Appeal No. UKEAT/0198/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 November 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MR L MIREK — APPELLANT

GRAYSONS AUTOMOTIVE SERVICES — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR MARCIN KOZIK (Representative) KL Law Ltd 3A Canberra House London Road St Albans AL1 1LE
For the Respondent	MR JACK FEENY (of Counsel) Instructed by: Cox Cooper Ltd Solicitors Cambrai Court 1235 Stratford Road Hall Green Birmingham B28 9AA

SUMMARY

RACE DISCRIMINATION - Continuing Act

The Employment Tribunal erred in law in striking out, at a Preliminary Hearing where no evidence was adduced, four of the six allegations of unlawful race discrimination made by the Claimant in circumstances where he contended that they all formed part of a continuing act.

First, while it is not necessary for an Employment Tribunal to set out precisely the approach it proposes to adopt, it is important that the correct approach is adopted. If that is apparent from the language used by an Employment Tribunal then no complaint can be justifiably be made. Here, however, on each occasion on which the Employment Judge dealt with whether a continuing act or a one-off act was involved in this case, the language used was the language of making primary findings of fact. That was an error. The Claimant's case should have been taken at its highest unless directly contradicted by undisputed contemporaneous or other material.

Secondly the reasons given did not meet the **Meek** test. None of the points made on appeal by the Respondent appear as part of the Employment Tribunal's Reasons. Furthermore, the finding that the conduct of Ian Hateley came to an end on 3 June 2015 did not answer the question whether there was any arguable link between the matters ending on 3 June 2015, and the grievance raised on 30 November 2015, followed by the meeting on 11 March 2016. The Claimant's case depends on there being a continuing discriminatory state of affairs involving conduct on the shop floor followed by a total failure to recognise or address that conduct. The Employment Tribunal failed to consider or address this point altogether. The Reasons do not provide any explanation for why the Claimant's case on this point failed.

Thirdly, to the extent that the Employment Judge can be said to have addressed this issue, the conclusion that there was no possible link between the shop floor conduct ending on 3 June 2015,

and the grievance complaint about those matters in November and the March 2016 meeting, is perverse because it is unsupported by any evidence. It is true that the Claimant did not expressly assert ongoing conduct by Mr Hateley after 3 June 2015. His claim however was against the Respondent as a whole. Given the involvement of Ms Morris at the meeting on 3 June 2015, and again on 11 March 2016, and given that the grievance of 13 November 2015 raised complaints about alleged abuse on racial grounds in the meeting on 3 June 2015, albeit directed at Mr Hateley, it is difficult to see what evidential basis there was for reaching that conclusion in circumstances where factual disputes could not be and were not to be resolved by the Employment Tribunal at the Preliminary Hearing.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is an appeal from the judgment of Employment Judge Dean sitting in Birmingham following a Preliminary Hearing on 19 April 2017. There was a significant delay between the date of the hearing and the judgment, which was not promulgated until 13 March 2018. The Employment Judge gave no explanation for that delay of almost one year. Although it formed part of the grounds of appeal, I do not read the decision of Mrs Justice Elisabeth Laing allowing the appeal to proceed to a Full Hearing as permitting the appeal to proceed on the basis of delay. In any event, Mr Kozik, who appears on behalf of the Appellant does not pursue delay as a freestanding ground of appeal.

2. By her judgment, Employment Judge Dean held, among other conclusions, that the Employment Tribunal did not have jurisdiction to entertain complaints of unlawful race discrimination in respect of acts or events arising on or before 20 May 2016, and that Mr Mirek can only have his unlawful race discrimination complaints heard at a Full Hearing to the extent that they relate to acts or omissions occurring on or after 21 May 2016. That conclusion is challenged on this appeal as perverse, based on a misdirection by the Employment Tribunal and/or not adequately explained to the extent that it depended on the question whether there was a continuing course of conduct in this case.

3. The Respondent, who appears by Mr Jack Feeny of counsel (who also appeared below) resists the appeal. He contends that the Employment Judge's conclusion is sustainable save in one limited respect. He concedes before me as he did below, albeit the Employment Judge did not appear to appreciate this, that the allegations of unlawful race discrimination relating to the meeting on 11 March 2016, are at least arguably part of a continuing act or state of affairs linked

to the grievance outcome on 23 May 2016. Accordingly, to the extent that the judgment rules out the allegations concerning 11March 2016, it cannot stand.

