Neutral Citation Number: [2024] EAT 132

Case No: EA-2023-SCO-000063-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 12 August 2024

Before :

THE HONOURABLE LADY HALDANE

- -

Between :

MS JEN NELSON

Appellant

- and –

RENFREWSHIRE COUNCIL

Respondent

- -
- -

Mr David James (instructed by Thompsons Solicitors) for the **Appellant**
Mr Michael Briggs (by direct access) for the **Respondent**

Hearing date: 18 June 2024

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JUDGMENT

THE HONOURABLE LADY HALDANE:

Introduction

1. This matter came before me for a Full Hearing, allowed pursuant to an order of HHJ Shanks dated 15th August 2023. I shall refer to parties as the claimant and respondent as they were below.

2. The claimant is a teacher. She appeals against a decision of the Employment Tribunal ('ET'), delivered orally by Employment Judge Whitcombe on 10th May 2023 and followed up with written reasons in a Judgment dated 24th May 2023. By that Judgment, EJ Whitcombe dismissed the claimant's claim for constructive unfair dismissal pursuant to § 95(1)(c) of the **Employment Rights Act 1996** ('ERA').

3. At the heart of her claim lies an assertion that there was a repudiatory breach of the implied term of mutual trust and confidence arising from behaviour towards the claimant by a head teacher employed by the respondent, and the manner in which the claimant's grievance relating to that behaviour was handled by the respondent. The respondent did not seek to argue that any dismissal was fair, and arguments originally advanced that the claimant did not resign in response to the alleged breach of contract and that the claimant had affirmed the contract even if there had been a breach were abandoned during the course of the hearing before the ET.

4. The issues for determination are, in broad terms, three in number. Firstly, in light of the findings of fact made by the ET, whether its decision to dismiss the claim is perverse. The second issue is whether in any event the ET failed properly to apply established legal principles to the facts. There is an additional challenge to the decision on the basis that it is not **Meek** compliant, in other words that its' reasoning in key respects is inadequate.

Background

5. The claimant was formerly employed by the respondent as a teacher from 20 February 2012 until 7 November 2022, when she resigned with immediate effect. Latterly she worked at Linwood High School as a Support for Learning teacher.

6. The claim arises as a result of events during a 13-month period from 7th October 2021 until the claimant's resignation on 7th November 2022. The initiating event or incident came about because the claimant felt that the Head Teacher had behaved in an aggressive and intimidating way towards her during discussion about a work-related issue on 7th October 2021, both in the Head Teacher's office and in a stairwell after the meeting.

7. The Head Teacher's voice was overheard by witnesses to be raised and described as having an 'angry' tone when she was speaking with the claimant in her office. The claimant was seen to leave the office looking visibly upset and was followed by the Head Teacher who said to her words to the effect of 'If you've got something to say, say it to my face' as well as 'what we were discussing is confidential.' The Head Teacher was pointing at the claimant as she did so.

8. These events caused the claimant to lodge a grievance. That grievance included the events described above, but was not limited to that event. It was alleged that the Head Teacher had treated the claimant in a way which was 'threatening, insensitive and aggressive' contrary to the respondent's own 'Respect at Work' policy. An investigation was initiated. This would normally be carried out by the Head Teacher, but given her central role the process was instead initiated by Susan Bell, Education Manager. A stage 1 hearing was convened, which the claimant attended with her Union Representative. Susan Bell and an HR adviser also attended. No statements had been taken or provided by the respondents for the purposes of that hearing.

