Appeal No. UKEAT/0044/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 May 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR K ADJEI-FREMPONG — APPELLANT

HOWARD FRANK LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

Constructive Dismissal - affirmation

The Employment Tribunal ("the ET") found changes to the Claimant's job (made unilaterally, without consultation and affecting 30% of his work) amounted to a fundamental and repudiatory breach of contract but also found the Claimant had failed to expressly object to those changes between their introduction (17/1/2014) and his resignation (3/3/2014) but had worked to them without objection and had therefore affirmed the contract of employment.

On appeal, held:

(1) On the material before it, the ET had been entitled to conclude the Claimant had not expressed his objection to the changes before his resignation. The first ground of appeal therefore failed.

(2) In considering whether or not the Claimant was to be taken to have affirmed the contract, however, context was everything (see, in particular, **W E Cox Toner (International) Ltd v Crook** [1981] IRLR 443 EAT; **Buckland v Bournemouth University Higher Education Corp** [2010] EWCA Civ 121, [2010] IRLR 445 CA; and **Chindove v William Morrisons Supermarket plc** UKEAT/0201/13/BA). In this case, the ET's Reasons suggested that there had been a failure to take into account that the Claimant had been away from work due to ill-health from 4/2/2014 until his resignation; his conduct during that period could properly be seen in a different light to the period before that (on the ET's finding, 10 working days), see **Chindove**, and it was not apparent that the ET had proper regard to that distinction.

Moreover, it was the Claimant's case before the ET that he was expecting to receive written confirmation of the Respondent's conclusions, as an outcome of the meeting on 21/1/2014, and he was biding his time until receipt of this. As the Respondent had agreed to provide the Claimant with written confirmation of the meeting, and did not subsequently inform him that its HR advisors had advised that it should not do so, the Claimant's position in this respect might be seen to provide an explanation of any failure to expressly object; it was certainly a relevant factor going to the context that the ET needed to engage with in this case. That was all the more so given that the conclusion of the meeting of 21/1/2014 cited by the ET was in fact the record of the Respondent's own internal discussions in the absence of the Claimant and the written record of this had not been provided to him.

Finally, an employee was to be permitted some time for reflection before it was to be implied that s/he had affirmed the contract after an employer's repudiatory breach (**Buckland**) and it was not apparent that the ET had taken this into account as part of the relevant factual matrix, i.e. a case involving someone who had been employed since 2006; who was still awaiting written confirmation of the meeting of 21/1/2014, and whose case was that he was biding his time until he got this; who worked his new duties for 10 days before being signed off due to stress.

The appeal on this basis would be allowed and the question of affirmation remitted to the same ET for fresh consideration.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent, as below. The appeal is that of the Claimant against a Judgment of the Watford Employment Tribunal (Employment Judge Liddington, sitting alone on 26 and 27 August 2014, "the ET"), sent to the parties on 9 September 2014, in which she held that the Claimant had not been constructively dismissed and so his claim of unfair dismissal could not be made out.

2. The Claimant was and is represented by his solicitor. The Respondent was represented before the ET by an employment lawyer but here by its employment law consultant. The appeal was permitted to proceed after consideration on the papers by HHJ John Hand QC.

The Background Facts

3. The Respondent is a small accountancy practice, with some ten employees, which employed the Claimant as an Accounts Assistant from July 2006 until his resignation on 3 March 2014. Towards the end of December 2013, going into 2014, there had been various issues on both sides relating to the Claimant's employment. Performance concerns held by the Respondent, coupled with questions as to how those might relate to the Claimant's absence for stress-related ill-health, led it to write to him on 17 January 2014 setting out various concerns and stating that his workload would be reduced to bookkeeping and simpler VAT work. On the ET's assessment, that was a reduction in the Claimant's work of some 30%.

4. At a meeting with the Claimant on 21 January 2014, various performance issues were discussed. This resulted in the Respondent confirming the decision regarding the reduction in the Claimant's workload. Thereafter the Claimant attended work between 21 January 2014 and

4 February 2014 - ten working days - during which time he worked under the supervision of one of the partners, a Mr Bennett, and made no objection to working in this reduced capacity.

5. On 4 February 2014, a further, case-specific, performance issue was raised with the Claimant, who neither understood the problems identified nor accepted responsibility for them. The following day, he was signed off with work-related stress. He did not return.

