Appeal No. UKEAT/0457/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 October 2013
Judgment handed down on 21 August 2014

Before

HIS HONOUR JEFFREY BURKE QC

MR C EDWARDS

MR B M WARMAN

MR P ATKINSON — APPELLANT

COMMUNITY GATEWAY ASSOCIATION — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA PRINCE (of Counsel) Bar Pro Bono Unit
For the Respondent	MR NICK COOKSEY (of Counsel) Instructed by: Trowers & Hamlins 10 Colmore Row Birmingham B3 2QD

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

The Claimant claimed constructive unfair dismissal and that he had been exposed to detriment for making a protected disclosure. While investigating his conduct the Respondents accessed his emails and discovered that he had been abusing the email system by sending overtly sexual messages to a female friend and had sought to help her obtain a position in the Respondents. He resigned before disciplinary proceedings were completed, complaining that they were being conducted in such a way as to amount to repudiatory breach.

At the close of the Claimant's case the Respondents made submissions that his claims should be struck out as having no reasonable prospect of success. Those submissions succeeded; the Tribunal decided that 1) the constructive unfair dismissal claim could not succeed as a matter of law because the Claimant was himself in repudiatory breach of contract 2) the Respondents' accessing of the Claimant's emails was not in breach of his Article 8 rights and 3) the PID claim could not succeed because the Respondents were not in law vicariously liable for the employee who were said to have acted to the Claimant's detriment.

On appeal:-

1. It was conceded that the ET's decision as to vicarious liability was in error, being based on a misapplication of **Fecitt** (2011 EWCA Civ 1190); and that part of the claim would have to be remitted

2. The ET erred in law in concluding that one party to a contract of employment cannot accept a repudiatory breach of contract by the other if he is himself at that time in repudiatory breach but that repudiation has not been accepted by the other. Doubts expressed in recent English decisions such as **Tullett Prebon** (2010 EWHC 484) as to whether there was such a principle and the decision of the EAT in **McNeill v Aberdeen City Council** (UKEATS/0037/08) that there was, had been laid to rest by the decision of the Court of Session which reversed the EAT's decision. The correct solution in employment law is that an unaccepted repudiation has no effect; if a party himself in repudiatory breach establishes unfair dismissal that breach can be fully taken into account at the remedy stage.

3. Therefore the unfair dismissal claim also had to be remitted for reconsideration

4. The ET had not erred in law in their decision as to Article 8

5. The remission should be to a fresh Tribunal

HIS HONOUR JEFFREY BURKE QC

The appeal

1. By this appeal, the Claimant before the Employment Tribunal, Mr Atkinson, appeals against the judgment of that Tribunal, sitting at Manchester, presided over by Employment Judge Holmes and sent to the parties on 18 December 2012, that his claims to have been constructively unfairly dismissed by the Respondents, Community Gateway Association, and to have suffered detriment for having made a public interest disclosure be struck out as having no reasonable prospect of success.

2. The Respondents had applied to the Tribunal for an order striking out the Claimant's claims at the close of his case at the substantive hearing of those claims, on the 5th day of that hearing. Because the Claimant was not represented, the Tribunal, after hearing the Respondents' submissions, adjourned to enable the Claimant to obtain advice and to put in written submissions, by way of response; the Tribunal considered those submissions and then issued a full reasoned judgment.

3. By the time this appeal came before us, the grounds on which it was based had been reduced to 4 areas; they were: –

- The Tribunal erred in striking out the claims when it did and should have heard all the evidence on both sides before reaching any conclusions.

- The Tribunal erred in concluding that the constructive dismissal claim must fail because, assuming in the Claimant's favour that the Respondents had been guilty of conduct which amounted to a repudiatory breach of the contract of employment, the

Claimant had, on his own evidence, himself been guilty of conduct which amounted to a fundamental breach of that contract and, as a result, was barred by law from successfully claiming to have been constructively dismissed.

- The Tribunal erred in law in concluding that the Respondents were not prevented by Article 8 of the **European Convention of Human Rights**, as embodied in domestic law, from relying on a series of emails which the Claimant had sent to his lover through his employers' email system.

- The Tribunal erred in law in concluding that the Claimant's claim to have suffered detriment by reason of public interest disclosure ("the PID claim") could not succeed because the Respondents could not, in relation to such a claim, be held to have been vicariously liable for the acts of their employees who were said to have acted in such a way as to cause detriment to the Claimant.

4. We will describe these issues as issues 1 to 4.

5. At the beginning of the hearing of this appeal, Mr Cooksey, on behalf of the Respondents, conceded that the Tribunal had erred in law in their conclusion which has given rise to issue 4 of the above issues and that the authority on which the Tribunal had relied, **NHS Manchester v Fecitt** ([2011] EWCA Civ 1190), did not support the Tribunal's conclusion. He accepted that the PID claim would have to go back to the Tribunal for decision according to law and that the only question which we had to resolve on that issue would be whether to remit it for reconsideration to the same or to a fresh Tribunal.

