**HOUSE OF LORDS**

Lord Bingham of Cornhill Lord Browne-Wilkinson Lord Steyn Lord Hope of Craighead Lord Millett

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT**

**IN THE CAUSE**

*ANYANWU AND ANOTHER*

*(APPELLANTS)*

*v.*

*SOUTH BANK STUDENT UNION AND ANOTHER*

*(RESPONDENTS)*

*AND*

*COMMISSION FOR RACIAL EQUALITY*

**ON 22 MARCH 2001**

**[2001] UKHL 14**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. This appeal turns on the correct interpretation and application of section 33(1) of the Race Relations Act 1976. Section 33 of the Act (as amended) 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 32 (or would be so liable but for section 32(3)) shall be deemed to aid the doing of the act by the employer or principal.
> (3) A person does not under this section knowingly aid another to do an unlawful act if -
>> (a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of this Act, the act which he aids would not be unlawful; and
>> (b) it is reasonable for him to rely on the statement.
>
> (4) A person who knowingly or recklessly makes a statement such as is mentioned in subsection (3)(a) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding level 5 on the

standard scale."

2. Section 33(1) is to be read in its context, as a provision in an Act passed to remedy the "very great evil" of racial discrimination (as recognised by Templeman LJ in *Savjani v Inland Revenue Commissioners* [1981] QB 458 at 466-467) and it must be construed purposively (see *Jones v Tower Boot Co Ltd* [1997] ICR 254 at 261-262, *per* Waite LJ). Since the 1976 Act is one of a trio of Acts (with the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995) which contain similar statutory provisions although directed to different forms of discrimination, it is legitimate if necessary to consider those Acts in resolving any issue of interpretation which may arise on this Act. The framework of the 1976 Act, although familiar, is important in construing section 33(1). Part I (sections 1-3) defines what, for purposes of the Act, is meant by racial discrimination. Part II (sections 4-16) provides that certain discriminatory acts in the crucially important field of employment shall be unlawful and makes certain exceptions. Part III of the Act provides that certain discriminatory acts shall be unlawful in a number of different fields such as education (sections 17-19); the provision of goods, facilities and services by (among other providers) hotels, banks, insurers, recreational establishments, transport officers and professions (section 20); and housing (sections 21-24).

3. Part IV of the Act is entitled "Other unlawful acts" and includes a series of sections which includes section 33. Section 29 applies to discriminatory advertisements. Section 30 makes it unlawful for a person with authority or influence over another to instruct that other to do, or to procure or to attempt to procure that other to do, anything which is unlawful under Part II or Part III of the Act. Section 31 makes it unlawful to induce or attempt to induce any person to do any act which contravenes Part II or Part III of the Act. Section 32 makes employers and principals vicariously liable for the conduct of their respective employees and agents. Section 32(3) provides a defence to an employer in proceedings brought against him under the Act in respect of an act allegedly done by his employee, if he can 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 his employment acts of that description. Section 33, quoted above, completes this Part.

4. Part VIII of the Act governs the enforcement of its provisions and is of obvious importance if the Act is to have the teeth which Parliament doubtless intended it should. Section 53 makes plain that these enforcement provisions are to be read as both exclusive of any other means of enforcement and as exhaustive. Consistently with the modern practice of allocating employment disputes to specially constituted employment (formerly industrial) tribunals, section 54 provides that any complaint of a racially discriminatory act made unlawful by Part II of the Act (the sections dealing with employment), or under sections 32 or 33 in relation to such an act, must be made to an employment tribunal. The Act permits no other procedure. If the complaint is of a racially discriminatory act made unlawful by Part III of the Act, or under sections 32 or 33 in relation to such an act, proceedings can be brought only in a designated county court in England and Wales or a sheriff court in Scotland. Again, the Act permits no other procedure. Section 63 of the Act provides that proceedings in respect of a contravention of sections 29, 30 and 31 may be brought only by the Commission for Racial Equality, a body established by section 43 of the Act with important strategic duties which are there specified.

