



Neutral Citation Number: [2022] EWCA Civ 24

Case No: A2/2021/1372

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MATHEW GULLICK QC
UKEAT/0238/20/00

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

Between :

PHILIP PARR
- and -
**(1) MSR PARTNERS LLP (FORMERLY MOORE
STEPHENS LLP)**
(2) SIMON GALLAGHER
(3) PAUL STOCKTON
(4) SUKHJINDER SINGH AULAK
(5) SIMON BAYLIS
(6) TIM WEST
(7) RICHARD MOORE
(8) JEREMY WILLMONT

Appellant

Respondents

Jonathan Cohen QC (instructed by **CM Murray LLP**) for the **Appellant**
Daniel Stilitz QC (instructed by **Addleshaw Goddard LLP**) for the **Respondents**

Hearing date: 16 December 2021

Approved Judgment

This judgment was handed down remotely at 10:30 on 14 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Bean

1. In January 2019 the Appellant Philip Parr brought employment tribunal proceedings alleging direct age discrimination by the Respondents. An issue was raised as to whether the claim had been issued in time, which was dealt with at a Preliminary Hearing in the ET at London Central before Employment Judge Elliott on 11 and 12 September 2019. EJ Elliott determined that the Respondents' acts complained of amounted to "conduct extending over a period" within the terms of s 123(3)(a) of the Equality Act 2010 and that the claim had therefore been issued in time.
2. The Respondents appealed to the Employment Appeal Tribunal. By a decision handed down on 24 June 2021 Mathew Gullick QC, sitting in the EAT as a deputy High Court judge ("the judge"), held that there had been no "conduct extending over a period" beyond 30 April 2018 and that the claim was therefore out of time. He allowed the Respondents' appeal, set aside the finding of the ET, and remitted the claim to the ET (if practicable, EJ Elliott) to determine whether to extend time for the presentation of the claim form on what is generally known as the "just and equitable" ground. The judge granted Mr Parr permission to appeal to this court.

The facts

3. Mr Parr was born in 1958. He had a long career at the accountancy firm which became the First Respondent, joining in 1982. He was promoted to salaried partner in 1988 and became an equity partner in 1995. At that time, the firm was a partnership subject to the Partnership Act 1890. It became a limited liability partnership ("LLP") in 2005. Mr Parr became a member of the LLP and retained the status of equity partner under the LLP membership agreement ("the Members' Agreement"). At the times material to this claim, Simon Gallagher, the Second Respondent, was the Managing Partner. The Third to Eighth Respondents were the members of the Partnership Committee.
4. Clause 1 of the Members' Agreement, as in force at the material time, contained the following definitions, insofar as material:

"Accounts Date means 30 April in each year and/or such other date as the Partnership Committee may determine, subject to the approval of a Simple Majority of the Equity Partners

Effective Date means 3 October 2005

Equity Partners means the persons named in part 1 of schedule 1 and any other person appointed as an Equity Partner after the Effective Date, other than any Retired Member, and for the avoidance of doubt may, pursuant to clause 26.4, in certain cases include some or all of the Fixed Share Partners ...

Fixed Share Partner means the persons named in part 3 of schedule 1 and any other person appointed as a Fixed Share Partner, other than any Retired Member

Members means the Equity Partners and Partners

Normal Retirement Date has the meaning ascribed to it at clause 29.2

Partners means the persons named in part 2 of schedule 1 and any other person appointed as a Partner after the Effective Date, other than any Retired Member

Retired Member means a Statutory Member who has in accordance with this Agreement retired or ceased to be a Statutory Member

Salaried Partners means those employees of the LLP Business who have been admitted as Statutory Members from time to time and whose rights are governed by their separate contracts of employment, other than any Retired Member

Statutory Members means the Equity Partners, Partners, Fixed Share Partners and Salaried Partners”

5. Clause 29 of the Members’ Agreement made provision in relation to retirement of Members (i.e. both Equity Partners and other Partners) who had reached the age of 60:

“29.2 Subject to clause 29.4, each Member shall in any event retire on the Accounts Date next following his 60th birthday (the Normal Retirement Date).

29.3 In agreeing to the Normal Retirement Date, the Members have given careful consideration to the requirements of the Equality Act 2010. It has been agreed between them that the default retirement age is objectively justified and is a proportionate and reasonable means of achieving the legitimate aims of enabling proper succession planning for both the LLP Business and the Members. It also 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.

29.4 Subject to the approval of the Partnership Committee, the Managing Partner may extend the Normal Retirement Date of an individual Member in circumstances where that Member indicates he wishes to continue as a Member or if the Managing Partner asks the Member to continue as a Member. 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 on-going contribution to the LLP Business by the Member concerned and the matters set out at clause 29.5. Any agreed extension shall be for a specific period of time, the conclusion of which will represent the Member's Normal Retirement Date and shall be on such terms as to remuneration and otherwise the Managing Partner may determine. The Managing Partner may alternatively agree that any retired Member may be employed by the LLP on such terms as the Managing Partner shall determine.”

