Appeal No. UKEAT/0020/15/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 May 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR M HORLORKU — APPELLANT

LIVERPOOL CITY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR JAKE DAVIES
(of Counsel)

For the Respondent

MR TIM KENWARD
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SUMMARY

UNFAIR DISMISSAL

RACE DISCRIMINATION

The issue on the appeal is whether the Employment Tribunal had erred by failing to deal with a case advanced by the Claimant, and not withdrawn nor conceded. It was held that the Employment Tribunal should not consider a claim outside those in the ET1, but that did not mean it had to consider every claim within it: where parties agreed issues as being those which an Employment Tribunal had to determine in its Judgment, before that Judgment was delivered, all they could ask was that the Employment Tribunal resolved those issues on which they had agreed. That was what the Employment Tribunal here did. Once it was clear as a matter of fact that the issues list had been agreed, there could be no complaint that the Employment Tribunal had failed to deal with incidents identified as giving rise to claims of harassment if they were also potentially claims of direct discrimination; the Employment Tribunal here had shown sufficiently that it had considered all the facts in answering whether there had been discriminatory conduct at all; and on application of **Mensah** and **Muschett** it was dismissed

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal raises the question whether a Tribunal is in error of law if it deals with the issues which are within the ET1 but where the issues with which it deals do not cover the whole of the ground set out in that ET1.

2. The Decision under appeal is that of an Employment Tribunal at Liverpool (Employment Judge Ryan, Mr Bell and Ms Worthington). In a Reserved Judgment of 10 March 2014 it dismissed the Claimant's claims that he had been unfairly dismissed, directly discriminated against on the ground of his race, subject to harassment because of his race and victimised for having complained about his treatment. On appeal no issue arises as to the fairness within the **Employment Rights Act 1996** of the dismissal, which was by reason of redundancy.

3. The claims arose out of the Claimant's employment as a Community Cohesion Support Officer. The Claimant is black. After he had been in post for some time, the Respondent Council decided that it needed to appoint four officers to deal specifically with Eastern European communities in Liverpool. There were thus now five officers dealing with the same general pattern of work. Because of the financial constraints which applied after April 2011, the Council decided that that number needed to be reduced from five to three. The Claimant considered that, in particular given his longer and particular experience, he ought to have been appointed or assimilated or slotted in to one of those three posts. Instead he was put in a pool together with the other four. That he considered to have been act of discrimination against him, the ground for which was his race. He was not successful in interview for any of the three posts. Thereafter he marked time, in effect, working for the Council in particular projects: the

first from 4 August 2011 until 4 November 2011 in the Registrar's Office; the second from 7 November 2011 to 16 January 2012 in the City Centre Office; and thereafter from 17 January 2012 until 1 May 2013 working in the Environmental Services Department, after which his employment ended.

4. During that time he was not well supported by the Council (see paragraph 2.16), though the Tribunal were later to conclude that this was largely because of the significant need of others to have support also at the same time rather than because there was any discrimination against the Claimant on the ground of his race.

5. Various roles within the service of the Respondent on a more permanent basis were considered whilst the Claimant was engaged in these projects. Of those which came for specific consideration, it turned out he was either not suited for them or, if suited, he was unsuccessful in obtaining them. The Tribunal recorded that he did not make any complaint during the course of the hearing, that his failure to obtain such a post was itself due to his race.

6. He raised a grievance about the fact that he had been placed in the pool at the outset. That began on 8 December 2011. It was rejected. He was upset that shortly after that he was moved (on 16 January 2012) from the post which he had been occupying in the City Centre Office to that in the Environmental Services Department. He was given short notice. He felt it detrimental. He thought it was a consequence of his having made a complaint, his grievance. That incident gave rise to the one claim of victimisation which the Tribunal ultimately considered.