9. The outcome of the hearing is narrated in the judgment of the ET as follows:

> "21. The outcome on seven numbered points was given in a letter dated 27 June 2022. The conclusion on the relevant point was expressed as follows. "There are two witness statements which state that the head teacher pointed at you and said, 'if you have anything to say to me, say it to my face.' This could be construed as an aggressive statement. However, this is denied by the head teacher and by another witness which makes it one word against another. I therefore do not find evidence that the head teacher treated you in a manner that was 'threatening, insensitive and aggressive'"
>
> The words "do not find evidence" are curious given that the allegation was supported by the claimant's own evidence and there was at least partial corroboration of the claimant's account. The question was whether that evidence was more likely to be correct than that of Gillian Bowie and Eileen Sheridan. I find that no statements were taken from Gillian Bowie at any stage and that the only statement taken from Eileen Sheridan post-dated the stage 1 decision. It was contained in an email dated 30 June 2022. That appears to have been an attempt to bolster the decision with written evidence after the decision had been communicated to the claimant. It appears that Susan Bell must also have had undocumented conversations with the Head Teacher Gillian Bowie and with Eileen Sheridan that were not shared with the claimant prior to reaching a decision."

10. The claimant appealed that outcome to a 'Stage 2' hearing. This was chaired by John Trainer, Head of Care and Criminal Justice for the respondents. The claimant attended with the same union representative as before. Susan Bell also joined the meeting via Microsoft Teams. The ET notes how that hearing unfolded as follows:

> "24. On the relevant issue John Trainer summarised the sources of evidence without

> explaining even in the broadest terms why he gave more or less weight to any particular piece of evidence. The only facts really found were ones on which all witnesses agreed – Ms Bowie had spoken to the claimant in the stairwell and also spoke to the trade union representatives about a meeting they were due to attend with her. The conclusion acknowledged that the claimant experienced the incident to be "threatening, insensitive and aggressive" but Mr Trainer said, "I do not, however on the basis of the evidence heard consider it was established that the Head Teacher was 'threatening, insensitive or aggressive'."

11. The stage 2 outcome letter reminded the claimant of her right to appeal to stage 3. Paragraph 1.4 of the respondents' grievance procedure states that 'employees will normally be expected to exhaust these grievance procedures if they wish to take their grievance to an employment tribunal.' Stage 3 would be heard by a panel of council members rather than members of the local authority management team.

12. The claimant did not exercise her right to appeal to stage 3. She no longer had any faith in the system. She resigned with immediate effect by a letter dated 7th November 2022, citing a 'serious material breach' of contract and constructive dismissal. She referred to the evidence of first-hand witnesses being ignored; that Susan Bell had admitted she was not impartial and that John Trainer had ignored that admission. The claimant stated she had no option other than to resign.

13. On the question of the failure to exhaust stage 3, the ET found at paragraph [27] as follows:

> 'My finding is that in the absence of specific evidence to suggest otherwise…stage 3 appeals …could be expected to be diligent, fair, and certainly not biased in favour of management.'

The ET's decision and reasoning

14. The question of whether or not the ultimate disposal of this matter by the ET stands up to scrutiny having regard to the various findings made by it is central to this appeal. It is therefore necessary to record these in some detail. So far as the essential allegations are concerned, the ET found these proved, on the following basis:

> 44. While I do not accept the submission that the Head Teacher's words, "if you've got something to say, say it to my face" are necessarily aggressive regardless of context, I accept that they were aggressive when seen in their proper context in this case. The tone of voice was angry and the Head Teacher was pointing at the claimant. I accept the eyewitness assessment that it was "not professional behaviour" and that the Head Teacher's manner was aggressive. Similarly, while I find that the words "what we were discussing was confidential" were unobjectionable in principle they must be seen in the overall context, which was of aggressive behaviour.
>
> 45. The Head Teacher raised her voice, both in her own room and also near the stairwell. She pointed at the claimant and spoke in a way which was aggressive when assessed in its overall context.
>
> 46. I therefore find the essential allegation proved. I find that on the relevant occasion the Head Teacher acted in a way which was not only insensitive but also aggressive and intimidating. The claimant's case in her grievance was that the Head Teacher's conduct had been "threatening, insensitive and aggressive". I find that it met all three aspects of that definition.
>
> 47. Assessed objectively, I find that this incident was likely to, and did, undermine trust and confidence without reasonable and proper cause. However, on its own, it

would not come close to a breach of the implied term because it does not reach the level of destruction of, or causing serious damage to, the relationship of trust and confidence. It was regrettable and inappropriate behaviour. It should not have happened. It should have been a matter for reflection and apology, sooner rather than later. It was, however, a one-off incident of relatively brief duration. There seems to be general agreement that it was out of character and that the Head Teacher had not been known to act in a similar way on any previous occasion, whether towards the claimant or anyone else. That is why I find that although the incident caused some damage to the relationship of trust and confidence, that relationship was certainly not seriously damaged or destroyed."