6. Mr Parr's Normal Retirement Date, calculated in accordance with Clause 29.2, was 30 April 2018, that is to say the accounting date following his 60th birthday in February 2018.
7. Several months prior to his 60th birthday the Appellant proposed that he should continue with the firm and not retire, on the basis that there was a business case for him to do so. Mr Gallagher recommended to the Partnership Committee that the Appellant be permitted to remain as a member of the LLP for two years beyond his Normal Retirement Date, i.e. until 30 April 2020, but not as an Equity Partner. Mr Gallagher's evidence was that although he considered that there was a case for the Appellant to continue with the firm beyond his Normal Retirement Date, he did not consider that the Appellant was contributing to the business as an Equity Partner should. The Committee accepted the recommendation.
8. On 13 October 2017, the Appellant and the First Respondent entered into a Deed, referred to as a De-Equitisation Agreement, setting out the terms upon which Mr Parr would remain a Member after 30 April 2018. This provided that after that date, he would cease to be an Equity Partner under the Members' Agreement and would become an ordinary Partner. Clauses 1 and 2 of the Deed provided:
 - “1. Any capitalised terms used in this Deed and not defined shall have the meanings ascribed to them in the Members' Agreement.
 2. The Relevant Member [i.e. the Claimant] shall cease to be an Equity Partner and become a Partner with effect from the Transition Date.”
9. The Employment Judge found that the Claimant had faced a choice between remaining as an ordinary Partner or leaving the firm completely. He was not given the option to remain as an Equity Partner. In those circumstances, he chose to remain as an ordinary Partner. Mr Gallagher's evidence, which was not in dispute and was accepted by the ET, was that in at least three previous instances the discretion had been exercised differently so as to permit Equity Partners to continue as such after what would have been their Normal Retirement Date.

10. The Claimant was dissatisfied at not being offered a further period as an Equity Partner. However, he took the view that the difference between his earnings as an Equity Partner and his future earnings as an ordinary Partner was not so significant as to cause him to take legal advice on his position. At around the time that the De-Equitisation Agreement was entered into, he believed that his loss would be a reduction in income of the order of £31,000 in the subsequent financial year. He considered, with that figure in mind, that any legal action he might take would cost a considerable amount of money in legal fees in comparison to the possible benefit from it. The ET accepted the Claimant's evidence that when he entered into the De-Equitisation Agreement he knew that he would lose out but he did not anticipate the full extent of his potential losses, which were dependent on future events.
11. The Appellant's status therefore changed at the end of April 2018 from that of Equity Partner to ordinary Partner. He was repaid the capital sum which he had invested in the business. After that he was not required to make any further capital contributions and did not have the potential liabilities that he would have had as an Equity Partner. He accepted in his evidence to the ET that he knew the effect of the De-Equitisation Agreement was that he would also lose any right to distribution of capital profits.
12. On 13 September 2018, the Appellant learned at a partners' meeting that the First Respondent was planning to sell parts of its business. This was not something of which he had been aware when he entered into the De-Equitisation Agreement in October 2017. Mr Gallagher's evidence, accepted by the ET, was that the First Respondent's Management Board had made the decision to sell those parts of the business on 14 February 2018, that is to say several months after the Claimant's De-Equitisation Agreement. Separately, a prospective merger with BDO was also initially explored at a meeting between the key personnel from both firms on 1 March 2018. The merger took place on 1 February 2019.
13. In December 2018, the Claimant raised the issue of whether he would benefit from the proceeds of the forthcoming disposal of the First Respondent's business, believing (unrealistically, as the ET found) that he would receive a share despite having ceased to be an Equity Partner as a consequence of the De-Equitisation Agreement. He was told that he would not do so.
14. On 1 February 2019, the First Respondent's business was transferred to BDO, resulting in the First Respondent going into what the Employment Judge described as "wind-up mode". At about the same time, two parts of the First Respondent's business – its wealth management division and a proprietary software product – were also sold to other buyers. Mr Parr's case is that had he remained an Equity Partner his share of the proceeds would have been almost £3 million. Hence his issue of the ET claim in January 2019.

The Equality Act 2010 section 123

15. Section 123 of the 2010 Act provides, so far as material:-

“(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.”

16. Although there was no discussion in either of the judgments below about the section of the 2010 Act under which Mr Parr brought his claim (and it was not mentioned in his form ET1) it appears to be s 45, dealing with LLPs. Section 45(2) provides that an LLP must not discriminate against a member as to the terms on which he is a member or by subjecting him to any other detriment (among other things). For the purposes of the present appeal it is not suggested that it matters which provision of s 45 applies.