7. The Claimant also considered that four incidents which had occurred whilst he was working on the projects were acts done to his detriment because of his race, or indicated that he was being discriminated against. These ultimately were considered as complaints that he had been subject to harassment within the **Equality Act 2010**. The first related to being told that the ringtone on his mobile phone was not appropriate in an open plan office in which he worked. The second, that when his Blackberry needed repair, though the Tribunal found he was reimbursed for the costs of repair which he himself had organised contrary to procedure, it was not returned, or was removed, from him. Thirdly, his removal from the Registrar's Office in November 2011 to the City Centre Office was unwanted conduct and an act of harassment. And finally that he was harassed by the fact that he had no permanent workstation.

8. At the outset of the Judgment the Tribunal, under the heading "Issues", said this:

> **"The issues were agreed with the parties at the outset and rehearsed and revised during the course of the Hearing, such that it was agreed that the following issues fell to be resolved, namely:**
>
> **1.1. In respect of the claimant's unfair dismissal claim:**
>
> > **1.1.1. Whether the dismissal was rendered unfair by virtue of the respondent's alleged failure to follow its Human Resources policies in connection with redundancy, redeployment and support whilst an employee was in the redeployment pool.**
> >
> > **1.1.2. Whether the claimant's dismissal was rendered unfair by the respondent's alleged failure to consider his suitability for alternative employment or the availability of suitable employment for him.**
>
> **1.2. In respect of the race discrimination claims where the claimant based his claims on the fact of his being a Black African (and where there was an issue as to whether the claimant had presented his claims within the prescribed time limits):**
>
> > **1.2.1. Direct discrimination: Whether the claimant suffered a detriment because he was Black African by virtue of the respondent's failure to assimilate him into a new post in the course of a restructuring exercise when three officers were required out of a pool of five which included the claimant; the claimant's argument being that he should have not been placed in the pool but should have been appointed as one of the three officers in the new role automatically.**
> >
> > **1.2.2. Victimisation: whether the claimant's removal at short notice from a project working in the City Centre office whilst he was in the redeployment pool amounted to a detriment because he had complained about the restructuring exercise that put him at risk of redundancy to Councillor (now Mayor) J Anderson.**
> >
> > **1.2.3. Harassment: whether the following unwanted conduct related to the claimant being a Black African and had the purpose or effect of harassing him, namely:**
> >
> > > **1.2.3.1. The removal of a Blackberry handset that he had been allowed to use whilst in his substantive role.**

> **1.2.3.2. Being spoken to about the nature or volume of his ringtone on his mobile phone whilst in an open plan office.**
>
> **1.2.3.3. His being moved from a project in the Registrar's Office in November 2011.**
>
> **1.2.3.4. The alleged fact that the claimant did not have access to a work station following his unsuccessful application for one of the three remaining roles following the restructuring process and his assignment to the redeployment pool in the period 4 August 2011 to 1 May 2013."**

9. Since the argument and decision in this appeal centrally rests upon whether the Tribunal was entitled to restrict its consideration in its Judgment to those issues, regard must be had to how it came about that they were determined as they were. The Claimant at this stage was acting in person as he had done before. He could not therefore sensibly have been expected to be able, with pinpoint accuracy or even at all, to ascribe the particular legal labels which might appeal to a lawyer as deriving from the **Equality Act 2010** to characterise that which he was complaining about. Rather, in his originating application, he set out his complaints as matters of fact and the way that he saw things. He began at paragraph 5.2 in the ET1:

> **"I have been a victim of persistent and consistent discrimination and victimisation over a period of 2 years (April 2011 - May 2013), during my employment with Liverpool City Council. During this time I was ignored, isolated, harassed, experienced differential treatment and humiliated in front of other colleagues being moved around jobs with no prior notice. Eventually this culminated in my ultimate dismissal on 01/05/2013 when I was dismissed on the grounds of redundancy. I do not think that the "redundancy" complied with legislation or was what constitutes a formal redundancy."**

He then went on to complain about the matters which have been summarised, insofar as they are summarised factually, above.

