Appeal No. UKEAT/0066/20/LA (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 21 July 2020

Before

THE HONOURABLE MR JUSTICE CAVANAGH

(SITTING ALONE)

MR P SRIDHAR — APPELLANT

KINGSTON HOSPITAL NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PARAMESWARAN SRIDHAR (The Appellant in Person)
For the Respondent	MR ROBERT MORETTO (of Counsel) Instructed by Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE

RACE DISCRIMINATION

The Appellant appealed against the ruling of the Employment Tribunal at a Preliminary Hearing that certain of his race discrimination and racial harassment claims should be struck out because they were out of time. The appeal was allowed, on the basis that the Tribunal had not addressed the Appellant's contention that apparently disparate acts and omissions were linked as being part of a continuing discriminatory state of affairs so as to amount to an act extending over a period for the purposes of **Equality Act 2010**, section 123(3)(a), following **Hendricks v the Commissioner of Police for the Metropolis** [2003] ICR 530 (CA). The EAT substituted a finding that it was premature to strike out the relevant parts of the Appellant's claim, as the **Hendricks** issue should be determined by the Tribunal at the Full Merits Hearing, after hearing all the evidence.

The Appellant also appealed against the decision of the Employment Tribunal at the Preliminary Hearing that the Appellant would not be able to advance a victimisation claim at the Full Merits Hearing. This ground of appeal was dismissed, on the basis that the Tribunal had been right to refuse the victimisation claim to be advanced, as it was not pleaded in the ET1 and had not been included in the list of issues that had been agreed by counsel for both parties and approved by the Tribunal at a previous Preliminary Hearing, and because the Appellant had not applied to amend to add the victimisation claim.

The third ground of appeal, which was that the Tribunal had been wrong to dismiss the Appellant's reconsideration application because it was out of time was dismissed. The Appellant was right that the Tribunal had erred in finding that the reconsideration application was out of

time, but the subject-matter of the reconsideration application consisted of grounds of appeal, rather than a valid reconsideration application, and the subject-matter had been dealt with in this appeal. Accordingly, no purpose would be served by allowing the appeal on this ground and remitting the reconsideration application to the Employment Tribunal.

THE HONOURABLE MR JUSTICE CAVANAGH

1. This appeal is brought by Mr Parameswaran Sridhar an associate special surgeon at Kingston Hospital NHS Foundation Trust. Mr Sridhar is a British citizen of Indian origin and obtained his medical qualifications in India. The claim is for direct and indirect race discrimination and harassment in relation to a number of alleged discriminatory acts and types of treatment that Mr Sridhar claims that he has suffered since October 2007, about two years after he started working for the Trust. Mr Sridhar also contends that he has made a victimisation claim.

2. Mr Sridhar remains in the employment of the Trust. Mr Sridhar issued a claim form on 16 November 2018 and a further claim form on 29 August 2019. He has recently issued a third claim form, but this appeal does not relate to that third claim. The claim is currently listed for an eight-days Full Merits Hearing in September 2020. The appeal has been expedited because the determination of the issues in the appeal will potentially affect the scope of the issues to be heard at the Full Hearing before the Employment Tribunal ("ET").

3. A Case Management Preliminary Hearing in the first claim took place before Employment Judge Harrington at London (South) ET on 25 April 2019. At that stage both parties were represented by counsel. The Case Management Summary sets out a list of issues that had been agreed between the parties on that occasion.

4. At this hearing, the Employment Judge ("EJ") listed a second Preliminary Hearing to deal with the Trust's application to strike out certain of Mr Sridhar's claims as being out of time. The second Preliminary Hearing took place on 30 September 2019 before Employment Judge Wright. On this occasion, Mr Sridhar represented himself and the Trust was again represented by counsel.

5. The ET's decision and Judgment in respect of the second Preliminary Hearing was sent to the parties on 12 December 2019. The ET struck out the relevant claims as being out of time. Mr Sridhar filed a written statement for the second Preliminary Hearing, but he did not give evidence at it.

6. The first ground of appeal before me is that the ET erred in law in striking out these claims. I should add that this ground is split into two parts in the Notice of Appeal, but I think that it is more convenient to deal with it as a single ground.

7. There are two other grounds of appeal. These are, first, that Mr Sridhar asserts that the ET has overlooked a claim of victimisation which he says he made in the claim form. He is currently not permitted to advance that claim at the Full Merits Hearing. Finally, Mr Sridhar complains that there was procedural irregularity in that the ET sent the Case Management Order and Written Reasons from the Preliminary Hearing on 30 September 2019 to Mr Sridhar's former representative, a direct access barrister, rather than to Mr Sridhar himself, and this led to a reconsideration claim being dismissed as out of time.

8. On 12 June 2020 at the sift, Kerr J set the appeal down for a Full Hearing. Before me, Mr Sridhar has represented himself, and the Trust has been represented by Mr Robert Moretto of counsel. Mr Moretto did not appear for the Trust in the ET. I am grateful to Mr Sridhar and to Mr Moretto for their helpful submissions. I will deal with each of the three grounds of appeal in turn.

Ground 1

The time limit issue

9. The elements of Mr Sridhar's claims were set out in subparagraphs in the agreed list of issues which was appended to the Case Management Order or incorporated in it following the ET hearing on 25 April 2019. At the second Preliminary Hearing, the ET struck out a number of claims as being out of time. Mr Sridhar appeals against the strike out and the claims in paragraphs 4.1, 4.4, 4.7, 12.2, 12.4 and 12.8 of the list of issues.