15. On the question of the grievance procedure itself, the ET's findings were as follows:

> 49. I find that Susan Bell's approach to her task was unsatisfactory for several reasons. There was no proper attempt to gather evidence from the Head Teacher at all. No statement was obtained from her and she did not attend any sort of minuted hearing. The Head Teacher did not face any questions from the claimant or her representative. Her evidence seems to have been gathered in an informal discussion. That was not only inadequate for a fair and thorough investigation, it also meant that a rather different process and level of scrutiny was applied to the claimant's evidence on the one hand and the Head Teacher's evidence on the other. That was not a promising starting point for a fair comparison.
>
> 50. Susan Bell's reasoning as expressed in the outcome letter is not reassuring…….The claimant's account was supported, at least in part, by the evidence of two other witnesses with no obvious reason to be dishonest or mistaken. The reasoning in the outcome letter is thin,…… Since she did not give evidence

> at this employment tribunal hearing I have not had any opportunity to discover whether any more detailed reasoning lay behind the brief treatment of the relevant issue in the outcome letter. I therefore conclude that there was none.
>
> 52. I find that the stage 1 grievance decision was one of poor quality. That should be a matter of concern to the respondent and specifically to those in its HR department responsible for ensuring that grievance decisions are taken fairly. I find that this, even without more, undermined trust and confidence without reasonable and proper cause.
>
> 53. However, those are not the only concerns. Susan Bell made two comments when defending her decision at the stage 2 hearing which revealed bias on her part…….
>
> 54. I find that Susan Bell's handling of stage 1 of the grievance process was not only inadequate and unfair, it was also biased against the claimant. That fact also damaged the relationship of trust and confidence without reasonable and proper cause

16. The ET then turned to the stage 2 of the grievance process and found as follows

> "55. The approach to evidence at the stage 2 grievance hearing was also problematic. While portrayed by the respondent as a "re-hearing", it was not a re-hearing in any meaningful sense".

Although not finding that there was bias in the handling of the stage 2 procedure, the ET concluded on this aspect of matters:

> "……stage 2 of the process was inadequate to detect and correct the earlier bias. The respondent had got a lot of important things wrong, and the claimant was, and

was entitled to be, distressed about those failings. Objectively, the relationship of trust and confidence had been damaged".

17. The ET then addressed the question of stage 3 of the grievance process, with which the claimant had not engaged. The key aspects of its reasoning on this chapter were:

'…There was every prospect that the stage 3 decision would have been taken diligently, independently and without bias…..

64. Assessed objectively, I find that stage 3 was an entirely viable option with a realistic chance of righting the wrongs of stages 1 and 2. There was a very reasonable expectation that stage 3 would be independent, fair, thorough, and free from bias. There was also a very reasonable expectation that the claimant's account of events on 7 October 2021 would have been accepted and that the bias and procedural irregularities at earlier stages of the process would have been acknowledged and corrected.

65. My conclusion is that although the claimant had been poorly treated on 7 October 2021 and badly let down at stages 1 and 2 of the grievance process, there remained a realistic prospect of resolution and a satisfactory outcome at stage 3'

That analysis led the ET to the following ultimate conclusion

"In contractual terms, I find that there was no breach of the implied term of trust and confidence because although that relationship had certainly been damaged without reasonable and proper cause, the situation had not reached the level of serious damage to, or destruction of, the relationship of trust and confidence. In other words, the degree of damage to that relationship had not reached the level

necessary to constitute a breach of the implied term.