10. The ET1 came before Employment Judge Ryan sitting alone in a case management discussion on 28 November 2013. The purpose of that was to further narrow and clarify the issues (paragraph 1 of the case management order). The record of this noted that Mr Kenward, acting for the Respondent as he does before me today, required further clarity with regard to the claims. It is clear the claims were not legally focussed. It set out at paragraph 3 the explanation

for the claims, which again gave a predominantly factual account. In the course of what the Claimant said he complained about his allocation to the pool of five as being discriminatory, but added that his being moved from the Registrar's Office was a further example of direct race discrimination and furthermore victimisation; and at paragraph 3.3, in dealing with the alternative posts to which he might have been appointed whilst on project work, he said in respect of three of them, 3.3.3.1 to 3.3.3.3, that the way in which he had been dealt with in respect of those amounted to direct race discrimination.

11. The case management order went on, at paragraph 5, to note that a concern had been voiced by the Respondent that the Claimant had complained in paragraph 5.2 of his ET1 of "victimisation … isolation and harassment". It was agreed by all that (in order for greater clarity, I infer) there should be a sequential exchange of witness statements, which would allow full details of those allegations to be given with sufficient particulars to enable the parties to prepare for the hearing. The Claimant duly produced a witness statement. It set out the background of the Claimant's experience and then in the text complained essentially of the same incidents as I have already noted. In respect, for instance, of the treatment over the ringing of the mobile phone and the other incidents which had occurred, prior to 16 January, the Claimant wondered whether he had been picked on unnecessarily, treated differently and unfairly and, if so, was it a case of harassment? He queried whether "bias", as he put it, could justifiably be claimed in respect of the failure to redeploy him to another post, and in his conclusion argued that his displacement from his substantive role and placement into the redeployment pool was unfair treatment by reason of race, colour and ethnic origin:

> **"The same unfair treatment continued throughout my time in redeployment by the way I was shoved around from one project work to another, often at short notice. …" (witness statement, paragraph 13b)**

He maintained that the way in which he had been treated unfairly was linked with the way he had been treated, he thought discriminatorily, such that there was here an overall picture of discrimination against him. It is clear to me that, by the time the matter began before the Tribunal, the case had not been definitively addressed as one in respect of which the only complaint of direct discrimination was, as the Tribunal was later to record it, that relating to the redeployment pool, with allegations of harassment which, though it necessarily involves a finding that the treatment is because of a protected characteristic, is not direct discrimination as such and victimisation, which requires no finding of discrimination, though it does require a complaint to have been made that there has been some breach of the law relevant to discrimination. It is unnecessary for present purposes to set out the precise provisions of the **Equality Act 2010**.

The Tribunal Decision

12. The Tribunal Decision, somewhat unusually, in identifying the issues not only referred to them as having been agreed at the outset but as being "rehearsed and revised during the course of the hearing". It identified those issues which required to be resolved it as it saw it in its reserved Judgment and considered first the allegation of direct discrimination in 1.2.1. As to this, there was a disagreement between the minority and the majority. Ms Worthington in the minority drew an inference from the failure of the Council to produce any minute of any of the three meetings which had considered the grievance and the grievance appeal arising out of the Claimant's allocation to the redeployment pool rather than his assimilation to the post. She concluded that the absence of minutes was so surprising that it led her to think that those minutes must have contained comments and observations supportive of the Claimant's main contention.

13. The Tribunal did not say anything directly about that which the majority thought in respect of the absence of those minutes. However, as Mr Davies points out, it did not suggest that Ms Worthington was wrong to think that the minutes were absent. It concluded, paragraph 3.2.10, that the decision was not to do with race but because the roles of the Claimant and the other four were essentially the same. His non-appointment to post was fair. The marking of him as fourth out of five was conscientious, honest and reasonable. It rejected the complaint of victimisation. It accepted that there had been a complaint by the Claimant of race discrimination. That would amount to a protected act within the meaning of section 27 of the **Equality Act**. But it did not consider the move of the Claimant from the City Centre team to Environmental Services at short notice was because of his making that complaint. See paragraph 2.19. The timing was entirely coincidental. The move was because departments which could not fund project work, or did not need project work to be undertaken but were only carrying people during the redeployment period, were beginning to feel financial pressure. It therefore identified a positive reason for the move and did not consider that it was anything to do with the Claimant's case.