10. These claims are concerned, first, with a claim of race discrimination concerning the Trust's admitted failure to provide Mr Sridhar with a contract of employment or statement of terms and conditions during the years from October 2007 to July 2010 (when he was given a contract), and the Trust's alleged failure to provide him with contract documentation relating to that earlier period in 2013, after Mr Sridhar brought a grievance about this matter, despite, according to Mr Sridhar, promising to give him an employment contract. The Trust says that it did provide Mr Sridhar with or at least offer him adequate documentation in 2013.

11. Mr Sridhar says that as a result of this treatment he was blocked from being admitted onto the specialist register of the General Medical Council. This is a precondition for an appointment as a consultant in NHS Trusts, apart from Foundation Trusts. Mr Sridhar contends that as a result he had to withdraw from applying for a consultant post in Jersey in 2011 and was barred even from applying for other consultant jobs. Mr Sridhar says that this was direct race discrimination and/or harassment.

12. Mr Sridhar also complains in these paragraphs about four other matters. These are, first, direct race discrimination in being given junior doctors' shifts in the period from July 2010 to

September 2016. Second, being only allocated two trainees from 2013 to date despite being a GMC accredited trainer. Third, Mr Sridhar contends that, at a meeting on 14 June 2018, three colleagues told him that consultants are superior to associate specialists. He says that this was direct discrimination or harassment, and also evidence of a continuing negative attitude. Fourth, he complains of harassment in the form of failure to allocate a junior doctor to assist him with surgery, despite having written to the surgical tutor to ask for one.

The relevant statutory provisions

13. Section 123(1) of the **Equality Act 2010** ("EqA") provides that Tribunal claims may only be brought in respect of acts of discrimination which took place within the period of three months prior to the claim being presented or within such further period as the Tribunal thinks just and appropriate.

> **123. Time Limits**
>
> **"(1). [F1 Subject to [F2 sections 140A and 140B]] proceedings on a complaint within section 120 may not be brought after the end of—**
>
> > **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> >
> > **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(3) For the purposes of this section—**
>
> > **(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.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> > **(a) when P does an act inconsistent with doing it, or**
> >
> > **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."**

14. There is also a short period of extension, to accommodate ACAS conciliation, in accordance with section 140(b) of the **EqA**. No issue arises on this appeal in relation to section 140(b).

15. The claim form was presented on 16 November 2018. The ACAS conciliation period was from 20 September to 20 October 2018. This means that acts were in time in relation to the primary limitation period if they took place on or after 21 June 2018 or continued into that period, unless they were brought into time by the other provisions of section 123.

The ET's Reasons for the strike out time limit grounds

16. The passage in the ET Judgment dealing with this issue is relatively short and so I can set it out in its entirety. It is set out at paragraphs 8 to 15 of the Judgment of December 2019.

> **"Out of time?**
>
> **8. The respondent applies to strike out the following claims as out of time (numbering taken from the previous Case Management Order): 4.1 to 4.4, 4.6, 4.7, 12.1 to 12.5 and 12.8.**
>
> **9. If the allegations were found to be out of time, the Tribunal was asked to exercise its discretion to allow an extension of time on the basis that it is just and equitable to do so (s. 123 Equality Act 2010).**
>
> **10. The respondent contends that the allegations are so historic that it will suffer severe prejudice in responding to them. There is the problem of locating the various members of staff (notwithstanding the claimant says the main protagonists remain employed by the respondent) and memory recall after such a long period of time.**
>
> **11. The claimant referred to more recent correspondence which he says evidences a continuing act bringing them within time. That correspondence is revisiting decisions which have been taken and as such does not bring the allegation within a continuing act.**
>
> **12. As submitted by the respondent, ignorance of the time limit is not enough. The claimant says that he sought redress through the respondent's grievance processes (in 2013 and 2014) and even if that were the case, once he received the grievance outcome and was dissatisfied with it; that was the point at which he should have presented his claim (if not before in order to protect himself in respect of the time limit).**
>
> **13. The respondent accepts there will be some prejudice to the claimant if these claims are not allowed to proceed. However, there are other claims which the respondent accepts were presented within the time limit. By not exercising**

discretion to extend time under s. 123, that does not mean the claimant is not able to pursue his remaining claims.

14. On balance, the Tribunal finds the allegations are out of time and was not persuaded to extend the time limit. There is no expectation that it should do so, they are one-off acts, they are historic and there will be severe prejudice to the respondent if they are allowed to proceed.

15. Those allegations are therefore struck out as being out of time."

17. The ET thus held that simply inviting the employer to revisit decisions that have already been taken did not bring the allegation within the continuing act provision. At paragraph 14, the Tribunal said that the acts complained of were one-off acts. It was for these reasons that the ET rejected Mr Sridhar's primary contention that the claims were still in time when the claim was presented in November 2018.

18. As for the extension of the time on the just and equitable basis, the ET refused to extend time on the basis that the allegations were historic, and the Trust would suffer severe prejudice if it had to respond to them. Ignorance of time limits was no defence and nor was the fact that Mr Sridhar had sought redress through the internal grievance processes in 2013 and 2014. The Tribunal also pointed out that Mr Sridhar is able to proceed with his other claims.

The parties' submissions

Mr Sridhar

19. Mr Sridhar has several alternative submissions. Mr Sridhar relies first on section 123(3)(a), which provides that "conduct extending over a period is to be treated as done at the end of the period." In his skeleton argument, Mr Sridhar said that he argued that there has been continuing and ongoing acts of discrimination and victimisation and that the Trust as employer was responsible for the continuing state of affairs.