The findings of the employment tribunal

17. In her decision EJ Elliott said:-

“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 ceased 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 736, Supreme Court. I take the view that it is not appropriate at this preliminary hearing to express [a] 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 such 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 this 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 within 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.”

The judgment of the EAT

18. In his judgment Mathew Gullick QC said:-

“42. This is not a case, such as *Hendricks*, in which it is alleged that there are a series of connected acts of discrimination which can be aggregated so as to amount to “conduct extending over a period”. Rather, it is contended that there is, as the Employment Judge held at paragraph 76 of the written Reasons, a continuing discriminatory rule or policy. The authorities to which I have already made reference demonstrate that close attention must be paid to the particular circumstances of the individual case. The judgments show that the distinctions that are capable of being drawn in these circumstances can be fine ones.”

43. What Auld LJ said in *Cast v Croydon College* at page 508F of the report is of importance:”

“As to a "one-off" discriminatory act, it is important to keep in mind that it may be an application of an established discriminatory policy or it may be inherently discriminatory regardless of any such policy. If the complaint is of a specific discriminatory act the fact that it may have been an application of an established policy adds nothing for this purpose. The starting point is, therefore, to determine what is the specific act of which complaint is made.”

In the present case, the specific act of which complaint is made is the Claimant’s demotion (as the Employment Judge described it), i.e. the change in his status from Equity Partner to ordinary Partner which became effective after 30th April 2018. That is clear from paragraphs 9 and 12 of the Claimant’s Grounds of Complaint in the Employment Tribunal:

“9. The “Accounts Date next following his 60th Birthday” was in Mr Parr’s case 30 April 2018. As a result, on 30 April 2018, Mr Parr was removed as an [Equity Partner] from the LLP. This was less favourable treatment because of Mr Parr’s age. It was, as is any application of a mandatory retirement age, direct discrimination within the meaning of Section 13(1) of the Equality Act.”

“12. De-equitisation was direct discrimination within the meaning of Section 13(1) of the Equality Act. It was less favourable treatment because of Mr Parr’s age. It was not justified pursuant to Section 13(2) of the Equality Act...”

44. I start my analysis by rejecting Mr Stilitz’s submission that the implementation of the De-Equitisation Agreement is properly to be described as a termination followed by a re-engagement. As Mr Cohen correctly submitted, the Claimant remained a member of the First Respondent throughout; his membership of the LLP was never terminated. This situation is not, in my judgment, the same in factual terms as those cases in which the present issue has been raised in the context of either a dismissal or there being no ongoing relationship between the parties, such as *Okoro v Taylor Woodrow Construction Ltd* [2012] EWCA Civ 1590, [2013] ICR 580 (see at [36-37]). Rather, two important things happened after 30th April 2018, consequent upon the De-Equitisation Agreement. Firstly, the Claimant remained a member of the LLP but his status as a member changed from that of Equity Partner to that of ordinary Partner. Secondly, the future period of the Claimant’s membership of the LLP as an ordinary Partner, prior to retirement, was fixed at two years. The Employment Judge’s reference to what happened as a demotion captures the essence of what occurred: it is clear that the Claimant viewed the change in status from Equity Partner to ordinary Partner with a fixed term of two years as both undesirable and unwelcome.

45. The De-Equitisation Agreement was itself the product of the operation of Clause 29 of the Members’ Agreement. That provided for the norm to be the retirement of all Partners (i.e. not just Equity Partners) on the 30th April immediately following their 60th birthday. However, that was subject to a discretion on the part of the Managing Partner (subject to Partnership Committee approval) to disapply what would otherwise be the case, i.e. mandatory retirement as a Partner shortly after reaching the age of 60.

46. I accept Mr Stilitz’s submission that Clause 29.4 of the Members’ Agreement is important because it provides an express discretion permitting Equity Partners to continue beyond what would be their Normal Retirement Date. The evidence before the Employment Judge, which she accepted, was that the discretion had previously been exercised to permit Equity Partners to remain at the firm in that capacity after they had reached what would have been their normal retirement age. This is not, therefore, a case in which there was a rule that no-one could continue as an Equity Partner after reaching what would otherwise be their normal retirement age. There was a genuine discretion, which had been exercised in a different way in other

cases. As Mr Stilitz correctly submitted, on the Employment Judge's findings of fact the matter was looked at on a case-by-case basis; in other instances the Equity Partner had continued as such beyond the age of 60.