66. I have considerable sympathy for the claimant's position. She was let down by processes intended to ensure that disputes are resolved at an early stage without needing to bring an employment tribunal claim. However, at the date of her resignation those internal processes had not been exhausted and the potential of the remaining stages was enough to mean that the relationship of trust and confidence had not been damaged sufficiently seriously to found a claim for constructive dismissal. As the authorities set out above emphasise, a breach of the implied term is not established simply by showing that the employer acted unreasonably."

The consequence of those findings was that the claim for unfair dismissal in terms of § 95(1)(c) **ERA** was dismissed.

The legal framework

18. So far as relevant to the present case, § 95 **ERA** provides

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

19. It is for the claimant to satisfy the ET that she has been constructively dismissed in terms of § 95(1)(c). Otherwise, her employment is treated as having terminated as a result of resignation which is not treated as a dismissal.

20. The breach must be a significant one going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221, CA.

21. There is implied into every contract the fundamental term of trust and confidence. It is a fundamental breach of contract for an employer to conduct itself in a manner which impinges on the relationship in a way in which, looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer **Malik v BCCI** [1998] A.C.20.

22. Further, the repudiatory breach need not be the sole or even predominant reason for the resignation. It need only be one of the factors relied upon when resigning; **Wright v North Ayrshire Council** [2014] ICR 77, EAT. The test for whether there has been a repudiatory breach is an objective one that does not depend on the subjective intentions of the employer; **Leeds Dental Team v Rose** [2014] ICR 94, EAT.

23. Finally, the correct role for an appellate Tribunal such as this one is set out in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672:

> "58. … where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should … be slow to conclude that it has not applied those principles, and should generally only do so where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. ..."

24. The other side of that coin of course is that where an ET has fallen into error, the EAT's role is not to find any way in which to uphold a decision where the reasoning reveals a fundamental lacuna or error of approach; as confirmed by Sedley LJ in **Anya v University of Oxford** [2001] ICR 847 CA:

> "26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

The claimant's submissions

25. For the claimant, Mr James advanced arguments under four headings, accepting that there was a degree of commonality and overlap between the seven grounds of appeal. The overarching criticism of the decision of the ET centred on the failure properly to assess the situation as it stood at the point of the claimant's resignation; instead the ET impermissibly looked to hypothetical future events.

26. Mr James looked first at the arguments under the heading of perversity. He properly accepted that an appeal on grounds of perversity entails a high bar, however he submitted that given the egregious nature of the conduct and the findings in fact made by the ET that bar was cleared here. The claimant had been subjected to unprofessional aggressive and intimidating behaviour. There had been a concerted effort to brush off her complaints and exonerate the

wrong doer. There had been two extremely flawed grievance procedures with superficial findings. At neither stage of the procedure had the claimant's grievances been properly engaged with and at that point she had lost faith and resigned. The finding that the stage 1 procedure was actually biased was a significant finding and the grievance procedure as a whole had been a whitewash. Such circumstances were clearly likely to damage the relationship of trust and confidence between employer and employee and the failure of the ET to make such a finding was perverse.

27. Mr James then dealt with grounds of appeal 2, 5 and 6 together. The essence of these grounds, taken together, was that what might happen at some point in the future is not relevant and cannot trump that which has already taken place. So far as ground 2 was concerned, in taking into account the fact that the claimant had not completed all stages of the grievance procedure the ET had given weight to an irrelevant consideration. The only conduct to be considered when determining an issue as to constructive dismissal is that of the employer (**Tolson v Governing body of Mixenden Community School** [2003] I.R.L.R 842 paragraph 8). It was not the law that if someone chooses to lodge or pursue a grievance they are required to exhaust the process before any situation of breach of the implied term of trust and confidence could arise.