20. He said he had been a victim of continuous institutional racism and discrimination during his employment with the Trust, with the same common motive, common employer, and common employment environment. He submitted that the various allegations are all part of the same continuing act and that this contention is something that can only be dealt with at the hearing. He relied on the Judgment of the Court of Appeal in **Hendricks v the Commissioner of Police for the Metropolis** [2003] ICR 530, which I will return to later in this judgment.

21. Second, Mr Sridhar relied on section 123(4)(b) which provides *inter alia* that, in the absence of evidence to the contrary, a person is to be taken to decide on the failure to do something on expiry of the period in which that person might reasonably have been expected to do it. He points out that in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, the Court of Appeal said that the date by which the employer might reasonably have been expected to comply with the duty should be determined in light of the facts as they might reasonably have appeared to the Claimant.

22. Mr Sridhar made a formal complaint in August 2018. The outcome of that complaint was communicated to Mr Sridhar in November 2018. The outcome letter said, "PWS was told on more than one occasion that he would be given a letter confirming his service for the period. This has, until present, not been fulfilled." Mr Sridhar said that, in light of this form of words, he was still expecting the Trust to do something about it right up until his claim was presented.

23. Third, Mr Sridhar submitted that the ET erred in law in that it only dealt with the complaints about the failure to provide contract documents in 2007 to 2010, and after the grievance in 2013. The ET reasoning failed to provide a rationale for the strike out on time grounds of the other claims. To recap, these were the complaints about direct race discrimination

in being given junior doctor shifts in 2010 to 2016, in only being allocated two trainees from 2013 to date, in being told in June 2018 that consultants are superior to associate specialists, and a failure to allocate junior doctors to assist him with surgery, despite him having written to the surgical tutor to ask for one.

24. Mr Sridhar said that he came off the junior doctor rota in 2016, but that he is yet to be placed on a senior doctors' rota, and that he is still not being treated as a senior doctor. He says that he is still on the list of trainers even though he did ask to be taken off it.

25. Mr Sridhar also submitted that even if the claims were out time, time should be extended on just and equitable grounds. He points out, in particular, that the meeting of 14 June 2018, which he says that he was told that consultants are superior to associate specialists was only a week before the three-month period began.

26. In addition to these three main grounds, Mr Sridhar mentioned two other points in his grounds of appeal or skeleton argument, which I need to deal with only briefly. First, at paragraph 4 of his grounds, Mr Sridhar pointed out that his claim was brought less than six years after the grievance process outcome was signed on 10 July 2013 and he referred to the entitlement under the **Limitation Act 1980** to bring a claim based on simple contract within six years.

27. As Moretto points out, this has no relevance, as Mr Sridhar's claims are discrimination claims under the **EqA**, not claims for breach of contract, and so the **Limitation Act** time limit has no application. I do not read Mr Sridhar's grounds of appeal as seeking to rely on the **Limitation Act**, but if he were doing so this would have been misconceived.

28. Second, Mr Sridhar also referred in his skeleton argument to what is often described as the last straw doctrine, but this, too, has nothing to do with time limits in discrimination cases. This doctrine is concerned with something else entirely, namely whether a Claimant in a breach of contract case is entitled to claim constructive dismissal on the basis that the last act complained of is the last straw in that, taken together with a number of previous acts, which were not in isolation repudiatory breaches of contract, the whole course of conduct amounted to breach of contract. Mr Sridhar acknowledged this was not directly relevant, but he said that a similar principle to the last straw doctrine also underpins the doctrine relating to a continuing discriminatory state of affairs as identified in **Hendricks**.

The Trust's submissions

29. On behalf of the Trust, Mr Moretto submitted that the claim relating to the contract documents was at least seven and a half years out of time. He says that the "act extending over a period" extension has no application where, as here, the allegation is of a failure to do something before the end of the limitation period. Such a case is specifically dealt with by section 123(4), and time runs out when the employer does an act inconsistent with it or the period runs out when the employer would have reasonably been expected to do the act. On that basis the period ran out long ago.

30. Mr Moretto says that a potential Claimant cannot start time running again simply by asking again for the thing to be done, but anyway Mr Sridhar's claim must be based on the alleged discrimination in period from 2007 to 2010 because the only loss suffered was the loss of the job opportunity in Jersey, which happened in 2011. He submitted that the alleged failure to provide documentation after the grievance in 2013 could therefore not have caused any loss. Mr Moretto

said that the appeal is not based on the contention that there was a continuing discriminatory state of affairs. That is not the ground of appeal pursued by Mr Sridhar.

31. Mr Moretto says, in any event, that the Claimant cannot assert that the allegations are linked. The Claimant has to specifically set out the date of the act and who did it and how those separate acts are linked, indeed, so linked as to give rise to a *prima facie* case of a discriminatory state of affairs that could be seen as conduct extending over a period; see, for example, **Aziz v FDA** [2010] EWCA Civ 304 at paragraphs 35 to 36, **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548 at paragraph 10. Mr Moretto said that Mr Sridhar did not plead or set forward any such case or any such link.

32. As for the strike out of the allegations apart from the contract documentation complaint, Mr Moretto says that it is clear that the ET's reasoning applied to all of the relevant allegations and so it was **Meek** compliant. This is a reference, of course, to **Meek v City of Birmingham District Council** [1987] IRLR 250 at paragraph 8. Mr Moretto says that in any event, it is plain on Mr Sridhar's pleaded case and on the documents that he has provided to the ET, that these claims are out of time.