5. The expression "aids" in section 33(1) is a familiar word in everyday use and it bears no technical or special meaning in this context. A person aids another if he helps or assists him. He does so whether his help is substantial and productive or whether it is not, provided the help is not so insignificant as to be negligible. While any gloss on the clear statutory language is better avoided, the subsection points towards a relationship of cooperation or collaboration; it does not matter who instigates or initiates the relationship. It is plain that, depending on the facts, a party who aids another to do an unlawful act may also procure or induce that other to do it. But the expressions "procure" and "induce" are found in sections 30 and 31, not section 33, and are differently enforced; they mean something different from "aids" and there is no warrant to interpreting "aids" as comprising these other expressions. By section 12 of the Race Relations Act 1968, the predecessor of the 1976 Act, those who deliberately aided, induced or incited another person to do an act made unlawful by Part I of that Act were to be treated as themselves doing that act, but they could not be subjected to proceedings at the direct suit of the injured party and the 1976 Act adopted a different legislative approach. It is plain that a party who causes another to do an unlawful act does not necessarily aid him to do it. A farmer who starves his sheepdog, with the result that the ravening dog savages a new-born lamb, may reasonably be said to have caused the death of the lamb, but he could not be said to have aided the dog to kill the lamb. In the present appeal no issue arises on the meaning of "knowingly" in this context and it is unnecessary to consider what an aider must know to be liable under section 33(1).

6. Mr Anyanwu and Mr Ebuzoeme, the appellants, were students at and members of the South Bank University. As a result of elections held in May 1995 they were engaged to serve as full-time salaried officers of the South Bank Student Union for a fixed term of one year beginning on 1 August 1995. In that capacity they were trustees of the funds of the student union, which was treated as an educational charity. Questions were raised by the university about their conduct as trustees, and disciplinary proceedings were instituted. The university suspended both appellants as members of the university by letters dated 22 February 1996, which also forbade them from entering any university building including the student union until given permission to do so. Following the appellants' non-appearance at the disciplinary proceedings the university expelled them from the university with immediate effect by letters dated 29 March 1996 which again forbade them from entering any university building including the student union. It was of course impossible for the appellants to perform their duties as employees of the student union if they were unable to enter its premises and by letters dated 2 April 1996 to each appellant the student union treated the appellants' employment contracts as at an end. There is an unresolved question whether by these letters the student union dismissed the appellants, or whether the student union treated the contract of employment as frustrated by supervening impossibility of performance. That is not an issue before the House.

7. The appellants made complaints of unlawful racial discrimination against the student union and the university (and against other personal respondents whose joinder in these proceedings has been disallowed). In his form of application Mr Anyanwu summarised the grounds of his complaint, relying on the suspension of 22 February 1996, the expulsion on 29 March 1996 and the termination of his employment by the student union on 2 April 1996. He

expressed the belief that he had been discriminated against on racial grounds, he being of black African origin. The brief summary of his complaint in the form of application was expanded in a typed statement: in this, a large number of accusations were made against a number of parties, and Mr Anyanwu again relied on the suspension of 22 February 1996, his expulsion on 29 March 1996 and his dismissal on 2 April 1996. Mr Ebuzoeme made a similar complaint in his form of application, relying on the same three events. He also submitted a statement in support of his claim, which also made a number of accusations of racial discrimination. He also placed reliance on the letters which suspended, expelled and dismissed him, and he summarised his case against the university in these terms:

> "(a) Refusal to accept me as equal to that of my predecessor.
> (b) Misuse of administration and disciplinary rules by Prof T Watkins [the deputy Vice Chancellor] as vehicle for discrimination and preferential treatments. Ref: incident of the 15th Dec. 95.
> (c) Incitement of racial hatred. Ref letter of the 5th Feb. 96.
> (d) My suspension and expulsion was racial because it would have handled my case differently if I was an English student.
> (e) It instigated my removal by its actions and inactions."

Both the forms of application and the statements were drafted by the appellants without the benefit of legal assistance.

8. The appellants had earlier sought, without success, to obtain permission to apply for judicial review against the university in relation to their suspension and expulsion. Relying on this refusal of permission, the university (which is the sole respondent to this appeal) applied in the industrial tribunal that the proceedings against it should be struck out on grounds of res judicata. The tribunal considered this application at a preliminary hearing on 21 March 1997. It held that the appellants' complaints against the university should be struck out as frivolous or vexatious. In the reasons for its decision issued on 7 April 1997 the tribunal said:

> "2. So far as the issues were concerned, these were clarified and agreed by the [appellants] after some discussion as follows. Both [appellants] complain against the [student union] that they discriminated against them on the ground of race first by excluding the [appellants] from the [student union's] premises on 22 February 1996 and secondly by dismissing the [appellants] on 2 April 1996. The [student union] deny both allegations and indeed claim that the contracts of employment were frustrated and not terminated by any action of the [student union]. The issues in respect of the [university] . . . were agreed as follows:-
>
>> "(a) that they [the university] interfered with the [appellants'] contracts of employment by excluding them from their place of employment
>> (b) that they made various allegations against the [appellants] in connection with union funds.
>> (c) that they made allegations against the [appellants] in respect of other employment matters for example intimidation of union staff.
>> (d) that there had been preferential treatment in terms of funding being granted to the [student union].

