operated a rule that the position of head of department was open to men only, for as long as the rule was in operation there would be a continuing discrimination and anyone considering herself to have been discriminated against because of the rule*

> *would have three months from the time when the rule was abrogated within which to bring the complaint.*

59. ***Amies*** was approved by the House of Lords in ***Barclays Bank plc v Kapur 1991 2 AC 355*** per Lord Griffiths.

60. In relation to dismissal, when notice is given, time runs from the date on which notice expires, not the date on which it is given - ***Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT.***

61. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050, CA*** Leggatt LJ summarised at paragraph 18 the approach to be taken by the ET on the issue of a just and equitable extension:

> *First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see* British Coal Corporation v Keeble *[1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see* Southwark London Borough Council v Afolabi *[2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see* Dunn v Parole Board *[2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30]–[32], [43], [48]; and* Rabone v Pennine Care NHS Trust *[2012] UKSC 2, [2012] 2 All ER 381, para [75].*

62. At paragraph 19 Leggatt LJ went on to say in relation extending time:

> *"factors which are almost certainly relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent …"*

63. At paragraph 25 the Court of Appeal said that the discretion given by section 123 on what the tribunal considers just and equitable is "*broad and unfettered*". There was said to be no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. Whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.

Conclusions

64. Unless there is a continuing act of discrimination the claim is out of time and requires consideration of the just and equitable extension. I find that if there was no continuing act, it is out of time by 5.5 months. The respondents submitted that it was either 15 months or 5.5 months out of time, depending upon whether time was taken to run from the De-equitistation Agreement of 13 October 2017 or when the claimant ceased to be an equity partner on 30 April

2018. I find it is the latter date, based on ***Lupetti*** above, being the date upon which the demotion took place, not the date of the agreement which put that arrangement into place.

65. I did not accept the claimant's argument that absent a continuing act, the claim was only 3.5 months out of time. This was put on the basis that the tribunal should notionally add back in time for Early Conciliation of one month stopped clock and one month Early Conciliation. I was unable to accept this argument. Early Conciliation is a statutory concept with requirements that must be fulfilled in order for the time extension to take effect.

66. The claimant asked the tribunal to consider the position as if he had gone for Early Conciliation within the primary time limit, being by 29 July 2018, which he had not and then speculate that Early Conciliation would have taken a month. In this case Early Conciliation lasted three or four days for most respondents and one day for two of the respondents. It is impossible to speculate how long Early Conciliation might last within the structure of the Regulations.

67. I agreed with the claimant's submission that to agree with the respondents would be to find that the EC Rules had the effect of creating a longer time limit of five months. I find that unless a claimant complies with the requirements of the Early Conciliation Regulations, he or she cannot claim the benefit of the time extension for which those Regulations provide. It is a statutory extension of time with conditions attached. It is not a notional extension when a claim is otherwise out of time.

68. I have therefore considered whether there was a continuing act of discrimination.

69. The respondents' submission was that there was no continuing act because everything flowed from the De-Equitisation agreement of 13 October 2017. The respondents submitted that if the claimant was right, he could bring his claim two or five years after the De-Equitisation agreement, say in 2023 and still be within time. It was submitted that this could not be right because everything flowed from the loss of equity status in 2018 when the claimant cased to be an equity partner once and for all. It was submitted that there was no continuing act thereafter. It was submitted that the fact that the claimant became an equity partner of BDO was "*neither here nor there*", it was a matter that could not have been anticipated.

70. The claimant relies on his de-equitisation as a demotion. There is no doubt in my mind and I find that it was a demotion, to a fixed share partner. It was not what the claimant wanted, but he accepted it as the only alternative open to him was the unattractive option of leaving the firm for which he had worked for 36 years.

71. Both parties made submissions on the leading authority of ***Seldon v Clarkson Wright & Jakes 2012 ICR 716****,* Supreme Court. I take the view that it is not appropriate at this preliminary hearing to express view on the full merits case, although both parties made submissions on the strengths of their positions at full merits.

72. In relation to the continuing act point, it was suggested that this was not a case of a mandatory retirement age because there was a discretion by which an equity partner could stay on beyond 60 as had happened in the three cases mentioned by the second respondent. The claimant took the tribunal to the relevant clause in ***Seldon***, judgment paragraph 7, which said "*Any partner who attains the age of 65 years shall retire from the partnership on 31 December next following his attainment of such age (or such later date as the partners shall from time to time and for the time being determine).* I agree with the claimant that the ***Seldon*** case contained a discretion, albeit not as detailed as in the present case.

73. In terms of a continuing act, the claimant was not dismissed on 30 April 2018, he was demoted. If he had been dismissed, I agree that time would have run from that date. However, he continued in a demoted role.

74. In ***Hendricks*** at paragraph 52, Mummery LJ said that the concepts of policy, rule, practice, scheme or regime should not be treated as a complete and constricting statement of what is an act extending over a period. The focus should be on whether there was an ongoing situation or a continuing state of affairs in which those affected were treated less favourably.

75. In this case there was a rule, contained in the Members' Agreement at clause 29, that the member shall retire on the accounts date next following his 60th birthday. In common with ***Seldon***, it had provision for discretionary relief, which was not granted and as a result the claimant was demoted to fixed share partner. I find that whilst that rule continued, it was a continuing act and a continuing state of affairs which resulted in less favourable treatment because the claimant had reached the age of 60.

76. I find that as held in ***Amies*** and approved by the House of Lords in ***Kapur***, while the respondents operated a rule that resulted in demotion at age 60, being less favourable treatment because of age, time would only begin to run from when the rule was abrogated. The reason why the claimant was not in the role that he wanted to be in, that of equity partner rather than fixed share partner, was because of the existence of the rule in clause 29. I see no difference as in the scenario set out in ***Amies*** between a failure to appoint, leaving a person in a lesser role than the one for which they applied and a demotion, placing this claimant in a lesser role.

77. I therefore agree with the claimant that there was a continuing act of discrimination which existed at the date upon which he presented his claims and as a result his claims are with in time. As I have found that there was a continuing act and the claim is within time, it was not necessary to consider the just and equitable extension or the balance of prejudice in that respect.

78. The claim is within time and shall proceed to a full merits hearing.

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Employment Judge Elliott

13 September 2019

Sent to the parties and entered in the Register on:

13 Sep. 19.

For the Tribunal: