Appeal No. UKEAT/0108/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 October 2016
Judgment handed down on 22 November 2016

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

LENLYN UK LIMITED — APPELLANT

MR H KULAR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR SIMON PERHAR (of Counsel) Instructed by: Lyons Davidsons Solicitors Victoria House 51 Victoria Street Bristol BS1 6AD
For the Respondent	MR MICHAEL DUGGAN (One of Her Majesty's Counsel) Instructed by: HKK Law PO Box 511 Isleworth Middlesex TW7 4WN

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Polkey deduction

The Employment Appeal Tribunal ("the EAT") dismissed the Appellant employer's appeal against a Decision of the Employment Tribunal (by a majority) ("the ET") that the Clamant was constructively dismissed. The EAT held that the ET had not misdirected itself and was entitled to reach the conclusion which it did.

The EAT allowed the Claimant's cross-appeal against the ET's **Polkey** deduction and deduction for contribution. The EAT remitted the case to the ET for it to re-consider those issues in the light of the EAT's Judgment.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. These are an appeal and a cross-appeal from a Decision of the Employment Tribunal sitting at London Central ("the ET"). The ET consisted of Employment Judge Goodman ("the EJ"), Ms Samek and Dr Weerasinghe. I will refer to the parties as they were below.

2. The Respondent was represented by Mr Perhar and the Claimant by Mr Duggan QC. I thank both counsel for their written and oral submissions.

3. After a hearing between 8 and 14 October 2015, the ET on 14 October 2015 decided:

   a. unanimously, that the Claimant had not been dismissed or subjected to a detriment for making a protected disclosure;

   b. by a majority (the EJ dissenting) that the Claimant was unfairly dismissed;

   c. unanimously, that the Claimant contributed to his dismissal and that his compensation should, accordingly, be reduced by 30%;

   d. by a majority (Dr Weerasinghe dissenting) that had the Claimant not been dismissed, there was a 75% chance that he would have been dismissed within 6 weeks on the grounds of his conduct; and

   e. unanimously, that the compensation should not be increased on account of a failure to comply with the ACAS Code on settlement agreements; and

   f. by a majority (Dr Weerasinghe dissenting) that it should not be increased on account of a failure to comply with the ACAS disciplinary code.

4. The ET adjourned the assessment of compensation and the Claimant's application for costs to a further hearing. The ET was asked to give Written Reasons for its Decision and did so in a Judgment sent to the parties on 21 December 2015. I was told that the remedies hearing is listed for December this year.

The Grounds of Appeal

5. The Respondent relies on three grounds of appeal.

a. The majority of the ET erred in failing to consider whether the Respondent had a reasonable and proper cause for its conduct: it did, because £1.9m had "gone missing on the Claimant's watch".

b. The majority's decision that the circumstances of the protected conversation were such that the Respondent evinced an intention no longer to be bound by the contract was perverse.

c. The majority erred in finding that the Respondent had asserted that the outcome was a foregone conclusion.

The Cross-Appeal

6. The Claimant relies on two grounds in his cross-appeal.

a. The ET did not give adequate reasons for its conclusion that there was a 75% chance that the Claimant would have been dismissed within 6 weeks, having regard to the Claimant's case on that issue.

b. The ET erred in holding that the Claimant contributed 30% to his dismissal.

The ET's Decision

7. The ET summarised the case by saying that the Claimant was employed by the Respondent as a Financial Controller. He resigned in December 2014, having been given a choice to accept an offer of money to end his employment or to face disciplinary proceedings. The background was that in March 2014, the Respondent had engaged a contractor, Coin Co, to collect cash and bank it. By October 2014, Coin Co owed the Respondent £1.9m. No one had noticed this debt accruing. The Respondent was not able to recover the money, because Coin Co went into administration. In November 2014 the debt was discovered. There was an internal and external investigation. The offer was made to the Claimant once the Respondent had the report of the external investigation.

8. The ET summarised the case on protected disclosures by saying that the disclosures relied on were a series of oral complaints made by the Claimant between 18 March and 7 December 2014. Some of those were referred to in emails. The detriments relied on arose from events from the end of November 2014 up to the end of the employment; and two were after the dismissal.

9. In paragraphs 5-7 of the Judgment the ET set out the evidence it had considered. Six witnesses gave oral evidence. The ET considered witness statements from two other witnesses and a 1,037-page bundle. It explained why it had allowed the Claimant to rely on an out-of-office email submitted by him on the last day of the hearing.

10. The ET made detailed findings of fact over some 50 paragraphs.

11. The Respondent runs retail foreign exchange bureaux at airports and in high streets in the United Kingdom. It is part of a group. The Claimant had worked for the Respondent for 18 years when he resigned. He had no accountancy qualification, but knew a lot about the business and had much experience. His salary was a little less than £60,000 a year. He had four responsibilities. One was core business balance and bank reconciliations in the foreign exchange business. The ET described his team in paragraph 9 of the Judgment.

12. Coin Co was awarded a contract for collecting cash for the Respondent from its retail outlets, and banking it. The previous contractor was the Co-op Bank. Coin Co was the cheapest contractor. It was a small business and there were concerns about its credit risk. These led to the insertion of a clause in the contract which provided for a higher rate of interest than was usual, 8% over base rate, if cash was not banked within four days of collection. Mr Mamillapillai in the Claimant's team was responsible for reconciliations for Coin Co. He and the Claimant reviewed the contract and told Mr Thathiah, the Group Financial Director, that they did not have the resources to do reconciliations every four days. He told them to do reconciliations every month. He would pick up any problem from monthly reports to the board and from his daily liquidity checks.