The history

6. We intend to set out the history in this section of our judgment as briefly as is possible. Much of the history was contentious; the Tribunal heard only the evidence on one side, although no doubt they had the relevant documents put in by both; they set out the facts upon which they were proceeding for the purpose of the strike-out application at paragraphs 3.1 to 3.36 of their judgment, prefacing those paragraphs with these words: –

> **"As no evidence has yet been heard from the respondents' witnesses, no findings of fact are made at this stage. For the purposes of this submission therefore, the following relevant facts are either agreed, or, if contentious, are presumed in the claimant's favour."**

7. The Respondents are a Housing Association based in Preston, Lancashire. The Claimant was their Director of Resources from 2005 until he resigned in March 2011. Difficulties arose in late 2010, when an overspend of £1.8 million was discovered; the Claimant at one time accepted sole responsibility for the overspend; but he later sought to pass the responsibility on to others. As a result he was informed by the Chief Executive Officer, Ms Bellinger, that his position was untenable. She offered a compromise package, under which he could resign on terms which included two month's pay; he was warned that if there was no resolution, he would be suspended and would face disciplinary proceedings. The Claimant declined that offer; while he was off work, at first through illness and then at the Respondents' behest, the Respondents instituted an investigatory process into the Claimant's responsibility for the overspend. That process also included remarks made by the Claimant at a staff awayday which were said to have been inappropriate – and indeed he admitted that they may have been inappropriate.

8. At about the same time, the Claimant told Ms Bellinger that the Respondents' Vice-chair had discussed with the Managing Director of another Housing Association matters which were regarded as confidential to the Respondents; he claimed that the provision of this information was a protected disclosure.

9. The Respondents then discovered that the Claimant had been for some time conducting a relationship with a lady who worked for another Housing Association and, in breach of the Respondents' email use policy, which he had himself written and was responsible for enforcing, had used the Respondents' email system to communicate with her often during the working day. The emails which he sent to her were not marked "personal/private" as the policy required, were of a highly personal nature and included overtly sexual content which the Tribunal described in paragraph 3.8 of their judgment. In the course of those emails he had also discussed a number of matters relating to the Respondents' business, described more fully in paragraph 3.9.

10. In March 2008 the Claimant had encouraged his lover to apply for a vacant post with the Respondents. He had assisted her in preparing her application for that post, telling her what questions would be asked at interview and how to make her presentation. He did not sit on the interview panel; but, after the interview, he suggested to a colleague (who, we presume, was on the panel) that his lover should be offered the job. She was offered it; but she declined it. At no time did the Claimant reveal to the Respondents his personal association with her.

11. These discoveries were added to the matters to be investigated for disciplinary purposes. The Claimant claimed that the emails were private communications which should not have been accessed. The disciplinary hearing was fixed for 9 March 2011. There followed disagreements between the Claimant and the Respondents about procedures and whether the hearing should be postponed. The Claimant's requests for a postponement did not succeed; the hearing went ahead on the fixed date; the Claimant renewed his application at the hearing because he was not represented; he was given a further 20 minutes to find a representative. He left and the meeting continued in his absence.

12. Before a conclusion was reached, he submitted a letter of resignation with immediate effect, on 14 March. His Tribunal claim was put forward on 9 June.

The Tribunal's judgment

13. On 18 December 2012 the Tribunal issued a certificate of correction by which they corrected clerical errors in their original judgment, including errors as to paragraph numbers. We will refer only to the corrected version.

14. Having set out the facts, which were either not in dispute or were assumed in the Claimant's favour, the Tribunal set out the parties' principal submissions. We need to summarise them briefly because they shaped the Tribunal's judgment. The Respondents submitted that:-

- By his own admission, the Claimant had, unknown to the Respondents, committed fundamental breaches of his contract of employment by using the Respondents' email system in the manner described above; as a result, on authority, including that of **Tullett Prebon plc v BGC and others** ([2010] EWHC 484), he was precluded from succeeding in his claim to have been constructively unfairly dismissed.

- The Claimant's PID claim was bound to fail because he did not believe that his disclosure to Ms Bellinger was true, had not been made it in good faith and had done so only as a lever to improve his position in the potential disciplinary proceedings against him; and in any event, on the authority of **NHS v Fecitt** (see above), the Respondents could not be vicariously liable for the actions which were said to have caused his detriment.

15. The Claimant submitted that:-

- On the authorities, while an employee's own breach of contract might disentitle him from succeeding in a constructive dismissal claim, it was not the law that it must have that effect.