33. The claim relating to contract documents relates principally to the period from 2007 to 2010. The claim in relation to the emergency on-call rota was dealt with in the grievance outcome of May 2013. Even as Mr Sridhar's case was put at the Preliminary Hearing on 24 April 2019, the alleged discrimination ran out in September 2016, and so is two years out of time.

34. As for the claim about not having trainees, Mr Sridhar himself says that he was given two trainees in 2017. He sent an email on 21 July 2017, saying that he was withdrawing from the list of clinical supervisors and so this is also out of time.

35. The claim relating to being told that consultants were superior to associate specialists is a one-off act which was out of time. As for the failure to provide a junior doctor in surgery, Mr Moretto says that emails provided by Mr Sridhar shows that this was in September 2016 and so was two years out of time. Mr Moretto submits that the ET was entitled to exercise its discretion not to extend time, a broad discretion, and that it would have been wholly prejudicial to the Trust to extend time.

Discussion

36. It is worth, at the outset, identifying that there are four main routes by which a claim for race discrimination or racial harassment can be brought in time under section 123 of the **EqA** and I leave aside the complications added by the requirements to involve ACAS under section 140(a) and (b), which are irrelevant for present purposes. These four routes are:

> (1). The act complained of took place within the primary three-month limitation period which began on 21 July 2018.
>
> (2) The act or omission took place over a period and the period concluded within that primary limitation period.
>
> (3). The act was one of a number of apparently separate acts, which together amount to a continuing act, which extended into the primary limitation period as part of a continuing discriminatory state of affairs applying the guidance in the Judgment of the Court of Appeal in **Hendricks**.
>
> (4). If the claim is otherwise out of time, the case may nonetheless proceed if it is just and equitable to permit it to do so.

37. In the present case, none of the discrete acts in these claims took place within the primary limitation period and so route 1 does not arise. However, Mr Sridhar relies on each of routes 2

to 4. I will deal first with allegation that there was a continuing discriminatory state of affairs, albeit made up of separate acts so that they are all in time. This is route 3.

Does the continuing discriminatory state of affairs have to be specifically pleaded, and has it been raised in the appeal?

38. As far as route 3 is concerned, that is the **Hendricks** argument, Mr Moretto submits that it was not open to Mr Sridhar to advance this argument because this is not how the case was pleaded and, in particular, because it does not form one of the grounds of appeal.

39. In relation to the contract documentation point, Mr Moretto submits that Mr Sridhar relies only on a challenge to the finding on route 2, and in relation to the other struck out allegations, he relies only on a failure to deal with them at all in the Judgment. I do not accept this submission. It is true that the claim form does not mention **Hendricks** and does not specifically refer to a continuing discriminatory state of affairs, but, in my judgment, it was not necessary for it to do so in terms. This was a question that would arise if and when the time limit point was taken at a later stage in the proceedings.

40. It is obviously better if the continuing state of affairs point is made specifically in a claim form, but it is not essential. In **Hendricks** itself, the Claimant did not make clear in the claim form that she was alleging a continuing discriminatory state of affairs. This only became clear when counsel made submissions on her behalf. This is apparent from paragraph 27 of the Judgment, which states:

> **"27. On the "continuing act" point it was made clear by the counsel then appearing for Miss Hendricks that, although the acts complained of appeared on their face to be separate incidents, they in fact constituted a "seamless whole of continual and continuing less favourable treatment by the Respondent's officers.""**

41. Again, in the **Aziz** case, it appears from paragraph 21 of the Judgment that the Claimant did not allege in terms in her claim form that she was alleging a continuing discriminatory state of affairs, but this did not pose any barrier to advancing such an allegation at the Preliminary Hearing, which was later held to deal with time limits.

42. In any event, the introductory words to the grounds in the claim form in this case do make clear that Mr Sridhar was complaining or asking why he was being treated by the Trust as an inferior because he was born in India and trained there. He then set out the particular allegations of discriminatory treatment in broadly chronological order, which was a sensible way of doing it. One section of his grounds is entitled "some more examples of less favourable treatment." In my judgment, if it was necessary to do so, the claim form made its sufficiently clear that the complaint was a complaint of continuous less favourable treatment by the Trust and its senior employees.

43. Indeed, in my view, it was clear from the language used in the claim form that Mr Sridhar was complaining of a continuing discriminatory state of affairs which was in place since 2007.

44. It is true, also, that the agreed list of issues did not say in terms that the Claimant was complaining of a continuing discriminatory state of affairs, but once again, I do not think that as a matter of law and procedure it was necessary to do so.

45. By the time of the second Preliminary Hearing, on time limits, in September 2019, it was clear that Mr Sridhar was alleging a continuing act. I have seen the witness statement that Mr Sridhar provided for the hearing in September 2019 and in this statement, he made clear that he was alleging a continuing state of affairs. He said, "the Respondent is responsible for the ongoing situation and continuing state of affairs... all the allegations are linked to a policy of the

A Respondent." In any event, the **Hendricks** principle is so well known by now that its potential application in the present case should have been considered by the ET as a possibility.

B 46. As for the Notice of Appeal, I think it is right as Mr Moretto submits that the focus of the part of the Notice of Appeal relating to the contract documents was focused on route 2; that is that time had not expired because the time when the Trust might reasonably be expected to have done the act it had failed to do had not yet expired. Nevertheless, in my judgment, the interests C of justice and the overriding objective are best met by allowing the **Hendricks** ground to be advanced.