6. On 3 March 2014, the Claimant submitted his resignation. The Respondent invited him to submit a grievance and to reconsider his decision but he did neither, considering that the working relationship was "beyond repair".

The ET's Reasoning

7. The ET found the changes to the Claimant's job - made unilaterally and without consultation on 17 January 2014 - amounted to a fundamental and repudiatory breach of contract. The background problems were discussed at the meeting of 21 January, but the Respondent considered that the Claimant failed to engage with the issues so there could be no positive outcome. As the ET recorded:

> **"… It was agreed that notes would be prepared to go into the claimant's file although the claimant expected to receive a copy. On the advice of the respondent's HR advisors, the claimant was not sent a copy of these notes." (paragraph 19)**

8. The ET then recorded the Respondent's conclusions as to the way forward:

> **"this needs to be addressed immediately, as we are concerned as to the errors Kevin is making. We are seeking advice from our human resources advisors as to his illness and how we can approach it. As for the immediate, we need to mitigate the impact on this firm. As such Kevin's work duties will be restricted to bookkeeping and preparation of VAT returns only. Kevin is to stop in his role of training other staff members and is to stop in preparing year-end accounts. We will advise the other staff members of Kevin's reduced working roles, so no-one is confused over what is expected of them. In addition, either Paul or myself … require to see all emails to clients before Kevin sends them out." (paragraph 20)**

9. Although it is not there made clear, that passage comes not from the note of the meeting with the Claimant but from the continuation of that note, recording the Respondent's internal discussions (or setting out an aide-memoire of them), which took place subsequent to the meeting with the Claimant. Notwithstanding the fact that the conclusion was thus reached after the meeting with the Claimant and no written record was provided to him, the ET found:

> **"… he understood what his duties would be going forward and how they should be performed. …" (paragraph 22)**

Moreover the ET found as a fact that:

> **"During the 10 working days between the meeting on 21 January and what turned out to be the claimant's last day at work on 4 February, the claimant worked under the supervision of [Mr Bennett]. He made no objection to the changes in his duties, nor did he ask when he would be returned to his full duties. He received support from [Mr Bennett]." (paragraph 23)**

10. The ET referred to various authorities, citing (on the issue of affirmation) **Western Excavating (ECC) v Sharp** [1978] ICR 221 CA, where it was said the complainant:

> **"must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged."**

11. The ET then separately sets out its conclusions, finding (paragraph 2 of that section) that:

> **"… following that change on 17 January 2014, the claimant worked without protest until 3 March, when he raised the issue for the first time in his letter of resignation. That delay means that the claimant had acquiesced to the breach and cannot now rely on it as a reason for his alleged constructive dismissal."**

12. The Claimant also relied on the meetings of 21 January and 2 February 2014 as constituting separate breaches of contract; the ET disagreed, concluding he was unable to:

> **"… resurrect an earlier breach of contract which has been affirmed by relying on subsequent events neither of which is a breach of contract …" (paragraph 5, Conclusions)**

The Appeal

13. The grounds of appeal fall to be considered in two parts. First, whether the ET reached a perverse conclusion in holding that the Claimant had not objected to the changes made to his workload, which the ET had found had been made in breach of contract. Specifically it was the Claimant's case that his evidence (as accepted by the Respondent before the ET) was that, at the meeting of 21 January, he had objected to the changes communicated on 17 January 2014. Second, whether, in any event, the ET's reasoning betrayed a misdirection as to the nature of his right to elect whether to continue with the contract, notwithstanding the Respondent's breach of contract, or to accept the repudiation as having terminated the contract and the nature of the doctrine of affirmation whereby that right of election is lost.

14. The first of the grounds of appeal requires me to determine what was the evidence before the ET. Assisting the EAT with that task, Employment Judge Liddington has helpfully provided the relevant parts of her notes. These record the Claimant saying in re-examination:

> **"The claimant says that as far as he is aware he did object to the removal of duties at the 21 January meeting."**

Otherwise the notes do not suggest that the point was clearly pursued before her.

