Appeal No. UKEAT/0068/15/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 & 10 July 2015
Judgment handed down on 5 August 2015

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING

(SITTING ALONE)

MR S ADEBOWALE — APPELLANT

ISBAN UK LIMITED & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JASON BRAIER (of Counsel) Instructed by: Stones Solicitors Linacre House Southernhay Gardens Exeter Devon EX1 1UG
For the Respondents	MR GAVIN MANSFIELD QC (of Counsel) and MS ELEENA MISRA (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP Rutland House 148 Edmund Street Birmingham B3 2JR

SUMMARY

PRACTICE AND PROCEDURE - Amendment

PRACTICE AND PROCEDURE - Case management

PRACTICE AND PROCEDURE - Striking-out/dismissal

PRACTICE AND PROCEDURE - Preliminary issues

PRACTICE AND PROCEDURE - Disposal of appeal including remission

RACE DISCRIMINATION

RACE DISCRIMINATION - Inferring discrimination

RACE DISCRIMINATION - Contract workers

RACE DISCRIMINATION - Protected by s41

JURISDICTIONAL POINTS - Claim in time and effective date of termination

JURISDICTIONAL POINTS - Extension of time: just and equitable

HARASSMENT

The employee appealed against the striking out, on various grounds, of his entire claim for race discrimination and harassment. The appeal was allowed in part. The Employment Appeal Tribunal ("the EAT") upheld the decision of the Employment Tribunal ("the ET") to refuse permission to amend the claim, and (if an extension of time was necessary) to refuse to extend time for bringing aspects of the claim. The EAT held that the ET had erred in holding that all the pleaded allegations were out of time. The EAT also held that there was sufficient doubt over the adequacy of the ET's reasons for striking out some claims on the grounds that they had no reasonable prospects of success, and for striking out the claims against certain respondents, to mean that those aspects of the claim should be remitted for reconsideration. The EAT held that they should be remitted to a different ET, on the grounds that the ET had dismissed an application for reconsideration of its decision without giving any reasons for it.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a decision of the Employment Tribunal ("the ET") on a Preliminary Hearing. Employment Judge Glennie ("the EJ") heard some evidence. The Appellant was not represented, but the Respondent was. In a Reserved Judgment with Written Reasons, the EJ struck out the Appellant's entire claim, for various reasons, as I explain below. The decision was entered on the register and sent to the parties on 21 July 2014. The appeal was allowed to proceed to a Full Hearing by Mr Recorder Luba QC on 25 February 2015.

2. The appeal was very ably argued by Mr Braier for the Appellant and by Mr Mansfield QC for the Respondent. I am grateful to both of them for their helpful skeleton arguments and focussed oral submissions. There are eight Respondents in this case. I will refer to them numerically, as R1-R8.

The facts

3. In the light of the issues on this appeal I do not need to say very much about the facts.

4. The Appellant claims that he was been discriminated against and subjected to harassment on grounds of race. Respondents 1-8 disputed those claims. The Appellant was employed by R1, initially as a contractor, and then as a full-time employee. His case is that he experienced racial bullying and harassment throughout his employment, and that his complaints about this treatment were not properly investigated, and ultimately rejected. He instructed solicitors in May 2013. He was absent from work on grounds of ill health from 24 June 2013. On 29 July 2013 his solicitors wrote a letter to R1, making 43 separate allegations. The

Appellant's claim form, with a 25-paragraph rider ("the ET1") was presented on 3 September 2013. In the ET3, the Respondents asked for a stay pending internal resolution of the Appellant's complaints. The Respondents also asked for claims against some of Respondents to be struck out, and for further particulars of the date of each allegation, the identity of any person alleged to have discriminated, and of any witness, the precise statutory provisions relied on, and the precise reasons the Appellant alleged the provisions had been breached. They asked for specific disclosure of his diary and of an IT report.