D 47. Mr Sridhar is a litigant in person and the skeleton argument which he filed for the Employment Appeal Tribunal ("EAT") makes clear that he was relying on the **Hendricks** point. His witness statement before the ET had also, as I had said, made this clear, although the word E "**Hendricks"** was not used. Mr Moretto addressed the **Hendricks** point in his skeleton argument dated 10 July 2020 for this appeal and in his oral submissions, and so he was not taken by surprise and was able to deal with it, even though in sensibly doing so he did not derogate from his submission that the **Hendricks** point was not taken in the Notice of Appeal and was not open to F Mr Sridhar.

48. The subject matter of Mr Sridhar's appeal is that he is challenging the strike out of his G claims as being out of time and I do not think he should be shut out of taking an arguable point in this regard. As for the other allegations, Mr Sridhar is saying that the ET did not give sufficient reasons and I take the view that this ground of appeal encompasses the contention that the ET has H not addressed the **Hendricks** point in relation to this allegation.

49. If it had been necessary, I would have been prepared to give Mr Sridhar leave to amend his Notice of Appeal by taking the **Hendricks** point as set out in paragraph 19 of his skeleton argument, but I do not think it is necessary for him to do so.

The substance of the Hendricks point

50. I now come to the substance of what, for convenience, I am calling the **Hendricks** point.

The law

51. I will start with the guidance in the case law authorities. In **Hendricks**, a police officer made a series of race and sex discrimination complaints about things which had happened to her during her service as a police officer. At first sight, these were separate and discrete acts. The allegations were different in nature from each other, and they concerned allegations against a range of different officers, at different times, and in different places.

52. The ET held as a preliminary issue that it had jurisdiction to hear the claims on the basis that they were in essence a complaint of a policy or practice extending over a period. The EAT allowed the Commissioner's appeal on the ground that the Claimant's allegations could not support findings of such a policy or practice.

53. The Court of Appeal allowed the Claimant's appeal to the extent that it set aside the strike out and held that the issue was to whether the Commissioner was responsible for an ongoing situation or continuing state of affairs, which female ethnic minority officers were treated less favourably should be determined by the ET as a matter of fact at the Full Merits Hearing. At paragraphs 48 to 50 and 52 of the Judgment, Mummery said:

> **"48. On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working**

> **environment does not necessarily rule out the possibility of continuing discrimination against her, for which the Commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed form the Service. She remains a serving officer entitled to the protection of Part II of the Discrimination Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the Service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period." I regard this as a legally more precise way of characterising her case than the use of expressions such as "institutionalised racism," "a prevailing way of life," a "generalised policy of discrimination", or "climate" or "culture" of unlawful discrimination."**
>
> **49. At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no "act extending over a period" for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.**
>
> **50. I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that the ground of the less favourable treatment is race or sex.**
>
> **….**
>
> **52. ...the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

54. It is important to note, therefore, that the Court of Appeal did not hold that the complaints were in time. Rather, the Court of Appeal held that it was not appropriate to strike out the relevant complaints on time grounds at a preliminary stage and that all the matters, including the question relevant to the time limits, namely whether there was a continuing state of affairs, should be considered at the Full Merits Hearing. The burden would remain with the Claimant at that Full Merits Hearing to prove that this was so.

55. Subsequently, in **Lyfar,** at paragraph 10, the Court of Appeal made clear that in order to avoid a strike out in a case where the complaint was that apparently discrete acts made up a

continuing discriminatory state of affairs, the Claimant had to show a *prima facie* case, which was the same thing as the ET asking itself whether the complaints were capable of being part of an act extending over a period. At paragraph 11 in **Lyfar**, the Court of Appeal said that to resolve that issue it may be advisable for oral evidence to be called; see, for example, **Arthur v London Eastern Railway Limited (trading as One Stansted Express)** [2006] EWCA Civ 1358.

56. In **Aziz**, at paragraph 34 the Court of Appeal referred to practical considerations concerning whether strike out should be dealt with as a preliminary issue. The court said:

> **"34. One issue of considerable practical importance is the extent to which it is appropriate to resolve issues of time bar before a main hearing. Obviously there will be a saving of costs if matters outside the jurisdiction of the ET are disposed of at an early stage. On the other hand a claimant must not be barred from presenting his or her claim on any issue where there is an arguable case."**

57. At paragraph 36, having set out the *prima facie* case test referred to in the Court of Appeal in **Lyfar**, the Court of Appeal in **Aziz** went on:

> **"36. Another way of formulating the test to be applied at the pre-hearing review is this: the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs: see Ma v Merck Sharpe and Dohme Ltd [2008] EWCA Civ 1426 at paragraph 17."**

58. In **Aziz** itself, which concerned alleged discrimination and failure of a trade union to give support to a member in a race discrimination claim, the Court of Appeal held that the ET had been right to strike out some of the claim because the allegations fell into discrete phases, but held that Miss Aziz had an arguable case to the effect that all of the allegations in a particular phase formed a continuing act or omission and so said that the Tribunal had been right to let the whole of that part of the claim proceed. In **Aziz**, the Claimant gave evidence at the Preliminary Hearing and was cross-examined; see Judgment paragraph 23.

Applying the law to this appeal

59. In the light of these authorities, the ET should only have struck out Mr Sridhar's complaints at the Preliminary Hearing stage if, on the material before the Tribunal, the Claimant had not established a *prima facie* case relating to the continuing discriminatory state of affairs, the claims were not capable of being part of such a continuing discriminatory state of affairs, and it was not reasonably arguably that there was such a continuing discriminatory state of affairs. All of these are different ways of saying the same thing.

