Case No: A1/2001/2529

Neutral Citation Number: [2002] EWCA Civ 1686
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL (HH JUDGE D SEROTA QC)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 27th November 2002

Before :

LORD JUSTICE JUDGE
LORD JUSTICE MUMMERY
and
LORD JUSTICE MAY

Between :

JOY HENDRICKS — Appellant
- and -
THE COMMISSIONER OF POLICE OF THE METROPOLIS — Respondent

(Transcript of the Handed Down Judgment of
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Mr Robin Allen QC and Mr Jason Galbraith-Marten (instructed by Schilling & Lom and Partners) for the Appellant
Mr John Cavanagh QC and Miss Louise Chudleigh (instructed by the Metropolitan Police Service Solicitors' Department) for the Respondent

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Judgment
As Approved by the Court

Lord Justice Mummery :

The Appeal

1. This is an appeal by Miss Joy Hendricks from the order of the Employment Appeal Tribunal dated 5 November 2001, allowing an appeal by the Commissioner of Police of the Metropolis (the Commissioner) against an interlocutory decision of the Employment Tribunal.

2. The Commissioner challenges rulings of the Employment Tribunal on preliminary jurisdictional questions. The main issues are concerned with statutory time limits on bringing proceedings for discrimination, when an act is alleged to extend over a period. If an act extends over a period, it is treated as having been done at the end of that period; whereas, in the case of an isolated act, time runs from when that act was done. The distinction, which is sometimes difficult to apply in practice, has been discussed in recent decisions of this court and of the Employment Appeal Tribunal. As the time limit is only three months, unless extended by the tribunal in cases where it is just and equitable to do so, the distinction can be critical: on it depends the jurisdiction of the tribunal to entertain the application.

3. In extended reasons sent to the parties on 11 April 2001 the Employment Tribunal unanimously decided

> "(1) that these Tribunals do have jurisdiction to consider the Applicant's complaints of sex discrimination and race discrimination; and
>
> (2) that these Tribunals do have jurisdiction to consider her complaints of sex discrimination and race discrimination arising out of the assault charge brought against her in September 1998. "

4. On 20 February 2002 Sedley LJ granted permission to appeal.

The Parties

5. Miss Hendricks, who is black, has been a police officer in the Metropolitan Police Service since 25 January 1987. She has been on long-term sick leave since 15 March 1999 suffering from stress. She was on full pay until 1 April 2000. Her pay was then stopped.

6. The Commissioner is the only respondent. Under Section 9A of the Police Act 1996, as amended,

> "(1) The metropolitan police force shall be under the direction and control of the Commissioner of Police of the Metropolis appointed under section 9B."

7. As the chief officer of police for the metropolitan area, the Commissioner is, by virtue of section 88 of the 1996 Act,

> "....liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and accordingly shall in respect of any such tort be treated for all purposes as a joint tortfeasor."

The Employment Tribunal Proceedings

8. Miss Hendricks presented two originating applications to the Employment Tribunal. She named the Commissioner as respondent in each case.

i) The Discrimination Proceedings

On 8 March 2000 Miss Hendricks presented an originating application complaining of race and sex discrimination over a period of 11 years. In Form IT1 she stated that the date when the matter that she was complaining about took place was "20 12/99 & continuing". In the box for further details she added

> " During most of my service, approximately eleven years, I have been subjected to race and sexual discrimination and harassment.
>
> I am currently seeking advice and assistance from the Commission of Racial Equality. Full details of my complaint will follow once advice has been received from the CRE and a decision of representation made."

