Appeal No. UKEAT/0019/11/DA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 24 February 2011

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

(SITTING ALONE)

PENNINE ACUTE HOSPITALS NHS TRUST — APPELLANT

MRS G POWER & ORS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PHILIP ENGELMAN (of Counsel) Instructed by: Messrs Hempsons Solicitors Portland Tower Portland Street Manchester M1 3LF
For the Respondents	MR SIMON CHEETHAM (of Counsel) Instructed by: Messrs Leigh Day & Co Solicitors Priory House 25 St John's Lane London EC1M 4LB

SUMMARY

AGE DISCRIMINATION

JURISDICTIONAL POINTS – Claim in time and effective date of termination

The issue was whether a complaint was out of time. An Employment Judge who was asked to rule on whether a complaint of the receipt of lower pay than those in a comparable position but for their age had been made within the time limits provided by the **Employment Equality (Age) Regulations 2006** reg. 42 erred. She did not address the basis of claim as advanced to her by the Claimants (albeit deciding in their favour), and if she did came to her conclusion on a basis which was flawed, since she did not clearly identify the act which was complained of in the claim and was said to be a continuing act; and when she dealt with the reasons for her decision did so in terms which neither party's representatives understood. Her judgment appeared to deal with the consequences of re-grading under the NHS Agenda for Change to a transitional pay scale, in the case of those who were younger, which ceased some considerable time before the claims were issued, yet found their complaint to have been in time as part of a continuing act. The distinction between acts and consequences was not obviously appreciated. Case remitted for reconsideration.

THE HONOURABLE MR JUSTICE LANGSTAFF

Introduction

1. Employment Judge O'Hara decided, in the Manchester Employment Tribunal in October 2010, that all the complaints made by a number of complainants under the **Employment Equality (Age) Regulations 2006** had been presented within the relevant limitation period. She was invited to, and did, give written reasons for that decision on 17 November. This appeal is against that decision.

The Underlying Facts

2. The Claimants were employed as sterile services technicians. They had been engaged as such, along with older technicians, upon the same pay scales. When Agenda for Change was introduced within the National Health Service, their pay and conditions, as with the older technicians, were assimilated within the Agenda for Change pay salary bands.

3. In October 2006 they were, on appeal, all assimilated to salary band 3. However, salary band 3 involved a significant rise in pay. My understanding is that, in consequence, where there was a sufficient difference between the bottom pay point in band 3 and the salary previously enjoyed by an employee, there would, in most cases, be a transitional spine point to bridge the gap in slow increments as opposed to one link.

4. The contention for the employer is that this was recognised potentially to affect the pensions of those who were and are close to retirement (that is, the retirement age that then applied within the NHS) and, accordingly, those technicians who were closer to retirement were promoted straight to the bottom spine point within the band, whereas those who were younger went onto the transitional points, which were at a lower level. The transitional arrangements ceased in October 2007.

5. In the claim brought by the Claimants, it is said that the Claimants are now paid at point 7, whereas their comparators in 2008 were paid at point 8. All that distinguished them was their age.

The Law

6. The **Employment Equality (Age) Regulations 2006** provide, by regulation 3, for a definition of discrimination in the context of age. It is of the same general tenor as discrimination in the areas of sex and race, save that direct discrimination is capable of justification by the employer. By regulation 42, provision is made for the period within which proceedings are to be brought. 42(1) provides:

> **"An employment tribunal shall not consider a complaint under regulation 36 unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done."**

7. (4):

> **"For the purposes of this regulation …**
>
> **(a) when the making of a contract is, by reason of the inclusion of any term, 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 …"**

8. The decision here was expressly reached upon the basis that what was complained of was an act extending over a period such that 42(4)(b) applied.