60. In these circumstances, in my judgment, this ET erred in law in striking out these claims. The ET did not purport to apply these tests. Moreover, I think that there is force in the point that Mr Sridhar has made that the ET failed adequately to consider the matter.

61. It is always necessary to bear in mind that ETs do a difficult job in circumstances where, as here, at least one party is not legally represented. However, in light of the witness statement, it should have been obvious to the ET at the hearing that Mr Sridhar was putting his case on the basis of the continuing discriminatory state of affairs. It was reasonably clear from the claim form that this was so and, in any event in my judgment, the **Hendricks** route to a claim being in time is now so familiar that the ET should at least have explored it.

62. As Mr Moretto said in his oral submissions, **Hendricks** is very well known, and the **Hendricks** issue would have been in the ET's mind. As I have said, the ET did not refer to the test in **Hendricks** and the cases that followed it, let alone apply it.

63. Still further, as Mr Sridhar has pointed out, the ET only really addressed the contract documentation allegation and did not give any specific consideration to the other allegations or even acknowledge that they were different from the contract documentation allegation.

64. Despite Mr Moretto's valiant submissions on this point, I take the view that this part of the ET's reasoning was not **Meek** compliant as no adequate explanation was given for the ET's conclusion. There was no indication in the Judgment as to what these allegations were, let alone any analysis of them against the tests set out in section 123. Though succinct Reasons are a judicial virtue, in my judgment this part of the Judgment did not go far enough to tell the parties sufficiently why they won or lost.

65. Mr Moretto said that if a potential extension of time applies to the case such as this, it will cut across section 123(4)(b), which provides that, where the claim relates to an omission, time runs from when the Respondent could reasonably have been expected to have done the act I do not agree. Section 123(4)(b) covers a different issue from the **Hendricks** principle. Section 123(4)(b) is concerned with when time runs for the particular omission in question. A claim may be in time, by application of the **Hendricks** principle, even it is not in time by reference to section 123(4)(b). The **Hendricks** principle is concerned with when individual claims, which in themselves are out of time, could nevertheless be in time because they are part of a continuing state of affairs. A provision equivalent to section 123(4)(b) was in place in the **Sex Discrimination Act 1975** and the **Race Relations Act 1976** when **Hendricks** was decided; see section 76(6)(c) and the **Race Relations Act** section 68(7).

66. For these reasons, in my judgment, the ET's ruling on continuing act cannot stand.

67. The next question that arises is whether I should remit the strike out issue to another ET or should decide the issue for myself. As Mr Moretto points out, the EAT must remit unless it finds that any error was immaterial and/or that there is only one conclusion that the ET could properly have reached, namely that the allegations were out of time; see **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630 at paragraph 20 and **Jafri v Lincoln College** [2014] ICR 920 at paragraphs 21 and 46 to 47. I mention in passing that there is one other circumstance in which the ET can decide the issue for itself, which is where the parties agree that the EAT should do so.

68. Mr Moretto invited me, if I took the view that the ET erred in law, to make the decision myself, and he, of course, invited me to strike out the claims on time grounds. In my judgment, it is right that there was only one conclusion that the ET could properly have reached on the time limits issue, at the Preliminary Hearing but it is not the one which is contended for by Mr Moretto. Rather, it is that the claims should not be struck out on time limit grounds at this stage in the proceedings.

69. The only material of substance that the ET had to go on was the pleaded case. Mr Sridhar had not given oral evidence and his contentions have not been tested by cross-examination. On the basis of the pleaded case, in my judgment, it could not properly be said that the individual allegations were not capable of being part of a continuing discriminatory state of affairs. The allegations, if true, could at least potentially indicate a state of affairs which Mr Sridhar as a doctor of Indian origin was being treated less favourably than a white doctor would have been treated in similar circumstances. There was, at least arguably, a constant theme running through the allegations relating to general treatment and undervaluing of Mr Sridhar as an associate specialist.

70. The allegation of a continuing discriminatory state of affairs on the pleading was not just a bare assertion without any possible foundation in fact. There is material in the pleaded case for which the inference of a continuing discrimination state of affairs may be drawn. This is a very different thing from finding that there actually was a discriminatory state of affairs and that the various claims were in time. This matter has not been decided yet. It will be for the ET to decide at the Full Hearing after hearing all of the evidence and looking at the case in the round.

71. The burden is on the Claimant, and it may be that Mr Sridhar will not succeed with his contentions relating to the time limit. Mr Moretto says that there is no substance to the allegation of continuing acts and that there are breaks in time when nothing is complained of. That may or may not be so but that is a matter for the ET to decide at the Full Merits Hearing. However, I do not think it was open to an ET at the Preliminary Hearing to find that the claims were not capable of being part of a discriminatory state of affairs and to strike out the claims even bearing in mind the broad discretion that an ET has in relation to strike outs. This is particularly so in circumstances where the ET had not heard any evidence on the point.

72. The claims must be considered by the ET which deals with the full merits of the claims and that Tribunal can decide the time limit issues alongside the underlying merits, if any, of these claims should the Tribunal decide that they are in time. I appreciate that this will extend the scope of the Full Merits Hearing, but, as Mummery LJ pointed out in **Hendricks**, such a result is often unavoidable in discrimination cases and in any event, out of time events can often be relied upon in evidence. Furthermore, there is a further allegation to the effect that Mr Sridhar was denied a consultant's contract which goes back to 2007. This is claim 4.5 in the list of issues. This claim was not struck out and is accepted to be in time. It will therefore be dealt with at the

Full Merits Hearings. This means that, regardless of the outcome of the appeal, the evidence before the ET would have had to deal at the Full Merits Hearing with events going back to 2007.