The Relevant Legal Principles

15. On affirmation, it is common ground that the approach to be adopted is as laid down by the EAT in **W E Cox Toner International Ltd v Crook** [1981] IRLR 443, at paragraphs 13 to 15:

> **"13. It is accepted by both sides (as we think rightly) that the general principles of the law of contract apply to this case, subject to such modifications as are appropriate to take account of the factors which distinguish contracts of employment from other contracts. … If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to**

elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation … Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation …

14. It is against this background that one has to read the short summary of the law given by Lord Denning MR in the *Western Excavating* case [[1978] ICR 221]. The passage [at page 226] 'moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged' is not, and was not intended to be, a comprehensive statement of the whole law. As it seems to us, Lord Denning was referring to an obvious difference between a contract of employment and most other contracts. An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will himself be doing an act which, in one sense, is only consistent with the continued existence of the contract, he might be said to be affirming the contract. Certainly, when he accepts his next pay packet (ie, further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great … Therefore, if the ordinary principles of contract law were to apply to a contract of employment, delay might be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties. It is not the delay which may be fatal but what happens during the period of the delay …

15. … provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job."

16. The question of the approach to the issue of affirmation of a breach of contract in the employment context was revisited by the EAT (Langstaff P presiding) in **Chindove v William Morrisons Supermarket plc** UKEAT/0201/13/BA, guidance upon which both parties again placed reliance. In that case, the EAT considered the proposition that passage of time might itself be sufficient for the employee to lose any right to resign. As it warned:

"25. … the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain

> **employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.**
>
> **27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force. We are told, and it is consistent with our papers, that the Claimant here was off sick. Six weeks for a Warehouse Operative, who had worked for eight or nine years in a steady job for a large company, is a very short time in which to infer from his conduct that he had decided not to exercise his right to go. All the more so, since there seems, on the short findings of fact of this Tribunal, that there was no reason other than the employer's conduct towards him for his choosing to go. …"**

17. The Claimant further relies on the approach adopted in **Buckland v Bournemouth University Higher Education Corporation** [2010] IRLR 445 CA, per Jacob LJ:

> **"54. Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation.**
>
> **…**
>
> **56. … Once an employer has committed a repudiatory breach there will generally be some time to make for him to try make amends, for tempers to cool and for the employee to make a rational decision as whether he or she should stay on."**

Submissions

The Claimant's Case

18. On behalf of the Claimant it was submitted that there are two possible readings of the ET's Judgment. The first was that, because the Claimant did not expressly object until his resignation letter, he had affirmed the contract. Alternatively, the decision could be read as concluding that he had affirmed by continuing to work.

19. Taking the first possible reasoning, the evidence showed the Claimant had intended to respond to the change in his duties made by email on 17 January 2014 (see his email of 20 January 2014). He did not get the opportunity to do so because, at 21 January 2014 meeting, it

was agreed the final position would be set out in writing. The Claimant therefore bided his time awaiting that (paragraph 62 of the Claimant's witness statement). The Claimant contends he objected to the changes at the meeting of 21 January itself, although he accepts that is not expressly stated in his ET1 and does not appear in the Respondent's note of the meeting. In any event, as his statement made plain, he made clear he was waiting for the written confirmation as to what the Respondent was doing, and his testimony to the ET was that he thought he had objected at the meeting of 21 January (see the Employment Judge's note).

20. Furthermore the Respondent had not put a positive case that the Claimant failed to object. If the ET had rejected the Claimant's evidence that he objected on 21 January, that should have been clearly stated. The conclusion was unsafe and could not stand.

21. Alternatively, if the ET concluded that the Claimant affirmed the contract by continuing to work, that amounted to an error of law. Merely working after such change was not sufficient (**Cox Toner**, paragraph 13). A reasonable period for reflection had to be allowed (**Buckland**); the ET should not conclude an employee has affirmed the contract after too short a period.

22. Moreover, to the extent that the ET had regard to the period between 4 February and 3 March as relevant to the question whether the Claimant had affirmed the contract, that failed to take proper account of the fact that he was then signed off work through ill health. That period must have less weight as evidence of affirmation than if the Claimant had been healthy and attending work (**Chindove**). To the extent the ET failed to have proper regard to that, it failed to take into account a relevant consideration and that rendered the decision unsafe.

The Respondent's Case

23. For the Respondent, Mr Rees submitted this was in reality a perversity appeal. The Claimant had not provided any basis to support his contention that he was relying on having objected to the changes to his work at the meeting on 21 January 2014. Indeed the record showed an absence of such objection (see the ET1, the Claimant's witness statement and the Employment Judge's note of the evidence). The Claimant's skeleton argument seemed to suggest there was clear evidence before the ET that he had objected at the meeting of 21 January but there was not. That being so, the ET was entitled to reach its conclusion on the question of affirmation. It was in that context that the court must view the second basis of challenge, the question of a possible misdirection on the issue of affirmation.