5. There was a Preliminary Hearing on 22 January 2014. The Appellant was ordered to produce a schedule setting out each act of direct discrimination or harassment on which he relied. I will refer to this as "the Scott Schedule". Paragraph 1.7 of the order required that the Scott Schedule should only refer to matters already pleaded in the ET1. No new issues were to be raised without permission. The Appellant was also ordered to provide a witness statement and supporting documents in support of his case against Respondents 2, 3, 4 and 8. A further Preliminary Hearing was ordered, at which the ET would consider whether to strike out the claims against Respondents 2, 3, 4 and 8, and any other allegations, for lack of prospects of success, and whether the claims were in time. The Respondents later accepted that the ET had jurisdiction to hear the claims against R3. As a result, one of the issues at the hearing which took place on 29 and 30 May 2014 was whether the claims against Respondents 2, 4 and 8 should be struck out.

The issues on this appeal

6. Mr Braier had 13 grounds of appeal by which he challenged the decisions of the EJ on 6 issues. Those were whether the EJ erred in law

(1) in holding that 16 allegations were not pleaded in the Appellant's claim;

(2) in refusing leave to amend to introduce new allegations;

(3) by striking out allegations on the grounds that they had no reasonable prospects of success;

(4) by holding that all the remaining allegations were out of time;

(5) (obiter) by striking out the claim against R2, R4 and R8; and

(6) in apparently deciding that several allegations not pleaded in the Scott Schedule but pleaded in the claim could no longer be advanced.

4. Discussion

(1) Is or are any of the claims in time?

7. The logical starting point is whether the claim, or any part of it, is in time. At this stage I deal only with what was left of the Scott Schedule after the decision of the EJ, but I bear in mind that there were other allegations in the Scott Schedule, which he struck out as having no reasonable prospects of success, but which were in time. I also bear in mind that paragraph 18 of the ET1, which referred to the decision on the Appellant's grievance (on 5 June 2013) was also (if it was still part of the claim) in time.

8. The parties agreed that allegations 9, 24, 29 and 43 in the Scott Schedule were not struck out by the EJ. The EJ did not deal with these allegations or make any findings about them. The pleading does not tie them to early June. It seems to be common ground that the Appellant was in the office between 12 June when he returned from his honeymoon and 24 June when he went off sick (as the ET3 recorded). I reject the Respondent's submission that there is no credible case that these allegations continued beyond 3 June 2013. The pleading does not confine the allegations to early June, and the point was not tested by the EJ.

9. Mr Mansfield QC accepts that if the allegations were in time, the EJ would have had to consider whether they were capable of amounting to a continuing act when taken with other pleaded allegations which were, prima facie, not in time. The EJ did not do so. He did no more than to indicate, when considering whether to extend the time for making the claim, that he would have been prepared to make an assumption to that effect, for argument's sake, as it were (see paragraph 41 of the Judgment of the EJ). The EJ not having decided the point, I have to consider whether I can decide it, or whether I should remit it to the ET to decide. I recognise that the task of deciding how these allegations fit with the rest of the pleaded case is one which is not suitable for decision on an appeal, even bearing in mind the overriding objective. It follows that I should not express a view about this issue. I therefore remit the case to the ET for it to decide whether and if so to what extent these allegations are in time, and are a continuing act taken with any other allegations in the Scott Schedule. I include in that remittal the other in-time allegations which remain in the case as a result of my decisions on the other points in this case, and would therefore properly be before the ET.

(2) What is the relationship between the Scott Schedule and the ET1?

10. This point embraces the Appellant's grounds 1, 2, 3, 4 and 13.

(a) Paragraph 18 of the ET1

11. I consider, first, the questions whether, paragraph 18 of the ET1 not having been repeated in the Scott Schedule, (a) the EJ was entitled to assume that that part of the claim had been abandoned, and (b) I am entitled to conclude that that is what he did. No express reasoning in the Judgment deals with this point. No argument appears to have been addressed to it. Paragraph 18 of the ET1 refers to the outcome of R1's investigation, and the Appellant's shock at it, "given the fact that there was historic evidence of acknowledgement that there had

been unlawful and improper conduct by [R1] and the fact that during the investigation process, [the Appellant] was informed that … [R1] intended to terminate the employment of [R3] due to his conduct towards the [Appellant]. The [Appellant] was later informed by [R1's] Chief Information Officer...that [R3's] employment would not be terminated because "*sacking someone would not necessarily solve the problem*".