13. The ET found in paragraph 12 of the Judgment that the Claimant was overworked. He had gone to Mr Thathiah in early 2014 to ask for another member of staff. Mr Thathiah approved a job description, but then left with effect from 11 March 2014. The member of staff was not provided. There were "significant discontinuities" in the management of the team. The ET described those in paragraph 13 of the Judgment.

14. After Mr Thathiah left, no-one seemed to have done a liquidity check, whether daily or otherwise. No-one checked the debtors, or noticed that there was a problem with Coin Co. The Coin Co figure was not separately identifiable from "other debtors". The ET explained why, in paragraph 14 of the Judgment, it was a time of particular difficulty for the Claimant's team.

15. The banking arrangements for the cash were changed. When the Co-op Bank had collected cash it had credited collections to a separate account for each airport. The new arrangement was that Barclays credited all the airport collections to one account which was then posted to the Respondent's Luton account by the Respondent's staff. This caused more difficulty in carrying out reconciliations and seeing if any money was missing. Coin Co gave a receipt for the cash to the branches, but not to the accounts department. When attempts were made to get receipts from the branches, "there was little paperwork available".

16. The Respondent had a system for recording cash collections. This took the figures for money received in tills every day. This was supposed to be matched to the cash collected. Coin Co had "more accurate" [presumably than the Respondent] coin weighing equipment. This took out counterfeit coins and foreign money from the totals collected. This made it harder to work out what money had come from where. Mr Mamillapillai stopped working on 4 April. He did not return and eventually resigned on 31 July. The Claimant asked for temporary cover in mid-May and a temp arrived on 26 May. She was being trained and it took her some time to learn the job. As the Coin Co reconciliation was particularly difficult, it was put on one side. It was not until 31 July that anyone asked Coin Co if it had any paperwork.

17. During this period, the Claimant from time to time raised the issue of resources. In paragraphs 20-28 the ET set out his case about this. It is not clear to what extent it was

accepting his evidence or merely recording it. In paragraphs 22 and 26 the ET refers to oral evidence which is not supported by documentary evidence. On balance and given that these matters are recorded under the heading "Findings of fact", I consider it probable that the ET accepted the Claimant's evidence about these matters.

18. The ET found that in September the Claimant was asked to prepare a monthly report for September. He did so in the third week of October. He spotted a rise in debtors, and identified the culprit as Coin Co. He asked his team to get to the bottom of it. They said that they had been trying to, but that it was difficult. In paragraph 30, the ET said, "On 7 November he notified that Coin Co was a problem". In paragraph 31 the ET described what was clear with hindsight. Coin Co had always paid late; the intervals between the payments had increased, and it seemed that from late summer they had not paid over any of the cash they had collected. The cumulative loss by late November was £1,900,000. The Respondent sent a formal demand to Coin Co. By that stage, Coin Co was in administration. A later review suggested that the Respondent was unlikely to recover anything from Coin Co.

19. The ET described changes to the Respondent's management in paragraph 32 of the Judgment. As a result, the Claimant was to report to Mr Merchant, the new Group Financial Controller ("GFC"), rather than to the Chief Financial Officer ("CFO"). The CFO, Mr Vallance, also joined the Respondent. The Claimant thought that this would be seen as a demotion. No other aspect of his employment changed. He had a meeting with the GFC. He discussed this. He also told the GFC that there was no age-listing of debtors, so he could not tell for how long money had not been collected. His assistants had not told him there was a problem. At paragraph 34 the ET described the Claimant's complaint that he was being excluded from drinks.

20. The Respondent then tried to find out what had gone wrong with Coin Co. Staff were instructed to try and get a picture. The Claimant and his two staff were interviewed to see what the difficulties had been. The Claimant said in his interview that things would have been different if more resources had been given to reconciliation issues. The Claimant at first denied having seen the Coin Co contract but then accepted that he had seen it and knew that Coin Co was a poor credit risk. He said he felt let down by a failure of supervision.

21. Mr Vallance commissioned a report from an independent forensic accountant, Jane Fowler. The ET summarised her instructions in paragraph 38 of the Judgment. As amended, her instructions were to investigate whether there had been any fraud or criminal conduct, or negligence. She was to investigate the Respondent's actions and, as far as she could, Coin Co's. She interviewed the Claimant, two of his team and five other people. The ET did not find whether or not she had had the GFC's notes of his investigation (Judgment, paragraph 39). Her report was sent to the Respondent on 15 December 2014.

22. She found that Coin Co had stolen money. Coin Co had collected money, but not banked it. There was no internal dishonesty, but she blamed the Claimant. She analysed the Respondent's systems. She criticised the Claimant for not introducing systems which would have picked up the problem with Coin Co. She said that there had been a complete failure to address the risks of Coin Co. The Coin Co account had not been controlled or monitored. This was the responsibility of the Claimant, with the oversight of the CFO. Had there been proper training or allocation of resources, the problem would have been detected earlier and much of the loss would have been avoided. In paragraph 40 of the Judgment, the ET quoted paragraphs 50 and 51 of her report, with redactions. She said that the Claimant's conduct "could be considered negligent". She recommended that the Respondent consider "the need for a full

disciplinary investigation" into the Claimant's apparent lack of care in respect of the Coin Co account, and consider widening the investigation to his management of his team, as not one of them appeared to have raised any issues about Coin Co in a period of eight months.