24. The correct approach was as laid down in **Chindove**. The issue was one of conduct not of time. Here, the crucial finding was at paragraph 23 (see above) and it was on that which the ET based its conclusion that affirmation could here be implied. This was not simply having regard to the time period but also to the Claimant's conduct. Each case on affirmation had to be assessed on its own facts. It was the Respondent's submission that no objection was raised at the meeting of 21 January, so waiting for the notes of that meeting as an excuse for not objecting could not be an effective argument.

25. Paragraph 23 was sufficient to determine the appeal. That did not include the period of sick leave. Given the circumstances of this case, where the Claimant chose not to pursue a grievance, ten working days were sufficient.

Discussion and Conclusions

26. The first ground of appeal depends on what evidence was before the ET. The starting point was the Claimant's ET1, to which was attached a detailed Particulars of Claim complaining of the removal of "the central and/or core aspect of the Claimant's job and thus leaving the Claimant with little or nothing to do" but not identifying any objection to this on the Claimant's part prior to his resignation. There was then the Claimant's witness statement. That was a detailed document of some 31 pages. It does not expressly refer to the Claimant communicating an objection to the changes in his work duties, although it does describe the effect of those changes on him. What it did include, however, was a clear statement of the Claimant's case that, whilst it was reiterated at the meeting on 21 January that his duties were being restricted, it was stated that "the final position would be confirmed in writing" (paragraph 62). His complaint was that "not having a conclusion to that meeting meant my duties remained unjustifiably restricted without any formal clarification as to my role and duties" (paragraph 71) and he then speaks of "waiting for this issue to be resolved" (paragraph 72). There was also the Respondent's note of the meeting of 21 January, which did not record any objection to the change in duties. Finally, there was the oral evidence before the ET, as recorded in the Employment Judge's note, which suggests a less than conclusive statement of belief on the Claimant's part but does not indicate that this was a point greatly explored in the evidence, and certainly it was not put to the Respondent's witnesses in cross-examination.

27. On the basis of that material, can I conclude the ET reached a perverse conclusion that the Claimant did not expressly object to the changes made to his work after 17 January? Specifically, that the ET erred in failing to conclude that he had so objected on 21 January?

28. In approaching this question, I observe that the ET went into some detail as to what happened at the 21 January meeting in its findings of fact. It expressly found the Respondent's notes accurately reflected what was discussed. The Claimant had not taken his own note. The notes do not record any objection to the work changes on the part of the Claimant. The lack of objection is perhaps consistent with the Claimant's stated belief that he was entitled to bide his time until he got the notes of the 21 January meeting, a point to which I return below.

29. On the ET's findings, on the material before it, it was not perverse for it to conclude that the Claimant had not made any express objection to the changes until he resigned.

30. I turn then to the second basis for the appeal, the approach to the question of affirmation. On this issue, as the authorities make clear, context is everything. Cases are fact-sensitive. It will not be for this court to interfere with an ET's assessment of the facts unless it can properly be said that it erred in its approach, which would include taking into account that which was irrelevant or failing to take into account that which was relevant.

31. It is perhaps unfortunate in this case that the authorities to which the ET was taken did not focus on this issue. The ET might have been better assisted by references to **Cox Toner**, **Buckland** and **Chindove**. That said, the question arises as to whether the ET's conclusion on this question in fact demonstrates a failure to approach this issue in a context-sensitive manner.

32. This was not a case where the Claimant was awaiting resolution of a grievance; he chose not to make one. Equally, it is not a case where the changes did not have an immediate impact; they did. That would have been all the more obvious to him in January, a very busy period for the Respondent. The ET also found that the changes in his duties were understood

by the Claimant after the meeting on 21 January (if not before), and he was also aware that no time limit had been set (paragraph 22). For ten days thereafter, he continued to work in this reduced capacity without objection (paragraph 23). Are those findings not a complete answer to the appeal and sufficient to support to the ET's conclusion?