- The evidence as to his breaches of contract had been obtained in breach of his right to privacy and was therefore inadmissible.

- He had made the disclosure on which he relied in good faith and reasonably believing it to be true; those were factual matters which could not be determined without a full hearing. The detriment was said to have been caused by the Respondents' Chief Executive Officer and Vice-chair; those actions were the actions of the Respondents.

16. At paragraphs 8 to 10 of its judgment, the Tribunal set out the principles of law in a constructive dismissal claim in familiar and accurate terms, which do not call for further comment in this appeal. At paragraph 10 they set out the Respondents' argument that the Claimant was precluded from succeeding in his constructive dismissal claim by reason of his own repudiatory breach. They said, at paragraph 11: –

> **"There is, however, a further aspect to the law of constructive dismissal which the respondents rely upon. Assuming for the purposes of this submission that the claimant's case satisfies the tests set out above, so as potentially to entitle him to claim that he was constructively dismissed, there remains a barrier to him succeeding. That barrier is that he was, on his own unchallenged evidence, himself guilty of conduct which amounted to a fundamental breach of contract on his part, the effect of which, as a matter of law, is that he cannot claim constructive dismissal."**

The Tribunal referred to three authorities, including **Tullett Prebon**, which we will consider in due course.

17. At paragraph 12 of their judgment, the Tribunal set out the statutory provisions relevant to the PID claim, namely sections 43A and B, 47B and 103A of the **Employment Rights Act 1996**, as amended by the **Public Interest Disclosure Act 1998**. At paragraph 14 they pointed out that in **Coral Squash Clubs v Matthews** ([1979] IRLR 390) Slynn J had said that the power which a Tribunal has to stop a hearing at the end of the case for the party whose evidence and submissions came first must be exercised with caution and that other case law suggested that the exercise of that power must be used only in exceptional circumstances. They said that the position had been "most recently reviewed" in the Court of Appeal in **Logan v Commissioners of Customs and Exercise** ([2004] IRLR 63), in which Ward LJ had stressed that it would be rare indeed for a submission of "no case" to be made in an employment tribunal, and rarer for it to succeed. At paragraph 15 they said:-

> **"Clearly, where any factual issues require resolution, on all the evidence, such a submission is inappropriate. In this instance, however, we are not dealing with a submission of no case, we are being invited to strike the claims, or either of them, out on the basis that they have no reasonable prospects of success. That is a slightly different application or submission. For these purposes, we are either acting on the basis of the agreed evidence given by the claimant, or, where there is a dispute on the evidence, we are assuming that the evidence will be found in his favour. In other words, we are putting his factual case at its highest. No factual issues therefore need to be resolved for this purpose, they are assumed in the claimant's favour. Further, we also have to have regard to the overriding objective, to be found in Regulation 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004."**

They set out the terms of the overriding objective in that Regulation, pointed out that they had not been in force at the time of any of the earlier authorities and concluded that to entertain the Respondents' application at that stage of the proceedings accorded with the overriding objective. They therefore proceeded to consider the Respondents' submissions on their merits.

18. Having decided to take that course, the Tribunal assumed, for the purpose of those submissions only, that the Respondents had themselves been guilty of repudiatory breach of contract. They then asked themselves whether there was any reasonable prospect of the Claimant's showing that he was not himself in repudiatory breach of contract. They concluded,

at paragraphs 18 to 19, that the Respondents were a hybrid authority only, some of whose functions were public functions and others were private functions to which the Convention did not have direct effect. They concluded that the Claimant's use of the Respondents' email system to communicate with his lover was not related to the discharge of the Respondents' public functions and were therefore not subject to the direct application of the Convention. However, if that was wrong, the Claimant could only rely on a breach of Article 8 of the convention, where he had an "expectation of privacy" and that, on the assumed facts, he had no such expectation. Further, the accessing of the Claimant's emails by the Respondents was a proportionate means of pursuing legitimate aims and therefore did not constitute a breach of his Article 8 rights; see paragraphs 20 and 21.