The Tribunal Decision

9. The Tribunal Judge made reference to facts which had been agreed as background for the purposes of the hearing, which so far as material I have already summarised. Then at paragraph 5 it set out what she understood as the complaint being made by the Claimants:

> **"The complaint in this case is set out at paragraph 11 of the ET1. It is phrased in these terms:**
>
> > **'The Claimants believe that by paying them less than older technicians the Respondent has acted unlawfully pursuant to Regulation [sic] 7(2) (a) - (d) of the Regulations.'"**

10. She then dealt with submissions made to her by Mr Engelman (who appeared before her, as he does before me today) which were, essentially, to the effect that a distinction had to be made between an act and the consequences of that act. Thus, he drew particular attention before her, as before me, to the case of **Sougrin v Haringey Health Authority** [1992] ICR 650.

11. That case usefully surveyed three earlier decisions, which are in point. The first of those was the case of **Amies v Inner London Education Authority** [1977] ICR 308. In that case, a woman had complained that a man (who was otherwise in materially identical circumstances to her) had been appointed to the position of a head teacher, as she had not, and she had thereby suffered a detriment. This was an allegation of sex discrimination, but in the **Sex Discrimination Act 1975**, as in the **Race Relations Act 1976**, there are provisions which are materially indistinguishable from those contained in regulation 42 to which I have referred. It was submitted to the Appeal Tribunal that she was entitled, despite the passage of time, to maintain a complaint about his being appointed rather than her. That was said to be because the consequences of that appointment continued.

12. As to that argument Mr Justice Bristow for the Appeal Tribunal, said, at 311:

> **"The Applicant's complaint here is that by not appointing her, and by appointing a man with lesser qualifications, the employers have unlawfully discriminated against her. She herself has in our judgment given the right definition of the 'act of discrimination' of which she complained to the Tribunal under section 63(1).**
>
> **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 head of the department; he has been ever since October 13, 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."**

13. In **Sougrin** itself, the case concerned four staff nurses. There had been a massive regrading of staff within the National Health Service. All four had been graded at grade E. Grade F carries a higher rate of pay than does grade E. One of the nurses succeeded in an appeal in being appointed to grade F. She was white, the other three were black; one of those was the Claimant. She complained that there was no material distinction between her case and that of the successful appointee, other than the race of each. It was that upon which her claim was founded.

14. The Court of Appeal dismissed her appeal and they did so upon the basis that the act complained of, for the purposes of section 68 (the cognate section to regulation 42 in this case) was that the authority had refused to upgrade the applicant while upgrading her comparator, not that it operated a policy or rule not to upgrade black nurses. The discriminatory act was a once-and-for-all event, occurring at the latest on the dismissal of her appeal against the decision to maintain her grade, and that the payment of a lesser salary than that paid to her comparator was therefore not an act extending over a period but the continuing consequence of that event.

15. Accordingly, argues Mr Engelman, an act must be distinguished from the continuing consequences of an act and a close focus needs to be had upon the substance of the complaint which, as can be seen in the case of **Amies**, there was a failure to appoint the teacher to the head of department post and, in **Sougrin**, the failure to appoint to a higher grade.

16. Mr Engelman also argued before the Tribunal that in **Barclays Bank v Kapur** [1991] ICR 208, Lord Griffiths had observed in the course of his speech, at 213(b) to (d), that the applicants, who were former east African Asians who had been employed by Barclays Bank upon terms which did not credit them with their previous service for the purposes of computing their pension entitlement, whilst the bank so credited employees of European origin who had joined the bank at about the same time, that they could not rely upon the equivalent provision to regulation 42(4)(a) because the cognate provision in the Act of 1976 only applied to contracts coming into force after that Act.

17. He argued before the Tribunal, as before me, that here there could be no question of the contract itself giving rise to an extension of the time limit because it had plainly been made (and, insofar as relevant, amended) prior to the coming into force of the regulations but that this, nonetheless, had a relevance in considering the application of 42(4)(b). If an act was done over a period in reliance upon a contractual term, then he urged that the court could not regard this as falling within 42(4)(b); it would have to focus upon the making of the term itself. If, for illustration, an employee had been employed at a particular wage and, a while later, a second but older employee had been engaged under a contract which provided him with more money because of his age, the continuing situation in which each worked cheek by jowl doing the same job but for different rates of pay determined by their age, would not give rise to a complaint by the first employee which he could bring at any time on the basis that the discrimination was a continuing act. The act here would depend upon the terms of the contract (in this case, the

terms of the contract of the second employee which favoured him for a legally impermissible reason). Detriment arose from that act at the date that the second employee was employed and the contract was entered into and that, therefore, was the relevant date for the Tribunal.

