Appeal Nos. UKEAT/0450/13/JOJ
UKEAT/0451/13/JOJ
UKEAT/0452/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 March 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

UKEAT/0450/13/JOJ & UKEAT/0451/13/JOJ

LONDON BOROUGH OF HILLINGDON	APPELLANT
MRS M MESO	RESPONDENT

UKEAT/0452/13/JOJ

MRS M MESO	APPELLANT
LONDON BOROUGH OF HILLINGDON	RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2014

APPEARANCES

For London Borough of Hillingdon	MR NIGEL PORTER (of Counsel) Instructed by: London Borough of Hillingdon (Legal Services) Civic Centre (3E/04) High Street Uxbridge UB8 1UW
For Mrs M Meso	MR JACK MITCHELL (of Counsel) Instructed by: ARKrights Solicitors 15-17 Exchange Road Watford WD18 0JD

SUMMARY

RACE DISCRIMINATION

There were three linked appeals. The Claimant alleged she had been dismissed because of her race. The Employment Tribunal dismissed this claim, and was held entitled to do so.

The Respondent appealed findings that a named employee had been party to discrimination against C. She had not been accused of this before the hearing, and had not had the opportunity to appear before the Tribunal to rebut the finding. Held: the finding was not clearly supported by evidence or allegation and should not have been made.

Finally, the Respondent appealed against a decision by the ET at a remedy hearing to reconsider whether it should accept jurisdiction – it had held at the liability hearing that there was a continuing act, but it changed its mind at the remedy hearing. It decided to hear the Claimant as to whether it should extend time on the basis that it was just and equitable to do so. The Respondent argued it could not do so, for to do so would be to admit evidence which did not satisfy the requirement of "fresh evidence" under rule 34(3)(d) so should not be admitted under rule 34(3)(c) ("interest of justice") if the ET was exercising a power of review – but it did not identify what, if any, power it WAS exercising. Held: that whether it was finishing an unfinished issue arising in the proceedings as a whole whilst they were still live, or applying rule 34, the ET was entitled to do as it did and the exercise of its discretion was permissible. Appeal rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. The Employment Tribunal at Watford – Employment Judge Bedeau, Mr Surrey and Mr Kaltz – made two decisions, each of which is subject to appeal in this hearing. They were different aspects of the same case, which had been brought by the Claimant against her former employer, the London Borough of Hillingdon ("Hillingdon"). The first was a decision in respect of liability, Reasons for which were given on 26 November 2012. The second, consequential upon the first, was a decision as to remedy, Reasons for which were given on 23 April 2013 but, for reasons which I shall describe, was peculiarly linked to the decision on liability because it amended aspects of it and gave further consideration to some of it, including dealing with an issue that had not been resolved at the earlier hearing.

The background facts

2. The Claimant was employed as a deputy team manager in the education and children's services department with effect from 1 February 2010. Her appointment was subject to satisfactory completion of a probationary period. The usual period was six months, but it might be extended and, if extended, would be subject to a review; if the review did not consider her performance satisfactory, the result would be her dismissal. The Tribunal found that she was dismissed following a probationary review on 19 October 2010. It was held by a Ms Bell, a service manager, that she had not met the standards required, in particular with poor records management, and she had not built "credibility to facilitate effective team management skills". Ms Bell decided she should be dismissed with effect from 19 January 2011. Her appeal, by way of review, was heard and rejected by a Ms Nixon in December 2010.

3. The Claimant claimed that these actions against her were direct race discrimination. She also claimed that she had been discriminated against directly on the grounds of race and subject to harassment related to race because of the way in which she had been treated by a fellow employee – a Ms Brady – and by her line manager, a Ms Harris. The Tribunal concluded that Ms Brady's treatment of the Claimant was such that her complaint against Hillingdon on the basis of that treatment amounted to discrimination against her on the ground of her race. For exactly the same actions and behaviour of Ms Brady it concluded that she had been harassed. Other aspects of the claim that she brought before the Tribunal do not now feature in this appeal; it is concerned solely with the claims that she made to have been discriminated against and subject to harassment by Ms Brady, Ms Harris, Ms Bell and Ms Nixon. It is a particular feature of this case, to which I shall return, that the discrimination alleged against on the one hand Brady and Harris and thereafter Bell and then Nixon, for which it is said Hillingdon is responsible, is sequential. The only involvement that Bell and Nixon had with the Claimant's case was in respect of the probation review and the appeal respectively.

4. As to Brady, the Tribunal concluded that she had a low opinion of the Claimant's competence as a deputy team manager, in which capacity she managed Brady and two others, a Ms Hemming and a Ms Kibbler. They were known as placement officers; within the placement team there was also a placement administrator, a Ms Bhatia. Brady regularly raised concerns that she said she had in respect of the Claimant with Ms Harris, the manager above the Claimant. When Ms Harris was away for a short while at the start of April 2010, the relationship between Ms Brady and the Claimant deteriorated. Ms Brady became openly

mocking. She would ask the Claimant to repeat herself, she refused to take work and instructions from the Claimant, she asked the Claimant not to interfere with her work, when the Claimant was on the phone she stood behind her and insisted to know to whom she was speaking, all this taking place in an open-plan office and being clearly humiliating.

5. In this continuum of relationship between Brady and the Claimant two particular incidents stood out to the Tribunal. They were, respectively, on 23 June and 23 July. On 23 June there were in fact two such incidents according to the Tribunal's findings of fact. Brady took the Claimant to task for the Claimant making a particular phonecall and shouted at the Claimant. Secondly, later that afternoon, at a team meeting, Brady openly questioned what the Claimant was saying, the Claimant's voice was drowned out, and Brady refused to participate further in the meeting. Ms Harris was present at the team meeting. She set up a meeting between her, Ms Brady and the Claimant to discuss the issues that plainly arose from this conduct. That was the meeting of 23 July. At that meeting Brady told the Claimant that she had no respect for the Claimant "because she didn't know anything". The Claimant complained that she was not considered as part of the team but, rather, outside it.