On 3 July 2000 she made a detailed statement (110 paragraphs) about her complaints of discrimination. Pursuant to orders of the Employment Tribunal, further particulars were supplied by Miss Hendricks on 24 August 2000 and on 17 November 2000. The statement and the further amended particulars refer to numerous alleged instances of less favourable treatment of her from 1989 down to, and even after, the presentation of the originating application. She makes nearly 100 specific allegations of discrimination, mainly in the period 1989 to 1994, involving 50 or more officers. The Commissioner contends that the discrimination proceedings have been brought out of time, as no specific acts or omissions amounting to discrimination, other than the stoppage of pay in April 2000, occurred in the three month period preceding 8 March 2000. If the case is allowed to continue, the substantive hearing will be long and expensive. In the view of the Commissioner's advisers, 100 witnesses will be required to give evidence about incidents alleged to have happened years ago. The hearing is estimated to last about three months.

ii) The Victimisation Proceedings

On 14 July 2000 Miss Hendricks presented a second application to the Employment Tribunal. In it she alleges victimisation following a complaint of race and sex discrimination. She stated that the date when the matter she was complaining about took place was 18 April 2000 when she was informed, during the course of a telephone conversation, that her pay was reduced from "full pay" to "no pay". She referred to her discrimination proceedings and alleged that the fact of the reduction and the way it was effected was "directly related to her putting a complaint of race and sex discrimination before the tribunal and, and in the circumstances, such action constitutes victimisation."

The Commissioner accepts that the victimisation proceedings were brought in time.

9. In notices of appearance the Commissioner denied that there had been any race or sex discrimination or victimisation.

10. Following a directions hearing on 17 October 2000, at which both parties were represented by counsel, the Chairman ordered that the two claims be consolidated and heard together. A letter from the chairman dated 23 October 2000 stated

> "3. The Issues : The Applicant identified the issues under three broad headings – race discrimination, sex discrimination and claims under the Equal Treatment Directive. In general terms the claims could be summarised as being treatment from the Applicant's colleagues in the form of comments, bullying and ostracism;

> treatment by management in the form of failure to prevent her treatment from her colleagues, the failure to send the Applicant on a course, unjust appraisals and lack of support. In addition the Applicant relies on the complaint of assault brought by two of her colleagues in 1998. She further claims sex discrimination in the form of victimisation arising from Inspector Sutton's enquiry of colleagues about her private life which led to a greater degree of stress than she would have otherwise have suffered, and, finally, the withdrawal of her sick pay."

11. After ordering Miss Hendricks to provide further and better particulars of her complaints, commenting that "as presently pleaded, the information is too lengthy and indigestible to be clear as to the nature of the Applicant's complaints", the Chairman directed that the matter be set down for a preliminary hearing on 29 January 2001 to consider the following points

> "i) Whether having regard to the time limit contained within section 76 of the Sex Discrimination Act 1975 a Tribunal has jurisdiction to consider the Applicant's complaint of sex discrimination.
>
> ii) Whether having regard to the time limit contained in section 68 of the Race Relations Act 1976 a Tribunal has jurisdiction to consider the Applicant's complaint of race discrimination.
>
> iii) Whether given the nature of the complaint relating to the assault charge brought against the Applicant in September 1998 the Tribunal has jurisdiction to consider her complaint of discrimination arising there from".

The Statutory Provisions

12. Under section 6(2) of the Sex Discrimination Act 1975 (the 1975 Act)

> "It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her-
>
> (a)...
>
> (b) by dismissing her, or subjecting her to any other detriment."

13. The complaints made in this case are of less favourable treatment of Miss Hendricks on the ground of her sex. That is a claim of direct discrimination within section 1(1)(a) of the 1975 Act.

14. Section 17 of the 1975 Act contains provisions for the special case of the police-

> "(1) For the purposes of this Part [Part II-Discrimination in the Employment Field], the holding of the office of constable shall be treated as employment –
>
> (a) by the chief officer of police as respects any act done by him in relation to a constable or that office;
>
> (b) by the police authority as respects any act done by them in relation to a constable or that office"

15. It is common ground that the Commissioner is a "chief officer of police" within the meaning of section 17.

16. The 1975 Act contains relevant provisions relating to vicarious and constructive liability-

> "41(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.
>
> (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act as done by that other person as well as by him
>
> (3) In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of employment acts of that description."