28. The fifth ground of appeal criticised the failure of the ET to consider whether the whole of the employer's conduct could be regarded cumulatively as a repudiatory breach. Although the ET had considered separately the actions of the head teacher, Susan Bell and John Trainer and found each to be problematic, it had failed then to go on and consider whether the totality of the employer's conduct amounted to a cumulative breach. This omission amounted to an error of law.

29. Ground 6 criticised the ET for elevating a term in the respondent's internal policy above the implied term of trust and confidence. An employer is not entitled to rely on the literal letter of an internal policy to displace or damage the relationship of mutual trust and confidence

(**Stevens v University of Birmingham** [2015] I.R.L.R. 899 at paragraphs 107 and 108). In other words, if conduct is sufficiently egregious it does not matter if a policy states that employees should normally exhaust the grievance process. If there has been a breach of the implied term, then that is a repudiatory breach and the contract would fall away. Although the ET did not make an explicit finding that the claimant required to exhaust the grievance process, the terms in which the ET made its findings at paragraphs [27] and [64] clearly suggest it thought the failure to do so was significant and weighed in its assessment of whether or not there had in fact been a breach of the implied term in this case.

30. Mr James summarised his position on this aspect of matters by submitting that the basic error was taking into account an irrelevant factor – the failure to exhaust the grievance procedure. Further, in concluding that a further stage in procedure might have resolved matters, the ET implicitly criticises the claimant for not following that through and affording the employer an opportunity to resolve the issues, and in so doing lessened the seriousness of what the employer had done. Rather the focus ought to have been on what had happened, and whether the conduct from the claimant's perspective was sufficiently serious. It was implicit in the reasoning of the ET that a third stage might have resolved matters and if it had not, then there could be said to be a breach of the implied term. That approach ignored the fact that the conduct in question was the same conduct at all times, even with an additional stage of procedure. The same failings would still be present. To imply that the third stage might have resolved matters, or if not, that a breach would exist was not a principled distinction in a situation where there was a finite amount of conduct in question.

31. Mr James then turned to ground 3, described as the '**Buckland**' ground. Mr James indicated that parties were in agreement as to the principles to be drawn from this case. The criticism here focussed on paragraph [38] of the judgment and what Mr James submitted was a misstatement of the principle to be drawn from **Bournemouth University v Buckland** [2010] I.R.L.R. 445. Under reference to that case, the ET stated

> ‘’…an employer may of course act to make amends to prevent such a breach from occurring in the first place’’

Properly understood, the principle enunciated in **Buckland** was that an employer could not attempt to cure a repudiatory breach once this had occurred (for example by conducting a fair third stage grievance procedure. Rather, in such circumstances, whether the contract continues is entirely out of the employer's hands (**Buckland**, paragraph [53]). The principle erroneously attributed by the ET to **Buckland** seemed rather to be drawn from an entirely different case, **Assamoi v Spirit Pub Co (Services) Ltd** UKEAT/0050/11, a case to which the ET was not referred but which held that an employer could intervene to stop a situation escalating prior to a breach actually occurring. The error in the proper principle to be drawn from **Buckland** led the ET into error in concluding that the employer's conduct could be lessened in seriousness at a point after the breach had actually occurred.

32. Mr James then dealt finally with ground 4. This related to an alleged misapplication of the **Malik** term (**Malik v BCCI** [1997] ICR 606 HL). Mr James accepted that the ET had set out correctly the proposition to be drawn from that case at paragraph [34] but the error arose in how the ET purported to apply the principle to the facts of the case. Properly analysed, the question was whether, looked at objectively, the conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence. Importantly, in a question of whether the conduct was likely to have that effect, it was not relevant whether it did in fact have that effect. Mr James set out, at paragraph 27 of his skeleton, 6 examples of where he argued it could be seen that the ET had applied a test of whether or not the conduct did, objectively, have the effect of destroying or damaging the relationship of trust and confidence and thus imposed a higher bar than the proper lower threshold of whether it was likely to have that effect (**Leeds Dental Team v Rose** (EAT) [2014] ICR 94, at paragraphs [25], [28]).