18. The Tribunal set out its understanding of the submissions (and also the arguments that had been addressed to it) upon the supposition that it might conclude that there was no continuing act, in which case, it could extend time if it thought it just and equitable to do so. In the event it decided it would not be just and equitable to extend time if there were no continuing act. There is no complaint made by either party before me about that finding, which must therefore stand, and about which I need say no more.

19. Having set out the argument made by Mr Engelman, the Tribunal came to give its reasons for its decision. It concluded (between paragraphs 21 and 22) that it could not accept that the acts complained of here were related to the making of a contract for the purposes of regulation 42(4)(a); there is no complaint about that specific finding. It went on to say that it did not accept Mr Engelman's submission that, if the claim was one which constituted the making of a contract, the Claimants were precluded from relying upon sub-paragraph (b) of regulation 42(4). This is subject to attack here. I can deal with the submissions here shortly.

20. The starting point has to be the wording of the regulations. The purpose of 42(4) is to provide for separate occasions when time might be extended; (a), (b) and (c) are to be read disjunctively. There is no warrant, as it seems to me, for thinking that "any act extending over a period" is to be read as "any act other than the insertion of a contractual term or the reliance upon a contractual term or by reference to a contract". It seems to me that the regulations mean exactly what they say and they must be interpreted in the light of the act complained of by the complainant. I do not think here it is helpful to introduce the idea that, somehow, 42(4)(a)

implicitly limits the operation of 42(4)(b), if it would otherwise properly be read widely enough to cover the circumstances which the Tribunal is considering.

21. As a matter, therefore, of statutory interpretation, in the context, I consider that the Tribunal Judge was entirely right to come to the conclusion that she did in respect of this argument. It is, however, after this point that the Tribunal's decision becomes problematic. I should set it out in full from paragraphs 24 to 27:

> **"24. In relation to the evidence in this case the Tribunal noted that the application of the preferential rule in paragraph 9.17 of the Agenda for Change document …**[I interpose to say that was the rule which gave preference in terms of salary point to those who were older] **…only operated to the detriment of the Claimants once they and the comparators had been re-graded onto band 3. Thereafter it operated for the period of time when the special transitional provisions applied. That ended on 30 September 2007. According to the evidence of Mr Hayes the purpose of the special transitional provisions was to ensure that the careful costing controls of the implementation of the new pay arrangements did not exceed the costs ceiling imposed by HM Treasury … Therefore it seemed to the Tribunal that the circumstances of the matters complained of could be considered to be an act extending over a period.**
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> **25. With respect to Mr Engelman the Tribunal considered that the decision in the case of *Sougrin* was based on facts which were essentially different. Insofar as it was authority for the proposition that the decision by the employer in that case to place the claimant on a lower grade than a white colleague was a one-off event and was not a continuing act for the purpose of the equivalent provisions in the Race Relations Act the decision could be distinguished. In the present case the complaint is about the terms of a mechanism which applied over a period of time and which had an inevitable consequence for the Claimants and the comparators which was to lead to different rates of pay.**
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> **26. The Tribunal noted the decision of the Court of Appeal in the case of *Hendricks*…** [that was a reference to the *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530] **…and in particular focused its attention on the question whether the act was one which extended over a period as distinct from a succession of unconnected or isolated specific acts. The Tribunal concluded that this case concerned an act extending over a period and not a series of isolated unconnected acts.**
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> **27. In the Tribunal's view the acts complained of here were a consequence of the application of the mechanism within the AFC Agreement by which people who were within five years of retirement were treated differently so far as the application of the special transitional provisions were concerned. As soon as the Claimants and the comparators came within band 3 this mechanism was triggered and the Claimants would not be able to move as quickly through the spinal points as the comparators. Therefore the Tribunal found that it did have jurisdiction to consider the claims in this case."**

22. Both counsel submit to me, or accept, that the wording in these paragraphs lacks the clarity for which they might have hoped. Paragraph 24 was one which Mr Engelman suggested he could not understand; Mr Cheetham (who appeared before me, as he did before the Judge)

observed it contained passages in its reasoning which were difficult to reconcile and he, too, frankly conceded the difficulties in this paragraph, as in others from those I have quoted.