17. Section 42 is concerned with aiding unlawful acts and provides

> "(1) A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description.
>
> (2) For the purposes of subsection (1) an employee or agent for whose act the employer or principal is liable under section 41 (or would be so liable but for section 41(3)) shall be deemed to aid the doing of the act by the employer or principal. "

18. Section 63 defines the jurisdiction of the employment tribunals in discrimination cases.

> "(1) A complaint by any person ("the complainant") that another person ("the respondent") –
>
> a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part II or,
>
> b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant,
>
> may be presented to an employment tribunal. "

19. Section 76 of the 1975 Act sets the period within which proceedings are to be brought.

> "(1) An employment tribunal shall not consider a complaint under section 63 unless it is presented to the tribunal before the end of –
>
> a) the period of three months beginning when the act complained of was done; or
>
> b) .....
>
> (5) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, he considers that it is just and equitable to do so.

(6) For the purposes of this section –

(a) where the inclusion of any term of in a contract renders the making of the contract an unlawful act that act shall be treated as extending throughout the duration of the contract, and

(b) any act extending over a period shall be treated as done at the end of that period, and

(c) a deliberate omission shall be treated as done when the person in question decided upon it,

and in the absence of evidence establishing the contrary the person shall be taken for the purposes of this section to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done".

The general interpretation provisions in section 82(1) provide that, unless the context otherwise requires, "act" includes a deliberate omission.

20. The Race Relations Act 1976 (the 1976 Act) contains similar provisions relating to discrimination in the employment field (section 4 (2) (c)), the special position of the police (section 16), the jurisdiction of employment tribunals (section 54), vicarious and constructive liability (sections 32 and 33) and time limits (section 68). It should be noted, however, that, commencing on 2 April 2001, section 16 of the 1976 Act (the equivalent of section 17 of the 1975 Act cited above) was repealed by section 9(2) of the Race Relations (Amendment) Act 2000. As already indicated, the discrimination proceedings in this case were commenced before 2 April 2001 and are unaffected. After that date it is now provided that a chief officer of police may be constructively liable for acts of race discrimination committed by one of his officers against another. (The 1975 Act has not been amended in this way.)

Decision of the Employment Tribunal

21. As an appeal from an Employment Tribunal only lies on a question of law arising from any decision of, or arising in any proceedings before, such a tribunal under (among others) the 1975 Act or the 1976 Act, the focus of the appeal is on the extended reasons given by the tribunal for holding that it had jurisdiction to consider Miss Hendricks's complaints of sex and race discrimination. Having referred to the relevant statutory provisions the Tribunal noted in paragraph 3 of its reasons that

> "…the Applicant complains of both race discrimination and sex discrimination. She maintains that she was subjected to both those forms of discrimination from 1989 onwards right up to the present time : she says there have been incidents involving one or other or both virtually throughout her service. It is her case that both race and sex discrimination are institutionalised in the Metropolitan Police Service and that the treatment which she has received is all part of a "continuing act" on the part of the Service for which the Respondent must bear the responsibility."

22. The Tribunal then referred to the evidence given by Miss Hendricks in her detailed 42 page witness statement dated 19 January 2001and orally at the preliminary hearing. It noted that the evidence referred to 60 or more incidents involving words said to her and acts done to her and complaints that superior officers had failed to take any action at all when they should have done so or failed to take action which was appropriate in the circumstances.

23. Although the evidence principally related to 5 years service in Territorial Support Groups (TSG) beginning in July 1989, it is clear from Miss Hendricks's evidence and particulars supplied that she was complaining of the continuation of less favourable treatment while she remained on sick leave and right down to the issue of the discrimination proceedings in March 2000 and even after then.