73. In light of this conclusion, it is not necessary for me to go on to consider the other potential routes to the claims being in time. Suffice it to say therefore that if the only ground in relation to the contract documentation challenge had been that Mr Sridhar could still have reasonably expected the Trust to make matters right in July 2018, I would have dismissed this part of the appeal. In my judgment, once a few months had expired after the May 2013 grievance ruling, it was no longer reasonable to expect for the Trust to have issued contract documents for the period from 2007 to 2010. That ship had sailed. The specific act or omission complained of consisting of the failure to provide contract documents for that period therefore came to an end in summer 2013 at the latest, some five years before the claim was presented. As for the other individual acts, the ET simply failed to make the findings about them.

74. If the claims were otherwise clearly out of time, I would not have been inclined to disturb the Tribunal's findings that it was not just and equitable to extend time. ETs have a wide discretion in this regard and the ET gave its consideration to the arguments and set out conclusion that was reasonable and was **Meek** compliant, albeit succinct. However, this is all academic. For reasons I have already given, I allow Mr Sridhar on the time limits points.

The victimisation issue

75. This leaves two remaining grounds of appeal. The first is that the ET has omitted Mr Sridhar's victimisation claim from the list of issues and has indicated that unless there is an amendment it will not be dealt with at the Full Merits Hearing. This matter was first raised by Mr Sridhar, as I understand it, not at the Preliminary Hearing on 30 September 2019 itself but by

A sending an email to the ET that evening. It was, however, dealt with by EJ Wright at paragraphs 22 to 27 of her Judgment.

B 76. She pointed out that the ET's Case Management Summary after the April Case Management Hearing had included the list of issues which had been agreed by counsel for both parties. Mr Sridhar was at that stage represented by counsel. The Case Management Summary referred to a "detailed and lengthy discussion... in order to identify the entirety of the Claimant's

C claim" and the Order also said, "no other claims or issues will be considered without the permission of the Tribunal."

D 77. EJ Wright also pointed out that this summary was sent to Mr Sridhar's representative on 12 June 2016. In his skeleton argument, Mr Sridhar said that he did not receive this for some time, but it was eventually provided to him.

E

78. As Employment Judge Wright said, Mr Sridhar had not appealed it. Employment Judge Wright said, "the victimisation claim is not therefore before the Tribunal and will not be considered by the Tribunal panel at the final hearing." She said however that the way was still

F open to Mr Sridhar to make an application to amend his claim to add a claim for victimisation. Mr Sridhar has not done so; his position being that there is no need to do so.

G 79. I have carefully reviewed the claim form and I can find no allegation of victimisation in it. There are references to discrimination and to harassment but no reference to complaints of victimisation. The document does refer to a meeting with Kelvin Cheatle, the Trust's HR

H Director on 20 August 2018 and states that the outcome of this meeting was that Mr Sridhar felt intimidated. However, there is nothing in the claim form to say that this took the form of an

allegation of victimisation, nor was there any statement that this was done in response to a previous allegation of discrimination. There is nothing on the face of the claim form, therefore, to amount to an allegation of victimisation.

80. This meeting with Mr Cheatle in August 2019 is the matter which Mr Sridhar now says is a victimisation claim. He says that on that occasion Mr Cheatle threatened him that if he did not withdraw his Tribunal claims, he might win the battle and lose the war.

81. There was a separate document in which it was made clear and spelt out that this was an allegation of victimisation. This was a document prepared by Mr Sridhar's barrister and it does, as I have said, spell out that this was a victimisation claim. Mr Sridhar says that this document was handed up to Employment Judge Harrington and to counsel at the time of the spring 2019 Preliminary Hearing and that they went through the document and that this formed the basis for the list of issues. He said that what happened was that everybody forgot and omitted by accident the victimisation claim.

82. Mr Moretto did not appear for the Trust at the time, but he has checked the counsel who did then appear, and counsel has no recollection one way or another as to whether that document was handed up. He said that a great deal of time was spent going through the claim form and providing a list of issues. My decision on this matter does not depend on whether or not this document was actually handed over in this meeting at this hearing. What is clear, and Mr Sridhar himself fairly accepts this in his skeleton argument, is that the victimisation claim was not discussed at the first Preliminary Hearing and no suggestion was made of a victimisation claim in the list of issues, which list of issues was agreed on Mr Sridhar's behalf by counsel and was adopted by the ET.

83. In my judgment, therefore, Employment Judge Wright was entitled to come to the conclusion that by agreeing to the list of issues through counsel, Mr Sridhar had made clear that there was no victimisation claim. Having said that, it is clear that a list of issues should not be treated as automatically binding upon all future stages of ET proceedings. There may be a change of circumstances or some other reason why the Tribunal should not stick to it.

