

ENGLAND AND WALES / JUDGMENT

MA v Merck Sharp & Dohme Ltd

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Neutral Citation Number: [2008] EWCA Civ 1426 Case No: A2/2008/0919 IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL MRS JUSTICE COX UKEAT/0487/07/LA Royal Courts of Justice Strand, London, WC2A 2LL Date: 16/12/2008 Before : LORD JUSTICE MUMMERY LORD JUSTICE SEDLEY and LORD JUSTICE RIX

- ----- Between : Respondent Appellant MA
- and - MERCK SHARP & DOHME LIMITED
- ----- (Transcript of the Handed Down Judgment of WordWave International Limited A Merrill Communications Company 190 Fleet Street, London EC4A 2AG Tel No: 020 7404 1400, Fax No: 020 7831 8838 Official Shorthand Writers to the Court)
- ----- The Appellant was not represented and appeared in person MR JASON GAILBRAITH-MARTEN & MR DANIEL DYAL (instructed by Taylor Vinters) for the Respondent Hearing date: 21st November 2008
- -----

Judgment

Lord Justice Mummery : Appeal summary 1. 2. 3. 4. 5. 6. This is an employee's complaint of race discrimination throughout an employment relationship lasting from 1997 to 2005. There is a long running dispute about the time limits for his complaints: were they complaints of acts extending over a period (i.e. the whole period of employment), or of a succession of isolated and unconnected specific acts, some of which are in time and some are not? In the majority of cases these are not difficult questions. They are problematical when, as here, the complaint is that over a long period there has been less favourable treatment on racial grounds in almost every aspect of the employment: inappropriate work assigned, failure to provide adequate support staff, payment of a lower salary, non-promotion, unsatisfactory appraisals, unjustified criticisms, exclusion from projects and benefits, unjustified disciplinary proceedings and unsatisfactory handling of grievance procedures. The Race Relations Act 1976, as amended (the 1976 Act) provides for a short limitation period. An ET shall not consider a complaint of race discrimination unless it is presented before the end of the period of three months beginning when the act complained of was done: section 76(1) of the 1976 Act. In the case of an act extending over a period, however, the act is treated as done at the end of that period: section 76

(6) (b). The court has a discretion to extend the time if it is just and equitable to do so: section 76(5). In this case an application for extension of time was refused at an early stage. There was no appeal. Three years have passed since Dr Qing-Ping Ma, who is of ethnic Chinese origin, presented his complaint to the employment tribunal (the ET) on 22 August 2005 alleging race discrimination by Merck Sharp & Dohme Limited (Merck) by whom he was employed as a Research Fellow. One of the main points of contention on time limits is the significance of his transfer in August 2002 to work in Robotics, another part of Merck. Merck submits that the transfer to what they say is or was another Department is relevant to the issue of the continuing nature of the alleged discriminatory acts. Dr Ma, who has acted in person throughout the proceedings, does not agree. He has, of course, the right to conduct his own case, but it increases the burden on him and on Merck, as well as on the tribunals and courts. If he had been legally represented I doubt whether the time limits issue would have taken over three years to resolve with two judgments in the ET by the Chairman sitting alone (Judge Glennie in May 2006 and Ms Jones in July 2007) and two judgments in the Employment Appeal Tribunal (the EAT), Keith J in February 2007 and Cox J in April 2008. This appeal is from the order of the EAT (Cox J) dated 14 April 2008 dismissing Dr Ma's appeal from the ruling of the ET at a pre-hearing review (the Jones decision) holding that 8 complaints were in time, but dismissing the remaining complaints as out of time. The present position is that the hearing of the case has been fixed for next year. It is estimated to last for 25 days, which will be a considerable burden on the resources of the parties and the tribunal. The acts of discrimination which have been held to be within time are taken from the list of 12 heads of complaint put together by the ET at an early Case Management Discussion in November 2005. They are set out in paragraph 11 below. Merck has not appealed against the ruling of the ET as to which complaints are in time. Dr Ma has appealed against the ET's ruling, which was upheld by the EAT, that the remaining issues are out of time so far as they occurred pre-2004. In consequence of that ruling the ET chairman went on to state in her judgment that "In the interests of proportionality I order that the other allegations which predate the transfer to Robotics [August 2002] and do not concern the alleged failure to assign appropriate work and the alleged refusal to provide support staff [two acts held to be in time] should be excluded from the full merits hearing," 7. 8. At the hearing of the appeal Dr Ma submitted that it was an error of law for the ET to exclude the alleged discrimination in the earlier years of his employment (i.e. from 1997 to 2004) and to exclude evidence of those acts from the determination of the in- time complaints. He had made it clear from the outset of the proceedings that he had been treated less favourably on the ground of his race since he started working for Merck and that that "state of affairs still continues." The various complaints were, he said, linked in such a way as to make them extend over the period down to the date of the proceedings. The complaints could not properly be isolated from one another so that some were in time and some were not. Merck's position was that the ET and the EAT had correctly analysed the nature of Dr Ma's complaints and had reached the correct legal conclusion that not all matters complained of were acts extending over the whole of the period of his employment. Those that were in time dated from 2004. The decision was not open to criticism. Indeed, the ET had only done what recent decisions of this court had encouraged ETs to do, namely manage unwieldy discrimination cases involving allegations over many years by limiting the issues and