12. I bear in mind that the Appellant was legally represented when he submitted the ET1, but not when he produced the Scott Schedule, or at the hearing in front of the EJ. The order requiring the Scott Schedule made clear that the Appellant should set out in it all the allegations on which he relied. Though its language was not identical to that of the order in **Amin v Wincanton Group Limited** (2012) UKEAT/0508/10/DA, its effect in substance was the same. **Amin** is closely analogous. I find the approach of this Tribunal in that case helpful. That approach was to hold that the failure to plead a dismissal claim (which had been pleaded in the ET1) in particulars which had been ordered by the ET did not deprive the ET of jurisdiction to deal with the dismissal claim. In this case, there were allegations in the Scott Schedule, and in the ET1 about the handling of the Appellant's grievance. The allegations as pleaded in the Scott Schedule make it clear that the Appellant's case was that that handling went beyond procedural errors, but was unfair and victimised him. It was clear from the Scott Schedule that his case was that this alleged treatment was an aspect of his discrimination claim. Against that background, in my judgment, the failure to repeat paragraph 18 of ET1 in the Scott Schedule was, at the very least, a surprising omission.

13. As I have said, there is no express reasoning in the Judgment dealing with paragraph 18. I should make it clear that I do not criticise the EJ for this. He had a mass of material to deal with, and the Appellant was not legally represented. I am not prepared to infer from his silence

on this point that he reached a considered view that paragraph 18 of the claim form had been abandoned, not least because there seems to have been no argument about it. Nor am I prepared to hold, on this limited material, and on an appeal, either, that the EJ would not have been entitled so to hold, or, that he was bound so to hold. I would therefore also remit this question to the ET. The same reasoning applies to the allegations listed in paragraph 81 of the Appellant's skeleton argument, that is the allegations made in paragraphs 15.7, 15.15, 15.21, 15.28, and 15.30 of the ET1. Like paragraph 18, these paragraphs, too, were left out of the Scott Schedule.

(b) Were paragraphs 3, 19, 34, 46, 47, 50, 54, 57, 60, 62, 63, 64, 69, 73, 74 and 76 of the Scott Schedule pleaded in the ET1?

14. At the ET Preliminary Hearing, the Appellant only made submissions about paragraph 2 in the Scott Schedule. The EJ held that this allegation was found in paragraph 5 of the ET1. He did not explain his conclusion that "It was not... possible to find any of the other allegations identified by the [Respondents] in the same way". In my judgment there is no freestanding reasons point here. The EJ's construction of the ET1 was either right, or wrong.

15. Both sides agreed that the proper construction of the Scott Schedule is a question of law. They did not make extensive submissions about the right approach to construction, although Mr Mansfield QC submitted that I should be influenced in my approach by the EJ's interpretation of the ET1.

16. In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at

its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the EJ. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her.

17. An important issue in relation to this question is the extent to which, on its proper construction, the ET1 confined the very general allegations of racist bullying, pleaded in paragraphs 5 and 8 and elsewhere, to a period earlier than the dates which were attributed to similar allegations pleaded in the Scott Schedule.

18. At first reading, the allegations pleaded in the ET1 seem to be split under 2 headings, "Initial complaints of race discrimination" and "Further complaints of race discrimination". The ET1 reads as though general introductory allegations pleaded in its first half, and, in particular, in paragraphs 5 and 8, on which Mr Braier mainly relied, are alleged to have happened before the additional allegations, pleaded in great detail in the second part of the ET1, under the second heading.

19. Paragraph 14 refers to the Appellant's insistence to R1 that he had "many more examples of bullying/discriminatory conduct to provide as part of the investigation". R1, it is said, did not give him time to consolidate and set out all his allegations. Paragraph 15 says that R1 only investigated a number of the Appellant's complaints and that the majority were not addressed. It is then said that his complaints are "as follows", and 34 further allegations are set out. This supports the view that the recent complaints are consolidated in paragraph 15, and

that those 34 allegations are a full statement of those recent complaints. Against that, the pleading of the general allegations in paragraphs 1-13 can be seen as the background to the later group of allegations. On this reading, the implication of paragraphs 7 and 8 read together is that the banana and monkey "jokes" were to a large extent superseded by more "sophisticated" (that is, somewhat more coded) derogatory words. That, I infer, it is the way in which the EJ read the ET1.