14. As to the four incidents which the Claimant had, in his view, regarded as harassment, it examined each at paragraph 2.25 and concluded none was a matter which in any way occurred because of the Claimant's race.

15. In the course of applying the law which it set out briefly at paragraph 3, the Tribunal commented at paragraph 4.4 that the placing of the Claimant into the pool was appropriate but at paragraph 4.5 specifically dealt with a time point as well. Accordingly the claim of direct discrimination identified in paragraph 1.2.1 was rejected on two bases: (1) on the merits, (2) as to time. The Tribunal did not, it appears, consider any question of time in respect of the

complaints of victimisation or harassment although it had set out in its list of issues to do so. It determined those on the merits. In the course of considering the case, it observed at the last sentence at paragraph 4.6:

> **"… The majority finding is that the claimant was treated in a non-discriminatory, fair and reasonable manner throughout."**

16. The word "throughout" was echoed as the very first word of the following paragraph 4.7: "Throughout the period of time that the claimant was in the redeployment pool …". At paragraph 4.9 the Tribunal commented that the notice given for the move, of which the Claimant complained, was not unduly short and "was not untypical". In paragraph 4.11 it commented, in respect of the harassment claims in particular, though Mr Kenward asked that the words be seen more generally:

> **"… Management's actions were fair and reasonable in all the circumstances, and if the claimant had not been dismissed we consider that he was unlikely ever to have complained about any one of those matters which have perhaps had more of an effect on him in hindsight than at the time. …"**

The Appeal

17. The appeal now is on the basis of five grounds, which were given permission to proceed following a Rule 3(10) Hearing before HHJ Eady QC, the initial grounds having been rejected on the sift by Wilkie J. Those revised grounds are that when the Tribunal recorded the issues at paragraph 1.1.2, it failed to reflect the Claimant's claim as set out in paragraph 5.2 of the claim form. Ground 2 was that it failed to consider whether matters postdating the selection process amounted to direct discrimination. It should be noted that that also may be said to have been asserted by the original claim form. Thirdly, the Tribunal failed, having dealt with the individual allegations, to look back over all the findings in order to consider whether taken together it should draw an inference of discrimination. And fourth, in consequence, it failed properly to apply section 123 of the **Equality Act 2010** in relation to time limits. A fifth

ground was that the Tribunal failed to make any findings on the Claimant's evidence given in the first part of paragraph 9 of his witness statement. In that the Claimant had said:

> **"I went into redeployment on the same day as another colleague, Atanas Atanasov, in July 2011. This colleague was located in one place until 2013 and not shoved around like me."**

18. It was said that here the Claimant was identifying a comparator. It considered that it was a complaint of direct discrimination. Therefore the Tribunal were alerted to the need to compare the Claimant with Mr Atanasov. There is no trace that it gave consideration to any such comparison during the course of its Judgment. Accordingly it simply, in these various respects, failed to deal with the claim as it had been advanced.

The Law

19. It is important to remember the role which a Tribunal has. Its procedure is not inquisitorial; it is accusatorial. Thus it is not for the Tribunal to make a case for a party. It is for the Tribunal to resolve the dispute which is put before it by the parties. These essential points were stated, with the agreement of Wilson and Thorpe LJJ, by Rimer LJ in **Muschett v HM Prison Service** [2010] EWCA Civ 25, [2010] IRLR 451 at paragraph 31:

> **"… Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. … Of course an employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena."**

20. This view of an Employment Judge, as sitting not so much in Olympian detachment but more as an umpire between two rival cases, underlies the approach also of the Court of Appeal in the earlier case of **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531. Peter Gibson LJ was there considering a case in which an Employment Tribunal had determined the claim of a nurse and midwife, who alleged that she had been discriminated against when she had applied for vacancies in the maternity and neonatal units at one of the Respondent trust's

hospitals only to be told that there was nothing available. Later, when she discovered that a number of vacancies in both departments had recently been filled, she felt she had been discriminated against in what had been said to her in respect of both the maternity and neonatal units. Before the Tribunal her claim, although on the pleadings put on both bases, was pursued only in respect of the maternity positions. The neonatal units were not considered.