6. Those findings of fact are broadly summarised in the conclusions that the Tribunal reached on the claim of direct race discrimination. Having set those out between paragraphs 29 and 32, it said:

> **"30. Compared with a white non-African deputy team manager in his or her probationary period, we have no doubt that such an individual would have been treated with respect, courtesy and due deference. That person would have been considered as part of the team and not outside of it. In our view, Miss Brady and Miss Hemming would have wanted such a person to manage them. The all-white placement officers, in particular, Miss Brady had difficulty accepting a black African as their manager. Miss Brady knew that by saying she**

> **had no respect for the claimant no disciplinary action would be taken against her such was the measure of her confidence. […]**
>
> **32. The claimant was racially discriminated against. […] She was constantly complained about, intimidated and ridiculed. Accordingly, in respect of Miss Brady's treatment of the claimant, the claimant's complaint of direct race discrimination is well-founded."**

7. As to Ms Harris, the Tribunal considered her behaviour toward the Claimant from paragraphs 33 to 39. Summarising those findings, it concluded that she had engaged in supervisions with the Claimant; she had kept Ms Brady and Ms Hemming under her line management, which the Tribunal thought somewhat unusual; and she had written a probationary review in the management case statement for the hearing of 19 October that was unfair, in particular in that it concentrated on deficiencies in performance during the first five months and not in the probationary extension period beyond the first six months that had occurred. She had been at the meetings of 23 June and 23 July and had taken no effective action about the unacceptable behaviour of Ms Brady in those meetings. She failed to realise that the Claimant had improved during her probation review period. It considered that the burden of proof had as a result been reversed. It was therefore for Hillingdon to satisfy the Tribunal that the behaviour of Ms Harris towards the Claimant was in no respect whatsoever on the basis of her race. That involved Hillingdon satisfying the Tribunal as to what was the reason. The Tribunal expressed it at paragraph 39 in these terms:

> **"We have come to the conclusion that Miss Harris' treatment of the claimant was the consequence of poor management. As a result of her other responsibilities she relied heavily on what the placements were telling her about the claimant. This was demonstrated when she referred to mistakes which were earlier on in the claimant's employment and failed to recognise that the claimant had improved during the extended period of probation. The reason for her treatment of the claimant was the failure to objectively manage the claimant and was not because of race. This complaint is not well-founded and is dismissed."**

8. The reference to "placements" may well be shorthand for placement officers, a phrase used in the preceding paragraph and probably relating to the placement officers as distinct from Ms Bhatia, the placement administrator.

9. The Tribunal concluded in respect of the harassment claim as follows at paragraph 44:

> **"In relation to the harassment complaint related to the claimant's race, we have taken into account the findings in respect of Miss Brady's and Miss Hemming's treatment of the claimant. We have no doubt that their behaviour had the effect of violating the claimant's dignity and creating an intimidating, degrading, humiliating and offensive work environment for her. This was more than the claimant's perception. It was demonstrated particularly during the time she was deputising for Miss Harris in April and August 2010 and also during the meetings on 23 June and 23 July 2010. She made reference to it in her 25 June 2010 email. From an objective point of view, it was reasonable for such treatment to have the effect of violating the claimant's dignity, creating an intimidating, degrading, humiliating and offensive work environment. The consequence was that she did not feel part of the team and was looking at employment outside of the Council. We find that this complaint is well-founded."**

10. The actions by Brady were plainly the acts in respect of which the Claimant had succeeded. One of the issues that had been before the Tribunal, having been identified at a prior case management discussion, was whether any of the acts relied upon were out of time. As to that, the Tribunal found, in a paragraph to which I shall return later in this judgment (paragraph 47), that the complaints prior to 19 October 2010 were part of a "continuing act". Accordingly, since the proceedings were issued three months later and on 18 January 2011 they were in time.

11. Hillingdon appealed; so too did the Claimant. The remedy hearing also gave rise to a further appeal by Hillingdon. Although the appeal by Hillingdon was first in time, for reasons of convenience in argument I invited the Claimant to set out her appeal first. I shall deal with the appeals therefore in that order.

The Claimant's appeal

12. The Claimant's first ground effectively was to argue that the conclusion that the Tribunal reached as to the cause of dismissal was wrong. The way in which Mr Mitchell advanced it, in a skilful argument, was that the dismissal should have been held to be an act of discrimination because it was and must have been seen to have been the fruit of the poisoned tree. In essence, he argued that on the findings of fact that the Tribunal had made Brady had regularly spoken to Harris. Harris' views about the Claimant were thus heavily influenced by Brady. Brady's views were discriminatory, therefore Harris' views were infected by discrimination derived from what Brady had told her. She expressed her conclusions as to the Claimant's capabilities for the purpose of the probation review in particular in a management case statement. Those views were, on the findings of the Tribunal, heavily relied upon by Bell, therefore her decision was in part on the grounds of race. It was caused by the discrimination, albeit the discrimination of Brady, by these means. Nixon's hearing on appeal was by way of review, in which she in effect had to ask whether on the material upon which Bell relied there was a proper case to dismiss.