4. I refer to the parties as the Claimant and the Respondent as they were below for ease of reference and I am grateful to both Mr Kozik and Mr Feeny for their helpful submissions.

The Factual Background

5. Two important preliminary points should be made before coming to a summary of the factual background. First, the facts of this case have yet to be determined and are substantially in dispute. The Respondent denies the allegations of unlawful race discrimination and have given a starkly different account of events of what was said and done. The summary I am about to provide is based to a large extent on the Claimant's ET1 and must be read and understood as simply a summary and as not by any means representing findings of fact in this case. As I have said, factual disputes have yet to be resolved and will in due course be resolved at a Full Hearing with evidence tested on cross-examination.

6. Secondly, an odd feature of this case and one that will have to be resolved ultimately by the Employment Tribunal at a hearing rather than by me, is that the Claimant is a Polish national but appears to be complaining about racial slurs and other treatment directed at him on the basis of being perceived to be a "lazy Romanian" or a Romanian rather than a person of Polish nationality. The issues as currently drafted may need to be considered on his part in order to determine whether they do in fact accurately reflect the case he has advanced in his ET1.

7. The Claimant was employed by the Respondent in about December 2007. He says in his ET1 that problems started in May 2015, when he was having difficulty performing certain tasks

such as lifting, on his own. He was told that he would be "workshop based from now on" and regarded that as a demotion and felt that he was about to be disciplined.

8. A meeting was arranged to discuss the issues he had concerning this and took place on 3 June 2015. The Claimant describes that meeting in his ET1 in the following terms:

> **"On 3 June 2015, 1 attended the meeting that Ms Shenton-Smith had scheduled with Mr lan Hateley and Ms Morris. At the meeting Mr. Shaun Hill (Service Manager) was also present. 1 was not permitted to be accompanied to the meeting. At one point during the meeting, Ms Morris told me to 'shut up and listen" and she also said that many people in the room would like to slap me in the face. Mr Hateley continued in the same vein, accusing me of being 'Romanian", "lazy", "negative", "having a crap attitude", and having "a chip" on my shoulder. In Mr Hateley's view "Romanian are lazy and Polish are hardworking". Mr Hateley went on to tell me that, 'I've got London's engineer with lowest opinion of you as a person you could ever wish to want. They don't believe you are technically good enough. I've got one engineer in London that does not want to work with you again". I replied: "But 1 was working alone in London". Mr Hateley continued: "You are Romanian not Polish. You are lazy and needs pushing, difficult and have a chip on shoulder. Everybody in the office believes you are a difficult person to work with. Shaun feels you are one of the most difficult engineers we have got to work with. I think you need to take that big chip of your shoulder. Next four weeks you gonna spend workshop based and be supervised. You are going to be micromanaged. You will be workshop based. I don't really care what your issues are. I am not wasting any more time this morning hearing you trying to justify every single point. You don't even accept there is a problem and that's what worries me the most. You feel you are perfectly in the right and there is nothing wrong". Ms Morris continued: "You have wrong type of personality to be a field service engineer. You are a negative person Lukasz, that's what you are. You are lucky you still have got the job". At the conclusion of the meeting Ms Morris said to me that, "You look very depressed". It is not clear how Ms Morris expected me to look after the appalling manner in which 1 had been treated. The company did not inform me about my right to appeal from the decision. 1 have never received an outcome letter neither minutes from this meeting. I have subsequently raised a grievance in relation to this incident."**

9. The Claimant states, again in his ET1, that his confidence was seriously eroded because of the manner in which he was treated by the company and that he became anxious and unwell, fearing that he would be disciplined or dismissed. He visited his GP and was prescribed with antidepressants. On 30 June 2015, he was signed off work by his GP with anxiety and stress. The Tribunal found that his last day at work was 26 June 2015.

10. The ET1 states that in November 2015, after five months on antidepressants the Claimant's health had slightly improved and he was able to start working on his grievance against his employer. He submitted a formal grievance on 13 November 2015. A grievance meeting eventually took place on 11 March 2016. The Claimant states that Ms Oonagh Morris who had

A been present at the 3 June 2015 meeting was present together with Ms Kosmane, an HR staff member and Mr Pawel Cierniak, the Business Development Manager.