23. Paragraph 24 was open to the objection, said Mr Engelman, that it came to a conclusion, introduced by the word "therefore", that the, "Circumstances of the matters complained of" (which was a reference to circumstances rather than acts, or consequences rather than acts and therefore falling foul of the principle in **Amies** and **Sougrin)** could be considered to be an act extending over a period. It is not clear how this follows from what has been set out previously in paragraph 24 but, if it related to the reference to the period of time when special transitional provisions applied, the Tribunal Judge had expressly recognised that that period ended on 30 September 2007. The applications to the Tribunal in this case were made, all except one, in September 2008, and one in December 2008; therefore, they must have been out of time and the act could only have extended to 30 September.

24. Mr Cheetham argued that if that had been so there would have been no need to introduce the passage which followed at paragraph 28 giving the Tribunal's conclusions as to rejecting a submission that it would be just and equitable jurisdiction to extend time by suggesting that this was introduced for the sake of completeness: it would have been necessary to go straight to it for a decision to be made. It is plain, therefore, he submits with force, that the Tribunal Judge did not think that she was dealing with an act which had continued only until 30 September 2007, although this was the logic of paragraph 24.

25. It is not clear from the submissions made to me what the relevance for these purposes was of there being special transitional provisions, but that seems to have led, in part, to the conclusion which was referred to.

26. In paragraph 24 the, "Circumstances of the matters complained of" were not more closely identified. Mr Cheetham invited me to read that as a reference back to what the Tribunal had itself identified as a complaint in paragraph 5, drawn from the ET1. The difficulty with that submission is that, whereas it might well have been what the Tribunal Judge had in mind, in paragraphs 25 and 27 she appears to have had a different view of what the acts complained of actually were, to the extent that Mr Cheetham was driven in his submissions to suggest that she had decided the case in favour of the Claimants on a basis that was not the Claimants case before her. In paragraph 25, the Tribunal Judge said that the complaint is:

> **"About the terms of a mechanism which applied over a period of time and which had an inevitable consequence for the Claimants …"**

27. He said that the complaint was not about a mechanism but it was about the fact that the Claimants were paid less than others, in materially identical circumstances, who were paid more purely because of their age.

28. That definition of the complaint in paragraph 25 is plainly different from the definition in paragraph 5. It may also be different from that in paragraph 27 where, "the acts complained of" have no clear definition but are said to be a consequence of the application of the mechanism whereas, in 25, the complaint is about the terms of the mechanism. The matter is perhaps further confused, says Mr Engelman, by the reference to **Hendricks**. **Hendricks** was a case in which, put broadly, the Court of Appeal decided that it was open to the Claimant to complain about a continuing act, if there was a series of acts, which might well be linked by a common hostility toward her on the basis of her sex. It does not help here (neither counsel suggested it did, and I accept this case is of no real relevance here).

29. It looked at a number of physically distinct acts which might be so linked. The relevance to a situation here where, on Mr Cheetham's case, what was complained about was a continuing failure to pay as much as others in similar circumstances were being paid was in issue or, on Mr Engelman's approach, what has been complained about was the act of placing the Claimants at a lower point on the salary scales in 2006, is not obvious.