23. The CFO read the report, discussed it with the HR Manager, Miss Pratt, and handed the matter over to her. She "apparently" decided that the Claimant should be made an offer by way of a protected conversation, instead of being subjected to disciplinary proceedings (Judgment, paragraph 42). He was called in to meet her at the end of the working day on Tuesday 16 December. There was a note taker. What was said was disputed. The ET concluded that the notes were "reasonably accurate". The Claimant was told that the investigation was finished. The forensic accountant's view was that he had been grossly negligent about Coin Co. The Respondent was considering taking disciplinary action against him. No decision had been made, but the Respondent wanted to make him a "without prejudice" offer to leave. He was given an envelope. He was told that there was a letter in it and a settlement agreement. He asked, and was told what the offer was. He said it was not enough. The offer was £18,000. The ET does not mention the figure, but the letter was in the bundle of documents for the appeal. Miss Pratt said that she was going on holiday, she wanted him to think about it, and he was to let her know by Monday (22 December) if he was interested in it. He was not required to come to work while he considered what to do. This would give him time to take legal advice. It was agreed that the Claimant's colleagues would be told he was taking time off for personal reasons. The meeting took 10 or 15 minutes.

24. The ET quoted the letter in paragraph 43 of the Judgment. The letter said that the external forensic accountant had found the Claimant "to be grossly negligent in failing if at all to exercise due care in respect of the Coin Co account in the management of the finance team

working on the account … Based on the findings of the external forensic accountant there are sufficient grounds for the company to consider taking disciplinary action including dismissal for gross misconduct which would mean undertaking disciplinary proceedings including suspending you pending the outcome of these proceedings." The Respondent considered that an alternative was to offer the Claimant a settlement to bring his employment to an end. The Respondent invited him to consider the settlement agreement. If no agreement could be reached, it was the Respondent's intention to "undertake disciplinary proceedings which may result in your dismissal for gross misconduct". The Claimant was told that he was not obliged to enter into a discussion but that if he did it was confidential and he should only discuss it with an adviser or his close family. The offer would lapse after 22 December. During that period *and until further notice* [the ET's emphasis] he would not be required to go to work. The letter referred to section 111A of the **Employment Rights Act 1996** ("ERA").

25. When he got home the Claimant remembered that he had forgotten to set an out-of-office reply. He tried to do that remotely, and discovered that he had been cut off from access to the Respondent's system. He tried to get advice from his union, but he could not at such short notice just before Christmas. He did get legal advice. He wrote a reply on 22 December 2014 which was a resignation and a grievance.

26. The ET summarised that letter in paragraph 47 of its Judgment. He said that he resigned because a decision had already been made to dismiss him. He said he was being scapegoated for reporting information protected by the Respondent's whistle-blowing policy. The offer was not a protected conversation. He gave four reasons. He was a whistle-blower. He had not been given a reasonable time in which to consider the offer. He referred to the ACAS Code which said that a reasonable time was likely to be 10 days. It was too close to the holidays, which

created pressure, which was intimidation and harassment. Finally, he was being threatened with disciplinary proceedings which would lead to dismissal. He concluded by saying that it was an open letter as there was no pre-existing dispute between them. He complained about being put on garden leave, and about his email being blocked for bringing an accounting mistake to the Respondent's attention. He had been demoted and under-resourced. Had he been given adequate resources, he would have found the problem much earlier. He then gave a very detailed explanation of his side of the story, including his case on protected disclosures. He said that the report must have been predetermined. It said nothing about resources and only focused on the role of credit controller. He was being forced out.

27. Miss Brown's reply was to set a date for the CFO to hear his grievance on 5 January. The Claimant said that this was too soon. He would not be able to prepare or to find a representative. The CFO should not hear it as he had complained about him (in particular in relation to being demoted and because of the instructions given to the accountant). Miss Brown's response was that the meeting would take place and the CFO's involvement was not for negotiation. Miss Brown made some inquiries. Miss Penfold confirmed that the Claimant had discussed resources with her and that it had been a difficult time for the business. The grievance was decided in the Claimant's absence. He did not go because he did not think he could get a fair hearing from the CFO. The ET was told that Miss Brown and the CFO went through the grievance and decided it jointly.

28. They sent a response on 23 January. The grievance was rejected in detail. The Claimant was told that if there had been a disciplinary hearing, he would have had an opportunity to make all his points. He would have had a chance to appeal. The "demotion"

was said to be a legitimate operational decision. The Claimant was offered an appeal but did not appeal.

29. The ET found that the Claimant did not ask for the accountant's report until 14 January. The ET set out the Respondent's reasons for not disclosing it. The Claimant made a complaint to the Information Commissioner. The Respondent did not disclose the report until the ET intervened at some point after August.

30. The ET set out the history of the claim in paragraphs 55-58 of the Judgment. It considered the claim based on protected disclosures in paragraphs 63-70 of the Judgment. It noted in passing (Judgment, paragraph 62), that the Respondent recorded little in writing. It accepted much of what the Claimant said he told the Respondent (ibid). It concluded that the Claimant did not have a reasonable belief that he had disclosed information that met the test in section 43B(1) of **ERA**. There is no cross-appeal against that finding.

31. That meant that the ET did not have to consider whether the Claimant had suffered any detriment on the ground that he had made a protected disclosure. It did so, nonetheless.

