Employment / Discrimination

Beating the clock

Spencer Keen looks at time limits in reasonable adjustments cases under the Disability Discrimination Act 1995

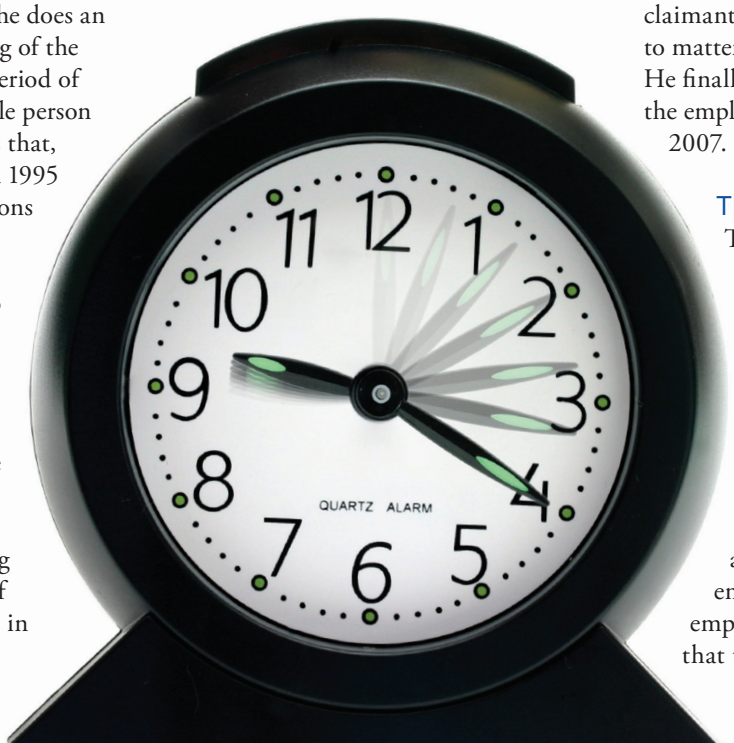
IN BRIEF

- Practitioners dealing with Disability Discrimination Act 1995 claims will now need to address time limits as a matter of priority.
- Practitioners should not be afraid of making an application to extend time if the time limit has expired.

In *Matuszowicz v Kingston Upon Hull City Council* [2009] All ER (D) 291 (Jan) the Court of Appeal handed down a judgment that will have a significant impact on when time starts to run in reasonable adjustments cases.

In *Matuszowicz* the Court of Appeal considered how time limits in reasonable adjustments cases are affected by the provisions of para 3 of Sch 3 of the Disability Discrimination Act 1995 (DDA 1995). This section provides that a deliberate omission is deemed to occur when it is decided upon. Significantly, a person is taken to have decided upon that omission either (i) when he does an act inconsistent with the doing of the omitted act or (ii) after that period of time within which a reasonable person would have acted. This means that, in many circumstances, DDA 1995 will treat as deliberate, omissions which could not properly be described as being deliberate. This is particularly relevant to the duty to make reasonable adjustments because breaches of that duty commonly occur by dint of non-deliberate omissions rather than positive acts.

Before *Matuszowicz* there was only one authority dealing in any depth with the effect of para 3 of Sch 3 on time limits in reasonable adjustments cases and that was the case of *Humphries v Chevler Packaging* UKEAT/0224/06. In *Humphries* the appellant argued before the Employment Appeal Tribunal (EAT) that the failure to make a reasonable adjustment was not an omission but an act which continued while the adjustment remained incomplete. The EAT rejected that argument and held that the failure to make an adjustment was an omission and not an act and that therefore s 3(4)(a) and (b) deemed that time ran either from the date the omission was decided upon or from the date it would have been reasonable to have made the adjustment. After *Humphries* was decided there was some uncertainty whether that decision was correct and whether, in some circumstances, a duty to make adjustments could constitute a continuing omission.



The facts of *Matuszowicz*

The claimant was employed as a teacher by Kingston Upon Hull City Council. He was a disabled person whose right arm had been amputated above the elbow. He began working at Hull prison in the autumn of 2003. He had problems opening the heavy doors at Hull and so was transferred to Everthorpe prison. Unfortunately Everthorpe prison presented the same problem.

The claimant claimed that, by August 2005, the respondent should have transferred him out of the prison service to an alternative position. The claimant was absent from work from December 2005. On 1 August 2006 the claimant's employment was transferred under Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/ 246) (TUPE) to Manchester City College. On 4 October 2006 the claimant presented a grievance in relation to matters occurring before 31 July 2006. He finally presented a claim form to the employment tribunal on 31 January 2007.