20. Mr Braier's submission was that on its proper construction the ET1 is not neatly divided into allegations which are said to have occurred before, and after, October 2012.

21. Four factors or groups of factors underlie this submission.

(1) Paragraphs 5 and 8 are expressed to be the start of the different types of conduct referred to in them, not their completion. Paragraph 7 refers to the conduct beginning to escalate with banana and monkey "jokes". Paragraph 10 refers to R7's beginning to retaliate by making louder sniffing noises etc. It goes on to say that "matters continued to escalate". Paragraph 11 says that the bullying and harassment did not subside.

(2) The conduct, particularly in paragraphs 5 and 8, is expressed in general terms, by way of examples.

(3) Paragraph 12, which is under the second heading, says that the Appellant "continued" to endure bullying and discrimination in silence. It refers to his "growing" concerns about unlawful access to his telephone and/or home computer, and the use of private information to "racially discriminate" against the Appellant. There is a reference in paragraph 13 to the "ongoing racism" which the Appellant was enduring in February 2013.

(4) The way in which 2 of the allegations in paragraph 15 are pleaded assumes a background of other conduct: paragraph 15.14 refers to R3 "continuing to torment [the Appellant] with his usual bullying comments", and paragraph 15.24 to "another banana joke" which is not otherwise specified.

22. In my judgment 3 broad tranches of allegation are outlined or described in the ET1. The first is the allegations pleaded under the first heading, which read naturally as occurring down to October 2012, when the Appellant made a complaint to his manager (paragraph 11). The second phase, described in paragraphs 12 and 13, is further racism which he suffered down to February 2013, when, he says, R1 began to investigate his complaints. The third is the further complaints which, he alleges, he wanted to make to R1 and which R1 did not investigate. There are 34 of these and they are set out in the sub-paragraphs of paragraph 15 of the ET1. The question about these 3 phases is whether they are distinct from each other, or overlap. Paragraph 15 has been pleaded with some precision, the dates attributed to the allegations pleaded in it start in "Q3 2012". That leads me to conclude that the natural reading of the pleading is that the allegations fall into 2 phases; the initial complaints and later complaints; and that those in the second, later, phase have been exhaustively pleaded in paragraph 15.

23. If there is any lingering doubt about the correct interpretation of the ET1, it is in my judgment resolved by 2 factors. They are (1) the fact that the ET1 was drafted by lawyers; and (2) the equivocation in paragraph 22 of the ET1. This records, against the background of the Appellant's illness, that he has only been able to provide limited instructions and has many more examples of "the unlawful treatment he endured on a regular basis". It reports that he has kept diary notes of that treatment, and "reserves the right to include additional examples of such treatment to support his claim". As Mr Mansfield QC submitted, it is not open to an Appellant

to reserve to himself a right to add to his ET1, as he requires the ET's permission to do so. The EJ was entitled to conclude, despite the references to the Appellant's illness, that because he had diary notes of his treatment, his lawyers would have chosen the most compelling examples for pleading in the ET1. This was, indeed, the approach which he took (Judgment, paragraphs 17-21).

24. Mr Braier submitted that allegations 3, 19, 34, 46, 47, 50, 54, 57, 60, 62, 63, 64, 69, 73, 74, and 76 in the Scott Schedule are better particulars of allegations pleaded in the ET1. These are my conclusions about those allegations. I recognise that my views about four of these allegations differ, or arguably differ, from those (somewhat hesitantly expressed) by Mr Recorder Luba QC when he decided the rule 3 (10) application in this case.

(1) Allegation 3 in the Scott Schedule reflects paragraphs 8 and 11 of the ET1.

(2) The date attributed to allegation 19 is too late to make it a further particular of an allegation pleaded in the ET1.

(3) The first part of allegation 34 is not reflected in the ET1. The password allegation, however, is reflected in the ET1.

(4) Allegation 46 is substantially similar to paragraph 13 of the ET1.

(5) The date attributed to allegation 47 (19/20 February 2013) is too late to make it a further particular of an allegation pleaded in the first section of the ET1.

(6) The same applies to allegation 50.

(7) The date attributed to allegation 54 (5 March 2013) is too late to link it to paragraph 12 or 13 of the ET1.