21. The Appeal Tribunal allowed an appeal. It considered that the Tribunal should have considered both the claims as had been expressed in the IT1 (as it then was). On further appeal to the Court of Appeal, that decision was overturned and the decision of the Tribunal restored. The reasoning is contained in the following extracts from the Judgment. At paragraph 14, Peter Gibson LJ said that the point being made was that:

> **"14. … the error of law found by the Employment Appeal Tribunal is dependent upon the existence of a duty on the industrial tribunal so to ensure, or a duty to hear every allegation in the originating application unless so abandoned, the industrial tribunal being bound to act of its own motion even if the applicant does not put forward evidence to make good the allegation nor argues in support of it. …**
>
> **15. There is no like duty in civil actions in the courts, even if the plaintiff is a litigant in person. It is every judge's frequent experience that more points are taken in a plaintiff's pleadings than are pursued at the trial and I cannot believe that a plaintiff who fails at the trial to take and prove a claim made in his pleadings could at the appellate stage successfully contend that the trial judge erred in law if he did not draw that claim to the plaintiff's attention to see if it had been abandoned."**

22. At paragraph 17 he referred to Rule 9, the equivalent then of what is now Rule 41, and observed:

> **"17. … Many litigants in the industrial tribunal appear in person or with lay representatives and despite the wide discretion given to the tribunal by rule 9(1) it is conceivable that the courts might have recognised a duty such as that implicitly found by the Employment Appeal Tribunal. However a long and consistent line of cases gives no encouragement whatever to the existence of such a duty and consistently with the procedural rules, which apply in the same way to unfair dismissal or redundancy cases and to discrimination cases, there has been no difference of approach between the two types of cases."**

23. At paragraph 28 he expressed that he had reached the clear conclusion that the Appeal Tribunal was not entitled to find an error of law, adding that he would encourage Industrial

Tribunals nonetheless to be as helpful as possible to litigants in formulating and presenting their cases. However:

> **"28. … it must be for the judgment of the particular industrial tribunal in the particular circumstances of the case before it whether of its own motion it should investigate any pleaded complaint which it is for the litigant to prove but which he is not setting out to prove. …"**

24. In the Judgment of Sir Christopher Slade, who with Henry LJ concurred, at paragraph 34 is said:

> **"34. … the almost irresistible inference from the terms of [a particular letter], coupled with the fact that Mrs Mensah never complained about the directions contained in it, is that she gave no indication whatever to the tribunal that she still wished to pursue her claim in regard to the vacancies at the neonatal unit. Furthermore, when she subsequently attended the full hearing before the tribunal, she adduced no argument or evidence to support this particular claim."**

Paragraph 35:

> **"35. … The authorities to which he has referred in my judgment preclude findings of any legal duty on the part of the tribunal to deal with it of its own motion, or of any corresponding legal right in Mrs Mensah to have it dealt with in the circumstances of this case."**

25. The argument for the Claimant, skilfully advanced by Mr Jake Davies of counsel, who appears pro bono, is that those authorities are to be distinguished. Although on the face of it they may seem hostile to the grounds of appeal, both turn upon their own facts, as indeed I would add the last words of paragraph 35 of Sir Christopher Slade appear to indicate.