47. In my judgment, the existence and operation of the discretion in Clause 29.4 of the Members' Agreement results in the present case being distinguishable from the scenario initially described in the obiter comments of this Appeal Tribunal in *Amies*, namely the application of a general discriminatory rule or policy to the individual claimant. What occurred in this case was not, in my judgment, the application of a rule of the type referred to in those observations or a situation such as that in the cases of *Calder* or *Kapur* where such a rule continues to apply against a claimant with a resulting continuing discriminatory effect. There is a distinction between the continuing application of a discriminatory rule or policy to a claimant (such as in *Calder* and *Kapur*) and the continued existence of such a rule or policy and its one-off application to a claimant. The effect of the De-Equitisation Agreement in this case was to make a one-off and permanent change to the Claimant's status as a member of the LLP. The losses about which complaint is made in this Claim are derived not from the ongoing application of a general discriminatory rule relating to the payment of remuneration to a group of workers with a particular protected characteristic such as that seen in *Calder* or *Kapur*, but from the specific decision taken in the Claimant's particular case to effect the one-off and permanent change in status brought about by the De-Equitisation Agreement. The Claim is based upon the change in the Claimant's status from Equity Partner to ordinary Partner, and the alleged losses derive from that event. That took place with effect from 30th April 2018 and which was the product of the way in which the discretion in Clause 29.4 of the Members' Agreement was exercised in the Claimant's individual case.

48. I reject Mr Cohen's submission that the Claimant's reduction in status was brought about by the operation of a rule which continued to have effect after the De-Equitisation Agreement came into force; rather, it was brought about by the one-off act of the Respondents exercising the discretion in Clause 29.4 in a particular manner and the resulting De-Equitisation Agreement. That the discretion in Clause 29.4 itself resulted from and was exercised because of the existence of the underlying normal retirement age does not, in my judgment, result in there having been a discriminatory rule in operation throughout so that any discriminatory conduct consequent upon the exercise of that discretion, insofar as the Claimant's change in status was concerned, would have extended throughout the entire period of two years from 30th April 2018 when (but for

the merger with BDO in 2019) the Claimant would have continued to have the lesser status of ordinary Partner.

49. I do not accept Mr Cohen's submission that the fact that Clause 29 of the Members' Agreement provides for a default or starting point of retirement at 60 means there was throughout the remainder of the Claimant's period as an ordinary Partner of the First Respondent the operation of a rule which constitutes "conduct extending over a period". That the change in the Claimant's status after 30th April 2018 may ultimately have derived from the operation of Clause 29 of the Members' Agreement is not a material distinction because that Clause, properly construed and in light of the evidence as to its operation in practice, did not constitute a rule that Equity Partners could not continue as such after reaching the age of 60 and, in any event, the Claim is about the application of an allegedly discriminatory rule to the Claimant on a single occasion (i.e. through the De-Equitisation Agreement) rather than on a continuing basis. What is in issue for present purposes is not, therefore, the continuing application of a rule, but the operation of the discretion in the particular circumstances of the Claimant's case.

50. In my judgment, the Employment Judge erred in her approach at paragraphs 75 and 76 of the written Reasons when she found that the Claimant's demotion from Equity Partner to ordinary Partner was the result of the operation of a discriminatory rule which continued, and which amounted to continuing conduct for the purpose of section 123(3)(a) of the Equality Act 2010, whilst Clause 29 of the Members' Agreement remained in effect. The Respondents did not operate a rule resulting in demotion at age 60; the Claimant's demotion was the product of the one-off exercise of discretion under Clause 29.4 of the Members' Agreement in the Claimant's particular case. The Claimant might, permissibly under Clause 29, have been offered an extension to the period of his Equity Partnership (as had, on the evidence before the Employment Judge, other Equity Partners who had reached the age of 60) - but, in the event, he was not. There was, however, contrary to the Employment Judge's finding at paragraph 76 of the written Reasons, no rule in operation preventing the Claimant's continuation as an Equity Partner after 30th April 2018. That the discretion itself derives from the presence of the normal retirement age in Clause 29.2 does not result in there being a discriminatory rule in operation beyond the date at which the change in the Claimant's status from Equity Partner to ordinary Partner took effect."

19. At paragraphs 51 and 52 the judge concluded:

"51. ... The Claimant's demotion from Equity Partner to ordinary Partner, which is the matter about which he complains,

was a one-off event resulting in a permanent change in the status of his membership of the LLP.

52. In my judgment, there was no “conduct extending over a period” in respect of the complaint raised in this case, beyond the date at which the De-Equitisation Agreement took effect, for the purpose of section 123 of the Equality Act. What occurred was a one-off act which after 30th April 2018 fundamentally and permanently changed the nature of the relationship between the Claimant and the First Respondent. That is properly to be considered an act which had continuing consequences, rather than conduct which extended over a period. It was a specific one-off decision on the particular facts of the Claimant’s case, not the application of a rule in accordance with which multiple decisions were taken from time to time (see *Owusu* at [21]) or the continuous application of a policy, rule, scheme or practice (see *Chaudhary* at [67]).”