(8) The date attributed to allegation 57 (19 March 2013) is too late to link it to paragraph 12 or 13 of the ET1.

(9) Allegation 60 (3 April 2013) reflects paragraph 15.4 of the ET1 (2012-June

2013). The same applies to the dates pleaded for allegations 62, 63, and 64. These allegations were struck out by the EJ as having no reasonable prospects of success.

(10) Allegation 69 is an allegation of unfairness in R1's investigation. It reflects paragraph 16 of the ET1.

(11) Allegations 73, 74 and 76, which relate to generalised racial bullying in the second half of June 2013, are not reflected in paragraph 15 of the ET1.

(c) Amendment

25. The upshot of my decision is that the Appellant needs permission to amend the ET1 if he is to rely on a number of allegations in the Scott Schedule. Permission was refused by the EJ. As a result of my decision on the previous issue, the Appellant needs such permission in relation to fewer allegations than the EJ thought. But that does not undermine the EJ's approach to that question, if it is otherwise sound. The EJ directed himself correctly on that issue. It was a question of case management for him. I can only interfere with his decision if it was perverse, which is a high threshold.

26. Mr Braier made 4 main criticisms of the EJ's approach.

27. I reject his submission that the EJ erred by taking into account the burden on the ET. There is nothing in the cases to which he referred me which suggests that the burden on the ET is legally irrelevant to a case management decision such as this.

28. He then submitted that the EJ erred in his balancing of the injustice to the parties; first he shut his eyes to the consequence that refusing leave would deprive the Appellant of his claim, and he did not give any weight to the fact that R1 and R2, as the evidence of Karen

Glasse showed, had carried out a very thorough investigation of all the allegations in the Scott Schedule and had interviewed many potential witnesses. I reject those submissions. The last sentence of paragraph 22 of his reasons shows that the EJ had in mind the relationship between the different applications he was deciding, and as this was a reserved decision, I am not persuaded that the EJ can possibly have been blind to the overall effect of his decisions on the issues (see paragraph 44 of his Judgment where he makes this clear). He was well aware of the investigation argument, but not impressed with it (see paragraph 42.2 of his Judgment).

29. I also reject Mr Braier's submission that the EJ mis-described the nature of the amendments at issue. He was right (Judgment, paragraph 14) that these were allegations of "new factual matters that had not previously been pleaded". He was also right that the Appellant was not asking to "re-label existing allegations or rely on new categories of legal claim in relation to factual matters which had already been pleaded".

30. The EJ was influenced by 3 main factors. First, the new allegations had been presented out of time. Second, he took into account the Appellant's explanation (ill health). He accepted that the Appellant had been ill, but did not accept, in the circumstances, that this was a satisfactory explanation for the late emergence of the details in the Scott Schedule. Solicitors had been instructed around 20 May 2013. They had written a detailed letter on 29 July 2013, with a schedule of 43 allegations, covering Q4 2011 to Q2 2013. Some of those allegations were historic and some were said to have occurred in the 3 months before the letter. The letter said that some of the prominent allegations had been taken from the Appellant's notes. The ET1 was very detailed. There were 34 allegations in paragraph 15, being the most recent of the 43 set out in the schedule to the letter. The EJ concluded (Judgment, paragraph 21) that the Appellant's illness had not stopped him giving instructions to his solicitors. He had a note of

the events which he thought were relevant. He and his solicitors seemed to have exercised a considered and deliberate judgment in selecting allegations from the note. Third, in his view, if he gave leave to amend, the Respondents would have to consider and answer a further 31 factual allegations. Those involved many different people and spanned January 2012 to July 2013. Extending the factual scope of the claim would put a considerable burden on the Respondents and the ET.

31. I do not consider that there are any grounds which would justify my interfering with this case management decision of the EJ. Nor do I consider, the parties not having distinguished between the different allegations for which leave was needed, that he can be criticised for treating them all in the same way. He expressly considered whether there was any basis for distinguishing between them, and could see none (reasons, paragraph 23, last sentence).