The ground of appeal

The respondent applied to strike out the claim on the grounds that it was out of time. The tribunal held that three out of the four complaints were out of time but allowed the fourth claim to proceed. The fourth claim was that there had been both a failure to transfer the claimant to suitable alternative employment and an enforced transfer to *un*suitable employment. The claimant alleged that the need for alternative suitable

work had become clear in August 2005 and that there was a continuing breach of duty to make adjustments from that date.The respondent appealed the tribunal's decision to allow the fourth claim to proceed.

Non-deliberate omissions

Lord Justice Lloyd described the important question as whether the effect of para 3(4) was to treat as a *deliberate* omission something which, but for that paragraph, could not properly be described as *deliberate*. Lloyd LJ stated that the effect of para 3(4) was to treat an inadvertent omission by the employer as an act that was done deliberately either when the employer had performed an act inconsistent with the omitted act or after that period of time within which a reasonable person would have acted.

Lloyd LJ recognised that the form of words in para 3, although identical to that used in other anti-discrimination cases, sat uncomfortably within the context of DDA 1995. An employer who failed to comply with the duty to make adjustments would be treated, in many circumstances, as having failed to comply with the duty on an artificial date. That date might not be readily apparent to the employee or employer either at all or possibly until a much later date when the time limit for making a claim had already expired.

His lordship considered that a failure to make an adjustment was "in this type of case" an omission and not an act (suggesting perhaps that in other cases a breach might be described as an act). His lordship also stated that since the allegation in *Matuszowicz*, concerned a continuing omission, the time limit was governed by para 3 of Sch 3. Sedley LJ agreed with the judgment of Lloyd LJ and stated that it was worth stressing that the effect of para 3 of Sch 3 "is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment".

Their lordships therefore agreed that even where an act is a continuing omission the time limits were governed by para 3. Once an employer has failed to prevent a disadvantage by making a reasonable adjustment the duty to prevent that disadvantage is, to all intents and purposes, extinguished.

Both their lordships recognised that their conclusions could cause considerable difficulties to claimants in DDA claims but stated that the ability to extend time when it was just and equitable to do so was capable of accommodating situations where the employee might be unaware that the start date had occurred or, where the employer's decision has not been communicated to him. It would clearly be reasonable to extend time where the employer had sought to lull the employee into a false sense of security by professing to continue to consider what adjustments to make, at a time long after the moment when the employee was entitled to make a claim. Lloyd LJ also noted that it was ironic that the respondent would be in a better position if it argued that it should have made the adjustments earlier.

Comment

The important part of this judgment is the decision that the time limit for a continuing omission runs from a fixed date because it is governed by para 3 of Sch 3, DDA 1995. In our book, *Disability Discrimination in Employment*, Richard Oulton and I argue that para 3 of Sch 3 should not be used to determine when the duty to make adjustments arises.

> "It would clearly be reasonable to extend time where the employer had sought to lull the employee into a false sense of security"

Interestingly, Lloyd LJ recognised that the question of whether the breach was deliberate or not was irrelevant to "identifying an act of discrimination giving rise to a substantive remedy…either the duty is complied with or not". The classification of the breach as an omission, according to Lloyd LJ, is only necessary for the purposes of calculating the time limit under para 3 of Sch 3. In other words Lloyd LJ distinguished the existence of the cause of action from the ability to enforce it. This is an important distinction but one which the decision in *Matuszowicz* blurs because the expiry of the time limit where a reasonable adjustment is required effectively extinguishes the duty to make that adjustment ever again.

In other areas of law, such as contract and tort, causes of action are capable of continuing in the sense that the time limit is measured from each instance of renewed harm. So, for instance, in the case of a breach of a covenant to repair property, the breach is continuing, because the covenant is broken afresh every day the premises are out of repair. The fact that an omission is deemed to be decided upon at a particular time under DDA 1995, should not prevent the duty to make adjustments arising afresh each day thereafter that the claimant is placed at a substantial disadvantage by the employer's PCP. There is nothing in the statutory language of Sch 3 or Pt II of DDA 1995 that would suggest otherwise.

Social model

It also remains to be seen whether a breach of the duty to make adjustments must always be characterised as an omission. The duty to make adjustments is predicated on a social model of disability which considers that the disadvantages posed to disabled people are unnecessarily placed in their way by society. A disabled person should presumably be able to argue, for instance, that an employer has acted in breach of the DDA by organising his office in a way that disadvantages him.

Conclusion

Practitioners dealing with DDA 1995 claims will now need to address time limits as a matter of priority. In many cases time limits will pass before the claimant has even consulted a lawyer. Practitioners should not be afraid of making an application to extend time, particularly if one of the reasons that the time limit has expired is that the claimant was waiting to see whether their employer was going to make the adjustment. NLJ

Spencer Keen is a barrister at 3 Pump Court, *E-mail:sk@3pumpcourt.com, www.3pumpcourt.com*