33. Mr James' final ground of appeal was that in any event the reasoning of the ET was not **Meek** compliant. This argument was pressed rather less vigorously than the other grounds of appeal, and Mr James candidly accepted this ground was more of a 'fall back' argument in the event of the first six grounds not finding favour.

34. For all the reasons he advanced, Mr James invited me to uphold the claimant's appeal. So far as disposal was concerned, he advised me that it was common ground between the parties that if the perversity ground succeeded then it would follow that a finding of unfair constructive dismissal should be made, there being only one correct answer in those circumstances. The matter should thereafter be remitted back to the ET for consideration of remedy. In the event that it was held that there was not a single right answer, then the matter ought to be remitted back to the same ET to reconsider with the benefit of directions, there being no issue with the primary facts found established.

The Respondent's submissions

35. Mr Briggs invited me to dismiss the appeal and uphold the judgment at first instance. He adopted his written skeleton and sought to amplify one or two aspects of that. So far as the allegation of perversity was concerned, Mr Briggs submitted that the ET had reached a conclusion on the facts found established that was within its' discretion. This Tribunal should only interfere if it finds that the decision of the ET was one which one reasonable tribunal, properly directing itself on the law, could have reached (**British Telecommunications plc v Sheridan**; **Tydeman v Oyster Yachts Limited** [2022] EAT 115) . The Tribunal's finding that the high threshold required for a breach of the implied term of trust and confidence had not been reached was one it was entitled to make.

36. Turning to the remaining grounds of appeal, Mr Briggs submitted that **Tolson** could be distinguished on the basis that the claimant in that case had not engaged with the grievance process at all whereas in the present case the claimant had put the grievance process at the

heart of her case. It was therefore entirely appropriate to give consideration to the safeguards built into that process in considering whether the implied term had been breached. **Tolson** accordingly had no application to the circumstances of this case.

37. On the criticism made of the purported application of the **Buckland** principle, whilst Mr Briggs took no issue with the analysis of that case offered by Mr James, his position was that it could have no application unless this Tribunal was persuaded that the ET was in error in concluding that there had been no breach. In this case **Buckland** did not 'bite' as there had been no breach and therefore no attempt to cure any alleged breach. When pressed on the question of whether or not the ET was in error in attributing the principle set out in its' judgment to the case of **Buckland**, Mr Brigg's position ultimately was that the second sentence of paragraph [38] was 'more of a general statement'; that it was correct in law as a matter of principle but was attributable to **Assamoi**.

38. Mr Briggs contended that the point taken in relation to the application of **Malik** had an element of semantics to it. Mr James had adopted an overly critical reading of the judgment and looked at fairly the ET had identified the test and correctly applied it. Its' approach was not inconsistent with the **Leeds Dental** case.

39. Grounds 5 and 6 Mr Briggs submitted were without substance. Ground 6 sought to invite an inference to be drawn as to the weight given to the respondents' policy from the mere mention of that policy in the judgment. He took no issue with the legal proposition that if policy was given precedence over the claimant's rights in the case of a repudiatory breach that would be impermissible, but that was not what had occurred here.

40. A similar criticism could be made of ground 5 – the fact that the ET had not made explicit reference to the cumulative effect of the matters found proved did not mean that, on a fair reading, the ET had not in fact considered the accumulation of conduct in deciding whether the implied term had been breached.

41. So far as disposal was concerned, Mr Briggs agreed with the suggested disposal in the event

that perversity were found in the judgment. In terms of the other grounds, in the event of a finding against the respondents on the **Tolson** point then the case ought to be remitted for the ET to determine whether, in the absence of a third stage grievance procedure it would have found the employers conduct reached the requisite threshold; similarly in the event of a finding against the respondents on the application of **Malik**, the matter ought to be remitted in order to consider the question of likelihood rather that what actually did or did not happen; and in the event of grounds 5 or 6 being upheld the matter ought to be remitted for reconsideration with appropriate directions.