(3) The application to strike out

32. The EJ struck out two groups of allegations on the grounds that they had no reasonable prospects of success. These were allegations 41, 42, 66, 67, 68, 70, 71, 72 and 78 relating to the investigation of the Appellant's complaints, and allegations 25, 60, 62, 63 and 64 relating to the Appellant's difficulties in logging on to his computer. The EJ was, I was told, given a copy of **Anyanwu v South Bank Students' Union** [2001] IRLR 305 (HL). He therefore must be taken to have understood the importance of not striking out race claims unless it was clear that they really are unarguable. The question, rather, therefore, is whether the EJ erred in law in striking out those claims on that ground.

33. Taken together, the claims about the investigation were claims that despite historic acknowledgements by R1 that the Appellant's colleagues had been guilty of racism, R1 did not

take his complaints seriously, acted unfairly, and reached the wrong conclusion. They went further than "procedural arguments" (Judgment, paragraph 29). The claims about the log-on problems are classified by the Appellant as harassment by 2 colleagues in particular, against an alleged background of racial bullying and harassment, and his allegations (ET1, paragraphs 12 and 15.28) that colleagues were hacking into his mobile telephone/home computer, and had joked, in relation to the bullying and invasion of privacy to which he had been subjected, "What does he expect, he works in IT". The Appellant also made allegations about the hacking of his telephone in the Scott Schedule. It may be said that such allegations are easy to make and hard to prove. The reason they are hard to prove is that, if they are to be proved, the ET must draw inferences from the primary facts. Whether such inferences should be drawn is hotly contested in almost every discrimination case.

34. It may be that in isolation, a suggestion that the dismissal of complaints by an HR department was an act of race discrimination or harassment would not have reasonable prospects of success. The same could be said of allegations about problems logging on to an IT system. But these groups of allegations did not stand in isolation in this case, for the reasons given in paragraphs 19.1 and 19.2 of Mr Braier's grounds of appeal. With some hesitation, I have concluded that the EJ erred in law in striking out these 2 groups of allegations on the grounds that they had no reasonable prospects of success. I am not satisfied from the reasons which he gave for striking them out that he took into account the highly relevant factors of the overall context in which the sets of allegations were made, and the undesirability of striking out allegations in race cases which depend on contested facts. I would remit this question to the ET for it to reconsider it in the light of my judgment.

(4) The application for an extension of time

35. My conclusion on issue (1), above, means that it is not necessary for me to consider whether the EJ erred in relation to this application or not. He considered this application on the basis that the latest allegation in the Scott Schedule to survive was allegation 61, dated 29 April 2013. In that situation the Appellant would have required an extension of 5 weeks or so, as the ET1 was presented on 3 September 2013. On the assumption that that was correct, and subject to one point, I can see no grounds for interfering with the approach of the EJ to this issue. His reasoning on this question overlapped to a degree with his reasoning on the amendment question, which I have held was not flawed in any way. The bald point, as the EJ saw it, was that the Appellant had the opportunity to bring his claim in time, solicitors were acting, and for whatever reason, presented the claim late.

36. That brings me to the proviso I have just expressed. Mr Braier submitted that the EJ erred in reaching this conclusion because its effect was to punish the Appellant for the mistakes of his solicitors. That he submits, is not the right approach: see **Virdi v Commissioner of Police for the Metropolis** [2007] IRLR 27, per Elias P (as he then was) at paragraphs 34-40.

37. Elias P recognised that the decision to extend time is the exercise of a broad discretion and that an appellate court can only interfere with it if there is an error of principle, or the decision is perverse. He noted that the failure to take into account a significant relevant factor is an error of law. In that case the Appellant had been represented by the Police Federation and solicitors. The claim had been lodged one day late. He knew about the time limit. The ET refused to extend time. The Appellant's evidence to the ET when asked why he had not put the claim in time had been that his solicitors should be asked that question. Elias P concluded that the chairman of the ET had erred materially in law in finding, in that state of the evidence, that

there was no explanation for the delay. He did not remit the matter to the ET. He held that the only factor weighing against an extension of time was the availability of a claim against the Appellant's solicitor. That, on its own, was not a legitimate reason for refusing to extend time (Judgment, paragraph 43).