(e)

that they used the General Manager of the union to make allegations against the

[appellants].

"3. It was alleged that all of these actions were designed to obtain the dismissal of the [appellants]."

9. The tribunal accepted the university's argument that the appellants' complaints against it had been or should have been the subject of previous adjudication, and made its striking out order on that ground.

10. The appellants' appealed against this ruling to the Employment Appeal Tribunal. On the appeal the student union played no part since it was accepted that the proceedings against it would continue in any event. For reasons given by Morison J the appeal was allowed. The Employment Appeal Tribunal understood the appellants' complaint to be that they had been dismissed by the student union from their employment on grounds of race contrary to the 1976 Act, and that the university had knowingly aided the union to do that unlawful act.

11. The Employment Appeal Tribunal ruled that the proceedings against the university should not have been struck out on grounds of res judicata or under the principle in *Henderson v Henderson* (1843) 3 Hare 100, 115.

12. The university challenged that ruling in the Court of Appeal, where the argument took a different turn: the Court of Appeal drew attention to section 33(1) of the Act, quoted above, and held by a majority (Butler-Sloss and Laws LJJ, Pill LJ dissenting) that even assuming the appellants' account of the facts to be correct it could not be said that the university had knowingly aided the student union to dismiss the appellants ([2000] ICR 221). Giving the first judgment (at page 227) Laws LJ said:

"The facts alleged by the [appellants] are vigorously contested, but must be taken as true for the purposes of this appeal, since the university's argument amounts to an application to strike out the case against it. The question for this court, as it seems to me, is whether on those alleged facts the university can conceivably be said to have 'knowingly aided' the [appellants'] dismissal by the union. In expelling the [appellants] and barring them from the union premises, the university brought about a state of affairs in which the employment contracts were bound to be terminated. In my judgment it is a plain affront to the language of the Act of 1976 to suggest that in such circumstances the university 'aided' the dismissal of the [appellants]. The verb 'aid' (to which no special definition is ascribed by the statute) means 'help' or 'assist'. Its use contemplates a state of affairs in which one party, being a free agent in the matter, sets out to do an act or achieve a result, and another party helps him to do it. The first party is the primary actor. The other is a secondary actor. The simplest example may be found in the criminal law. A breaks into a house in order to burgle it. B keeps watch outside or is ready to drive off the get-away car. Plainly B 'aids' A. But here, the university is the prime mover. It did not 'aid' (or 'help') the union to dismiss the [appellants]. It may well be said that it *brought about* their dismissal. But that is altogether a different thing."

13. Butler-Sloss LJ agreed with him and (at page 234) said:

"But, for my part, I am unable, in applying the natural meaning to the word 'aids', to

> attribute to it a meaning which distorts it. In ordinary language a person who aids another person is one who helps, supports or assists the prime mover to do the act. On the present facts the university took steps to expel the [appellants] for its own reasons, justified or unjustified. Those expulsions, carrying with them the prohibition against entering any part of the university buildings including the students' union, cannot in ordinary language be said to be knowingly aiding the students' union to dismiss the [appellants] within section 33(1). In this case the prime mover of the dismissal of the [appellants] was the students' union but its acts were effectively dictated to it by the prior decision of the university to expel the [appellants]. It seems clear to me that the students' union had no alternative but to dismiss the [appellants] after the university expelled them. In ordinary language can that conceivably be said to be knowingly aiding? I would answer 'No'."

14. In his dissenting judgment (at page 231) Pill LJ noted the university's concession that for purposes of the strike-out application the dismissals of the appellants should be treated as unlawful acts within the meaning of section 33, and recited the university's argument that it had not aided the student union to do those unlawful acts since it had itself suspended and expelled the appellants and that had led inevitably to the termination by the student union of the appellants' contracts of employment. He did not agree that the appellants' claim against the university should be struck out. He said (at page 232):

> "Even taking a narrow definition of the word 'aids', the acts complained of, suspension, expulsion and dismissal, and the alleged conduct of the university and the union which preceded each of them, are so entangled upon the facts alleged that it would not be appropriate to separate them at this stage. On any view, the dismissal is intimately connected with the suspension and expulsion. An environment of racial prejudice is alleged to have been 'encouraged and allowed to thrive by the university and the union' (Mr Anyanwu). The union are alleged to have been 'conniving with the university to remove me' (Mr Ebuzoeme). In further and better particulars given at the request of the university, Mr Anyanwu said that 'in all cases the acts of racial discrimination were carried out collectively by the respondents' (that is the university and the union)."