84. Where a list of issues is agreed, the general rule is that the issues to be determined will be limited to that list. In **Parekh v The London Borough of Brent** [2012] EWCA Civ 1630, Mummery LJ said at paragraph 30:

> **"30. ...the list was described by the employment judge as the issues "definitively recorded" by him. He recorded them following the discussions at the PHR by Mr Parekh and Mr Ross, appearing for the Council, with him. The list was not the product of any adjudication, let alone any binding adjudication, of a dispute of substantive fact or law between the parties, such as whether capability was the reason for the dismissal, or of a procedural application or dispute.**
>
> **31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see *Land Rover v. Short* Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see *Price v. Surrey CC* Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in *Hart v. English Heritage* [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.**
>
> **32. While on the matter of appeals I would add that, if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law. If the list is not agreed and it is contended that it is an incorrect record of the discussions, or that there has been a material change of circumstances, the proper procedure is not to appeal to the EAT, but to apply to the employment tribunal to reconsider the matter in the interests of justice."**

85. Very recently, the question of the status of a list of issues has been considered again by the Court of Appeal in **Mervyn v BW Controls** [2020] IRLR 464. This was a case in which there was a claim for unfair dismissal, but the list of issues did not include a fairly obvious alternative claim for constructive dismissal. The Court of Appeal said that it was good practice

for an ET at the start of a Substantive Hearing with either or both parties unrepresented to consider whether any list of issues previously drawn up at a Case Management Hearing properly reflected the significant issues in dispute between the parties. If it was clear that it did not or that it might not do so, then a Tribunal should consider whether an amendment to the list of issues was necessary in the interests of justice; see **Parekh** and **Scicluna v Zippy Stitch Ltd** [2018] EWCA Civ 1320:

> **"38. I do not read the last sentence of the judgment of Underhill LJ in *Scicluna* as imposing a requirement of exceptionality in every case before a tribunal can depart from the precise terms of an agreed list of issues. It will no doubt be an unusual step to take, but what is "necessary in the interests of justice" in the context of the tribunal's powers under Rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it.**
>
> **42. In the present case to use Judge Auerbach's vivid phrase, it "shouted out" from the contents of Ms Mervyn's Particulars of Claim that, on a proper analysis, she was alleging that she had been constructively dismissed.**
>
> **Conclusion**
>
> **43. It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice."**

86. It is clear therefore that at a further Preliminary Hearing the ET has the power to revisit the list of issues as indeed does the ET at the Full Hearing, but it does not follow that there is always an obligation to amend the list of issues. Here, the ET was told that an issue had been overlooked, but the list of issues was discussed carefully and thoroughly at the first Hearing and the list of issues was adopted which did not refer to victimisation. Victimisation had not been pleaded and indeed, it was not referred to during that first hearing.

87. In my judgment, the Employment Judge Wright was correct to say that Mr Sridhar could apply to amend and then his application to refer to victimisation could be dealt with on the merits

including whether it was now too late to do so. He has chosen not to do so, but that was his decision. I do not think that it was outside the scope of the Judge's discretion to deal with a case management issue in this way, particularly as she was not closing the door entirely to the possibility of relying on the victimisation challenge.

88. I should add that Mr Sridhar relies on the slip rule at paragraph 69 of the **ET's Rules**, but I do not see what the slip rule has to do with it. This was not a case of an accidental slip on the part of the ET. Indeed, there has been no slip on the part of the Employment Judge Harrington at all. She had not been asked by Mr Sridhar counsel to include victimisation in the list of issues. Accordingly, I dismiss this part of Mr Sridhar's appeal.

Procedural irregularity

89. The final ground concerns an application for reconsideration of Employment Judge Wright's Case Management Order, which was filed by Mr Sridhar on 20 January 2020. The subject matter of the application was concerned with the issues that are also the subject matter of this appeal, namely the time limit issue and the victimisation claim. Mr Sridhar's Notice of Appeal is dated 23 January 2020.

90. The Order and Judgment following the Case Management Preliminary Hearing on 30 September 2019, had been sent to the parties on 12 December 2019. On 18 March 2020, the ET rejected the reconsideration application on the basis that it had not been presented within 14 days of the Order being sent out. Mr Sridhar said that the Tribunal's Order had been sent by mistake to his former representative rather than him and that he had only seen it when the Trust's solicitor sent him a copy, which he received on 7 January 2020, and he then made his application for reconsideration within 14 days. This would, in my judgment, have been a potentially valid reason

for extending time for reconsideration; see **Rana v London Borough of Ealing Council** [2019] ICR 789.

91. On the other hand, as Mr Moretto points out, what was set out as grounds for reconsideration were actually grounds of appeal because Mr Sridhar was seeking to argue an error of law and in **Trimble v Super Travel Limited** [1982] ICR 440 at 445 F to G, Browne-Wilkinson J said, "We do not think that it is appropriate for an Industrial Tribunal to review its decision simply because it is said there was an error of law on its face."

92. This ground of appeal has been superseded by events. Mr Sridhar has had the opportunity to raise those matters that he wished to raise at the Reconsideration Hearing at the much more appropriate forum of an appeal before the EAT. In these circumstances, it would make no sense to remit the issues which have already been determined by the EAT to the ET at the Reconsideration Hearing, especially as **Trimble v Super Travel** makes clear that the reconsideration application would inevitably have been unsuccessful.

93. Finally, Mr Moretto submitted in his skeleton argument that if the appeal was to succeed in whole or at part, the matter should be remitted to the Tribunal to determine how the claims should proceed in light of the fact that; (a) any allegations which were held to be out of time are now potentially live again; (b) the Substantive Hearing is listed to begin on 7 September 2020 and; (c) the Claimant has recently presented a third claim.

94. I think that if the Trust is minded to ask for any consequential Orders from the ET, including being minded to make a potential application for an adjournment of the hearing, it should make that application to the ET. It is not necessary nor appropriate for me to remit the issue to the ET, and it is by no means certain that the effect of my Order will be that there will

now be insufficient time to deal with the claims at the September hearing and the parties should consider carefully whether they think it is necessary to apply to break this fixture. Therefore, I allow Mr Sridhar's appeal on the time limit issue and dismiss his appeal on the victimisation and the procedural irregularity issues.