Submissions

20. The arguments ably presented to us by Jonathan Cohen QC for the Appellant and Daniel Stilitz QC for the Respondent may be summarised thus. Mr Cohen submits that the presence of Clause 29.2 in the Membership Agreement was conduct extending throughout the period during which Mr Parr was a member of the LLP. Mr Stilitz responds that Clause 29.2 can only apply once to any individual case, and after the Appellant had passed his Normal Retirement Date on 30 April 2018 and had been de-equitised, Clause 29.2 ceased to apply to him.
21. Mr Cohen relies on two decisions of the EAT, *Amies v. Inner London Education Authority* [1977] I.C.R. 308 and *Calder v. James Finlay Corporation Ltd* [1989] I.C.R. 157, and their approval by Lord Griffiths giving the leading speech in the House of Lords in *Barclays Bank plc v Kapur* [1991] 2 AC 355 at 368. I will adopt Lord Griffiths’ description of the two EAT cases:

“In *Amies v. Inner London Education Authority* [1977] I.C.R. 308, the applicant, a female art teacher, applied for the job of department head at the school at which she taught. But on 13 October 1975 a man was appointed instead. On 29 December 1975 the relevant provisions of the Sex Discrimination Act 1975 came into force and on 1 January 1976 the applicant made a complaint to an industrial tribunal that by appointing a man the employers had discriminated against her by reason of her sex contrary to the provisions of the Act of 1975. The industrial tribunal held that they had no jurisdiction to hear the complaint as the act of discrimination, namely, the failure to appoint her to the post, had occurred before the Act came into force. The Employment Appeal Tribunal upheld the appeal [*sic*] and rejected a submission that the act of discrimination was an act extending over a period within the meaning of section 76(6)(b) of the Act of 1975 which is in identical terms to section 68(7)(b)

of the Act of 1976. In giving the decision of the tribunal Bristow J. said, at p. 311:

“Like any other discrimination by act or omission, the failure to appoint her, and the appointment of him, must have continuing consequences. She is not the head of the department; he has been ever since 13 October 1975. But it is the consequences of the appointment which are the continuing element in the situation, not the appointment itself 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. In contrast, in the applicant's case clearly the time runs from the date of appointment of her male rival. There was no continuing rule which prevented her appointment. It is the omission to appoint her and the appointment of him which is the subject of her complaint.”

In *Calder v. James Finlay Corporation Ltd. (Note)* [1989] I.C.R. 157, Angela Calder applied to her employers, James Finlay Corporation Ltd., for a mortgage subsidy which they granted to male employees over the age of 25. After she had attained the age of 25 she applied for a subsidy in May 1981 and was refused. She left her employment in October 1981 and within three months of the termination of the employment she complained that her employers had discriminated against her by refusing her a mortgage subsidy because she was a woman. The industrial tribunal were satisfied that she had been discriminated against because she was a woman but held that they had no jurisdiction to entertain the complaint because it had not been made within three months of the date upon which she had last been refused a mortgage in May 1981.

The Employment Appeal Tribunal allowed Miss Calder's appeal; Browne-Wilkinson J., giving the judgment of the appeal tribunal, said at p. 159:

“By constituting a scheme under the rules of which a female could not obtain the benefit of the mortgage subsidy in our judgment the employers were discriminating against the applicant in the way they afforded her access to the scheme. It follows, in our judgment, that so long as the applicant remained in the employment of these employers there was a continuing discrimination against her. Alternatively it could be said that so long as her employment continued, the employers were subjecting her to ‘any other detriment’ within section 6(2)(b). Once this conclusion is reached, in

our judgment it follows that the case does not fall within section 76(6)(b). The rule of the scheme constituted a discriminatory act extending over the period of her employment and is therefore to be treated as having been done at the end of her employment. Accordingly her application was within time.”

22. Mr Cohen submits that what the line of cases beginning with *Amies* shows is that an act or omission concerned with a change of status (such as a failure to promote) is a one-off act *unless* the act or omission is alleged to arise from a rule or policy. The fact that clause 29.4 of the Members’ Agreement confers a discretion to extend an equity partnership beyond the partner’s normal retirement date is irrelevant to whether the existence of clause 29.2 is conduct extending over a period. Mr Cohen argues that a mandatory retirement age, even with a discretion to extend, is a rule or policy; and that this is demonstrated by the decision of the Supreme Court in *Seldon v Clarkson Wright & Jakes* [2012] ICR 716.
23. *Seldon* concerned a solicitors’ partnership where the partnership deed contained a normal retirement age of 65 with a discretion to extend by agreement. Mr Seldon’s claim was brought in time and the case contains no finding either way on the issue before us. It is concerned instead with the issue of justification, on which it is now the leading case. However, at paragraphs 63-66, Baroness Hale of Richmond JSC considered the issue of whether a discriminatory measure has to be justified not only in general but also in its application to the particular individual. She said at [65]-[66]:

“65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of inter-generational fairness, it must be relevant that at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age. Nor can it be entirely irrelevant that the rule in question was re-negotiated comparatively recently between the partners. It is true that they did not then appreciate that the forthcoming Age Regulations would apply to them. But it is some indication that at the time they thought that it was fair to have such a rule.....