15. Three points in particular are important in approaching the central issue in this appeal, which is whether the Court of Appeal were right to allow the university's appeal and strike out the appellants' claim against it. First, the appellants' claim against the university is advanced under, and only under, section 33(1) of the Act. Second, the appellants' claim against the student union as their former employer is brought under Part II of the Act, under which the claim against the university under section 33(1) must also lie. Third, the issue before the House arises on demurrer: there has been no trial, and no findings of fact have been made, so the questions for decision must be answered by reference to what the appellants have alleged and not what they have proved.

16. The first question which must be asked is: what is the act of the student union made unlawful by Part II of the Act which it is said that the university knowingly aided the student union to do? The answer, in each case, is that the student union dismissed the appellant on discriminatory racial grounds. This is the unlawful act to which the judgments of the Employment Appeal Tribunal and the Court of Appeal were directed. The complaint of

exclusion was not, it seems, pursued, no doubt because this appears to have been an act (whether lawful or unlawful) of the university and not of the student union.

17. The second question is: what is it alleged that the university did which knowingly aided the doing of that unlawful act by the student union? The answer is in my view to be found in the issues agreed in the industrial tribunal and summarised in paragraph 2 of the tribunal's reasons, quoted above in paragraph 8. Although this summary was given and agreed in the context of an argument concerning res judicata, I can see no reason why it should not be treated as an accurate and comprehensive summary.

18. The third question is: do those allegations (if fully established) bring the appellants' complaints against the university within section 33(1) of the Act? The House is not concerned with allegations that the appellants might have made against the university in the county court under section 17 of the Act, but only with knowing aid given by the university to the student union in dismissing the appellants. I would for my part have doubted whether the appellants' allegations were sufficient to support their claim against the university on this limited basis under section 33(1), and I would have questioned whether the appellants' general claims against the university of racial prejudice, intimidation and interference (even if established) could have been said to satisfy the subsection. A majority of your Lordships do not however share my doubts, and having read the compelling opinions of my noble and learned friends Lord Steyn and Lord Hope of Craighead my reservations are assuaged if not entirely dispelled. I am content to acquiesce in the view which commends itself to the majority.

19. I would accordingly allow the appeal, set aside the order of the Court of Appeal and remit the matter to an employment tribunal for a hearing, long overdue, against both the student union and the university. In resolving the claim against the university, the tribunal should apply the plain terms of section 33(1) as explained by your Lordships. The subsection will apply if the university is shown to have knowingly aided (or helped or assisted) the student union to dismiss the appellants. It is not helpful to introduce "free agents" and "prime movers", which can only distract attention from the essentially simple test which (however complicated and controversial the facts) is the test to be applied.

20. The parties are invited to make submissions on costs; in the House and below, in writing within 14 days.

**LORD BROWNE-WILKINSON**

My Lords,

21. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I am in complete agreement with him as to the correct construction of section 33 of the Race Relations Act 1976 but do not share his doubts as to whether this is an appropriate case to strike out. On the latter point I agree with Lord Steyn in thinking that the case cannot be properly struck out but must continue to trial. On those grounds I would allow the appeal.

**LORD STEYN**

My Lords,

*I. Striking out*

22. The appellants were students at the South Bank University. In 1995 they came to be employed by South Bank Student Union. In 1996 they were expelled from the university and dismissed by the student union. They submitted claims under the Race Relations Act 1976. The claims against the student union were brought under section 4 of the 1976 Act which provides that it is unlawful for an employer to discriminate against an employee by dismissing him or subjecting him to any other detriment. The hearing of this claim on its merits has been delayed by the vicissitudes of the secondary or derivative claim against the university which was based on section 33(1) of the 1976 Act. This provision reads:

> "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."

The employment tribunal struck out this claim on the grounds that the issue was *res judicata;* the Employment Appeal Tribunal reversed this decision; and by a majority the Court of Appeal restored the decision of the employment tribunal on the basis of its view of the correct interpretation of the word "aids" in section 33(1): *Anyanwu and Another v South Bank Student Union and Another* [2000] ICR 221.

23. It is my understanding that your Lordships are agreed that the interpretation of section 33(1) adopted by the Court of Appeal should not be accepted. The issue now is whether on a different interpretation of section 33(1) upon which I understand your Lordships to be agreed, the claim against the university should be struck out or whether it should be heard on its merits by the employment tribunal.

24. In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.

*II. A Narrative*

25. The university is a corporate charity, registered with the Charity Commission. The student union is an unincorporated association, regarded by the Charity Commission as having charitable objects deriving from its relationship with the university. Under the Education Act 1994 the university exercises a degree of superintendence over the student union.