B 11. The ET1 continues that during the meeting the Claimant tried to discuss details of his grievance and to provide evidence to support his complaints but Ms Morris ignored his request to do so and kept saying words to the effect, "personality is not suitable to go out and be a service engineer." The Claimant complaints that at the end of the meeting he was told by Ms Morris, C "You can stay off with anxiety for another year or you can resign," and that she belittled his claim. He said that the minutes of the grievance meeting subsequently provided were inaccurate and contained a record of things that had not been said during the meeting and other relevant D statements made were not recorded as having been said.

12. By a letter dated 23 May 2016, the Claimant's grievance was not upheld. He complains E that the grievance outcome letter failed to address his complaints and says that it was apparent to him that the Respondent was "trying to cover up the fact that the racist and abusive words were said to me by Ian Hateley. My employer did not inform me that I had a right of appeal nor state how much time for the appeal I have got."

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13. The grievance outcome letter was available to Employment Judge Dean and is available to me. To my mind it is significant that under the heading, "Relating to the meeting on 3 June G 2015" the following paragraphs appear:

> **"We are sorry you were absent for such a long time due to anxiety and depression, and hope you feel much better now.**
>
> **Please accept our apologies for the delay. However the grievance was extremely long and we wanted to consider the detail carefully.**
>
> H **This is our written response to the grievance we received on the 1st December 2015. The HR team have had several involvements in Lukasz Mirek's performance/attendance review meetings. It is important to state that, at no point was Lukasz' pay or status diminished.**
>
> **The most recent performance review meeting is briefly described below.**

Performance Review Meeting on 03/06/2015

The meeting was prompted by Leanne Shenton, Internal Sales Manager, and Ian Hateley, Technical Director.

The meeting convened to discuss to Lukasz' performance issues. It was not a disciplinary hearing. Nevertheless, it is important to state that all present recalled that Lukasz was given the option to have someone sit in on the meeting on his behalf.

Leanne explained that she felt it was hard to plan Lukasz' jobs as he did not co-operate. Leanne also raised a concern that to every job that was allocated to Lukasz, he replied with a negative comment or it had to be re-attended afterwards.

The situation in Elmdon Service Centre was that engineers and administrators believed Lukasz was very inflexible and could choose the jobs he wished to do.

Waldek, Walkowiak, Service Engineer, who was recently promoted to Installations Engineer's position, also later admitted that he has once teased Lukasz as a "lazy Romanian".

We found this puzzling but on further investigation established some Polish people feel Romanians are lazy. Waldek said it was meant as a joke.

Lukasz was offered four options:

1. **Resign**
2. **Retrain**
3. **To be permanently workshop based**
4. **To opt for Voluntary redundancy, although this must be pointed out there was no actual redundancy. It was offered as a descent exit from the business for Lukasz."**

Under the heading "Grievance meeting" the letter identifies who was present at the meeting on 11 March 2016, and records an exploration of the Claimant's intentions as to what he hoped to achieve from the grievance. The letter states that the Respondent could not accommodate his request for a settlement but could accept his resignation, retraining, offering him a different job or redundancy. Although the letter does not appear, at least expressly, to address or resolve the formal grievance he raised about Mr Hateley's conduct, it does state in terms that it is "our formal response to your grievance."

14. The Claimant lodged his ET1 on 17 October 2016. Having regard to the early conciliation provisions, the complaint was in time in respect of all acts or omissions done on or after 21 May 2016, but was *prima facie* out of time for acts or omissions occurring on or before 20 May 2016 unless they were continuing acts or unless time could be extended.

15. As far as the complaints of unlawful race discrimination are concerned, complaints 1, 2 and 3 concerned conduct on the shop floor as follows: (i) Mr Hateley's response to a complaint in about May 2014; (ii) remarks made at a meeting on 3 June 2015; (iii) the decision to make the Claimant workshop-based rather than being a service engineer in the field in June 2015. Of the remaining three complaints, complaint 4 asserted a failure or refusal properly to discuss and deal with the Claimant's grievance at a meeting on 11 March 2016, and the downplaying or belittling that grievance. Complaint 5 concerned dealing with the Claimant's grievance so as to cover up racist and abusive language at the meeting 3 June 2015, and makes reference by way of example to the grievance outcome letter dated 23 May 2016. Complaint 6 concerns a failure adequately or at all to deal with the Claimant's grievance appeal thereafter.