24. Subject to a dispute about an alleged concession recorded in paragraph 11 of the extended reasons (to which I shall return later), there is no dispute that the Employment Tribunal correctly identified the issues in paragraph 12 as follows

> "(1) whether the acts and omissions about which the Applicant complains in her Originating Applications constitute what the Acts of 1975 and 1976 term a "continuing act", namely, one which is treated as done at the end of the period over which the act extends;
>
> (2) whether, if not, it is just and equitable nethertheless to allow the complaints of race and /or sex discrimination to proceed to a hearing for consideration on their merits?
>
> (3) whether a tribunal had jurisdiction to consider the Applicant's complaint of discrimination in relation to the assault charge brought against her in September 1998 ?

25. The tribunal concluded, for reasons to which I shall refer later, that this was a case of an act extending over a period and that the tribunal had jurisdiction to consider the complaints of sex discrimination and race discrimination. It is contended on behalf of the Commissioner that that conclusion raises a question of law on which the tribunal were rightly regarded by the Employment Appeal Tribunal as being in error.

26. It should be stated now that no question arises on the tribunal's rulings on issues (2) and (3). Miss Hendricks does not appeal against the tribunal's conclusion that, if, the discrimination proceedings were presented out of time, then they would not have held that it was just and equitable for her complaints to be allowed to be heard. The Commissioner does not appeal against the tribunal's ruling that it had jurisdiction to consider Miss Hendricks complaint of discrimination arising out of the assault charge incident, which ended in her acquittal, even though the prosecution was brought not by the police but by the Crown Prosecution Service. The tribunal accepted the submission on behalf of Miss Hendricks that the acts of two fellow white, male police officers in making complaints of assault against her and giving evidence against her

> "were conceivably part of a practice on the part of the Respondent which resulted in less favourable treatment to female officers and those from ethnic minority backgrounds."

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."

28. The tribunal referred to the submissions made on behalf of Miss Hendricks as follows

> "17 The cumulative effect of the continuous less favourable treatment to which the applicant was subjected (which at this stage has to be looked at on the face of the untested allegations) demonstrates, in her submission, a regime – or prevailing way of life – that exists within the Metropolitan Police Service.
>
> 18. It is the Applicant's case that she has been subjected to discriminatory acts on a regular and continuing basis throughout her career in the Service; that the persistent nature of the less favourable treatment to which she has been subjected constitutes a discriminatory act of a continuing nature; and moreover, given the claimed involvement of senior officers (which at this stage has to be assumed to have taken

> place) in either themselves committing discriminatory acts or omitting to take steps to relieve the Applicant from the discriminatory behaviour of her colleagues demonstrates the very essence of a policy or regime which is continuing..."
>
> "20 [Ms Genn, counsel for the Applicant] further submits that in any event time has not started to run against the Applicant because the Respondent's policy of treating officers who are female and/ or from ethnic minority backgrounds less favourably than white male ones remains in force and the Applicant is still a serving officer. "

29. After citing some authorities, the tribunal stated its conclusions in paragraphs 24 and 25 as follows

> "24 We recognise that, when explanations are given by the Respondent, it may be shown that there is no link between one incident and another cited by the Applicant and that there were different explanations for each, so that no policy, rule or practice is established. We do, however, have to make our decision on the basis of the facts as alleged by the Applicant, even though they are as yet untested; that is acknowledged in paragraph 20 of the decision in Owusu..... We have therefore to determine whether the Applicant has made out a prima face case that there was a continuing act in the form of a policy, rule or practice maintained by the Respondent.
>
> 25 In our view, on the basis of the Applicant's as yet untested allegations, a policy, rule or practice could be detected as result of which female officers and officers [coming] from ethnic minorities were treated less favourably than white male officers. In particular, we consider that her allegations of senior officers persistently either committing discriminatory acts against her or omitting to take steps to relieve her from the discriminatory acts or omissions of her colleagues, provides the foundation of a case that there possibly was such a policy, rule or practice."