26. During May 1995, while they were student members of the university, the appellants were elected to the executive committee of the student union. The student union employed the two

appellants full-time under contracts of employment as respectively a communications officer (in the case of the first appellant) and Vice President (in the case of the second appellant). These contracts were for a year beginning from 1 August 1995. By virtue of their contracts the appellants became trustees of the funds of the student union.

27. The conduct of the appellants was called into question. Disciplinary proceedings were taken by the university against them. In February 1996 they were suspended from the university. By letters dated 29 March 1996 they were expelled from the university. The letters stated that they "must not enter any university building, including the student union". The appellants contend that they were dismissed by letters dated 2 April 1996. The student union argue that the contracts were frustrated. This issue does not arise for consideration on the present appeal.

28. Both appellants challenged their expulsion by the university in judicial review proceedings. In June 1996 a High Court judge (Jowitt J) declined to grant leave in relation to the claim of the second appellant that the university approached the decision against him in a biased way. Subsequently, in the same month the same High Court judge also refused leave in relation to the first appellant's challenge to the procedure adopted which led to his expulsion. The latter decision was upheld on appeal.

29. By originating applications received on 21 May 1996 the appellants brought claims of race discrimination against the student union and the university in the employment tribunal. They complained of their dismissal by the student union and their expulsion from the university, alleging discrimination on the grounds of race. In June 1996 the appellants sent to the employment tribunal statements setting out their complaints about the conduct of the student union and the university. Both appellants furnished further and better particulars of their claims.

30. The solicitors for the university requested a preliminary hearing for the tribunal to consider, *inter alia*, whether the claim against the university should be struck out as frivolous and vexatious. On 21 March 1997 the preliminary hearing took place before the chairman alone. No evidence was led. On the other hand, in accordance with the customary and sensible practice of case management of the tribunal, the chairman took the opportunity to inquire into the general nature of the case advanced by the appellants against the university. At that time the precise way in which it was alleged that the university aided the student union in dismissing the appellants was not actively under consideration. The issue was whether *res judicata* barred the claims. Nevertheless, the chairman's elucidation was instructive. Being a critical document I set out the relevant part of his decision letter of 7 April. It reads:

> "2. So far as the issues were concerned, these were clarified and agreed by the [appellants] after some discussion as follows. Both [appellants] complain against the [student union] that they discriminated against them on the ground of race first by excluding the [appellants] from the [student union's] premises on 22 February 1996 and secondly by dismissing the [appellants] on 2 April 1996. The [student union] deny both allegations and indeed claim that the contracts of employment were frustrated and not terminated by any action of the [student union]. The issues in respect of the [university] . . . were agreed as follows:-

(a) that they interfered with the [appellants] contracts of employment by excluding them from their place of employment.

(b)

that they [the university] made various allegations [to the student union] against the [appellants] in connection with union funds.

(c)

that they made allegations against the [appellants] in respect of other employment matters for example intimidation of union staff.

(d)

that there had been preferential treatment in terms of funding being granted to the [student union].

(e)

that they used the General Manager of the union to make allegations against the [appellants].

3. It was alleged that all of these actions were designed to obtain the dismissal of the [appellants]."

On the appeal to your Lordships' House it was conceded on behalf of the university that a decision on the sustainability of the appellants' claim against the university must now take full account of this amplification and clarification of the claims, viewed against the background. But that is not how the matter came before the chairman: he was only considering a technical issue *res judicata*. In his decision of 7 April 1997 the chairman accepted the legal argument of the university that, by reason of the earlier judicial review proceedings, the claims against the university in the employment tribunal were barred by the doctrine of *res judicata.*

*III. The Employment Appeal Tribunal*

31. The appellants appealed to the Employment Appeal Tribunal against the striking out of their claims against the university. In a judgment dated 19 January 1998 the Employment Appeal Tribunal (Morison P presiding) allowed the appeal. The EAT held that the employment tribunal had erred in ruling that the claims under consideration should have been raised in the judicial review proceedings. The EAT also rejected a claim that it was an abuse of process to allow the claims against the university to proceed. The EAT remitted the claims to the employment tribunal for a substantive hearing on the merits.