66. There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified.”
24. Mr Cohen argues this clearly indicates that Lady Hale considered a retirement age clause in a contract of employment or partnership to be a “rule”. No doubt it is, but that does not throw any light on whether the application of the rule to a particular individual is a continuing act, or a one-off act with continuing consequences.
25. Mr Cohen drew our attention to the relevant part of the Explanatory Note to the 2010 Act saying that s 123 was intended to reproduce the effect of previous legislation; and

argues that s 123(3) should therefore be interpreted as if s 68(7)(a) of the 1976 Act were still in effect. This provided that where the inclusion of any term in a contract rendered the making of the contract an unlawful act, the act was to be treated as extending throughout the duration of the contract. But it seems to me a startling proposition to say that the inclusion of a mandatory retirement age clause in a contract, whether of employment or partnership, renders the making of the contract an unlawful act. For this reason among others I do not think that the old s 68(7)(a) is of any assistance in answering the question raised by the present case.

26. Mr Cohen further criticised the judge's decision in the EAT on the grounds that he misunderstood the decision of this court in *Tyagi v BBC World Service* [2001] IRLR 465 (to which I will return later), and in particular the observation of Brooke LJ that a discriminatory policy can only be relied on as an act extending over a period by a claimant in respect of whom it continues to be "in action".
27. Mr Cohen's argument was aptly described by Mr Stilitz as involving the following steps: (a) Clause 29 of the Members' Agreement contained a discriminatory rule; (b) that rule remained in force after Mr Parr's de-equitisation; (c) Mr Parr remained a partner of MSR (albeit not an equity partner) after he entered into the De-Equitisation Agreement; (d) it follows that the discriminatory rule continued to apply to him after the De-Equitisation Agreement, which amounted to a continuing act.

The Respondent's submissions

28. Mr Stilitz submits that the present case was a straightforward example of a one-off act with continuing consequences. Mr Parr asked for his equity partnership to be extended. MSR declined to do so, and so his equity partnership came to an end. Whether or not that refusal amounted to unlawful age discrimination, that was the end of the matter. The fact that MSR exercised its discretion to continue to engage Mr Parr as a non-equity partner had nothing whatsoever to do with the discrimination alleged.
29. Whether one characterises the alleged discrimination as a demotion, a termination and re-engagement, or the exercise of a discretionary power, it was a one-off act. When Mr Parr's request for an extension of his equity partnership was refused he entered into the De-Equitisation Agreement in October 2017, under which he would become an ordinary partner. The De-Equitisation Agreement had the effect of terminating his equity partnership, once and for all, on 30 April 2018.
30. Mr Stilitz referred us to the observations of Auld LJ in *Cast v Croydon College* [1998] ICR 500 at 508E-G cited by the judge at paragraph 43 of his judgment, in particular that it is important to determine the specific act of which complaint is made. In this case, he submits, the specific act is the de-equitisation.
31. Mr Stilitz also emphasised that Clause 29 of the Members' Agreement did not involve the application of a blanket or automatic policy. There was a discretion to extend a member's equity partnership beyond the age of 60 which had been exercised in a number of cases of which there was evidence before the ET, and it was artificial to seek to de-couple clause 29.2 from clause 29.4. There was nothing inevitable in the present case about Mr Parr's equity partnership being terminated. Had he made a commensurate contribution to the business, it would have continued, as it had in the case of other partners after the age of 60.

32. Mr Stilitz also relied on *Tyagi v BBC World Service* [2001] IRLR 465, and to the observation of Brooke LJ at [25] that the right of an individual to present a claim for discrimination “does not bite on a discriminatory practice which is not in action at all vis-à-vis [that] particular applicant”. He submits that after 1 May 2018 clause 29.2 was no longer “in action” in Mr Parr’s case. This was not a case of someone who re-applied to become an equity partner and received a series of refusals. Mr Stilitz argues that there is no reported case in which the mere existence of a policy has been held to give rise to a continuing act in circumstances where that policy has not had any continuous or repetitive impact upon the claimant.
33. In Mr Stilitz’s submission the fact that Mr Parr was kept on as a non-equity partner was irrelevant to his claim of discrimination. Since the act of discrimination relied on is in truth the de-equitisation, the fact that he was offered non-equity membership rather than leaving MSR altogether is immaterial.