13. All therefore came back to a question of causation. In this territory, he submitted, as before this Tribunal was not in dispute, that **Essa v Laing Ltd** [2004] ICR 746 CA established that reasonable foreseeability was not the test. I accept that. In the judgment of Clarke LJ (paragraph 53), agreeing with the lead judgment, that of Pill LJ, he said:

> **"[…] there is no need to add a further requirement of reasonable foreseeability and that the robust good sense of employment tribunals can be relied upon to ensure that compensation is awarded only where there really is a causal link between the act of discrimination and the injury alleged."**

14. The Tribunal, however, did not set out its last word as to the question of whether the dismissal was caused by discrimination in its liability part of its judgment. In the remedy judgment at paragraphs 20-22, under the heading "Was dismissal causally connected to Ms Brady's actions?" and thereby posing the very question to which this argument is addressed, it said this:

> **"20. Mr Dhar** [then Counsel for the Claimant] **invited the tribunal to find that the treatment meted out to the claimant by Ms Brady was causally connected to the decision taken on 19 October 2010 by Ms Bell to terminate the Claimant's employment. He submitted that the evidence presented during the probation review hearing was largely based on Ms Brady's views of the claimant. He referred to the case of [*Laing*].**
>
> **21. Ms Banton** [then Counsel for the Respondent] **submitted that [*Laing*] was a personal injury case. It was a difficult argument for the claimant to sustain that her dismissal flowed from the treatment of her by Ms Brady because Ms Bell was independent of what had preceded the probationary review meeting and the tribunal's findings, she said, do not make that connection.**
>
> **22. We accepted Ms Banton's submissions and concluded that our findings and judgment do not draw a connection between the behaviour of Ms Brady towards the claimant and the claimant's subsequent dismissal. Accordingly, the claimant would only be entitled to injury to feelings compensation."**

15. The Tribunal therefore set out its conclusion on the facts, expressly, in respect of the very issue that they were asked to determine, and the very issue that arises here for review. The issue on appeal therefore is whether the Tribunal was entitled to reach that conclusion and whether it sufficiently expressed its reasons for so doing. The first raises the question of whether the conclusion was perverse. As to that, the Claimant relied upon the fact that the Tribunal had found very little evidence that the Claimant actually lacked ability. This is open to the observation that what mattered was the genuine view of the employer unaffected by considerations of race, but it is the way in which the Tribunal expressed itself. Secondly, it was submitted that a policy in respect of personal development, the PADA policy, had not been implemented in accordance with its terms in respect of the Claimant, and in particular that the

management case statement for the purposes of the probation review was thought by the Tribunal to be misleading and unfair. Mr Mitchell argued that once it was established that that was so all else would follow. The Tribunal found that it had been based upon the views of the placement officers and noted its finding that Brady had regularly expressed her views to Harris.

16. The argument is summarised at paragraph 33 of Mr Mitchell's skeleton argument:

> **"The Claimant's position is that having determined that the actions of Elaine Brady and or the others was discriminatory, the Tribunal erred in law in failing to conclude that the dismissal of the Claimant was also based on that discrimination.**
>
> **a. The decision maker who determined to dismiss the Claimant based her decision on 'inherently discriminatory information from the placement officers' and given that this information was the 'operative, principal, substantial and/or effective cause of the Claimant's' dismissal, it follows that the Claimant's dismissal was 'tainted with race and/or was because of the Claimant's race'.**
>
> **b. These are the same placement officers, found to 'regularly ask the Claimant to repeat herself'** [I interpose to note that the Claimant's first language was not English; though the Tribunal found her easy to understand, there had been concerns expressed, for whatever reason, by those in the team about that] **and that they would 'refer matters about the Claimant's performance' to Miss Harris. The conduct of the placement officers is in stark contrast to the finding of the Tribunal that 'the Tribunal did not have any difficulty in understanding' the Claimant."**

17. I shall return to the question of the findings in respect of the placement officers when I deal with Hillingdon's appeal, but I have taken my conclusions on that part of the appeal into account in reaching my decision on this part of the appeal.

18. The argument by Mr Mitchell relied heavily on parts of paragraph 38 of the Tribunal's liability decision. In that it had described Ms Harris as having:

> **"[…] relied to a large extent on information given to her by the placement officers about the claimant's performance. Her perception rather than the reality was that the claimant was underperforming which was largely based on the placement officers' views."**

19. That was part of the Tribunal's reasoning in concluding that Ms Harris and Hillingdon had to satisfy the Tribunal that she was not discriminating on the ground of race against the Claimant, because it was part of the material upon which it relied to shift the burden of proof to Hillingdon.

20. The answer that Mr Porter gives, in an argument of equal skill, was that in essence this argument was one that asserted perversity. He pointed out, rightly in my view, that the Employment Tribunal had posed itself the right question. It had specifically directed its mind to it and had given an answer. He submitted that the argument assumes that the decision as to dismissal was reached because of information from "the placement officers", but he pointed out that this was a matter of necessary assumption for the argument to succeed. In fact, the Tribunal had not made any particular finding as to what views the other officers expressed and the extent to which, if at all, they too were racially discriminating against the Claimant. The argument assumed that any view that they gave had to be discriminatory.

21. By reference in particular to parts of sub-paragraphs 15.22, 15.26, 15.30, 15.31, 15.36, 15.48, 15.55, 15.57, 15.60 and 15.65 he sought both to demonstrate that Harris, who was acquitted of discrimination, demonstrably had concerns about the Claimant's performance and secondly the same matters demonstrated that there were matters that might have led to a decision that was nothing at all to do with race and everything to do with performance. He notes that at the disciplinary hearing it was not simply a question of the management's case being nodded through on the basis of an acceptance of its report. First, Ms Bell did not accept the entirety of that which Ms Harris was saying, in particular in respect of something known as

the Hillingdon invoice. Secondly, she spent 3½ hours dealing with the issues with the Claimant and even then took time that afternoon to consider what she should do in the light of the information that she had been given.