*IV. The Decision of the Court of Appeal*

32. The university appealed to the Court of Appeal against the decision of the EAT When the appeal came on for hearing on 21 May 1999 Laws LJ raised a new point on the applicability of section 33(1) of the 1976 Act to the alleged liability of the university. The appeal was adjourned and the grounds of appeal were amended to include a ground that the university had not aided the student union within the meaning of section 33(1). On the resumed hearing the new ground was debated. It eventually formed the basis of the judgments of the majority: [2000] ICR 221. Laws LJ gave the leading judgment. He observed (at 227D-F):

"In expelling the applicants and barring them from the union premises, the university brought about a state of affairs in which the employment contracts were bound to be terminated. In my judgment it is a plain affront to the language of the Act . . . to suggest that in such circumstances the university 'aided' the dismissal of the applicants. The verb 'aid' (to which no special definition

> is ascribed by the statute) means 'help' or 'assist'. Its use contemplates a state of affairs in which one party, being a free agent in the matter, sets out to do an act or achieve a result, and another party helps him to do it. The first party is the primary actor. The other is a secondary actor. The simplest of examples may be found in the criminal law. A breaks into a house in order to burgle it. B keeps watch outside or is ready to drive off the getaway car. Plainly B 'aids' A. But here, the university is the prime mover. It did not 'aid' (or 'help') the union to dismiss the applicants. It may well be said that it *brought about* their dismissal. But that is altogether a different thing."

The proposition that as a matter of law a prime mover cannot be said to be under section 33(1) was at the core of the reasoning of Laws LJ. It was the basis of his decision that the university did not aid the dismissal of the appellants. Laws LJ did, however, consider an alternative argument advanced by the appellants. The passage in his judgment reads (at 229H-230C):

> "Miss Monaghan (for Mr Anyanwu) and Mr Crawford (for Mr Ebuzoeme) further submitted that the facts which the applicants alleged disclosed, or at least arguably disclosed, a state of affairs in which the university and the union were, in effect, deliberately aiding each other to discriminate against the applicants. That is not the case made in either applicant's IT1, nor in the summary conclusions of their witness statements. Mr Bean, for the university submitted that the court should look only at the IT1s in order to ascertain what was the case being made against the university. I have some sympathy with this, although I certainly accept that, given the relative informality with which proceedings before the employment tribunal are advisedly conducted, it would be wrong to adopt an excessively technical or formalistic approach to the case. However that may be, something altogether clearer would need to be asserted by the applicants for this court to proceed on the basis that the case being made involved knowing and deliberate mutual assistance between the university and the union, each acting as an independent party. . . . I would found my conclusion on this part of the case upon the simple proposition that the allegation suggested nowhere sufficiently appears in the documents that were placed before the tribunal."

It will be observed that Laws LJ did not consider the amplification and clarification of the appellants' allegations which were recorded by the chairman. That explanation is now by concession before the House and relevant to the issues. Butler-Sloss LJ agreed with the judgment of Laws LJ but said, at p 234F-G, that "the prime mover of the dismissal of the applicants was the student union but its acts were effectively dictated to it by the prior decision of the university to expel the applicants." Butler-Sloss LJ did not deal with the alternative argument of counsel for the appellants which finds support in the chairman's brief summary of the appellants' allegations against the university. Lastly, Pill LJ gave a dissenting judgment in which he adopted a broader interpretation of section 33(1) and, in any event, concluded, at p 232C-D, that "the alleged conduct of the university and the union which preceded each of them [viz the expulsion and dismissal] are so entangled upon the facts alleged that it would not be appropriate to separate them at this stage."

*V. The Proper Construction of Section 33(1)*

33. My noble and learned friend Lord Bingham of Cornhill set out the scheme of the 1976 Act and has explained with great care and precision how section 33(1) ought to be construed. I am in full agreement with his interpretation of this provision. It is therefore unnecessary for me to cover all the same ground. I do, however, state the major points germane to the present appeal. The correct approach is to construe the words of section 33(1) in its contextual setting. It creates a form of derivative liability predicated on the commission of an unlawful act by another person. For present purposes the unlawful act against which

section 33(1) must be considered is the alleged dismissal of the appellants by their employers (the student union) on discriminatory racial grounds. The issue of knowledge does not need to be considered on the present appeal. Focusing on the concept of knowingly *aiding*, the word is used in its ordinary sense. While there is no exact synonym the words help, assist, co-operate, or collaborate, convey more or less the right nuance. The word "aid" is therefore not used in either an extensive or a restrictive sense. The critical question is: Does the word aid in its contextual sense cover the conduct of the secondary party? It follows that it is wrong to be diverted by any inquiries not mandated by the statute as to whether the alleged aider was or was not a prime mover or a free agent. I would therefore hold that interpretation of section 33(1) adopted by the majority in the Court of Appeal ought not to be accepted.