32. The overwhelming reason why the Claimant was subjected to an investigation was because of the losses suffered on the Coin Co contract, not any disclosure. The "demotion" was for operational reasons, not because of any disclosure. The ET accepted (Judgment, paragraph 71) that there "was a lot wrong" with the forensic report. It did not give the full picture. It gave no account of the lack of resources and operating difficulties faced by the Claimant. It did not discuss the "failure of control at a higher level" after Mr Thathiah left, while blaming the Claimant for not devising such systems himself. But the ET said that it was not wrong in

identifying that the Claimant had to give some explanation for his team's failure to notice the increasing debt, or that these issues might have been expected to result in a disciplinary hearing (paragraph 71). Neither the report nor the accountant's instructions were because of any disclosure by the Claimant. The ET dealt with the Claimant's complaint that he was excluded from drinks in paragraph 72 of the Judgment. This had nothing to do with any disclosures.

33. The ET summarised the law relating to unfair dismissal in paragraph 75 of the Judgment. The Claimant's case (Judgment, paragraph 76) was that trust and confidence were eroded over a period, and that the conversation on 16 December was the last straw.

34. The ET then considered the "protected conversation" defence of the Respondent (based on section 111A of **ERA**). The ET recorded the common ground that if it dismissed the claim based on protected disclosures, the exception in section 111A(3) did not apply. The ET doubted this, noting that section 111A says, "according to [the Claimant's] case" [rather than, presumably "on the ET's findings"]. In this case, the Claimant had made a claim that his dismissal was automatically unfair.

35. The ET also considered whether the impropriety exception in section 111A(4) applied. It decided that it did. It took into account the ACAS Code. The 16 December letter did not say that the short time limit could be extended. The excuse for the short time limit was "unacceptable". This undoubtedly put pressure on the Claimant. The evidence was admissible (Judgment, paragraph 79). The ET also criticised the Respondent for "substantially misrepresenting" the accountant's finding in the 16 December letter and at the meeting. It was untrue to say that the accountant had found that the Claimant had been grossly negligent. She had said that there needed to be an investigation, not that she had found that the Claimant had

been grossly negligent. The ET considered the explanation of the Respondent's witnesses for referring to "gross negligence". The ET found that the evidence was evasive. Both the letter and what the Claimant was told at the meeting misrepresented the content of the report. That was improper conduct, and another reason why the evidence was admissible (Judgment, paragraph 81).

36. Whether or not the report should have been given to the Claimant at the meeting, it was improper to assert an untruth about the report especially when it was not provided to the Claimant, so that he had no means of knowing that it was an untruth. It was therefore unjust to exclude the report [I consider that this must be a slip for "the conversation"] from the evidence. The ET said that it was "part of the picture of the events which precipitated his resignation" (Judgment, paragraph 83). The ET therefore examined the matters which the Claimant said, cumulatively, were the cause of his resignation, noting the "last straw" doctrine (Judgment, paragraph 84. There is no appeal against this approach.

37. The ET then considered the matters on which the Claimant relied. The failure to address the issue of resources was not, on its own, a fundamental breach of contract. "The claimant was struggling, but unless and until he reached the point where his health was suffering, it is hard to see that this was a fundamental breach which would justify resignation of itself". The same, the ET found, went for "the fact that payroll and ATMs were added to his workload, and at some point shifted back again". The only real complaint, the ET said, of a fundamental breach justifying resignation was that the Claimant was being blamed for what had happened.

38. The ET said (Judgment, paragraph 85) that "In the claimant's perception, and possibly objectively too, it was not his fault, or not his sole responsibility, because he had raised with senior managers the fact that there was a resource problem, and that the balance sheet was not being reconciled, or was being reconciled late". The ET recorded that the Claimant blamed managers for not continuing the liquidity and monthly checks which Mr Thathiah had done, which, when the Claimant and his colleagues had discussed the difficulties with reconciliations, Mr Thathiah had said would pick up any problems.

39. The ET then said, "Nevertheless … it was not an unreasonable thing for an employer to do". I think, from the reasoning which follows, the ET was saying that it was not unreasonable of the employer to investigate, rather than it was not unreasonable of the employer to blame the Claimant. The ET understood his grievance, and had some sympathy for his difficulties and "the lack of management controls which should pick up the problem earlier". But a reasonable employer was entitled to investigate internally and to bring in an expert. "While [missing text in the original] that his practical difficulties may have tempered a critical view of his culpability, the fact that he was in the frame is not of itself a breach of trust …".

40. In paragraph 86 the ET rejected the suggestion that the accountant had been guided by her instructions to a particular view. The ET rejected the suggestion that there had been a private conversation with her, and that this had been a fix, in order to set up the Claimant for dismissal.

41. The view of the majority was that the Respondent had "proper cause to carry out this investigation" (Judgment, paragraph 87). Dr Weerasinghe disagreed. He considered that the Respondent acted "unreasonably" in excluding higher management from the investigation, and

that that was a breach of trust because it would make the Claimant think he had been scapegoated. The ET referred again to the flaws in the report in paragraph 88 of its Judgment. It took no account of failures of management supervision, nor of the Claimant's operating and resourcing difficulties, "but we cannot say that this report was, of itself, the cause of his resignation, because at the time he resigned he did not know what it said. He only knew what the letter, and HR said it said".