16. In relation to those six complaints, Employment Judge Dean held that the complaints about conduct in relation to the shop floor (in other words complaints 1, 2 and 3) ended at the final meeting on 3 June 2015, and the Tribunal did not have jurisdiction to entertain them unless time could be extended. The Tribunal dealt with the question of an extension of time about which it heard evidence from the Claimant and he was cross-examined. The Tribunal did not find the Claimant credible in relation to the effect that stress and anxiety was having on his ability to leave home and to take life decisions.

17. The Tribunal found that while his mental health may have been fragile in June 2015, his GP's report dated 19 October 2015, referred to his anxiety as being greatly reduced and his mood improving. The Tribunal found that the Claimant had access to material that would have enabled him to know well enough about the time limits and ultimately concluded that there were no grounds upon which it could be said to be just and equitable to extend time to permit the three shop floor complaints to be presented.

18. As far as complaint 4 is concerned, that is to say the failure to address the grievance of the meeting on 11 March 2016, Employment Judge Dean held this was a one-off act or omission on the part of the Respondent and equally, as with the earlier complaints, refused to extend time. Complaints 5 and 6 were in time and were directed to proceed to a Full Hearing.

The appeal

19. The Claimant challenges the finding that the shop floor conduct ended at the final meeting on 3 June 2015, and more importantly perhaps, challenges the Employment Tribunal's whole approach to the question whether there was a link between that conduct even if it did come to an end on 3 June 2015, and the grievance meeting and investigation that started with the formal grievance in November 2015 and was followed by the 11 March 2016 meeting as reflected at paragraph 40 and 41 of the Judgment:

> **"40. The allegations relate to conduct perpetrated, amongst others, by Mr Ian Hateley to the Claimant and may amount to part of a course of conduct by Mr Hateley in his treatment of the Claimant. Were that treatment by Mr Hateley continuous, I find it ended at the final meeting on the 3 June 2015 not long before the Claimant began a period of continuous sickness on the 26 June 2015. Complaints in relation to any such continuing course of conduct ought to have been presented within time by reference to ACAS on or before the 2 September 2015. They were not and the Tribunal does not have jurisdiction to entertain those complaints unless I consider circumstances were such that is just and equitable to extend time to allow the complaints to be presented out of time.**
>
> **41. The fourth complaint in relation to race discrimination is that set out at (1A)(iv) in response to the Respondents discriminatory manner of dealing with the Claimant's grievance raised on the 30 November 2015 and in particular the meeting held on the 11 March 2016 [page 26]. In particular the Claimant alleges that at that meeting, the Respondents failed and refused to discuss and deal with the Claimant's grievance. I find that the allegation is in respect of a one-off act or omission on part of the Respondents and to the extent that the allegation is one of direct discrimination because of race, a complaint ought to have properly been raised through early conciliation with ACAS on or before the 10 June 2016 and that the Claimant's complaint is prima facie out of time unless I consider that the circumstances are as such that it is just and equitable to extend time to allow the claim to be accepted."**

20. Section 123 of the **Equality Act 2010** sets out the primary limitation period of three months for bringing complaints of unlawful discrimination starting with the date of the act to which the complaint relates. Section 123(3) provides relevantly for the purposes of this appeal that for these purposes, "(a) conduct extending over a period is to be treated as done at the end of

the period; (b) failure to do something is to be treated as occurring when the person in question decided on it."

21. From the guidance given in the authorities and in particular **Hendricks v Commissioner of the Police of the Metropolis** [2002] EWCA Civ 1686 and **Lyfar v Brighton and Sussex University Hospital's Trust** [2006] EWCA Civ 1548, the following principles emerge and were in the event common ground. First, the focus when determining whether a complaint of discrimination involves separate incidents or a continuing act, should be on the substance of the complaints made, in order to determine whether a number of alleged incidents are linked to one another, and provide evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period; or whether alternatively, they are simply a succession of unconnected or isolated specific acts. In considering whether separate incidents form part of an act extending over a period, a relevant but not conclusive factor is whether the same individuals or different individuals were involved.