22. At one stage in his submissions Mr Mitchell said that the conclusion that the Tribunal reached had been against the weight of the evidence. In a perversity challenge, such words, which, in my view, accurately reflect his argument indicate that there was some material upon which the Tribunal could come to the view it did. This was not a question of there being no evidence but an argument that the Tribunal should have weighed the evidence differently from the way in which it did.

23. Perversity is a high hurdle. A decision that a body reaches must, if it is to be perverse, be capable of description as being wholly impermissible. Other expressions conveying this same idea include "flying in the face of reason" or "exciting astonished gasps from the objective observer". That cannot easily be said here, where the parties gave evidence as to what had happened; each of Harris, Bell and Nixon did so, as did the Claimant. The Tribunal was in the best position of all to judge what that evidence indicated. Critical to the weight that is given to the evidence is often the way in which witnesses portray their evidence in the witness box. It is not permissible simply to look at witness statements, though I record no one invited me to do so, to demonstrate the slimness of the case against the Claimant, for answers given in cross-examination reflected in no such witness statement are likely to be all the more telling. This was a case in which each of Harris, Bell and Nixon were open to questioning and, I take it, must have been cross-examined in order to establish if the Claimant could have a case against

them and to establish that if they themselves were entirely innocent of any racial motivation, nonetheless the decisions they took were as a matter of fact influenced by material that, emanating from Brady, was discriminatory, thereby making their own decisions to some extent discriminatory too.

24. I have concluded that whatever the criticisms may be the Tribunal here was entitled to reach the view it did because it could not be said that the conclusion it reached as to dismissal was perverse. It took a robust view which, as it was expressed by Clarke LJ in **Essa**, it should. I do not see that the conclusion can be set aside.

25. The second ground is accepted by Mr Mitchell as being a ground that is one of pure perversity. It is in respect of the case against and involving Ms Harris. I should add for completeness that I have taken my conclusion on this part of the appeal into consideration in reaching the conclusion that I have just expressed. He argues that Ms Harris saw the inappropriate treatment of the Claimant by Ms Brady on 23 June and 23 July in particular. The explanation given by the Tribunal at paragraph 39 for her treatment simply could not be a reasonable explanation. As he put it at paragraph 50 of his skeleton argument:

> **"It is clear that Ms Harris' failings are systematic, comprehensive and made in the full knowledge and having found that the Claimant had raised in her email of 25 June 2010 her perception of Miss Brady, such conduct was then actually then witnessed by her on 23 August 2010 [sic]. In those circumstances, the findings of poor management are insufficient to explain Ms Harris' conduct. Bearing in mind the Tribunal has found as a matter of fact that the 'management case statement' was unfair moves the actions of Ms Harris away from omission, into action which without doubt was less favourable treatment."**

26. He submitted, as that indicates, that poor management may be capable of explaining an omission to act, but it cannot be a sufficient reason for the actions that are actually taken. But

this argument has to face the hurdle that the Tribunal expressly shifted the burden of proof. Having done so and concluded that it had to be satisfied by Hillingdon – in practice, by Ms Harris – that her conduct had nothing whatsoever to do with race, the same high hurdle arises in the face of this argument as did in respect of ground 1. The answer seems to me to be simple. There was a real issue before the Tribunal. There was evidence both ways. There was cross-examination. The Tribunal heard the witnesses. The conclusion it reached is not so surprising that it was wholly impermissible.

27. Ground 3 was in effect linked with ground 1, arguing that the Tribunal fell into error during the remedies hearing in concluding that the Claimant's dismissal was not discriminatory and in effect reprising the argument with which I have dealt under ground 1; the result is the same and requires no separate and further reasoning.

28. Accordingly, I dismiss the Claimant's appeal against the findings.

Hillingdon's appeal

29. The first ground that Hillingdon advanced related to the way in which the Tribunal dealt with the position of Ms Hemming. The contention was that it made findings that it could not properly have made. In the Claimant's ET1 no allegations were made against any fellow employee other than Ms Brady. At the case management discussion that followed on 11 May 2011 before Employment Judge Manley, the complaints were summarised – see claim 2(1)(ii)(c) – as relating to Ms Brady's behaviour and Ms Harris' failure to assist or support the

Claimant, inaction over Brady's behaviour and in her giving misleading and incorrect information to the probationary review panel. Nothing was said there about Ms Hemming.

30. At the CMD the Claimant was ordered to send further information in setting out the details of what was said and done in respect of Ms Brady and whether there were any witnesses, and the same in respect of Ms Harris. It was plain, submits Mr Porter, that the focus was entirely upon Brady and Harris and not upon the other two placement officers or Ms Bhatia. Those Further and Better Particulars were produced. Save in one small respect they said nothing about Ms Hemming. That one respect was where the Claimant said that often when she made a comment in the office Ms Brady and Ms Hemming would look at each other from across the table and laugh to each other within earshot of the Claimant. She repeatedly gave "Louise", Ms Hemming, as the name of a witness to the conduct of Ms Brady in respect of which she complained. A fair reading of this document, submits Mr Porter, would be that she was putting forward Ms Hemming as a witness to discrimination committed by others.

31. In the witness statement that was made before the hearing and for the purposes of it, the Claimant made one reference to Ms Hemming; that was at paragraph 6, where she recorded the members of the team. There is no criticism there of Ms Hemming. Thus, when the hearing began, neither Hillingdon nor Ms Hemming could have anticipated that there would be any argument raised or any finding reached in respect of Ms Hemming's involvement. There was. It took place without Ms Hemming being present to give evidence.