42. The ET rejected the Claimant's complaint that the accountant had interviewed him in a hostile manner (Judgment, paragraph 89). Formality was appropriate in the interview. It was not a breach of trust and confidence not to be friendly in such a setting. The ET also rejected his complaint about social exclusion (Judgment, paragraph 90).

43. In paragraph 91, the ET said it was possible that Mr Vallance or Miss Pratt accepted the conclusions of the report uncritically. But an employer who had paid for an independent report had no reason not to use it. The Claimant could not know that it had been accepted without analysis, as he had not seen it, and "so it could not be a reason for his resignation".

44. The ET then considered the meeting on 16 December. The ET found that the Claimant was not told he would be dismissed. He was told that he had been found grossly negligent, which was untrue, although, the ET said, paragraphs 2 and 4 of the letter were more nuanced and accurate, saying that the Claimant could be dismissed [for gross misconduct] if the Respondent decided to take disciplinary action. An accurate letter would have said the accountant had concluded that he could be considered negligent and that the Respondent should consider the need for a full disciplinary investigation including of the management of the Claimant's team members.

45. Dr Weerasinghe decided that it was a breach of trust and confidence not to give the report to the Claimant in order to enable him to consider the offer. The majority disagreed. The concern of the majority was "not that they did not disclose the report, but that they mis-stated what it said. The question is not whether the claimant knew that the report was inaccurate, but that it sounded as if nothing he could do or say would change it, so that any participation by him in the disciplinary process was futile, that it was a foregone conclusion". The ET took account, it said, not only of the letter, but of the surrounding circumstances. The Claimant was sent home, ostensibly to consider the offer, and to get advice, not just until 22 December, the deadline, but until further notice, for which there was no explanation. He was denied email access. The Respondent's explanation that this was normal was not substantiated by any handbook. It was an odd thing to do for only five days, and for someone who was not required to attend work, as opposed from being banned from attending. The ET went on, "we can see how it operated on the claimant's mind, and objectively, to evince an intention not to be bound by the contract, namely that he had in fact been dismissed, because he was to stay at home until further notice, had no access to the organisation, and was told that he had been found guilty of gross negligence by an accountant".

46. At paragraph 94 of the Judgment, the ET recorded that it was split on the question whether making the offer was a breach of the duty of trust and confidence, so as to show an intention no longer to be bound by the contract. It appears from paragraph 93, however, that the ET had already found that, objectively, the Respondent's conduct on 16 December 2014 showed an intention no longer to be bound by the contract, and that, from what follows in paragraph 94, that the ET went on to consider in paragraph 94 whether there was reasonable or proper cause for what the Respondent did on 16 December 2014.

47. The ET said that the problem with protected conversations was that "the very fact of having [one] is something which evinces an intention not to be bound by the contract, and an intention to dismiss". I do not agree with that generalisation. It will all depend on the circumstances and on what is said in the conversation. The employer may have a protected conversation in which it shows nothing other than an intention to abide scrupulously with the terms of the contract and to make an offer in accordance with its terms, or on more generous terms.

48. Employees perceive such action and disciplinary action as hostile, the ET went on, but the ET had to consider whether there was reasonable and proper cause for such action. The majority considered that while the Claimant had the option of staying employed and of taking the opportunity to see the report and to rebut the Respondent's case in the disciplinary proceedings, the letter of 16 December "painted the picture wrongly, and made it look much more of a foregone conclusion" than the report suggested. Taking those matters together, it looked as though the Claimant would not get a fair hearing and "that therefore there was a breach of trust and confidence such as to resign". Dr Weerasinghe repeated that the Claimant should have had the report, because of the seriousness of the allegation it was said to support. The report was not given deliberately in his view, because it was known that it did not support the allegation of gross negligence, in order to put pressure on the Claimant. That was not the finding of majority, however.

49. The EJ's minority view was that the Claimant was faced with a choice of disciplinary proceedings and accepting an offer to leave, and that while there were "substantial defects" in saying that the accountant had found gross negligence, which created a false picture of his prospects, and it was misleading to send him home until further notice, "if he had been

suspended that would not fall beyond the line of improper conduct for which the employer had reasonable and proper cause. It was a clumsy way of dealing with a protected conversation, but did not evince an intention not to be bound by the contract" (Judgment, paragraph 95).

50. Paragraph 96 of the Judgment expands on the reasons of the majority. The Respondent's conduct was "tantamount to dismissal: the circumstances of the protected conversation were such that the employer evinced an intention not to be bound by the contract, that any disciplinary process … had been pre-judged, and the claimant would not be returning to work at any stage". At paragraph 97 the ET made clear that it reached that decision "knowing that the claimant himself did not know that … [the] report had been misrepresented by the respondent. He was entitled to take the employer's assertion at face value". They suggested that it was a foregone conclusion. He did not know that no account had been taken of the lack of resources or of senior management responsibility. "By a majority the conclusion is that he was entitled to think, without the report, that there would be no fair process if he stayed on and fought his case".

51. It is convenient for me to consider here Mr Perhar's submission that there is a contradiction between the penultimate sentence of this paragraph of the Judgment and the finding in paragraphs 82 and 93 that the Respondent was not obliged to provide the report to the Claimant. I reject that submission. The majority did not say, contrary to the earlier findings, that there was an obligation to provide the report. The ET was doing no more in this sentence than to take the non-provision of the report as a given and to say that, since he did not have it, the Claimant was entitled to take what the Respondent said about the report at face value, that is, that the independent accountant had found he was guilty of gross negligence. That, in turn, entitled him to think that there would be no fair process if he fought the case.