concentrating on the most important and the more recent instances of alleged discrimination. Background facts and proceedings 9. Dr Ma's employment with Merck began on 21 July 1997. In August 2002 he was transferred to Robotics. He says that Robotics was not a different department. It was a group within the department and he was still under the same management.

10. While still in the employment of the Company he presented to the ET on 22 August 2005 a complaint of race discrimination. He subsequently ceased to be an employee of the Company when he and others were made redundant. 3 years later the merits of his complaints have still not been determined, as the case has stagnated at the preliminary stage of time limits. 11. On 29 November 2005 there was a Case Management Discussion at which his complaints were, with the agreement of the parties, summarised under the following 12 heads for decision by the ET. I have added in italics a note in square brackets on the time limits applied by the ET to some of his complaints:

- (1) Failure to supply him with adequate and appropriate support staff;
 - (2) Failure to promote him since 1997; [out of time pre-2004]
 - (3) Paying him a lower salary than others similarly qualified; [out of time pre-2004]
 - (4) Rating him lower than others in annual appraisal since 1997; [out of time pre-2004]
 - (5) Transferring him to the Robotics Department in August 2002;
 - (6) Assigning him inappropriate work in view of his qualifications and experience;
 - (7) Excluding him from Project Core Groups; [out of time]
 - (8) Starting and pursuing disciplinary proceedings against him on or after 2 March 2005;
 - (9) Failing to pay salary increases to him in 2004 and 2005; [out of time pre-2004]
 - (10) Enforcing a Performance Improvement Plan on him and enforcing this thereafter;
 - (11) Failing in April 2005 to shortlist him for a Neurobiologist position; and
 - (12) Making allegations that throughout his employment he lacked inter-personal skills and could not work with or supervise other employees. [out of time pre-2004]
12. 13. Following a Pre-hearing Review in May 2006 Judge Glennie ordered that all the complaints relating to events prior to 22 May 2005 (i.e. more than 3 months before commencement of proceedings) were out of time. He also decided that it was not just and equitable to extend time. Only 4 complaints were allowed to proceed. His ruling that those 4 complaints were in time still stands. On 6 February 2007 the EAT (Keith J) allowed Dr Ma's appeal on the out of time complaints and remitted the case to another chairman for re-hearing. At the re-hearing a further batch of 8 issues was allowed by the ET to proceed (Ms Jones in the chair) in accordance with her judgment promulgated on 24 July 2007. That left the following issues that were held to be out of time: issue 2, issues 3 & 9 taken together, and issues 4, 7, and 12. Except in the case of issue 7, the limit imposed excluded complaints of acts pre-2004. In the