42. In a brief response, Mr James rejected the contention that the **Buckland** point only arose if a finding of perversity were made. This was a standalone point. The ET did not make a finding of breach *inter alia* because it misunderstood **Buckland**. Had the ET properly understood **Buckland** it would not have had regard to the stage three process and the focus would have been on conduct at the point of resignation. This argument did not depend on the first ground of appeal succeeding.

Analysis and decision

43. This is a case in which most, if not all of the key findings in fact were made in favour of the claimant. Yet her claim failed because the ET ultimately concluded that the threshold for a repudiatory breach of contract on the basis of a breach of the implied term of trust and confidence had not been reached.

44. The claimant argues that this represents a perverse conclusion and that in any event the ET fell into error in a number of respects as set out above in its' application of the law to the facts it found proved.

45. As is well understood, the threshold for perversity is a high one. An appeal on such a ground ought only to succeed where an 'overwhelming' case is made out that the ET reached a decision which no reasonable tribunal, on a proper appreciation on the evidence and the law,

would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision, it must proceed with great care (**Yeboah v Crofton** [2002] IRLR 634, per Mummery LJ at paragraphs 93-95). Despite the significant findings in the claimant's favour, on a proper application of the relevant test, I cannot conclude that in proceeding nevertheless to dismiss the claim that high threshold has been reached or that 'overwhelming' case made out. It follows that the appeal so far as predicated on this ground is dismissed.

46. However, whilst fully recognising that the weight to be given to the facts found proved is entirely one for the ET to assess, there is force in the submission by Mr James that particular weight appears to have been accorded to the failure of the claimant to follow through all three stages of the grievance process as having significance in the assessment of whether or not, looked at objectively, a repudiatory breach had occurred. The relevant passages of the judgment on the ET in this regard are set out at paragraph [17] above. The correct approach is as explained in **Tolson** which is very similar to, indeed perhaps on all fours with, the present case. I do not accept the submission for the respondent that **Tolson** falls to be distinguished on the basis that the claimant herself complained about aspects of the grievance procedure, and thus put the grievance procedure at the heart of her claim, or that **Tolson** is applicable only where the claimant has failed to invoke the relevant grievance procedure at all. The respondent also argues in its skeleton that for **Tolson** to apply the ET would have to have made a specific finding that the claimant's failure to avail herself of the third stage contributed to the breach in some way, and that there is no such finding.

47. It is correct to say that a finding in those precise terms is not made. However at paragraph [66] the ET concludes:

> 'However, at the date of her resignation those internal processes had not been exhausted and the potential of the remaining stages **was enough to mean that the relationship of trust and confidence had not been damaged sufficiently**

seriously to found a claim for constructive dismissal.' (emphasis added).

48. That can only be construed, as a matter of plain English, as an explicit link between the failure to exhaust the grievance process and a conclusion that the relationship had not been damaged to the extent necessary to found a claim for constructive dismissal. For the reasons already given, the fact that the claimant did not engage with the third stage of the grievance procedure or that, had she done so, a favourable outcome might have been achieved, is an irrelevant consideration in this context, and accordingly the appeal will be allowed in respect of the second ground of appeal.

49. So far as ground 3, the '**Buckland**' ground, is concerned, I agree with Mr James that it appears as though the ET has conflated two different cases, and attributed the wrong principle to the case of **Buckland**. However, had this been the only ground of appeal, and mindful of the need to read the Judgment as a whole, I would not have concluded that it led to the error of law contended for by the claimant. The mistaken description of the **Buckland** principle does not fundamentally undermine the Judgment of the ET in and of itself. Rather the principal error is in taking into account the failure to follow through on the grievance process in the manner set out in paragraph [66] of the Judgment, as discussed in more detail above. This error is an echo of that more fundamental one. I am not therefore of the view that this error is of the character that would merit remitting the matter back to the ET for reconsideration. It is a mistake, but not one that would be fatal to the decision on its own in the absence of the more fundamental issue identified above. This ground of appeal is accordingly dismissed.