Discussion

The authorities

34. I will start with *Barclays Bank plc v Kapur*, since it is the only case in the House of Lords or Supreme Court which has considered the topic now before us; though of course the observations of Lord Griffiths are not to be read as if they were a statute. The applicants had been employed by subsidiaries of Barclays Bank in Kenya or Tanzania and (before the coming into force of the Race Relations Act 1976) had accepted employment with Barclays in the UK on terms that their service in East Africa should not count towards their pension entitlement with Barclays Bank Ltd. They complained of discrimination on racial grounds because employees of European origin who joined Barclays at about the same time were permitted to count their years of service with different banks towards the computation of their pension.
35. The time limit provision under consideration in *Kapur* was more complicated than s 123 of the 2010 Act. It was s 68 of the 1976 Act, the relevant parts of which provided:
 - “(1) An industrial tribunal shall not consider a complaint under section 54 unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done
 - (6) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.
 - (7) For the purposes of this section —
 - (a) when the inclusion of any term in a contract renders the making of the contract an unlawful act, that act shall be treated as extending throughout the duration of the contract; and
 - (b) any act extending over a period shall be treated as done at the end of that period; and

(c) a deliberate omission shall be treated as done when the person in question decided upon it;

and in the absence of evidence establishing the contrary a person shall be taken for the purposes of this section to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done.”

36. The “deliberate omission” provisions of s 68(7)(c) of the 1976 Act are now replaced by the concept of a “failure to do something” in s 123(3)(b) of the 2020 Act; and s 68(7)(a) of the 1976 Act (which did not apply in *Kapur* because the claimant’s contract with Barclays had been made before the Act came into force) is not reproduced in s 123 of the 2010 Act. But the critical subsection, s 68(7)(b), is effectively identical to s 123(3)(a); it is not suggested that there is any difference between an “act extending over a period” and “conduct extending over a period”.
37. Lord Griffiths said in *Kapur* that *Amies* and *Calder* “illustrate the difference between a deliberate omission as a one-off decision within the meaning of section 68(7)(c) and the continuing state of affairs which is governed by section 68(7)(b)”. In the final paragraph of his speech he said:-
- “In the present case the Court of Appeal were in my view right to approve these two decisions [*Amies* and *Calder*] and to classify the pension provisions as a continuing act lasting throughout the period of employment and so governed by subsection (7)(b). The matter can be further tested by taking the case of an employer who before the Act was passed paid lower wages to his coloured employees than to his white employees. Once the Act came into force the employer would be guilty of racial discrimination if he did not pay the same wages to both coloured and white employees. If he continued to pay lower wages to the coloured employees it would be a continuing act lasting throughout the period of a coloured employee’s employment within the meaning of subsection (7)(b). A man works not only for his current wage but also for his pension and to require him to work on less favourable terms as to pension is as much a continuing act as to require him to work for lower current wages.”
38. Thus the ratio of *Kapur* is that the critical distinction is between a one-off decision and a continuing act or continuing state of affairs, and that to require employees to work on less favourable terms as to pension than their comparators is as much a continuing act as to require them to work for lower current wages.
39. This is to be contrasted with the decision of this court in *Sougrin v Haringey Health Authority* [1992] ICR 650. The applicant was a black staff nurse. She complained of being given an E grading in October 1988 while in February 1989 a white nurse who was her chosen comparator was upgraded to F. Her industrial tribunal claim for racial discrimination was not presented until May 1990. It was held by this court that the act

complained of was that the respondent authority had refused to upgrade the applicant while upgrading her comparator, not that it operated a policy or rule never to upgrade black nurses. The discriminatory act was a once-for-all event (occurring at the latest on the dismissal of her internal appeal), and the payment of a lower salary to her than that paid to her comparator was therefore not an “act extending over a period” within the meaning of s 68(7)(b) but the continuing consequence of that event. An argument on behalf of the appellant that the court was bound by *Kapur* to find in her favour was rejected. Lord Donaldson of Lynton MR said:-

“In the present case it has never been suggested that the local health authority had any such policy [not to pay the same wages to black and white employees]. Its policy was quite clearly to pay the same wages to every employee in the same grade regardless of racial distinctions. The applicant’s complaint was quite different, namely that she had been refused an F-regrading for racially discriminatory reasons.”

40. Another instructive decision of this court is *Tyagi v BBC World Service* [2001] IRLR 465. Mr Tyagi, who was of Indian origin, was employed by the BBC when in April 1997 he applied for a position as producer in the Hindi section of the World Service. He was not appointed. His employment ended in July 1997. In July 1998 he complained that he had been the victim of racial discrimination which he argued was part of a continuing policy discriminating against people of Asian origin. His ET claim was held to be out of time. Brooke LJ said at [25]:

“A general discriminatory practice which, among other things, would be likely to result in an act of discrimination to the person to whom it is applied, including persons in any particular racial group, and as regards which there has been no occasion for applying it, is policed only by the Commission for Racial Equality. The way in which section 1 bites on the actual treatment of an applicant or the actual application of a requirement or condition adverse to an applicant, in my judgment, means that *it does not bite on a discriminatory practice which is not in action at all vis-à-vis a particular applicant* if he is not employed by the employer at all so as to be denied access to the opportunities and benefits or otherwise treated disadvantageously in the ways mentioned in s.4(2), and if he is not being treated unfavourably by not being offered a job because of a discriminatory practice because there is no job on offer.” [emphasis added]

The present case

41. I accept Mr Stilitz’s central argument that Clause 29.2 could only be applied once to any individual. In Mr Parr’s case it was applied on 30 April 2018. After that, in Mr Stilitz’s vivid phrase, Clause 29.2 “disappeared into the rear view mirror”. Whether one treats the conduct as having occurred in October 2017 or on 30 April 2018, or as being conduct extending over a period which ended on 30 April 2018, makes no difference to the analysis.