52. In paragraphs 98-101 the ET considered whether to make a **Polkey** reduction (**Polkey v A E Dayton Services Ltd** [1988] ICR 142. The ET framed the question in this way "what is just and equitable for a compensatory award whether the claimant includes considering whether the employee would have been dismissed even with fair process [sic]". In paragraph 99 the ET considered what would have happened if the Claimant had not resigned. There would have been a disciplinary procedure. The Claimant would have made all the points he had made to the ET. "He would not have been able to get round the fact that the monthly reconciliations, which Mr Thathiah had told him to keep up, had not in fact taken place. Because of Mr Mamillapalli's absence, they had not been picked up when the temp came on board … Because of lack of prioritisation, he had not checked that they were being carried out, even though he knew that Coin Co might be a high risk customer. Even if other senior managers were at fault, that would not have meant that [he] was not at fault". The ET then set out the factors in the Claimant's favour, such as overwork. The ET concluded that there was prospect he would have faced dismissal, to take account of the balance of culpability.

53. The ET found it hard to see how he could not be found culpable to some degree. The majority found "a 75% chance that the claimant would have been dismissed at the conclusion of the fair disciplinary process". Dr Weerasinghe put that chance at 25%, giving different weight to the balance of factors described by the majority, and relying on the other checks and balances which had been ineffective. His view was that to single out the Claimant for blame would be an unreasonable response. The ET assessed that the disciplinary process would have taken six weeks. The Respondent would want to deal with things briskly but this period would make an allowance for Christmas and give the Claimant time to prepare and for the Respondent to make inquiries about the points raised by the Claimant.

54. In paragraphs 102-105 the ET considered contribution. It reminded itself that the conduct should be "culpable or blameworthy". In paragraph 103 the ET said that the factors relevant to contribution were that he did not alert his managers to the consequences of his operating difficulties. If there was a performance issue, it was about the Claimant not prioritising the tasks that needed to be done when he was unable to do them all. The ET noted that he did not know that nobody was doing Mr Thathiah's liquidity check, although he could have asked. He was only one level of control out of three and no senior manager seemed to have been checking liquidity trends. In paragraph 104 the ET isolated "the real difficulties" in June and July. The Claimant had not checked whether the Coin Co contract was being put on one side. Taking all the points together, the ET assessed the Claimant's contribution to his dismissal at 30%.

The Law

55. Section 95 of **ERA** is headed "Circumstances in which an employee is dismissed". Section 95(1) provides "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". This is known as "constructive dismissal". In **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 the Court of Appeal decided that paragraph 5(2)(c) of Schedule 1 to the **Trade Union and Labour Relations Act 1974** (a predecessor of section 95(1)) created a contractual test for determining whether or not an employee had been constructively dismissed. The Court rejected a "reasonableness" test. Lord Denning MR and Lawton LJ explained in their judgments how the contract test gave effect to the language of paragraph 5(2)(c).

56. After the decision in **Western Excavating**, the courts developed the implied term of trust and confidence (see **Woods v W M Car Services (Peterborough) Ltd** [1981] ICR 666, 670D (Browne-Wilkinson J - as he then was), approved in **Lewis v Motorworld Garages Ltd** [1986] ICR 157 and **Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd** [1991] ICR 524).

57. **Malik v BCCI SA** [1997] ICR 606 was the first case in which the House of Lords considered whether there was such a term. The employer, a bank, in liquidation by the time of the litigation, had run a dishonest and corrupt business. The employees discovered this after the end of their employment. They sued for "stigma damages" to compensate them for the difficulty they said they would have in getting new jobs as a result of their association with that business. They argued that running the business in that way was a breach of an implied term in the contract of employment, which entitled them to damages.

58. Their Lordships decided that there was such a term. Lord Steyn (with whom Lords Goff, Mackay and Mustill agreed) described the term (at page 621C-D) as imposing an obligation that the employer should not:

> **"without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"**

At page 622B, Lord Steyn said that he saw the emergence of this term as a "sound development".

59. He then considered and rejected three suggested implied limits on the term which the liquidator advanced. Two are relevant here. First, at page 623D-E he said that the motives of the employer were not relevant. The question was whether the conduct "objectively considered

A is likely to cause serious damage to the relationship between employer and employee". If so, "a breach of the implied obligation may arise". Lord Nicholls made a similar point at page 611B. He said, "A breach occurs when the proscribed conduct takes place: here, operating a dishonest and corrupt business. Proof of a subjective loss of confidence in the employer is not an B essential element of the breach, although the time when the employee learns of the misconduct and his response to it may affect his remedy". Second, Lord Steyn decided that there can be a breach of the implied obligation arising from actions of the employer which the employee does C not know about until after the employment has ended (at pages 624E-625F).

60. After uncertainty at the level of this Tribunal, the Court of Appeal clarified, in D **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121, [2010] ICR 908, that the test for establishing whether a contract of employment had been repudiated was a contractual test, not a test of reasonableness. In deciding whether or not an employee had been constructively dismissed (in a case where the breach relied on is a breach of E the implied obligation to maintain trust and confidence) the test in **Malik** should be applied. The test is objective: a breach occurs when the proscribed conduct takes place.