32. It was accepted, via Mr Mitchell, in a realistic response on this part of the claim, that it was very clear that the Claimant's sights had been set on Ms Harris and Ms Brady from the beginning and that the focus was on Brady and Harris and then thereafter Bell and Nixon. The reference to laughing was something that he referred to but submitted that nonetheless her evidence was to some extent relevant if it had been given. There had been mention in the grounds of resistance to references that the Claimant herself had made to Ms Hemming, matters from which perhaps derives the observation it is surprising if they were to be pursued that they did not then surface in the originating application, the CMD and the Particulars.

33. The Tribunal in more than one place, though in few, allied Ms Hemming to some aspects of the conduct of Ms Brady. I need not give specific references, but suffice it to say that a Tribunal is not entitled to reach a conclusion as to discrimination on a case that has not been made to it. In so far as its criticism of Ms Hemming reflected a view, it was not one that it had been invited by the parties at the outset of the hearing to make. It would be unfair, in particular to Ms Hemming, for her now as a consequence of this judgment to be criticised for any discriminatory act. It is a matter of some importance to a local authority officer, particularly one dealing in social services with a wide diversity of client, to be accused of discrimination and to some extent to have it suggested that they might have been a willing participant in it, though principally it was committed by others, and unfair that that should be so without them having a sensible and reasonable opportunity to meet it.

34. Mr Porter accepts that it is sufficient for me to say that this ground of appeal succeeds and to declare that the Tribunal did not reach any proper finding against Ms Hemming. I put it

that way because the narrative of the Tribunal should not be in general terms affected by this conclusion. Mr Porter accepts, in my view realistically, that it does not mean that, an error of law in this respect having been identified, the Tribunal's judgment in so far as it relates to Hillingdon on the basis of the discrimination by Brady can succeed.

35. I then turn to the second ground that Hillingdon advanced. It is said that the decision that the Tribunal made at paragraph 44, cited above, as to harassment of the Claimant by Ms Brady did not deal with every one of the aspects identified as necessary in **Richmond Pharmacological Ltd v Dhaliwal** [2009] IRLR 336. The law to which Mr Porter refers in his skeleton argument was cited in terms of section 26 of the **Equality Act 2010**, but given the finding as to time, to which I shall come, it is actually the **Sex Discrimination Act 1975** that fell for consideration (section 3A), though nothing, I think, materially turns upon the distinction. Section 3A, "Harassment", provides:

> **"(1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1B where on ground of race or ethnic or national origins he engages in unwanted conduct that has the purpose or effect of—**
>
> **(a) violating that other person's dignity, or**
>
> **(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.**
>
> **(2) Conduct should be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect."**

36. Underhill J outlined those provisions in **Dhaliwal** and identified the aspects that factually had to be proved. What Mr Porter submits is that in paragraph 44 there is no reference whatsoever to the ground upon which the behaviour of Ms Brady was accorded to the Claimant.

37. I do not accept this. I accept Mr Mitchell's argument that the ground is there even though it is not expressly and clearly set out. The section begins with the words:

> **"In relation to the harassment complaint related to the claimant's race, we have taken into account the findings in respect of Miss Brady's and Miss Hemming's treatment of the Claimant."**

38. Removing Ms Hemming, in line with the decision I have just indicated, the findings in respect of Ms Brady's treatment found that she had discriminated. The actions complained of that gave rise to harassment were in breach of those relied upon for the accusation of direct discrimination. The Tribunal had therefore clearly said that they were discriminatory. A Tribunal judgment must be read as a whole; taken as a whole, the Tribunal plainly said to the parties that this behaviour, which was discriminatory, had this effect. It could not be contended that the conduct was other than unwanted, and it was plain that the Tribunal examined the various aspects it was required to examine per **Dhaliwal** with care. Each box is ticked in paragraph 44; there is no error of law.

39. The second aspect of the appeal in respect of the findings in relation to Ms Brady asserts that the Tribunal did not sufficiently set out what precise acts Ms Brady had committed. It made no express finding sufficient to comply with the obligation of a Tribunal under rule 30(6) and as recognised by **Meek v City of Birmingham District Council** [1987] IRLR 250 to explain why it reached its conclusions. Here, the matter was of importance, because the time limit for putting in a claim began to run from the date of the last act by Ms Brady that could be identified prior to the bringing of the claim, thus in paragraphs 36 and 37 of his skeleton Mr Porter asserted this:

> **"36. There is a lack of necessary clarity as to which actions of Ms Brady were found by the ET to be direct discrimination and/or harassment on grounds of race and *when* such wrongs occurred. This is not *Meek* compliant, particularly in a case where issues of time limit and/or continuing act are in issue. […]**
>
> **37. There is […] no clear finding as to what *in fact* the last act of direct discrimination or harassment was, nor when it in fact occurred. Nor is this significant point clarified by a careful reading of paragraph 15.54 which makes no necessary findings in relation to conduct of Ms Brady. In all the circumstances this is not sufficient to be *Meek* compliant on such a significant issue."**

40. Paragraph 15.54 relates to the period of time that Ms Harris was on leave from 1 August, returning to work on 23 August, 2010. That date, 23 August, has a significance, as the next ground of appeal will describe. What the Tribunal went on to say was this:

> **"During that time the claimant was in charge of the team. There was a supervision meeting with Miss Hocking on 12 August 2010. […] The claimant said that she felt that the team was managing her rather than she being able to manage the team. She did not feel that she fitted in. She was looking for another job and would like to leave by November 2010."**

41. She then went on to discuss Ms Brady. It is absolutely right that that paragraph makes few findings, if any, about the behaviour of Ms Brady towards the Claimant during August. It describes it by implication rather than directly by describing the Claimant's reaction to the way that things were going during that period. The Tribunal were later to hold that 23 August was the last date from which date the time should be reckoned. Mr Porter in essence is submitting that the description here is so vague as to what Ms Brady did, if it is there at all, that the Tribunal could not properly have reached its conclusion as to that date.