38. He relied on a personal injury case, **Steeds v Peverel Management Services Limited** [2001] EWCA Civ 419. That case shows that, for the purposes of the **Limitation Act 1980**, "so far as fault on the part of the Appellant is a relevant factor in exercising the court's discretion under section 33, his solicitor's faults are not to be attributed to him personally. However, this is not to say that the existence of a claim against his solicitors is an irrelevant factor", because in weighing the prejudice to him of not extending time, the fact that he will have claim over against his solicitors for the full damages he would have recovered must be a highly relevant consideration (per Sir Christopher Slade, at paragraph 27). The Court of Appeal held in that case that the judges below had erred in treating the fault of the solicitors as decisive. The Court of Appeal re-took the decision, and allowed the claim against the defendant to proceed (see paragraph 40).

39. In the light of those authorities, it seems to me that if the claim was presented late and that was the solicitors' fault, that fault should not have been attributed to the Appellant unless he was responsible for the timing of the presentation of the claim. Elias P discounted such a possibility as "wholly fanciful" in **Virdi**. If then, it was necessary for this to be decided, the EJ failed to take into account a relevant factor. I would not have been as confident as was Elias P in **Virdi** that there was only one right answer to the re-formulated question, so had I needed to decide this issue, I would have remitted it to the EJ.

(5) The position of the Respondents 2, 4 and 8

40. The EJ considered this issue obiter. He would have struck out the claims against those Respondents if it had been necessary for him to do so. Respondents 4 and 8 were employees of R2. R1 and R2 were companies in the same group. The Appellant's contract of employment was with R1.

41. The EJ recorded that, in accordance with section 39 of the **Equality Act 2010** ("the Act"), the primary liability for infringements of the **Act** by employees is their employer's. He summarised the Appellant's evidence and held that there was no prospect that he would establish that he was employed by R2. The fact that IT services are provided to different companies in a group of companies does not make an employee who provides them an employee of a different group company from the company with which he has his contract of employment.

42. He also referred to section 41 of the **Act**. This is headed "Contract workers". Section 41(1), (2) and (3) provide that a principal ("P") must not discriminate against, harass, or victimise a contract worker ("A"). Section 41(5) defines P as a person who makes work available for a person ("A") who is employed by another person ("B") and is supplied by B in furtherance of a contract to which P is a party, whether or not B is a party to it. "Contract work" is the work described in section 41(5) (section 41(6)). A contract worker is a person supplied to P in furtherance of a contract such as is mentioned in section 41(5) (section 41(7)).

43. The authorities I was shown concern an equivalent, but somewhat different, provision in **Race Relations Act 1976**, section 7. Section 7(1) applied to any work for P "which is available for doing by [As] who are employed not by [P] but by [B], who supplies them under a contract

made with [P]".

44. In **Harrods Limited v Remick** [1997] IRLR 583, the employees were employed by licensees who operated franchises in the Harrods Department Store. They sold branded goods there for their employers, but Harrods took a commission on all sales, and the contracts between their employers and Harrods provided that, at the moment of sale, the goods belonged to Harrods. Sir Richard Scott VC (as he then was) said that the issue was whether the work that was clearly available at Harrods for the licensees' employees was "work for Harrods". He agreed with this Tribunal that it was. He held (Judgment, paragraph 22) that it was implicit in section 7 that the work in question would be not only work done for the employer (the licensees in that case), in that it was done pursuant to the contract of employment, but that it would also be work done for P. The effect of the contracts between the employers and Harrods was that the selling of goods by the employees was required under the franchise contracts to be done by the employers' employees for Harrods. The contracts also entitled Harrods to impose rules on the employees. The work could, therefore, properly be described as "work for" Harrods. The Vice Chancellor rejected the submissions that A had to be under the managerial control of P, and that P had to make the work available to A (Judgment, paragraphs 23 and 24). He also rejected the submission that the supply of workers should be the primary or dominant purpose of the contract between P and B (Judgment, paragraph 28). It was enough that the supply of workers was pursuant to an obligation under the contract (ibid).