30. In paragraph 27, the word "therefore" introduces the conclusion which the Tribunal judge moved to. That appears to have followed immediately upon concluding that Claimants and comparators came within band 3, triggered a mechanism, and that the Claimants would not be able to move as quickly through the spinal points as the comparators. Again, it is not altogether clear precisely what the Tribunal Judge had in mind. The essential requirement in approaching regulation 42 as it is, section 76 of the Sex Discrimination Act and 68 of the **Race Relations Act 1976** is, to be clear, about the act which is said to be continuing. This need for focus is emphasised in the judgments, respectively, of Balcombe LJ in **Sougrin**, at page 653F, where he said:

> **"In order to see what is 'the act complained of' within the meaning of section 68(1) it is necessary to look at the originating application. Since these are frequently prepared by an applicant acting without the benefit of professional advice the industrial tribunal should not approach the originating application in a technical manner, but should look at it to see what is the substance of the complaint. Looked at in this way it is clear that the applicant's complaint is that while a white nurse was graded F, she (the applicant) was graded E, and that the employer finally discriminated against her when on 13 November 1989 it rejected her appeal against her grade. That this is indeed the substance of the applicant's complaint is confirmed by her Notice of Appeal to the Appeal Tribunal, settled by counsel, which states in paragraph 5(2): 'The applicant's complaint related to the basis upon which she was graded E as opposed to a white nurse who was graded F'."**

He had earlier quoted from the application which made it clear that she was complaining specifically about the regrading decision (see page 653A-C).

31. Lord Donaldson of Lymington MR, said at 658G:

> **"In applying section 68(1) the first step must be to identify 'the act complained of'. Industrial tribunals are 'shop floor' courts whose procedures and approaches must be attuned to the needs of litigants in person. Accordingly a tribunal should not take a narrow or legalistic view of the terms in which the complaint is couched."**

32. He went on to observe that the complaint had been about regrading and the applicant had never suggested that there was any separate act of racial discrimination when, month by month, she was paid the salary of a staff nurse of E grade rather than that of F grade, saying at 659A – B:

> **"Indeed it is difficult to see how she could have done so, since there was no evidence whatsoever that anyone employed by the authority would at such times have been doing anything other than to seek to pay the applicant the salary to which she was entitled under her actual grading"**

33. The Tribunal here began by identifying the complaint, which is being paid less than those who but for age were in a comparable position. I have been taken during the argument to the ET1 itself. Mr Cheetham's case that this complaint was all about pay is supported by a number of paragraphs in the ET1. In paragraph 4 the less favourable treatment of which the Claimants complained was a belief that they had been paid less than older employees in circumstances which were the same or not materially different; that is, a complaint about pay. In paragraph 7 there is a plain reference to pay. In paragraph 9:

> **"The Claimants believe that they have been denied equal access to additional payments enjoyed by older colleagues for a reason related to their age."**

34. Paragraph 11 was that which the Tribunal itself quoted. At paragraph 14, the complaint is that the relevant circumstances were the same, with the exception of the comparators being older so as to obtain the benefit of increased pay, and the Claimants' belief that paying them less than the older technicians amounted to age discrimination.

35. In paragraph 16, there was a complaint about paying less. As to comparators, paragraph 18 begins with a complaint of receiving less salary and, paragraph 21, the Claimant expressed a belief that the comparators received additional forms of remuneration and benefits that they had been denied.

36. All those references are references to a failure to pay the same salary, on the basis of age.

37. Working the other way, Mr Engelman drew my attention to paragraph 8, in which is described as follows:

> **"The Claimants are paid at point 7 within band 3. This is a salary of £14,834, based on 2008 pay scales. The older technicians are paid at point 8 within band 3. This is a salary of £15,356. The Claimants will therefore be paid £522 less this year."**

This is capable of being regarded as a complaint about the point in the band to which the Claimants were assigned, as opposed to a complaint as to pay

38. If the Tribunal Judge was to approach the law to which she was appropriately referred by counsel in the cases of **Sougrin**, **Amies** **Barclays Bank v Kapur** [1991] ICR 208 and (though to a lesser extent) **Calder v James Finlay Corporation Limited** [1989] ICR 157, she would first need clearly to have in mind (and to show that she had in mind) the complaint about which she was reaching her determination. It is the substance of a complaint which matters: the precise formulation may not. This point is made, though in a slightly different context, in the judgment of Mummery LJ in the case of **Hendricks** (see paragraphs 51 and 52). The focus, he says, centrally, should be on the substance of the complaint.