42. I do not agree, for these reasons. First, the Tribunal itself reached that conclusion as a matter of fact. In doing so it was making a conclusion that synthesised all the evidence that had been put before it. Secondly, any finding must be read in context. The context here was that of a relationship between a manager and her subordinate in which throughout on the basis of the

Tribunal's findings the subordinate had not been prepared to accept the management of the Claimant because of the race of the Claimant. Where there is a relationship that is at the heart of a case, as opposed to distinct and discreet incidents, it is unrealistic to expect that the Claimant will be able to identify, separately, individual acts by date and by content. If I fall out with my neighbour and we are on bad terms, it may be very difficult indeed for me to specify when precisely the neighbour was manifesting their ill-feeling towards me. One incident of minor significance is inevitably likely to pale into another of minor significance but still form a significant composite whole. There will inevitably be particular incidents that are capable of persuading me that the relationship continues as before and has not been mended, but absent those the reasonable supposition is that it continues at least for a while as it has done before. Here, on the facts, the first time that the Claimant was left to manage on her own in the absence of Ms Harris she was given a particularly torrid time by Ms Brady. Her reaction to Ms Hocking in respect of the second period is part of the same piece. It is unrealistic to expect in the context of a fractured relationship causing distress to one at least of the parties that an incident can be recalled with accuracy as to date and precise content as being "the last incident" that occurred such that after that the matters were not to some extent continuing.

43. The assessment of such a situation is one entirely for the Employment Tribunal as a matter of fact. Here, there was some evidence before it; I cannot say that the Tribunal was not entitled to reach the conclusion it did as to date. It explained sufficiently why it reached the decision it did in respect of Ms Brady. The context it describes adequately gives the reasons for its conclusion, which is one of assessment, and there is a sensible reason why it should be 23 August, that being when Ms Harris returned and the Claimant was no longer being exposed as

she had been before to the team on her own. Accordingly, in my view, the Tribunal was entitled to reach the conclusion it did as to 23 August.

44. I now turn to perhaps the most difficult issue in the appeal. I have foreshadowed it by what I have said about time. At the start of the remedy hearing this case took a highly exceptional turn.

45. In its decision as to liability under the heading "Out of time" at paragraph 47 the Tribunal had said this:

> **"In relation to the assertion on the part of the respondent that the complaints prior to 19 October 2010 are out of time, we have come to the conclusion that events relied upon by the claimant preceding 19 October 2010 do form a continuing act. They involved, principally, Miss Harris' and Miss Brady's treatment of her. This covered the period from February to the decision not to extend the claimant's probationary period beyond nine months."**

46. That decision, having been promulgated on 26 November, was followed by the Claimant's counsel, it would seem, making a point about the fact that the Tribunal had involved Ms Harris in the acts of discrimination that had gone on. The Tribunal record that at the start of the remedy hearing he indicated he did not wish to disturb the findings of fact but he plainly wanted to argue about the conclusions that the Tribunal had drawn. When he referred to Ms Harris' and Ms Brady's treatment of the Claimant, the Tribunal immediately responded (paragraph 10 of the remedy hearing) that that statement was in error. The reference to Ms Harris' treatment needed to be deleted:

> **"The treatment we found that was racially discriminatory and harassment related to race, was meted out to the claimant only by Ms Brady."**

47. It then said expressly that that part of the judgment was reviewed under rule 36(2), having regard to rule 34(3)(e), of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** as amended, the then existing Rules of Procedure. It went on without identifying clearly what power it was exercising to alter the finding it appeared to have made at paragraph 47 but without in this respect making reference back to that paragraph, though it had mentioned it in paragraph 9. It said this (paragraph 11):

> **"In our findings of fact […] we made reference to that period when Miss Harris was on leave in August. She returned on 23 August 2010. We referred to the claimant's treatment during the time when she deputised for Ms Harris. From that paragraph, at the very latest, the last act would have been on 23 August 2010. We have, however, looked at the conclusion part of our judgment, paragraph 32, in which we stated that the claimant was racially discriminated against as those in the placement team believed that, as a black African, she was not up to the task of being a deputy manager. She was constantly complained about, intimidated and ridiculed. Reference to that would suggest that the claimant's treatment was continuous up until the time her employment was terminated but that was not in the tribunal's findings. Furthermore, in the claimant's witness statement she does make reference to two incidents in September 2010, but she had not given specific dates. In respect of those matters, the tribunal did not make any findings of fact. Even if we were to take those September matters into account, the complaint, in so far as it concerns Ms Brady's treatment of the claimant, is still out of time. For clarity, the last act was on 23 August 2010."**

48. I confess that I have so far never had to deal with an appeal in which a Tribunal has reached a conclusion in one paragraph of its liability hearing as to time, holding there to have been a continuing act, only in the remedy part of the same matter to have concluded that there was no continuing act and that the latest any act could have continued was to a time that was still out of time so far as the case was concerned. Whether the Tribunal indicated the view it expressed in the Reasons at the time or not, it dealt with what plainly consequentially occurred in the three following paragraphs, 12-14:

> **"12. Of concern to Mr Dhar is that he did not call the claimant during the liability hearing to give evidence relevant to the out of time issue and whether we should exercise our discretion and extend time on just and equitable grounds.**
>
> **13. Ms Banton objected to the time point being considered by the tribunal. She submitted that it was referred to in the list of issues to be considered as part of the liability hearing, paragraph 3.5, with reference being made to the exercise of the tribunal's discretion.**