22. Secondly and importantly as a matter of practice, particular thought should be given about the extent to which it is appropriate to resolve such questions at a Preliminary Hearing and if so, how that should be done? While there may be cost savings if this is done at an early stage, Claimants ought not to be barred from presenting their claims on any issue where they have an arguable case. For that reason, the test to be applied where the exercise is conducted at a preliminary stage before evidence is heard, is to consider whether the complaints made by a Claimant are capable of being part of an act extending over a period. There must be a reasonably arguable basis for the contention that they are so linked as to be continuing acts or to constitute an ongoing state of affairs.

23. In this case, because this issue was dealt with at a Preliminary Hearing, Mr Feeny explained that although there had been some disclosure by the Respondent that was available to the Employment Tribunal, and a witness statement from Ms Morris, it was agreed by all including the Employment Tribunal that Ms Morris should not be called and there should not be evidence on the issue of continuing conduct because the Employment Tribunal was not there to make findings of primary fact. Accordingly, although the Claimant gave evidence about his disability and in relation to whether time should be extended, as I understand it, he did not give evidence about the question of a continuing act.

24. In those circumstances, it is again common ground that the proper approach for the Employment Tribunal was to take the Claimant's case in his ET1 at its highest, subject only to direct contradiction of it by contemporaneous documents or uncontradicted evidence. Moreover, if there was any direct contradiction or undisputed factual material that contradicted his ET1 and was relied on by the Employment Tribunal, it goes without saying that the Employment Tribunal could reasonably have been expected to spell that out.

25. It also goes without saying that unlawful race discrimination claims when properly made should be adjudicated on at a substantive hearing for all the reasons so clearly explained in cases such as **Anyanwu and another v South Bank Student's Union and South Bank University** [2001] UKHL 14.

26. Against that background, I turn to address the appeal.

27. Mr Kozik contends that the Claimant's case in broad summary was that there was a continuing state of affairs throughout the whole period in which members of the Respondent,

both staff and at management level, had the view that Romanians are lazy, while Polish people are hard working. Their perception was that the Claimant was or behaved like a "lazy Romanian". When he complained that view was supported by management rather than challenged and there was a failure to investigate or address his concerns. Instead, those concerns were covered up and not dealt with, as exemplified by the conduct at the meeting on 11 March 2016, the outcome letter of 23 May 2016, the failure to advise him of appeal rights and the statement that he should either resign or leave his existing role to retrain.

28. Furthermore, Mr Kozik relies on the link between the conduct itself on the shop floor that gave rise to the initial allegations and that was in effect revived by the subsequent November 2015 grievance and then pursued at the meeting on 11 March 2016. He relies on the fact that Ms Morris was present at both meetings on 3 June 2015, and again on 11 March 2016, and was involved in the grievance outcome. There was accordingly, he submits, a continuity of personnel and no basis whatever for the Employment Tribunal's conclusion that Mr Hateley's conduct came to an end at the final meeting on 3 June 2015, in the absence of any investigation of the evidence or questioning of either Mr Hateley or other members of staff. Furthermore, he submits that there is nothing in the judgment to indicate that the Employment Tribunal was searching for a *prima facie* case of a continuing state of affairs. Instead, findings of fact appear to have been made that the incidents were not linked to each other in error of law or perversely. He also submits, that the Employment Tribunal failed altogether to address the question whether there was any link between the conduct up to 3 June 2015 and the 11 March grievance meeting, which was, as the Respondent now concedes, in time. If he is wrong and the Employment Tribunal did address these matters, no reasons were given.

29. Against those submissions in a careful and focused submission, Mr Feeny contends that subject to his concession, this decision is sustainable. There is no doubt, as he points out, that the Employment Tribunal was referred to **Aziz v First Division Association** [2010] EWCA Civ 304 and **Hendricks**: see paragraph 9 of the judgment. Employment Judge Dean can be taken to have read those authorities and understood them. Moreover, she referred to them in the context of a recognition that she was concerned with discrimination occurring over a period of time. Also, the reference to **British Medical Association v Chaudhary** [2003] EWCA Civ 645, the third authority she lists at paragraph 9, indicates that she understood that the continuity of personnel or otherwise was a relevant but not determinative matter since that is authority for that proposition.