42. The specific act of which Mr Parr really complains is the act of de-equitisation. This was correctly classified by EJ Elliott as a demotion. There is no dispute, and the ET found, that had Mr Parr's membership of the LLP simply been terminated on 30 April 2018, time would have run from that date; and that a dismissal, even if discriminatory, is a one-off act with continuing consequences rather than conduct extending over a period, even though the dismissed employee may suffer loss of pay and pension for the rest of his or her life. There is no logical reason why a demotion should be treated differently, just because the Claimant and the Respondents remained in a contractual relationship.
43. Nor am I attracted to Mr Cohen's argument that the very existence of Clause 29.2 is a discriminatory act which continues for as long as the parties remain in any contractual relationship. It is artificial to divorce Clause 29.2 from Clause 29.4 and to ignore the evidence that some equity partners were allowed to continue in post beyond the age of 60. The case law does draw a distinction, at any rate when analysing whether the conduct complained of is an "act extending over a period", between a rule, policy or practice which inevitably leads to the rejection of the claimant and one which involves (in practice and not just on paper) the exercise of a discretion. As Brooke LJ put it in *Rovenska v General Medical Council* [1998] ICR 85 at 92, "...[T]he courts have held that, if an employer adopts a policy which means that a black employee or a female employee is *inevitably* barred from access to valuable benefits, this is a continuing act of discrimination against employees who fall into these categories until the offending policy is abrogated" [emphasis added].
44. It is instructive to revert to *Amies*. The hypothetical case set out by Bristow J was of a school at which the position of head of department was open to men only – in other words, an absolute rule – and the hypothetical claimant would have succeeded. But Ms Amies herself lost her case, because there was no such policy. ILEA's failure to promote her was a one-off act, albeit with continuing financial consequences. So too was the employer's decision in *Sougrin* to place the claimant in grade E rather than the higher grade F. On the other side of the line are the absolute rule cases such as *Calder*, where the mortgage subsidy was only available to men, and *Kapur*, where Barclays' employees of African ethnicity were working on less favourable pension terms than their white comparators. Mr Cohen reminded us that the retirement age provisions in *Seldon* allowed an extension by agreement; but, as already noted, the issue of whether they amounted to a one-off act or an act extending over a period was never considered.
45. Finally, I do not accept that the judge misunderstood or misapplied *Tyagi*. Of course it was easy to see in that case that there was no continuing act, since the contractual relationship between Mr Tyagi and the BBC had ceased altogether. But, to adopt Brooke LJ's phrase, which I regard as a useful one, I do not consider that Clause 29.2 was any longer "in action" vis-à-vis Mr Parr after his de-equitisation had taken place on 30 April 2018.
46. Like the judge in the EAT I have reached this conclusion without reference to considerations of policy, but in my view there is force in Mr Stilitz's argument that if Mr Cohen is right, the result would be to encourage greater ruthlessness by partnerships and LLPs in making sure that a retirement age clause is put into effect so as to terminate the relationship altogether rather than allowing the former equity partner to continue in the lesser status of salaried partner, since to do the latter would leave the partnership

exposed to a discrimination claim for as long as any contractual relationship existed between the parties.

47. I would accordingly dismiss the appeal. In accordance with the judge’s order in the EAT, the case will now be remitted for Employment Judge Elliott (if she is available) to decide whether it is just and equitable to extend time for the presentation of the claim.
48. I add by way of footnote that it is unfortunate that the ET, having heard argument on both “conduct extending over a period” and the “just and equitable” issue and decided the first one in the Claimant’s favour, did not go on to decide the second issue in the alternative in case (as has happened) the decision on the first issue was reversed on appeal. This case illustrates the wisdom of the observation of Lord Scarman in *Tilling v Whiteman* [1980] AC 1 at 25 that preliminary points of law can often be treacherous short cuts.

Lord Justice Lewis:

49. I agree.

Lady Justice Elisabeth Laing:

50. I also agree.

ORDER

UPON hearing Leading Counsel for the Appellant and Leading Counsel for the Respondents

IT IS ORDERED that:

1. The appeal is dismissed.
2. No order as to costs.
3. Permission to appeal to the Supreme Court refused.