> **14. Unfortunately, the claimant was not called during the liability hearing to give evidence in relation to extending the time limit. Having considered the submissions our ruling is that it is a matter the tribunal should hear and determine as it formed part of the issues at the liability hearing. From our decision, the last act was on or around 23 August 2010."**

49. The Tribunal went on then to consider evidence then called by the Claimant and having considered that evidence and submissions said at paragraph 19 as follows:

> **"The tribunal […] adopted, the submissions made by Mr Dhar and do find that the claimant was relying on the outcome of the appeal hearing in support of her case. At the time she was unrepresented. She thereafter sought legal advice and was represented on or around the first week in January 2011. Within a short time thereafter the claim form was presented to the tribunal. There was no prejudice suffered by the respondent as it was able to call Ms Brady and other witnesses to rebuff the claimant's contentions. As regards the merits, the claimant has a judgment in her favour. Equally, a majority of the complaints have been dismissed. The period of delay was short. On balance, the tribunal will exercise its discretion on just and equitable grounds and extend time in respect of the complaint against Ms Brady. We have taken into account the guidance given by the Court of Appeal in the case of *Robertson v Bexley Community Centre* [2003] IRLR 434. The factors the tribunal may consider in exercising its discretion are: the reason for and the extent of the delay; whether the claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim tom [sic] proceed; and the merits of the claim. There is no general rule and the matter remains one of fact."**

50. That turn of events gives rise to two grounds of appeal on behalf of Hillingdon. The first is a challenge of some technicality. Mr Porter's argument is that the Tribunal had no right to hear further evidence. It was not clear what power it was exercising, since its reference to exercising a review power might be limited simply to the matter it considered at paragraph 10 and its deletion of the reference to Ms Harris. However, if it were exercising review powers, then rule 34 of the Tribunal Rules of Procedure 2004 would apply. Rule 34(3) provides:

> **"Subject to paragraph (4), decisions may be reviewed on the following grounds *only* [my emphasis]—**
>
> **(a) the decision was wrongly made as a result of an administrative error;**
>
> **(b) a party did not receive notice of the proceedings leading to the decision;**
>
> **(c) the decision was made in the absence of a party;**

> **(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or**
>
> **(e) the interests of justice require such a review."**

51. The evidence, submitted Mr Porter, had closed. Submissions had been made at the liability hearing. Interestingly, those submissions on the material available to me show that Mr Dhar did raise the question of just and equitable extension though without any specificity whatsoever. He argues, therefore, that this hearing of the Claimant on the remedy hearing was treating her evidence as in effect being new evidence, but it was not, within the terms of rule 34(3)(d). She had always been available to say why it was she did not put the claim in to the Tribunal before she did.

52. As to the interests of justice, which could have been the only paragraph under which the Tribunal was operating, that route was not open to it, because it was well established that in this context the interests-of-justice provision was not as wide-ranging as it might be in others. The very fact of there being rule 34(3)(d) precluded the interests of justice allowing new evidence which did not comply with the specific requirements in 34(3)(d). The point was made in **Flint v Eastern Electricity Board** [1975] ICR 395 and **General Council of British Shipping v Deria** [1985] ICR 198, and at page 202 of the latter Bristow J for the EAT said:

> **"[…] the fact that a new evidence review was excluded by the terms of rule 10(1)(d) would not necessarily exclude it under rule 10(1)(e), but that such an application invoking rule 10(1)(e) must be considered keeping an eye on the terms of rule 10(1)(d)** [I interpose to say for '10' one might now read '34' and for '(1)' one might now read '(3)']**. After all, each of the provisions of rule 10(1), from paragraphs (a) to (e), is there in the interests of justice, and clearly if the interests of justice as embodied in the terms of rule […] (d) exclude a fresh evidence review it will require exceptional circumstances before it can be just to allow it under the 'sweeping up' or 'longstop' provision of rule […] (e). Phillips J said, at p. 404 [of *Flint*]:**
>
> > **'But I do think that it is necessary, in case which otherwise falls within paragraph (d) … to find some other circumstance, some mitigating factor, to make it such that the interests of justice require such a review.'**

> **In each of the cases on which Phillips J's decision is founded, the 'other circumstance' or 'mitigating factor' considered was a circumstance connected with the failure to produce the evidence at the first hearing. In no case was it any other circumstance, such as the unusual nature of public importance of the case as a whole. In our judgment, the 'other circumstance' or 'mitigating factor' must relate to the failure to bring the matter within rule 10(1)(d). There must be something which in the interests of justice must be available to temper in favour of the applicant the rigour of the terms of rule 10(1)(d), designed as they are to do justice to both sides and to the community."**

This approach was adopted by the Court of Appeal in **Stanley Cole (Wainfleet) v Sheridan** [2003] ICR 1449.

53. The evidence, therefore, submits Mr Porter, should not have been received. Since it is established (see **Robertson** at paragraph 25) that it is for the Claimant to satisfy a Tribunal that it is just and equitable to extend time, it is for the Claimant to provide the necessary material. Here, the Claimant should not have been allowed to do so at the remedy hearing and, it would follow, could not now be allowed to do so at any further hearing. Therefore, submits Mr Porter, this Appeal Tribunal should simply record that the appeal is allowed and the claim is dismissed on the grounds of time, since it has not been shown to the Tribunal that it is just and equitable to extend it.

54. An alternative to the Tribunal exercising a power of review, is that it might have been determining an issue it had not yet determined. On this basis, its hearing would not be one of review, but it would rather be the determination of an issue in proceedings that, though concentrating on different issues on different days, were in effect part and parcel of one and the same hearing – that is, the Employment Tribunal hearing as to the case between the Claimant and Hillingdon – and the Tribunal was therefore entitled to conclude what was unfinished business. Just as leave may be given for evidence to be received at any stage before final

judgment, no matter that evidence had previously been given, cross-examined to, closed and then only after that an application made to re-open it, so it was here. The Claimant was called at the request of counsel on an issue that had not finally been determined, was heard and a decision was reached.