Judgment of the Employment Appeal Tribunal

30. On the Commissioner's appeal against that ruling, the Employment Appeal Tribunal, in a judgment given on its behalf by His Honour Judge Serota QC, allowed the appeal. As appears from the judgment (paragraphs 38 to 44) the Appeal Tribunal concluded, after extensive reference to the authorities and to the parties' rival submissions, that the Employment Tribunal had failed to address correctly the question of what constituted the "continuing act" upon which Miss Hendricks relied,

> "save, as is apparent, in the most general and somewhat vague terms. There was no real attempt made to identify the "act extending over a period."(paragraph 38).

It was stated the allegations made by Miss Hendricks could not support "findings of so broad, general and pervasive a policy" of discrimination as was asserted on her behalf. There was no allegation of any discriminatory policy. There were no allegations that other members of ethnic minorities or other women had been the victims of the policy. It was held that the allegations made by Miss Hendricks could not support findings of the alleged generalised policy of discrimination, or permitting discrimination, against all women and all members of ethnic minorities. The allegations were all specific to Miss Hendricks. The decision of the Employment Tribunal inferring a widespread and general practice alleged by her went far beyond anything in other reported cases. Although the Employment Tribunal was right to look at matters in the round, there was no justification for inferring such a generalised, vague and ill defined act or equally wide policy, rule, practice, regime or climate which was alleged. In their view the alleged conduct or omissions of senior officers relied on by the tribunal as evidence of the existence of some policy was irrelevant, unless a link could be shown between the acts of discrimination alleged, beyond the fact that they all took place while Miss Hendricks was employed in the Metropolitan Police. They said

> "Something more is needed that could demonstrate the existence of a policy or practice which needs, in our opinion, to be more tightly defined than that

> determined by the Employment Tribunal, for the reasons we have given."(paragraph 43).

Submissions of the Commissioner

31. Mr John Cavanagh QC, in his excellent submissions on behalf of the Commissioner, supported the conclusion of the Employment Appeal Tribunal. The Employment Tribunal had erred in law in its interpretation and application of section 76(6) (a) of the 1975 Act and the equivalent provisions in Section 68(7)(b) of the 1976 Act on the question of time limits and jurisdiction.

The Concession

32. I deal first with Mr Cavanagh's submissions on the so-called concession recorded by the Employment Tribunal in paragraph 11 of its extended reasons.

> " Both parties accept that the only act or omission on the part of the Respondent about which the Applicant complains that occurred within three months before the presentation of either the first or second of her Originating Applications was the stoppage of pay in April [2000]."

33. This statement was repeated in the judgment of the Employment Appeal Tribunal (paragraph 4)-

> "It is common ground that the Originating Application makes no specific allegation of any discriminatory conduct within the three months preceding 8 March."

34. This is also repeated in paragraph 11 of the Appeal Tribunal's judgment. As already pointed out, however, Miss Hendricks's detailed statements and the particulars supplied in the discrimination proceedings describe instances of acts of less favourable treatment alleged to have occurred during the period when Miss Hendricks was on sick leave between 15 March 1999 and the presentation of the Originating Application in March 2000. Some alleged instances of less favourable treatment are given for the period of the 3 months preceding the presentation of the Originating Application. Indeed, as the Employment Tribunal noted in paragraph 3 of its extended reasons (see paragraph 21 above), it was part of Miss Hendricks's case that she was subjected to sex and race discrimination from 1989 onwards " right up to the present time". It was part of her counsel's submission that the acts at which she complained were a continuing act, evidencing a policy which still remained in force, so that time had not started to run against her.

35. Mr Cavanagh submitted that there had been a concession by Miss Hendricks's former legal representatives in the Employment Tribunal and in the Employment Appeal Tribunal and that Mr Robin Allen QC, who now appears for Miss Hendricks, is not entitled to resile from that concession. Mr Cavanagh cited Jones –v- Governing Body of Burdett Coutts School [1998] IRLR 521 for the proposition that only in exceptional circumstances should discretion be exercised to allow a conceded point of law to be reopened: see paragraph 20 of the judgment of Robert Walker LJ. It is clear from that passage that the appellate courts' reluctance to allow conceded points of law to be re-opened is specially strong in cases where the result of doing so would be to open up fresh issues of fact, which had not been sufficiently investigated before a trial court or tribunal, and therefore necessitating a further hearing below.