50. Turning to ground 4, the alleged misapplication of the **Malik** term, the respondents' position is that this, properly understood, does not identify an error of law but rather is an exercise in semantics. Mindful that an appellate Tribunal should be slow to conclude that the first instance Tribunal has not applied the correct legal principles where those have been correctly

stated, and should only generally do so where it is clear from the language used that a different principle has been applied to the facts found (**DPP Law Ltd v Greenberg**), I observe that the ET correctly self directs on the **Malik** principle at paragraph [34], and also correctly sets out that the test for a repudiatory breach of contract is an objective one (**Leeds Dental Team Ltd v Rose** [2014] ICR 94. EAT).

51. Those observations are weighed in the balance with the six instances identified by the claimant and found in paragraphs [47], [52], [54], [60], [65] and [66] where the ET bears to make findings as to whether the relationship of trust and confidence had actually been damaged as opposed to whether, looked at objectively, the conduct is such that it would be likely to seriously damage or destroy the relationship of trust and confidence. With some hesitation, I conclude that the language used by the ET does indicate that a principle different from that correctly set out by it as encapsulating the proper approach has been employed. The issue is therefore more than mere semantics and in fact amounts to an error of law. I therefore also uphold the appeal on this basis.

52. Grounds 5 and 6 can be taken together. Ground 5 argues that the ET has failed to address whether, standing the findings made in relation to problematic conduct on behalf of a number of those involved in the grievance process, looked at cumulatively a repudiatory breach had occurred. Ground 6 suggests that in its' approach to the failure to follow through on stage 3 of the grievance process, the ET has in effect impermissibly elevated the respondent's policy above the implied terms of trust and confidence.

53. The respondent argues that the issue of cumulative breach is addressed in paragraphs [63] to [66] of the Judgment. On a fair reading, those passages focus on the failure to follow through with the third stage of the grievance process and the possible outcome had the claimant done so. I have already concluded that such focus led the ET impermissibly to take into account an irrelevant consideration. I also accept that this focus on the third stage of the grievance process means that the question of whether or not the conduct in question, looked at

cumulatively, amounted in and of itself to a breach of the implied term has not been addressed, and that it ought to have been. Whilst this ground in isolation might not have been considered fatally to undermine the decision of the ET, it is bound up with the issue identified in the second ground of appeal to such an extent that I conclude that it does amount to an error of law.

54. The same cannot be said for ground 6. The proposition that the ET has in some way elevated the respondents' policy above the implied term of trust and confidence reads too much into the passages identified, and is not consistent with a fair reading of the Judgment as a whole. Whilst errors of law can be seen in the approach of the ET to the question of the grievance procedure, such do not equate to an elevation of the policy over the implied term. The appeal on this ground is dismissed.

55. Finally, and for completeness, I dismiss the appeal so far as predicated on the proposition that the judgment is not Meek compliant. Although I consider that the ET has fallen into error in the particular areas identified above, these errors do not emerge from a lack of adequate reasoning, rather from a misapplication of the law to the facts found established.

Disposal

56. The appeal has been upheld so far as the second, fourth and fifth grounds of appeal are concerned. It follows that those matters will be remitted to the Tribunal for reconsideration.

57. Parties did not take issue with any of the findings in fact. Unsurprisingly therefore, neither party suggested that the matter was required to be considered by a differently constituted Tribunal. I see no reason to depart from that agreed position.

58. I will therefore remit the matter to the same Tribunal to consider whether, in light of its findings in fact, and without having regard to the failure of the claimant to exhaust the grievance procedure, the conduct found established amounts, individually or cumulatively, to a repudiatory breach of the implied term of trust and confidence. In undertaking that exercise,

the Tribunal should consider matters in light of the **Malik** principle, as correctly identified in paragraph 34 of the Judgment.