26. In **Mensah** at paragraph 27 Peter Gibson LJ had said that he would emphasise that Mrs Mensah's case:

> **"27. … has never been that she indicated to the chairman at the pre-hearing review that she wished to pursue her complaint relating to the neonatal unit vacancies. …"**

27. This therefore was a case in which no complaint had ever been advanced as such before the Tribunal which it was argued on appeal should nonetheless have been considered. The case here is very different. Although Mr Davies accepted, in paragraph 12 of his skeleton argument,

that the Employment Tribunal told the Claimant that it understood that his main complaints were as recorded at paragraph 1 of its Reasons and that he agreed that that was the case, nonetheless the Appeal Tribunal had invited Judge Ryan to set out his own note of that which had been said in closing by the Claimant. The note at paragraph 10 of the Response reads "Claims in ET1 and statement". This appears to be a reference back to the claims as made in the ET1 and described in the statement. This was not therefore a case in which it could legitimately be said that the Claimant had abandoned those particular claims. He argued that the Tribunal did not here deal with the overall argument that there had been ongoing discrimination until the date of dismissal because there was a state of affairs in which the Claimant was ill-treated by his employer. He thought that each of the incidents of ill-treatment was to do with his race. But the Tribunal failed to take a holistic overview of everything that had happened. Had it done so, it might very well have come to a different conclusion in respect of its decision as to time. It did not, when looking at the question of time limits, consider that there had been a continuing course of conduct. Yet that was the Claimant's allegation. It is possible that, had it done so and had it concluded that there was such a course, it would then have had to resolve whether or not, as a matter of fact, there had been discrimination against the Claimant in relation to his being allocated to the pool.

28. Here the Tribunal's Judgment falls short. It set out the views of the minority but it did not set out the basis upon which the majority did not draw the inference which appealed to Ms Worthington. The complaint generally was made that it was wrong to treat the several incidents alleged of harassment as though they were separate from and independent of each other and of the allocation to the pool. In discrimination cases in particular, it is important to take an overall view as well as carefully examining the circumstances of each individual allegation. If and on the assumption that the issues list did not fully reflect the matters which the Tribunal was bound

in law to consider, then it had failed to deal appropriately with the complaint about the way in which the Claimant had, as he put it in paragraph 9 of his statement, been shifted around whereas a comparator, who appears to have been the only other Community Support Officer who was not appointed to another job, was simply left in the same post throughout. There was no attempt anywhere in the Judgment to deal with the comparison and therefore a failure to grapple with a case which had been made.

Discussion

29. The first matter for me to resolve is whether or not the Tribunal accurately recorded the list of issues as being issues which were outstanding at the conclusion of the hearing. It was only those issues which were outstanding as it saw it in respect of which it needed to give reasons. As to this, the evidence it seems to me is all one way. First, the Tribunal said that the issues were agreed. It said at the outset, but added "and rehearsed and revised during the course of the hearing". Those words are unusual. They indicate that this was a case in which the issues requiring resolution evolved. It is not difficult to see why that may be where the allocation of legal labels to the particular factual situations of which the Claimant raised concerns occurred during the hearing.

30. The Tribunal having said that the issues were agreed, it would take considerable material for me to conclude that that was itself a misstatement. However, paragraph 12 of the skeleton argument of Mr Davies confirms the agreement. That is qualified by the word "main" in front of the word "complaints" but nonetheless indicates what the Tribunal thought were the main issues for its resolution.

31. Thirdly, I have a copy put before me of the Respondent's closing written submissions. Those closing written submissions set out issues in terms almost identical to the issues as the Tribunal described them. The one difference is that the Tribunal's list of issues at 1.2.3.4 describes the lack of access to a workstation as having lasted from 4 August 2011 to 1 May 2013. The Respondent's submissions understood from the Claimant's witness statement that any lack of access had gone on only until the end of 2011. It is however unnecessary for me to resolve that particular dispute, which seems to me irrelevant to the matters I have to conclude.

32. Accordingly I am satisfied that I should resolve this matter upon the basis that, between the parties, at the conclusion of the hearing, the issues with which the Tribunal was required to deal in its Judgment were those with which it did then deal. It did not deal fully, it seems to me, with the issue of time, but as it seems to me, if it was entitled to reach the conclusions it did on the merits of the various claims, that is irrelevant to the conclusion, since the claims anyway would fail.