36. As Mr Allen QC pointed out, the jurisdiction issue in this case was being determined on basis of the "untested allegations" of Miss Hendricks. There was no question at that stage of the proceedings of evidence being called by the Commissioner or of the tribunal making any finding of fact, which might have to be reopened if the concession had not been made.

37. In my judgment, the court should only allow a consession to be withdrawn in very special circumstances. In this case, such circumstances exist, as the concession was not made in sufficiently clear and unambiguous terms to be treated as binding on Miss Hendricks. It is impossible to reconcile what is stated in paragraph 11 of the extended reasons with other parts of the decision, from which it is clear that the tribunal appreciated that reliance was being placed by Miss Hendricks on acts of less favourable treatment on the grounds of sex and race alleged to have continued while she was on extended sick leave and into the period of 3 months immediately preceding the commencement of the discrimination proceedings. In those circumstances I do not regard Miss Hendricks as being bound by any concession inhibiting Mr Allen from submitting that this is a case of "an act extending over a period", so that it is not out of time. Lord Hobhouse indicated in Grobelaar v. News Group Newspapers Ltd [2002] UKHL 40 at paragraph 56 it is not right to decide appeals on the basis of legally mistaken concessions. Nor would it be right to do so where the Court or Tribunal recorded the concessions in unclear and confusing terms.

The Liversidge Point

38. Before dealing with the "continuing act" issue, I should mention a fresh point of law raised by Mr Cavanagh. He sought by a respondent's notice and by a supplementary skeleton argument to introduce into the case for the first time in this court a point that had only recently emerged. In Chief Constable of Bedfordshire Police –v- Liversidge [2002] IRLR 15 it was held by the Employment Appeal Tribunal that, on the true construction of section 16 of the 1976 Act and before the coming into force of the amendments made by the 2000 Act, a chief officer of police could not be made vicariously or constructively liable for acts of race discrimination committed by one police officer against another, as distinct from liability for his own acts. The decision, which was given on 21 September 2001 (i.e. before judgment was delivered by the Appeal Tribunal in this case) was upheld by the Court of Appeal on 24 May 2002: see [2002] ICR 1135.

39. Mr Cavanagh's point is that, even if Miss Hendricks's discrimination proceedings were in time, she is not legally entitled to pursue them against the Commissioner, because the special provisions in the 1975 and the 1976 Acts regarding the police are limited to acts done by the chief officer of police in relation to a constable or his office and do not extend to acts done by one constable against another constable. It was submitted that the acts of less favourable treatment of which Miss Hendricks makes complaint were acts done against her, not by the Commissioner, but by her fellow officers. Accordingly, neither section 16 of the 1976 Act nor Section 17 of the 1975 Act could be relied on to make the Commissioner liable for acts of police officers against fellow officers. The provisions relating to vicarious and constructive liability in those acts did not apply so as to treat the Commissioner as having committed such acts of discrimination.

40. In my judgment, it is not appropriate to entertain on this appeal an application by the Commissioner to strike out the proceedings against him on the Liversidge point.

41. Liversidge was distinguished by the Employment Appeal Tribunal in its decision in a sex discrimination case on 15 July 2002, Chief Constable of Cumbria –v- McGlennon [2002] ICR 1156 at paragraphs 37-38. The unlawful discriminatory act in that case was a management decision (posting of an officer to a station) alleged to have been taken and carried out by the Chief Constable acting through other officers under his authority and command and as part of the direction and control of the force vested in him under the 1996 Act. It was held that the claim was within the jurisdiction of the tribunal. The Chief Constable could be held liable, even though he had not done the alleged discriminatory act of posting himself.