45. The other authority to which I was referred was **Leeds City Council v Woodhouse** [2010] IRLR 625 (CA). In that case, Smith LJ observed that in other than a simple case, the section 7 issue should be considered as part of the whole claim, as it is a largely factual question. The employee made a discrimination and harassment claim against his employer, an

arms' length management organisation ("the ALMO") and the City Council. The employee was a former employee of the City Council. His employment was transferred to the ALMO when it was set up. The ALMO had a service agreement with the City Council for building maintenance services. The EJ in that case heard evidence and made full findings of fact. There was a management agreement between the ALMO and the City Council. Although formally and legally separate, the ALMO and the City Council in practice had "an extremely close" relationship. Paragraph 6.8 of the EJ's decision recorded the ways in which the employee's treatment by the City Council was the same as its treatment of its own employees. The agreement between the ALMO and the City Council required the ALMO to employ enough staff to ensure that the services the ALMO provided to the City Council were provided in accordance with that agreement, and imposed requirements about their skills and qualifications.

46. The employee submitted that the work he did for the ALMO was all work done for the City Council, which was P for the purposes of section 7. The City Council submitted that the work he did was solely for the ALMO and not at all for it (Judgment, paragraph 8). The EJ accepted that section 7 did not just apply to workers supplied by an employment agency to P, but had a wider scope. Smith LJ reviewed the authorities, including the **Harrods** case and a decision of the Northern Ireland Court of Appeal. She said, in paragraph 22, that the authorities showed that the mere fact that the employee does work under a sub-contract from which the principal will derive some benefit is not enough. It may well be that if it can be shown that the principal can exercise an element of influence or control, that would be enough. "But that is not to say that influence or control must be demonstrated in all cases". She held that in this case, the EJ had held that "due to the extreme closeness in the relationship between the contracting parties, it could properly be said that [the employee's] work was being done for the council, regardless of the exercise of control or influence". The CA upheld the decision of the

EJ.

47. Section 41 is intended in at least one respect to cast the net wider than section 7 of the **Race Relations Act 1976**. There is no requirement in section 41 that B should be a party to the supply contract with P. The EJ's reasons on this issue are short. I do not criticise him for that, as his decision was expressly obiter. I have read those reasons carefully. I am left with a doubt whether he appreciated that section 41 does not require the employee individually to be supplied under the contract with P, and that section 41 could apply if the "work" (referred to throughout section 41) was both "for" R1 and "for" R2. On the evidence before the EJ, there was a difference in kind between the work the Appellant did for R2 and the work he did for other companies in the group. About 73% of R1's revenue in 2013 came from its work for R2. R1 supplied services to R2 under a contract clause 8.3.1 of which required it to "employ or engage sufficient suitably qualified individuals to ensure that the Services [as defined] are provided in all respects within the terms of this Agreement …". This resembled the equivalent term in the contract in the **Woodhouse** case. On the Appellant's evidence, some of his work was solely for R1, some for R2, and some for other companies in the group. This is not expressly adverted to by the EJ and might support a finding that the Appellant was not supplied to R2. But as the **Woodhouse** case makes clear, any conclusion must depend on a careful evaluation of the facts. I would remit this issue to the ET for further consideration.

(6) Remission

48. I have decided that some issues should be remitted to the ET. The Respondent submitted that the case should be remitted to the same EJ. I have considered the decision of this Tribunal in **Sinclair Roche and Temperley v Heard** [2004] IRLR 763. The facts were very different: there had been 12 days of evidence in that case. In this case, the hearing only

took 2 days. The ET heard some evidence, and so will have some notes of that. It is now over a year since the hearing in front of the EJ. He may not readily remember the case, but, on balance, I consider that there might be a modest saving in judicial effort if it is remitted to him. Mr Braier submits that the case should not be remitted to the same EJ, principally because his unreasoned rejection of the application for reconsideration indicates a mind closed to the possibility that there was any error in the Judgment. I take into account the observations of Burton P in **Heard** about tribunal professionalism, at paragraph 46.6 in particular. However it does seem to me, in the light of the fact that the application for reconsideration raised points on the basis of some of which I have allowed this appeal, that the terms in which the application for reconsideration were rejected give rise to a reasonable apprehension that, in the words of Burton P, the ET "has so thoroughly committed itself that a rethink appears impracticable". I therefore remit the case to a different ET.

5. Conclusion

49. This appeal succeeds to the extent I have indicated. I remit the outstanding matters to a different ET for a further Preliminary Hearing at which the EJ must consider them afresh, in the light of the terms of this Judgment. If the parties wish to persuade the EJ to postpone the section 41 issue to a Full Hearing, they are free to do so, and he or she is free so to order.