55. This seems to me more likely to have been the power that the Tribunal was using, though I confess to some uncertainty about it, since the Tribunal itself said at paragraph 14 that the Tribunal should hear and determine the matter "as it formed part of the issues at the liability hearing". It obviously recognised that the issue that had been posed for its determination as to whether it would be just and equitable to extend time in the event that the claims were out of time, had not in fact been resolved by it at the liability hearing. If that is what it did, I would on the basis of that which I have just expressed consider it to be no error of law. It would be unusual, it should have been better expressed, but I could not say that the Tribunal was in error of law so as to permit an appeal against its conclusion. If alternatively, assuming my conclusion as to that to be wrong, then I would have to have regard to the alternative, that which Mr Porter submits is probable, that here the Tribunal was implicitly exercising its power of review under 34(3)(e).

56. Here, if necessary to do so, the Tribunal could have found – and, if their approach is to be regarded as implicit, did so – that there were remarkable circumstances. They could hardly have thought otherwise. I do not suppose that any Employment Tribunal is familiar with the sort of change of mind that occurred between the liability hearing and the remedy hearing in this current case. The remarkable circumstances were: first, the change of tack by the Tribunal;

secondly, the change of focus suddenly apparent for the parties, from whether the action had been brought within time as a continuing act to whether, being brought out of time, an extension was just and equitable; and, thirdly, counsel for one party saying that it was his own fault, in effect, that evidence had not been called earlier than it was. I emphasise that nothing is known as to the precise circumstances why the evidence was not called. They may have been many and various, as Mr Mitchell points out. Neither Mr Mitchell nor Mr Porter had the advantage of being present below. The Employment Tribunal was in the best place to determine what the interests of justice required, and whether they were reminded of the rule in **Deria** or not and the limitations on the power of review or not and whether they were addressed by counsel as to the vires that they had to re-open this particular part or not is unknown.

57. If necessary to do so, I would hold that the Tribunal here were in exceptional circumstances and could therefore legitimately exercise the power under rule 34(3)(e). Plainly, the Tribunal thought it was in the interests of justice to review the matter as it did; it would not otherwise have reached the conclusion it did. As to its power to do so, the power being implicit, even on Mr Porter's submission, I conclude that there were extraordinary circumstances here that would permit it.

58. But I would finally observe this. In the course of his submissions Mr Porter made reference to the principle embraced by the rule as to finality of decision. This rule is intended as an aid to justice. It must not be applied so mechanically as to create injustice. Here, there would be a very real sense of injustice for the Claimant, having the cup of victory taken from her lips, and then denied the opportunity of replacing it there before it was smashed before her,

because of a change in the view that the Tribunal expressed as to time. Whether she had a sense of injustice or not does not objectively establish that there was injustice. What is just is for the Employment Tribunal best to decide, and it does so not by reference to the subjective feelings of a party. But the circumstances here of the change, the recognition it had that it, the Tribunal, had not dealt with the issue, the sudden importance of the point to the hearing are all capable of being extraordinary and unusual circumstances. None of this, when recognising the general principle of the finality of litigation, does injustice to the rule itself or to the exception and the extent of an application of the extension in **Deria**; in my view, it would be permissible.

59. This does not dispose of the grounds of appeal in respect of time. Mr Porter argues that the Tribunal here, when it did come to exercise its discretion, did so on a basis that was wrong in law. He accepts that whether to extend time or not is a broad discretion. As with any discretion given to a Tribunal, there is a wide range within which a permissible conclusion may fall. It will only be an error of law if the Tribunal takes into account a matter it should not, leaves out of account a matter it should take into account, or reaches a decision that is wholly impermissible. On the basis of the evidence here, the latter can be ruled out. Hillingdon's case is that the Tribunal in paragraph 19, cited above, made an impermissible reference to the merits. The merits of the claim are really, submits Mr Porter, of unimportance. It cannot be significant that the Claimant had a judgment in her favour in part. It is always to be anticipated before any claim is considered on its facts that the Claimant might after all succeed. The fact that she might does not mean to say that she must be permitted the chance to do so. It can be no different if she has litigated and in part won. Moreover, here in his submissions he read the decision as looking at one side of the coin only; that is, the Claimant's position.

60. I do not regard it that way; I accept Mr Mitchell's response, which is that the two sentences, the one beginning, "As regards to the merits […]" and the following one, must be read together. The following one begins with the word "equally". There is a balance here struck by the Tribunal, noting that the Claimant's success on one approach is balanced, in effect, by the Claimant's lack of success – or Hillingdon's success, if one likes – on the other side. I have looked at paragraph 19. The factors that the Tribunal took into account are not limited simply to merits; they deal centrally with prejudice, they take into account time and the extent of time, and they look at the reasons for the delay. This is not just a case in which the only reason to extend time is that the Claimant made a wrong assumption about the effect of an appeal decision on the running of time. The Tribunal took the right approach in law. I reject the argument that it wrongly took into account a circumstance that it should not have done. Its conclusion was within its entitlement. Accordingly, I dismiss the appeal both in its more technical aspects and in relation to the exercise of discretion by Hillingdon on this basis.

Conclusions

61. For the reasons I have given, the appeals and cross-appeal fail, save only that Hillingdon's appeal in respect of the Tribunal's approach to Ms Hemming is upheld. It is sufficient that I replace the Tribunal's decision in so far as it relates to her with the conclusion that it did not properly reach any finding against Ms Hemming.