F 61. In **Bradbury v BBC** [2015] EWHC 1368 (Ch); [2015] Pens LR 457, an appeal from a determination of the Pensions Ombudsman, Warren J helpfully summarised the effect of the **Malik** test in this way:

G

> **"22. The question is therefore whether, objectively, there has been a breach of the implied term. In my view, that objective assessment must be carried out in relation to the implied term read as a whole thus encompassing both elements of that term. Accordingly, the conduct must be such as, objectively, is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause. Reasonableness, objectively judged, necessarily comes into establishing whether or not there has been a breach of the implied term. But this is not to apply, by the back door as it were, the "range of reasonable responses" test. It is not a question of establishing whether a particular course of action is within the range of reasonable responses to the particular state of affairs and the situation in which the employer finds itself; rather, the question is whether the particular course of action is a reasonable and proper response to that state of affairs and situation in the context of the implied term so as to prevent what would otherwise be a breach of duty from being one."**

H

Submissions

The Appeal

62. Mr Perhar accepted that the ET had to apply the test in **Malik**. He suggested that during a disciplinary investigation some breakdown in the relationship of trust and confidence is inevitable. I do not agree that any case establishes this proposition; the case he relied on, **Macauley v Newham London Borough Council** [2012] EWHC 4371 (QB) certainly does not do so. Whether there is such a breakdown will depend on the nature of any allegation made, and on how the parties behave. He submitted that the ET failed to consider whether there was a reasonable and proper cause for the Respondent's actions. There was such a cause, he said, because there was a £1.9m hole in the Respondent's accounts. The making of an allegation was not a breach of implied obligation.

63. The ET had erred by looking at matters from the Claimant's subjective point of view, rather than asking, objectively, whether there was conduct meeting the **Malik** test. He could not, however, show me an express misdirection of law in the ET's Judgment. But he submitted that the ET's view that the outcome of any disciplinary proceedings seemed a foregone conclusion was based on an impermissibly subjective analysis. No reasonable ET, properly directing itself in law, could have reached that conclusion.

64. I asked Mr Perhar whether it was a breach of the duty of trust and confidence for the Respondent to misrepresent the contents of the accountant's report. He submitted that it could not be because the Claimant did not know about the misrepresentation until later; it only became a breach when he found out. He accepted that there was no reasonable and proper cause for that misrepresentation.

65. Mr Duggan supported the ET's decision by reference to the terms of the Judgment, in particular paragraphs 93 and 94. The ET understood that it had to apply an objective test, and did so. The ET did not rely on the fact that the Respondent misrepresented the report; rather, its approach was to say that the Claimant was entitled (a) to base his conduct on the Respondent's assertion that the report contained a finding that the Claimant was guilty of gross negligence, and (b) to decide that there was nothing he could do, as the Respondent's decision was a foregone conclusion. He further submitted that there was only one possible answer to the question whether the Respondent had reasonable and proper cause for what it did. He criticised the reasoning of the EJ in paragraph 95 of the Judgment.

The Cross-Appeal

66. In his oral submissions, Mr Duggan accepted, on the basis of **Rao v Civil Aviation Authority** [1994] ICR 495 at page 501F-G, per Lord Bingham MR (as he then was), that it was open to the ET in principle to make both a **Polkey** deduction and a deduction for contributory fault, and that it is a matter for the expert judgment of the ET whether it is appropriate in a particular case to make both types of deduction. He was disposed to submit that 75% was on any view too high.

67. He submitted, in any event (on the basis of a passage in **Rao** at page 502B-C), that where (as in **Rao** and as here) the ET makes a large **Polkey** deduction, it should carefully consider whether it is appropriate to make a further deduction for contribution, since, in the words of Lord Bingham, "… the fact that an 80 per cent deduction has been made may very well in many cases, if not in this case, have a very significant bearing on what further deduction may fall to be made". Staughton LJ made a similar point at page 502F-G. There was nothing in the ET's Reasons, Mr Duggan said, to show that the ET had considered this point. This

omission was all the more important in this case because the **Polkey** deduction was based to a significant extent on the Claimant's culpable conduct. The factors which the ET took into account on both limbs of the case were very similar, and there was a risk of double-counting.

68. He relied in support of his third point on **Grantchester Construction (Eastern) Ltd v Attrill** UKEAT/0327/12/LA. At paragraph 23, Langstaff P (as he then was) accepted a submission that the ET in that case had erred in law by asking, in relation to a possible **Polkey** deduction, what chance there was that a reasonable employer would have dismissed the Claimant fairly, rather what chance there was that that the Respondent would have done so. Mr Duggan submitted that the ET should have asked itself, but failed to, what the chances were that the Respondent would have dismissed fairly. If it had done so, it would have needed to factor in its findings, in particular its findings on the employer's conduct which led it to admit evidence of the protected conversation, such as, for example, its finding that the Respondent had been guilty of improper conduct in misrepresenting the contents of the report.

69. Mr Perhar submitted that in so far as the Claimant challenged the 75% figure, that was a perversity appeal and could not succeed. He accepted that the ET had not specifically dealt with the two points which Mr Duggan made, but submitted that it was necessarily implicit in the Judgment that the ET had considered the points before deciding that the two deductions were appropriate.

Discussion

70. I have summarised the Judgment of the ET at some length, and can therefore consider the appeal and cross-appeal quite briefly.