42. Mr Cavanagh argued that the decision in McGlennon was wrong. He reiterated his proposition, derived from Liversidge, that a chief officer of police is only liable for acts of discrimination suffered by a police officer if he has himself done those acts.

43. In this case, however, it is contended by Miss Hendricks that the Commissioner is liable for the continuing discrimination suffered by her on the basis of what has been done or omitted to be done by him in the exercise of the statutory responsibility imposed on him by the 1996 Act for the direction and control of the force, and that this falls within the jurisdiction of the Employment Tribunal under section 17 of the 1975 Act and section

16 of the 1976 Act. It is clear from the submissions that were made to the Employment Tribunal and in this court on behalf of Miss Hendricks that it is her case that the Commissioner is directly liable for subjecting Miss Hendricks to continuing acts of discrimination in the force under his direction and control alleged rather than vicarious or constructive liability for the discriminatory acts of others. Mr Cavanagh submitted that the simple fact that a chief officer has direction and control of his force does not mean that any acts of a managerial nature carried out by subordinate officers are his acts for the purposes of the 1975 and the 1976 Acts. He also submitted that none of the complaints made by Miss Hendricks relate to actions required to be done by the Commissioner himself or to actions done by others on his delegated authority

44. In my judgment the facts need to be established before it is decided whether Liversidge covers this case. If discrimination is proved, then it may be possible to distinguish Liversidge. If discrimination is not proved, the claim would fail quite apart from the Liversidge point.

45. It should also be borne in mind that different considerations may apply to the claim for sex discrimination as a result of the obligation to give effect as far as possible to the obligations of the United Kingdom under the Equal Treatment Directive and that a different construction of the police provisions in the 1975 Act may be required.

46. All these difficult and important points are best decided once all the evidence has been heard and the facts have been ascertained. I would decline at this preliminary stage the invitation by Mr Cavanagh to make a definitive ruling on the application of the Liversidge case to the present case.

Continuing Act: conclusion and case management

47. On the crucial issue whether this is a case of "an act extending over a period" within the meaning of the time limits provisions of the 1975 Act and the 1976 Act, I am satisfied that there was no error of law on the part of the Employment Tribunal.

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

51. In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on "continuing acts" was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see Owusu v. London Fire & Civil Defence Authority [1995] IRLR 574 at paragraphs 21-23; Rovenska v. General Medical Council [1998] ICR 85 at p.96; Cast v. Croydon College [1998] ICR 500 at p. 509. (cf the approach of the Appeal Tribunal in Derby Specialist Fabrication Ltd v. Burton [2001] ICR 833 at p. 841 where there was an "accumulation of events over a period of time" and a finding of a "climate of racial abuse" of which the employers were aware, but had done nothing. That was treated as "continuing conduct" and a "continuing failure" on the part of the employers to prevent racial abuse and discrimination, and as amounting to "other detriment" within section 4 (2) (c) of the 1976 Act).

52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, 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.

53. I would add a few words on the case management aspects of a case like this, where the complaints involve numerous instances of acts by many different people over a long period. As appears from the directions already given, the tribunal chairman is well aware of the importance of directions hearings to ensure that the case is ready for hearing and to explore ways of saving time and costs.

54. Before the applications proceed to a substantive hearing the parties should attempt to agree a list of issues and to formulate proposals about ways and means of reducing the area of dispute, the number of witnesses and the volume of documents. Attempts must be made by all concerned to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations. The parties' representatives should consult with one another about their proposals before requesting another directions hearing before the chairman. It will be for him to decide how the matter should proceed, if it is impossible to reach a sensible agreement.

Result

55. I would allow the appeal. Both Originating Applications should now proceed to a hearing, subject to any further interlocutory directions of the tribunal.

Lord Justice May

56. I agree.

Lord Justice Judge

57. I also agree.

Order: Appeal allowed with the costs permission to appeal refused.
(Order does not form part of the approved judgment)