case of issue 7 the complaint of exclusion from Project Core Groups was totally out of time, because the complaint in the ET1 related to exclusion from such groups in 1999 and 2000. 14. Dr Ma appealed to the EAT (Cox J). His appeal was dismissed on 14 April 2008. He now appeals to this court. I granted permission to appeal on 5 June 2008 and expressed concern at the lack of progress in the case, as well my view about the reasonable prospect of the appeal succeeding. Dr Ma submits that all the issues should be held to be in time. Discussion and conclusion 15. 16. 17. 18. 19. I can well understand the thinking behind the attempts on the part of Merck and of the tribunals themselves to keep this case within reasonable bounds by a combination of case management powers and the application of time limits. The extraction of the 12 issues from Dr Ma's ET1 brought a coherent structure to his allegations. Both sides have benefited from that. However, practical problems persisted. The ET had to decide, in advance of hearing all the evidence, whether the disputed acts extended over a period or were a succession of isolated specific acts. The decided cases cited to the tribunals and discussed in the written submissions illustrate the problem and offer modest guidance, but they do not, and cannot supply, the answers to the particular case, which must always depend upon its own facts. The ET and the EAT approached the issue with the correct legal principles well in mind. They took commendable care in reaching their decisions that there were some complaints in time, as they were reasonably arguable instances of a connecting link to one another and to Dr Ma's Chinese ethnicity, and then distinguishing those complaints from other complaints which did not satisfy the time limits requirements. I have no difficulty in agreeing with Mr Gailbraith-Marten's submission or with the decisions of the tribunals below that it is not enough for Dr Ma simply to assert that the acts are continuing acts or that they evidence a state of affairs extending over a period. The complainant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. I am also of the view that this court should not be hyper-critical or over-analytical in its treatment of tribunal decisions which, even if not themselves technically discretionary case management issues, are closely connected to the practical management of complex or intractable litigation. After all it is the ET and not the Court of Appeal that is going to try the case. That said, however, there are features in the present case that have led me to the conclusion that a question of law does arise from the decision of the ET to limit or exclude from the substantive hearing on time limit grounds some of Dr Ma's complaints and evidence of them, and that there should be some variation in the ET's order. There is no need to repeat or to re-formulate the general guidance on time limits in cases that are claimed to be cases of continuing acts: see, for example, *Commissioner for the Police for the Metropolis v. Hendricks* [2003] ICR 530. I was disappointed to be told by Mr Gailbraith-Marten, who also appeared in that case, that the hopes expressed in that case about parties reaching sensible agreements on the formulation of lists of issues and on reducing the areas of dispute and the evidence by concentrating on the most serious and the more recent allegations have had no effect in practice. There is no point in judicial repetition of vain aspirations. In this case I would simply make the following points on the ET decision as upheld by the EAT. 20. 21. 22. 23. First, I agree with the ET and the EAT that issue 7

(exclusion from Core Project Groups) cannot be described as an act extending over a period so as to make it in time. The complaint in the ET 1 refers to Project Core Groups that existed in 1999 and 2000. The reasoning of the ET paragraphs 45 to 47 is correct. Secondly, it is clear that the problem area lies in the disputed significance of the transfer of Dr Ma to Robotics in August 2002. The state of the evidence on this is at present limited. Although Judge Glennie heard some oral evidence and some cross examination of Dr Ma, Ms Jones heard no evidence at all and had to decide the point on the pleadings and the documents. This posed the problem that there appeared to be factual disputes that could not be resolved by evidence until a later stage. Merck argued in the tribunals below that in 2002 there was a break in the continuity of events contended for by Dr Ma when he was “transferred to the Robotics group” and that he made no complaint in the period following that transfer. There was “a fresh start.” Dr Paul Whiting was now in charge and Dr Ma had a new line manager, Mr Simpson, and he was undertaking different work. The consequence was that none of the alleged discriminatory acts occurring before 2002 could reasonably be said to be connected to those alleged to have occurred after that year. Ms Jones accepted this submission holding that there was a break in continuity following Dr Ma’s transfer to Robotics in