33. This case, secondly, is materially different from cases in which there has been a clear statement of a particular point as being in issue at the outset of the hearing but during the course of which it appears that a concession is being made. In such a case (see **Segor v Goodrich Actuation Systems Ltd** UKEAT/0145/11, a decision of this Tribunal on 10 February 2012) the principle is that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous. That, however, is dealing with a very different factual situation than the one in question here.

34. If a Tribunal were to be expected to resolve the issues not only as being those put before it for argument and discussion by the parties at the time of the hearing but also by reference to

the pleading, or otherwise be in error of law, then the principle in **Mensah** would be other than it was. That principle recognises that although, as I would hold, a matter cannot be advanced unless it is within the scope of the pleadings (subject only to the agreement by the parties that it should be permitted to proceed) this does not have the consequence that every matter which may be said to be within the pleadings is a matter upon which the Tribunal's decision is actually required. It has to resolve the dispute as brought before it by the parties. That is its role: see **Muschett**. Here, therefore, the parties, as it seems to me, had agreed the approach which the Tribunal should take. Subject only to the "overall" point addressed by ground 3, it is the approach it adopted. On appeal it is too late to argue the case on a different footing.

35. Having taken that view, as I do, and adopting to that extent the submissions of Mr Kenward, grounds 1, 2, 4 and 5 must fall away. That still leaves ground 3. The fact that the issues are as defined by the Tribunal does not mean that the Tribunal in this case was required to consider each of the allegations made by the Claimant as if it was a completely separate act with no relationship to the others. Experience teaches that few acts between the same parties can in truth be said to be completely unrelated. To understand why the parties act as they do in respect of a particular situation, regard may need to be had to evidence as to how they have behaved towards each other on other occasions. As it has been put previously, it is difficult to understand a scene in the third act of a play without seeing what has happened in the first two acts of the same play.

36. A Tribunal considering a case of discrimination must be alert to the inferences which it may properly draw from the evidence that, despite the denials of the alleged discriminator, nonetheless it might have occurred. It must carefully examine the whole of the circumstances

to ensure that by focusing upon individual episodes it does not miss the eloquence of the story told by considering the whole.

37. The question here is whether the Tribunal, in what is a relatively succinct Judgment, indicated that that is what it had done.

38. In its Decision, Mr Kenward argues that it did just that in the concluding sentence of paragraph 4.6 and the sentence in the middle of paragraph 4.1 to which I have already drawn attention. It might be added that in paragraph 4.9, by the reference to the way in which the Claimant was treated by his move at short notice being "not untypical", the Tribunal was indicating it had regard to the evidence as to other events though it did not specify what they were.

39. A Tribunal's decision is not to be subject to overpernickety analysis. In particular, where it is relatively succinct, that ought more to be a matter of praise than of criticism. I have concluded that, brief though these references are, they do indicate that the Tribunal had a regard for the picture painted overall and had not in error of law focussed upon individual events to an exclusion of seeing a bigger picture.

40. There is further support, in my view, for the view to which the Tribunal came. That is because, in each and every one of the events which the Tribunal examined, it found a reason which it accepted as non-discriminatory for the way in which the Claimant had been treated. A claim of discrimination does not get stronger because there is a greater number of complaints. It is only if some of those complaints are justified or may be justified that they may be arrogated with others to present a rather different picture than if one had simply focussed upon

the events individually. Here that could not be said since at every turn the Tribunal rejected the case for the Claimant. Though it thought the case to be entirely genuinely pursued it thought also that the Respondent's explanation was entirely genuine.

41. Accordingly, as it seems to me, ground 3 of the Notice of Appeal has no substance. For those reasons, the appeal as a whole must be and is dismissed. I cannot, however, leave this Judgment without thanking Mr Davies, acting without remuneration as he does, for having exemplified some of the best characteristics of the legal profession in doing so.