The Appeal

71. In my judgment, on a fair reading, there is no relevant misdirection in the ET's Decision. The ET's express self-directions, in paragraph 75 of the Judgment, have not been criticised. The ET then explained in paragraph 76 that the Claimant relied on the "last straw" doctrine. It is clear, from those directions and what followed, that the ET appreciated that it had to decide whether any of the Respondent's acts (singly or together) were a fundamental breach of the contract of employment: see paragraph 84, where the ET said it would examine the matters which the Claimant said "were cumulatively the cause of his resignation, noting that a last straw in a series of acts undermining trust can suffice when a breach of term as to mutual confidence and trust is alleged". The ET then carefully considered each complaint. The ET was careful, in paragraphs 88 and 91 (and see paragraph 97), to exclude from this analysis matters which the Claimant did not know about at the time of his resignation.

72. When it considered the events of 16 December, the ET considered, first, whether what the Respondent had done, objectively, was a breach of the duty of trust and confidence (or evinced an intention no longer to be bound by the contract) (Judgment, paragraph 93). In most of paragraph 94, the majority considered whether there was reasonable and probable cause for what the Respondent had done and concluded that the Claimant was entitled to resign. The ET was again careful to leave out of account the fact that the Respondent had misrepresented what the report said (see the third sentence of paragraph 93).

73. The conduct which the ET was analysing was the conduct on the 16 December, and not the employer's earlier conduct. The ET had already held, by a majority, at paragraph 87, that the Respondent had reasonable and proper cause to commission the accountant's report and to consider it, and, unanimously, at paragraph 91, that an employer who had commissioned such a

report had no reason not to use it. Mr Perhar in his submissions had a tendency to elide these different strands of the Respondent's conduct.

74. The minority reasoning of the EJ in paragraph 95 in support of the position that there was reasonable and probable cause for what the employer did on 16 December is unconvincing. The EJ accepted, in effect, the force of the case against the Respondent, but held that if the Claimant had been suspended, that "would not fall beyond the line of improper conduct for which the employer had reasonable and proper cause". The point is that the Respondent did not suspend the Claimant. The Respondent, instead, treated him in the way described by the majority in paragraph 93. So the EJ was considering, not the Claimant's case, but a hypothetical case. Moreover, she gave no weight to the crucial factor, which was that the Respondent's conduct in asserting, untruthfully as it later turned out, that the independent accountant had found the Claimant guilty of gross negligence made it look to the Claimant, subjectively and objectively, as if the outcome of any disciplinary proceedings was a foregone conclusion.

75. Knowingly making a material misrepresentation to an employee is arguably a breach of the implied obligation of trust and confidence. The ET, as I have said, excluded from its consideration the fact that the Claimant did not know when he resigned that the Respondent had misrepresented the contents of the report. There was no cross-appeal against that approach and I have heard no argument about its correctness. It does seem to me, however, on the basis of the reasoning of the House of Lords in **Malik** (see paragraph 59, above), that it is strongly arguable that that approach was wrong.

76. For these reasons, I dismiss the appeal.

The Cross-Appeal

77. I am persuaded that this was a case in which, because of the findings it had made, the ET should expressly have considered two things.

78. First, there was significant material in its findings on other issues in the case, for example, the question whether the protected conversation was admissible, which might have called into question whether the Respondent could have dismissed the Claimant fairly. The ET found that the misrepresentation about the report was improper conduct and that the Respondent put pressure on the Claimant by requiring him to give an answer by 22 December. The ET found that two witnesses from HR gave an implausible and evasive explanation for the misrepresentation. The ET found that there were significant flaws in the accountant's report (there was "a lot wrong" with it, Judgment, paragraph 71). It is not for me to say what impact, if any, those findings have on the chances that the Respondent would have dismissed the Claimant fairly. But they are relevant to an assessment of the chances of a fair dismissal by this Respondent.

79. I am not confident that the ET took them into account on this aspect of the case. More fundamentally, two aspects of the ET's Reasons cause me concern. The first is the way the ET posed the question for it at paragraph 98, "The respondent argued … that what is just and equitable for a compensatory award … includes considering whether the employee would have been dismissed *even with fair process*" (my emphasis). The second is the ET's reference, in paragraph 100 to "*the conclusion of the fair disciplinary process*" (my emphasis). These passages make me doubt whether the ET appreciated that the question for it was to assess the chances that the Respondent (as opposed to some other employer) would have dismissed fairly. They suggest, rather, that the ET assumed that the Respondent would dismiss fairly.

A 80. I allow the cross-appeal on this issue, and remit the case for the ET to consider again, in the light of all its findings about this employer's conduct, what chance, if any, there is that the Respondent would have dismissed the Claimant fairly, and if so, within what period.

B 81. The second issue arises because there is a significant overlap between the factors the ET took into account when making the **Polkey** deduction and when making the deduction for contributory fault. In my judgment the ET should have considered expressly, and did not, C whether, in the light of that overlap, it was just and equitable to make a finding of contributory fault, and if so, what its amount should be. That overlap means that there is a real risk, which, I consider again, the ET did not take into account, that the Claimant was being penalised twice D for the same conduct. I allow the cross-appeal on this point and remit this case for the ET to consider again, after it has reconsidered the **Polkey** issue, what deduction, if any, for contributory fault is just and equitable, in the light of that overlap.

E 82. To the extent that there is a freestanding challenge to the figure for the **Polkey** deduction, it is now academic in the light of my decision on the first issue. I would have rejected such a challenge in any event, as the assessment of the appropriate figure (provided the F ET has taken into account relevant factors) is a matter for its expert judgment.

Conclusion

G 83. For these reasons, I dismiss the appeal and allow the cross-appeal to the extent indicated in paragraphs 80, and 81, above.

H