*VI. The approach of the Court of Appeal to the allegations of the appellants.*

34. Counsel for the university abandoned earlier technical objections to considering the explanation of the appellants' case as recorded by the chairman. Unfortunately, due perhaps to its concentration on the "prime mover" and "free agent" issues, the Court of Appeal did not consider the case of the appellants as amplified and clarified at the preliminary hearing. I have already cited that amplification and explanation in full. Fairly considered it conveys, or is capable of conveying, that the appellants allege, *inter alia*, that the university in order to achieve the dismissal of the appellants assisted the student union, or co-operated with it, by making allegations against the appellants to the student union to the effect that the appellants were involved in irregularities in connection with union funds and were guilty of intimidation of union staff. Taking into account the summary of the chairman, read with the statements of the appellants, I am persuaded that there is an arguable case under section 33(1) against the university. In my view it would be wrong to strike it out.

*VII. Disposal*

35. I would allow the appeal and restore the order made by the Employment Appeal Tribunal on 19 January 1998.

**LORD HOPE OF CRAIGHEAD**

My Lords,

36. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I am in full agreement with what they say about the interpretation of section 33(1) of the Race Relations Act 1976. As for its application to this case, I agree with Lord Steyn that the appellants have an arguable case against the university and that their claims should not be struck out. I should like however to add these observations, especially in the light of the points made by my noble and learned friend Lord Millett, whose speech I have also had the advantage of reading in draft. This is because, while we are all agreed as to the result of the appeal, there are some differences between us as to the route by which we reach that result.

37. I should like first to say that, if I had reached the view that nothing that the university is alleged to have done could as a matter of ordinary language be said to have aided the student union to dismiss the appellants, I would not have been in favour of allowing the appeal. I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be

determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. This was the point which Pill LJ was making in his dissenting judgment in the Court of Appeal [2000] ICR 221 when he said, at p 232, that the acts complained of and the alleged conduct of the university and the student union which preceded them are so entangled upon the facts alleged that it would not be appropriate to separate them at this stage.

38. Then there is the fact that the point of law with which this appeal is concerned was raised for the first time in the Court of Appeal. It was the Court of Appeal itself which drew attention to the terms of section 33(1) of the 1976 Act and invited argument upon it. The appellants had appealed successfully to the Employment Appeal Tribunal against the ruling by the industrial tribunal that their claim should be struck out as frivolous or vexatious. In the result the Court of Appeal held by a majority that the claim should be struck out on an entirely different ground, which neither the industrial tribunal nor the Employment Appeal Tribunal had considered when they were examining the appellants' allegations. The appellants may well have had a genuine sense of grievance at this turn of events.

39. Nevertheless I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to taken up by having to hear evidence in cases that are bound to fail.

40. In my opinion however the appellants have an arguable case against the university under section 33(1) of the Act and their claim should be remitted to an employment tribunal so that they may have an opportunity of leading their evidence. I have based this opinion on a reading of the statements which the appellants lodged in support of their applications to the tribunal and on the plain meaning of section 33(1).

41. The critical words in section 33(1) are contained in the phrase "who knowingly aids another person to do an act made unlawful by this Act". The state of mind that is referred to here is actual knowledge, in contrast to that referred to in section 33(4) which uses the phrase "knowingly or recklessly". The activity which is indicated by the word "aids" is best understood by reading it together with the words "to do an act" which appear in the same phrase. It can be contrasted with the words "instruct" and "induce" which are used in sections 30 and 31. The word "instructs" in section 30 is used to describe something done by a person with authority or influence. It is used in the sense of issuing an order which the other person must, or can be persuaded to, obey. A person who in that sense instructs, induces or causes another person to do an act may also knowingly aid him to do that act, or he may not. This is because the word "aids" indicates an act of a different kind from that which may have *caused* the person to do the unlawful act. It indicates the giving of some kind of assistance to the other person which *helps* him to do it. The amount or value of that help or assistance is of no importance. Nor is the time at which it is given. It may or may not have been necessary. All that is needed is an act of some kind, done knowingly, which helps the other person to do the unlawful act.

42. I would be cautious about selecting examples to illustrate what the word "aids" means which relate to criminal conduct. As Judge LJ said in *Hallam v Avery* [2000] 1 WLR 966, 972F, caution is required before the principles relating to the liability of secondary parties under the criminal law are used for the purposes of construing section 33(1). Of course, examples may be given to illustrate the difference

between causing or persuading somebody to do something and aiding or helping him to do something. But one must bear in mind that the word "aids" is being used in the context which section 33(1) has set for it. This is in the context of acts made unlawful by the Act, which are many and various and may require inferences to be drawn from a complex variety of facts and circumstances. For this purpose I think that it is enough to say that the word "aids" should be given its plain and ordinary meaning. It requires that the facts be examined to provide the answers to two questions: (i) what was the act done by the other person which was made unlawful by the Act? (ii) did the act which is in question aid the other person to do that act?