30. Accepting those points as I do, it is noteworthy, however, that Employment Judge Dean said (see paragraph 65) that she had not had the benefit of any direction on the law from the parties and that she relied upon her own self-direction. It is also significant, in my judgment, in light of the way in which she expressed herself that Employment Judge Dean did not at any point in the judgment state that she was considering the Claimant's case at its highest, given that she had not heard evidence or had evidence tested on these issues. Nor did she state that she was asking herself whether the complaints were capable of being part of an act extending over a period rather than making findings of fact about that issue.

31. Mr Feeny submits that the following matters appear from the judgment and are eminently relevant to Employment Judge Dean's conclusions. First, the Claimant's last day at work was 26 June 2015. That meant he was not present at work from then on and there was a long gap between the next possible event, namely his grievance in November, followed by the grievance meeting in March 2016, in all a nine-month gap. Secondly, Mr Hateley's conduct was found to have

ended on 3 June 2015. Thirdly, even taking the Claimant's case at its highest there was, he submits, a qualitative difference between the two sets of allegations. The shop floor conduct complaints are directed at Mr Hateley and involved allegations that express racial language was used. That is not so in relation to the complaints concerning the grievance and outcome. Furthermore, there were different agents in this case because although Ms Morris was present at most meetings and involved in the ultimate decision about the grievance, and although negative comments are attributed to her by the Claimant, they are not expressly alleged to have been racial. Mr Feeny also submits that the Employment Judge was entitled to use her assessment of the Claimant as a witness in relation to evidence he gave on other matters in order to determine whether his assertion of a link was reasonably arguable. Standing back, he submits that Employment Judge Dean was entitled to find that there was nothing beyond the Claimant's assertion of an arguable link and that it was not reasonably arguable that Ms Morris and Ms Kosmane were guilty of the same or similar unlawful discrimination as the shop floor type conduct complained of as racially discriminatory.

32. As far as the reasons challenge is concerned, Mr Feeny submits that there is enough reading the judgment as a whole for the Claimant to know why he lost on this issue. Finally, so far as the asserted misdirection of law is concerned, he relies, as I have already indicated, on paragraph 9 as demonstrating that the Employment Tribunal was well aware of the correct approach from **Aziz** and **Hendricks**. In addition, although the language she used at paragraphs 40 and 41 was the language of making findings, it is quite clear that Employment Judge Dean had in mind the correct approach and these paragraphs reflect a mere infelicity of expression and not any error of law.

33. Clearly as those submissions were made, I reject them for the reasons that follow. First, while it is not necessary for an Employment Tribunal to set out precisely the approach it proposes to adopt, it is important that the correct approach is adopted. If that is apparent from the language used by an Employment Tribunal then no complaint can justifiably be made. Here, however, on each occasion on which Employment Judge Dean dealt with whether a continuing act or a one-off act was involved in this case, the language used was the language of making primary findings of fact. For example, at paragraph 40, in relation to "allegations related to conduct perpetrated amongst others by Ian Hateley to the Claimant" Employment Judge Dean said, "Were that treatment by Mr Hateley continuous, I find it ended at the final meeting on 3 June 2015, not long before the Claimant began a period of continuing sickness...". At paragraph 41, she said in relation to the meeting on 11 March, "I find that the allegation is in respect of a one-off act or omission on the part of the Respondents…."

34. It seems to me that if Employment Judge Dean was looking to see whether the complaints were capable of being part of an act extending over a period or there was a reasonably arguable basis for that contention taking the Claimant's case at its highest that would have been reflected in the language she used. I would have expected some language at least to support that conclusion. However, reading the judgment as a whole and recognising that a pernickety approach is to be avoided, I cannot find any language to support that approach. In these circumstances, I cannot be confident that she did apply the proper approach here and this conclusion is sufficient to vitiate her decision at paragraphs 40 and 41.