2002. The EAT held that that was a finding open to her on the material before her, particularly given the way that Dr Ma was putting his case. They were not persuaded by Dr Ma’s protests that Robotics was not a different department but was a group within the Molecular and Cellular Neuroscience Department. The EAT held that the decision was not flawed by factual error nor was it perverse. Dr Ma continues to dispute the facts about the Robotics transfer and its significance. He says that he was transferred from the Neuroanatomy group to the Robotics group within the Molecular and Cellular Neuroscience Department. He says that after the Robotics transfer the head of department was the same person (Dr Paul Whiting) and that the departmental management committee consisted of roughly the same people. I think that it is difficult for this aspect of the case to be resolved without further exploration in greater detail than was possible at the hearing on time limits. On the information at present available I would hesitate about either upholding the ET’s decision or overturning it. Thirdly, taking up a point made by Rix LJ during the hearing, I think that the ET and the EAT, in reaching their conclusions, erred in attaching so much significance to the way in which Dr Ma himself identified his allegations by reference to three different categories of complaint and sought to show that they were part of a continuing act i.e category (1), “states of affairs” which continued despite changes of managers and his transfer to the Robotics department (failure to assign appropriate work and provide adequate support staff): category (2), 7 specific acts going back to 1997 which, taken together, showed a discriminatory practice or policy (unfair appraisals, lower salary, no promotion, alleged lack of inter-personal skills, exclusion from Core Project groups, imposition of Performance Plan and instituting disciplinary proceedings); and category (3), specific acts which, taken together, formed a continuing discriminatory state of affairs (transfer to Robotics August 2002, failure to short list him for neuro- biological post in April 2005). Despite this categorisation, it may be noted that in its original skeleton argument to

the EAT from Judge Glennie's decision, where the 3 categories are set out, Dr Ma recorded his case as being that the category (1) instances were "capable of indicating the existence of a discriminatory practice, regime, rule or policy, thereby constituting a continuing act over a period, and that the category (3) instances were also evidence of a continuing discriminatory state of affairs". The ET considered that the category (1) complaints were in time and then considered categories (2) and (3) together, as they related to acts carried out by different individual managers over a considerable period of time. In the EAT Dr Ma criticised the ET Chairman for failing to recognise that the specific instances listed in categories

- (2) and (3) were connected to the allegations in category (1), so that all of the allegations were capable of being an ongoing discriminatory state of affairs. He contended that, although the line managers changed over the years, there was never any change in the less favourable treatment meted out to him in all the respects alleged in categories (2) and (3) as well as category (1). He also wished to show that decisions after the Robotics transfer in 2002 still involved some of the same individuals who had previously been involved prior to the transfer to Robotics. A full hearing was required to decide these factual points. He argued that it was perverse of the ET to separate the acts by reference only to the years 2004 and 2005. The response of the EAT to these arguments was that, by seeking to connect all three of his categories, he was departing from the way in which he had previously presented his case "consistently throughout this litigation." (paragraph 51). Cox J explained that it was not a formal or technical matter. He was not entitled to criticise Ms Jones for taking the approach that he had put forward. I am unable to agree with the EAT on this point. The categories used by Dr Ma to present his case were not exclusive or self-contained. He had made it clear in his originating application that the substance of his case was that he was making complaints of discrimination throughout his employment. It was possible and permissible for him to argue that, on the basis of the assumptions to be made in his favour at this stage of the proceedings, all of the complaints (save for issue 7) were continuing throughout his employment, notwithstanding the forensic form of the three categories into which he put his complaints for the purposes of his presentation to the ET. A full merits hearing will take place next year relating to the complaints which have been held to be in time. It is difficult, in advance of the hearing, to disentangle the remaining complaints held to be out of time from those held to be in time and say that they are not acts extending over a period or are not continuous or not linked or connected or that a discriminatory state of affairs does not exist. I would accordingly vary the order of the ET by directing that there should be adjourned to the substantive hearing the question whether the remaining complaints which were held to be out of time were continuing acts over the whole period of employment. That question can be decided at the hearing with the benefit of having heard all the evidence. If the complaints are out of time Dr Ma will have no rights in respect of them, even if they prove to have some evidential value on whether other acts which were in time occurred and were acts of discrimination. 24. 25. 26. 27. 28. Result 29. For the above reasons I would allow the appeal to the extent of varying the order of the ET ruling that the

remaining complaints were out of time. I would direct that, save for the allegation of excluding Dr Ma from Project Core Groups in 1999 and 2000 which is out of time (issue 7), the time limits issues as to the remaining complaints should be adjourned to be decided by the ET at the substantive hearing. Lord Justice Sedley: 30. I agree. Lord Justice Rix: 31. I also agree.

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