39. Mr Cheetham argues with considerable force that, if the complaint here is a complaint that the Claimants are being paid less, then that failure to pay properly is a continuing act and it

is open, he submits, to a Tribunal so to find. Mr Engelman submits that what is really being complained about is not a failure to pay but a consequence of regrading. Mr Cheetham would distinguish the case of **Sougrin** on the basis that that case was one in which the Claimant very clearly identified regrading as the complaint that she was making; so too did the complainant in **Amies** complain not about lower pay but about not being appointed to a particular post. In any event those cases concerned appointment to positions; the pay, which was the continuing effect, was consequent upon the position occupied. Here, both the Claimants and comparators are within the same pay band, so no issue as to appointment to a position arises: it is only age which causes them to receive different pay for doing the same job. He argues again, as it seems to me, with force, that the cases of **Amies** and **Sougrin** do not themselves answer the case conclusively in favour of the employer. Indeed, for the reasons I have given, derived from his argument, I cannot accede to Mr Engelman's request to me that, if I should find the judgment of the Tribunal Judge flawed legally, I should determine that there is only one answer which the Tribunal Judge should properly (and could properly, in the circumstances) have given, which was to hold that there was here no continuing act.

Conclusions

40. In my view, the basis for the decision having been reached upon what may well be a basis which was not that addressed by the Claimant and which, if it was addressed by the Claimant would in my view have fallen foul of the argument which Mr Engelman addresses to me based upon **Sougrin**, cannot stand. The reasons given in the difficult paragraphs which I have set out are opaque and are recognised by both counsel to be so. Mr Cheetham's attempts to persuade me that the opening words in the decision in paragraph 5, setting out a complaint in clear terms, meant that that was the complaint being considered in paragraphs 24 to 27, is not one which I can accept because of the wording of 24 to 27, which does not seem consistent with that approach. The Tribunal here therefore did not address the arguments put to it, and if it did it

came to a conclusion which, as it seems to me, it might well have reached, but upon a basis which is flawed for the reasons which I have given. It does not clearly identify the act which is complained of in the claim, and said to be a continuing act; insofar as it does so in those paragraphs, it appears to deal with consequences and mechanism rather than the act complained of and, if so, those are consequences of an act which, by definition, has therefore taken place at some other and earlier time.

41. It follows that I have no alternative but to allow the appeal against this decision.

Remedy

42. Mr Engelman invited me to substitute the judgment of this Tribunal upon the basis that the only decision which a Tribunal could properly reach was that there was here no continuing act and, there being no question of the exercise of the just and equitable jurisdiction, the claim would simply have to be dismissed. Alternatively, he submitted that if this Tribunal came to the conclusion that the judgment below was flawed in the manner which I have described, I should remit the case to the Employment Tribunal. I have already rejected the first of Mr Engelman's contentions, for the reasons given above. Mr Cheetham too does not invite me to reach a determination of my own. I would have been prepared to do so in this case but, recognising that both counsel invite me to remit the case for decision, I shall accede to that request.

43. There is no contention before me as to ordering that the case should be remitted; I have submissions from one party only that it should go to a different judge. I should, however, say this: that the features in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 (to which I must have regard in deciding remission) include the professionalism of the Tribunal judges, and I have no reason to suppose that the employment judge here was anything other than fully

professional in her approach and would, if needs be, consider the case afresh with the guidance of this judgment, and reach a fully reasoned and appropriate decision. There is, however, no real difference in time as between one judge and another and it seems to me, therefore, I shall simply direct that the matter will go back to the Tribunal. It does not have to be heard by the same Judge, because there is no significant additional time which putting the matter before another judge would involve, but I do not direct a hearing before the same Tribunal.

44. The submission that was made initially by the Claimant – that it should be remitted to a different Judge – was not made forcefully, and did not reflect at all on the professionalism of this Judge. In the light of further submissions, it is plain that parties agree that any judge should be eligible, as is convenient, to hear the matter, and that if it be convenient for Judge O'Hara to hear it, this court is confident in her ability to do so professionally.