35. Secondly and in any event, I do not consider that the reasons given are adequate to meet the **Meek** test. None of the points made so clearly by Mr Feeny appear as part of the Employment Tribunal's reasons. Furthermore, the finding that the conduct of Ian Hateley came to an end on

3 June 2015, does not answer the question whether there was any arguable link between the matters ending on 3 June 2015, and the grievance raised on 30 November 2015, followed by the meeting on 11 March 2016. The Claimant's case depends on there being a continuing discriminatory state of affairs involving conduct on the shop floor followed by a total failure to recognise or address that conduct. It seems to me that the Employment Tribunal failed to consider or address this point altogether. The reasons do not provide any explanation for why the Claimant's case on this point failed.

36. The ET1 includes allegations that the Respondent (and not just Mr Hateley) unlawfully discriminated against him on the grounds of his race. He raised complaints about that specific conduct in his November 2015 grievance and alleged that the outcome of the grievance, both by reference to the 11 March 2016 meeting and the May 2016 outcome letter, simply covered up that racist behaviour. To my mind, that is capable of constituting a continuing state of affairs in which unlawful discrimination occurs. The Claimant may not be successful in establishing this ultimately, but that is nothing to the point. At the stage at which the Employment Tribunal was considering his case, he had to show that there was a reasonably arguable case and no more. In my judgment, he did so and the Employment Tribunal failed to address it.

37. Mr Feeny did not identify any document that undermined or contradicted that case, save for the Respondent's answer, which takes issue with the Claimant's factual account and gives the Respondent's own account of what occurred. That, however, raises a dispute of fact that can and should ultimately be explored and resolved. It does not provide an uncontradicted account that directly undermines the Claimant's case. In any event, the Employment Tribunal made no reference to having found that there were documents or material that fatally undermined his case. Further, it seems to me that the 23 May 2016 outcome letter is in fact capable of providing support

for the Claimant's contention rather than undermining it. Moreover, I do not accept Mr Feeny's contention that the Employment Tribunal was entitled to rely on its credibility assessment of the Claimant as a witness in relation to other aspects of the case on which he gave evidence and was cross-examined on, when determining whether his assertion of a continuing link was reasonably arguable. If that was to be the Employment Tribunal's approach, it should have been stated so that the Claimant would have had an opportunity to give evidence on these issues. It was not stated. Indeed, Employment Judge Dean said in terms that was not her approach. Her approach ought to have been to take the Claimant's case on this issue at its highest. She did not do so.

38. Thirdly, to the extent that the Employment Judge can be said to have addressed this issue, to my mind the conclusion that there was no possible link between the shop floor conduct ending on 3 June 2015, and the grievance complaint about those matters in November and the March 2016 meeting, is perverse because it is unsupported by any evidence. It is true that the Claimant did not expressly assert ongoing conduct by Mr Hateley after 3 June 2015. His claim however was against the Respondent as a whole. Given the involvement of Ms Morris at the meeting on 3 June 2015, and again on 11 March 2016, and given that the grievance of 13 November 2015 raised complaints about alleged abuse on racial grounds in the meeting on 3 June 2015, albeit directed at Mr Hateley, I find it difficult to see what evidential basis there was for reaching that conclusion in circumstances where factual disputes could not be and were not resolved by the Employment Tribunal.

39. For all those reasons, particularly the first and second but the third reason as well, this appeal must be allowed.

40. Mr Feeny realistically accepts that if the appeal is allowed, the appropriate course is for this case to proceed to a Full Hearing on the basis that the three shop floor complaints 1, 2 and 3 are capable of being linked to the three grievance allegations 4, 5 and 6. He is right to do so.

41. That, of course, does not entail that the Claimant has made out his case on continuing act and does not involve any substitution by the Employment Appeal Tribunal in relation to that issue. All it means is that this judgment recognises that the Claimant has established that his ET1, taken at its highest, is capable of substantiating a continuing state of affairs that gives jurisdiction to the Employment Tribunal to consider his claims as a whole. Whether he is ultimately able by evidence, whether oral or documentary, to establish a case of continuing act, will be determined at a Full Hearing along with the merits of the unlawful race discrimination complaints themselves.

42. If practicable I consider that this case ought to be heard by a different Employment Judge than Employment Judge Dean.