33. My concern in this regard is fourfold.

34. First, the paragraphs I have just cited (22 and 23) are derived from the findings of fact. In the Conclusions section, the reasoning suggests the ET had regard to the entirety of the period, 17 January 2014 to 3 March 2014, as relevant to the question of affirmation. Having agreed the ET was entitled to find that the Claimant had not objected during this period, my concern is that the reasoning does not evidence any distinction being allowed for that period of time when the Claimant was working to the new duties (the ten working days after 21 January, paragraph 23) and the period after 4 February, when the Claimant was signed off work sick.

35. As observed in **Chindove**, the Claimant's conduct during a period of sick leave may have far less force in implying an affirmation of a breach of contract than his or her conduct when actually attending work in full health. Whilst it might be open to an ET to conclude that the entire period was relevant, the reasoning in this case does not seem to allow for the possibility that there might be a relevant distinction between the two periods, before and after 4 February 2014. It suggests there was a failure to take into account that which was relevant.

36. The Respondent says I can be satisfied that paragraph 23 sets out the crucial finding - the ten working days were the sole period taken into account by the ET - and I should not be unduly concerned by the way in which the period of sick leave was treated.

37. I accept that the ET's reasoning should be read as a whole; I should not focus just on one particular passage. That said, this is how the ET has chosen to express its reasoning in the Conclusions section and I do not think I can entirely disregard that.

38. If that was the only point, I may still have taken the view that this did not render the Judgment overall unsafe. The second point of concern for me, however, lies in what appears to be a lack of engagement with the Claimant's case as to the context prevailing at this crucial time. His evidence was clear: he was promised a written outcome to the meeting of 21 January and he was biding his time until he received that. The failure to provide him with that written outcome was not explained to him and, up to the time he went off sick, he had no reason to think it would not be forthcoming. That was an important part of the context; it offers a potential explanation for the failure to expressly object before 4 February. I cannot see, however, that the ET expressly engages with that part of the Claimant's case.

39. Moreover (and this is my third concern), I am not sure that was simply a process failure. The ET's findings do not make clear that which is accepted before me: the conclusions set out in the Respondent's note (as cited at paragraph 20 of the findings of fact) were not reached and communicated at the meeting with the Claimant but reflect the Respondent's subsequent internal discussions. Although the Claimant might have known that his duties were being reduced (indeed his statement makes clear he was only too painfully aware that was so), it is not apparent that the conclusion expressed at paragraph 20 of the findings was in fact made clear to the Claimant, so as to make plain to him that this was the Respondent's final position at that time.

40. It might be open to the ET to reach the same conclusion, but I cannot be satisfied that it took into account that the Claimant was still waiting to hear the Respondent's final conclusion reached after he had left the meeting.

41. Finally, I cannot see that the ET had regard to the question of the time for reflection that should be afforded to an employee (**Buckland**) and how that might impact upon the assessment of the facts here. The Claimant had been with the Respondent since 2006. He had not been provided with the written notes or confirmation of the outcome of the meeting of 21 January (or told that he would not get those notes). He was then only at work for ten days and his evidence was that he was biding his time until he got written confirmation of what had happened and been decided on 21 January. He was then signed off work due to stress. It might be that an ET could still conclude that, even allowing for a period of reflection in this context, the Claimant had affirmed the contract, but I am not satisfied that these relevant factors were considered by the ET. On that basis I conclude the decision is unsafe and thus allow the appeal.

42. Having given my Judgment, I allowed the parties to address me further on the question of disposal. Given my reasoning there could be no dispute that this matter must be remitted to the ET, the only question is whether it should be the same Employment Judge. Apart from expressing a preference for a different ET, the Claimant did not specifically object to this matter being remitted to the same Employment Judge, and the Respondent was content for it to do so.

43. It seems to me that, having not disturbed the other findings in what is otherwise a carefully reasoned Judgment, there is no reason why this matter should not go back to the same Employment Judge, who will no doubt have some recollection of it and will understand the other reasoning explaining the findings already made. There is no reason to think that she

should not approach it in an entirely professional way, in the light of the Judgment I have given and such guidance as is set out there. Moreover, if, having considered the matter of affirmation afresh, a different conclusion was reached, that Employment Judge would be best placed to then go on to consider what other questions might arise in respect of the unfair dismissal complaint.

44. So, applying the guidance in **Sinclair Roche Temperley v Heard & Fellows** [2004] IRLR 763, for reasons for proportionality, practicality, and also because I have no reason to do otherwise, I remit this matter to the same ET for fresh consideration of the issue of affirmation.