43. As for the facts, I agree with Lord Steyn that the agreed list of issues which the chairman of the industrial tribunal set out in his decision letter of 7 April 1997 provides a helpful summary of the appellants' case. But I think that in order to obtain a complete picture of the allegations which the appellants are making against the university it is necessary to look at the statements which the appellants lodged in support of their applications. I note in passing that the issue which was before the tribunal when the agreed list of issues was prepared was whether the claims were barred by *res judicata.* That was a different issue from the question which has now been raised under section 33(1) of the Act. The appellants will not be confined to the points mentioned in that agreed list when they are presenting their evidence.

44. The picture which the appellants are seeking to present in these statements is the building up by the university of a climate of racial prejudice against them which the elected officials of the student union were unable or unwilling to withstand. Mr Anyanwu says in his statement that the university continually threatened and intimidated officers of the union, and that the student members of the union were dissuaded from acting against the university. Mr Ebuzoeme says in his statement that the university "instigated" his removal by its actions and inactions. Of course, if that is all that can be proved against the university it will not be enough to show that it "aided" the student union to dismiss the appellants on racial grounds.

45. But the appellants do not stop there. Mr Ebuzoeme says in his statement that the student union connived with the university to remove him. Mr Anyanwu refers to a letter which was written to him by the Vice Chancellor of the university on 22 March 1996 in which he said that the Board of Governors had approved a new interim constitution for the student union. The effect of the interim constitution was to place the affairs of the student union out of the hands of the student members and into the hands of trustees selected and appointed by the university. They replaced those who had been elected by the student body to act as its representatives. This action appears to have been taken under section 22 of the Education Act 1994, which requires the governing body of every educational establishment to take steps to ensure the fair, democratic and financially accountable conduct of student unions. The letters of 2 April 1996 which had the effect of terminating the appellants' employment were signed by Maggie Hammond as a trustee. It appears that she was one of the persons who had been selected to act in that capacity by the university.

46. I do not think that it is possible to say one way or the other at this stage, from the narrative that has been given, whether the actions of the university which are alleged against it aided the student union to do the unlawful act of which the appellants complain. But a case to this effect seems to me to be at least arguable. As Miss Cox QC observed in the course of the argument, it was only the student union that could dismiss the appellants. All the university could do was to aid the student union in effecting the

dismissal. But the actions alleged against the university were intimately connected with those of the student union, and the connection became even more intimate once the interim constitution had been approved and put in place. The university's alleged actions are said to have culminated in its decision to approve the interim constitution for the student union. It was the interim constitution which enabled the university to appoint Maggie Hammond as a trustee. Within days of her appointment she signed the letters on behalf of the student union by which, in effect, the appellants were dismissed. In my opinion the facts which led to this chain of events require to be investigated.

47. I would therefore, for these reasons, allow the appeal and remit the matter to an employment tribunal for a hearing against both the student union and the university.

**LORD MILLETT**

My Lords

48. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill, with which I respectfully agree.

49. I share his doubts whether the acts of the university relied upon, if established at trial, are capable of sustaining a finding that the university "aided" the student union to dismiss the appellants. The university may have encouraged, induced or incited the union to dismiss them; these concepts are closely similar and merge imperceptibly into one another. Indeed, the university may well have gone further and caused or procured the union to dismiss the appellants; concepts which are distinct from but also closely related to each other. But aiding is a very different concept from encouraging or inducing on the one hand and causing or procuring on the other. It requires a much closer involvement in the act of the principal.

50. In my opinion it is, however, unhelpful to have regard to words like "co-operate" or "collaborate", which introduce a different concept in which both parties are principals. Such words serve only to confuse the issue, since they distract attention from the particular act of the principal which the accessory is alleged to have aided. Where two parties join together to achieve a common purpose, they may no doubt be said to aid each other in achieving that purpose. But, in the course of their co-operation, each may play his separate part unaided by the other. I take a simple example. Suppose A and B decide to let a bull loose from a field. A opens the gate and B drives the bull out of the field. They co-operate in letting the bull loose. A may without inaccuracy also be said to have aided B to let the bull loose. But B can hardly be said to have aided A to open the gate. This serves to demonstrate the importance of identifying with precision the act of the principal to which the accessory is alleged to have lent his aid.

51. For my part, I do not think that anything which the university is alleged to have done (at least as summarised by the chairman of the industrial tribunal), even if done deliberately and with an eye to the dismissal of the appellants from their employment by the union, and even if their dismissal was one of the university's objects and not merely an incidental consequence of its actions, can as a matter of ordinary language be said to have aided the union to dismiss them. But there may be more to the appellants' case than is comprehended within the chairman's summary, and I agree that their claim against the university should proceed to trial so that the facts can be established.