19. The Tribunal then, at paragraph 22, concluded that the Claimant's use of the email system amounted to fundamental breach of contract; the argument that the Respondents had not applied their email policy strictly in the case of another employee might relate to the fairness of dismissal but was not relevant to the breach of contract issue. At paragraph 23 they addressed the Claimant's actions in relation to his lover's applying for employment with the Respondents; they said: –

> **"There is, however, a further matter, in respect of which the claimant does not (and cannot) argue that the respondents' conduct in any way could be said to have led him to believe that such behaviour was acceptable. That is the manner in which he not only encouraged his lover to apply for a post with the respondents, but assisted her with her application, to the extent of advising her how to make her presentation, and of what questions she would be asked. Whilst he stopped short of sitting on the interviewing panel, he did not disclose his connection with the candidate, and, after her interview, encouraged the respondents to offer her the post, which they did. That she did not take it up is of no relevance. This was a most serious and blatant abuse of his position as a Director for personal motives, which, had it been discovered at the time, or, indeed, at any time thereafter, would have led to his summary dismissal. There can be no suggestion that the respondents had condoned any such similar activity on the part of anybody else in the past, or had affirmed this breach, and hence, at the time that the claimant resigned, he was himself in fundamental, unaffirmed and unwaived breach of his contract, and he cannot claim constructive dismissal."**

20. In paragraph 24 the Tribunal said that they could see no reason why, having regard to the overriding objective and the absence of any need to find any further facts, they should not

conclude that the Claimant's constructive dismissal claim had no reasonable prospect of success because he could not avoid an adverse finding in relation to his own breach of contract, the legal consequences of which were fatal to that claim. They pointed out in paragraph 25 that, if the Claimant's case had succeeded, the Respondents would have been entitled to rely on his breaches of contract by way of reduction of any compensatory award, on the basis of **Polkey v A E Dayton Services Ltd** ([1988] ICR 442) and that a 100% reduction in the compensatory award would have been inevitable.

21. We have already foreshadowed the Tribunal's decision on the PID claim; they assumed that he had made the disclosure on which he relied; they concluded that, whether he had done so in good faith or without reasonable belief in its truth could not be determined without full consideration of the evidence; but they decided that the submission based on **NHS Manchester v Fecitt** was sound, that the Respondents could not be vicariously responsible for the acts complained of and therefore concluded that the PID claim had no reasonable prospect of success. That conclusion, as we have said, is now conceded to have been wrong in law.

Issue 2: constructive dismissal

22. We propose to start our consideration of the contentious issues before us by considering first Issue 2 – namely whether the Tribunal erred in law in concluding that the Claimant's constructive unfair dismissal claim must fail because he himself had been in fundamental breach of contract. It is common ground that in paragraphs 11 and 24 of their judgment the Tribunal applied what was described in argument as an absolute bar principle i.e. that in a constructive dismissal case if the Claimant was at the relevant time himself in fundamental breach (or "repudiatory breach", which for present purposes is the same) his constructive dismissal claim could not, as a matter of law, succeed. Ms Prince on behalf of the Claimant

submits that there is no such principle. Mr Cooksey, who advanced it before the Tribunal, submits that there is.

23. At the time of the arguments before us, the authorities, it was agreed, did not speak with one clear voice. It appeared that we would have to make our own attempt to understand and reconcile those authorities and to deduce what we see as the correct principle of law from them and from general principles. However, since the arguments were completed and during the regrettably lengthy period in which this judgment has been awaited, one of the authorities, **Aberdeen Council v McNeil** (UKEATS/0037/08) has been considered and reversed by the Court of Session; and, as a result, the law appears to us now to be much clearer. We have invited the parties to provide us with written submissions on the impact of that appellate decision; they have been good enough to do so; and we have considered those submissions in reaching our conclusions on this issue.

24. As an introduction we need to record, Mr Cooksey's acceptance in the course of argument that the implied term of trust and confidence upon breaches of which the Claimant based his constructive dismissal claim continues to exist and to impose obligations on both employer and employee until the contract of employment is terminated, whether or not either or both have the right to terminate the contract as a result of such breaches. We will return to this later.

25. The trail of authorities appears to be of recent origin. In **RDF Media v Clements** ([2008] IRLR 207) the claimants were employers of the defendant, who had entered into a restrictive covenant which sought to restrain him from competing with them for 3 years, which period would be reduced to if his employment were terminated, other than as a result of

voluntary resignation or summary dismissal. He resigned after 16 months and indicated that he intended to join a competitor. The employer sought an injunction requiring him to abide by the obligations in the covenant. It was his case that he had resigned because of breaches by the employer of the implied term of trust and confidence, that he had not voluntary resigned and therefore that the covenant only bit for 2 years. The employer's case was that if they were found to have been in breach as the employee claimed, he too was in breach of his obligations under the contract of employment and was not, as a result, able to accept the employer's breach as a termination of that contract. The trial judge, Bernard Livesey QC sitting as a deputy judge of the High Court, addressed the issue which we have to consider first at paragraph 120 of his judgment. He said: –

> **"Finally, when evaluating whether the employer has breached the implied obligation, it is not unimportant to consider the state of the relationship, which is of course a relationship which both parties have a mutual obligation to foster, at the time when the breaches alleged to have taken place. If, by way of example, an employee has no relationship or is himself in repudiatory breach of his relationship, this may have to be put into the scales as it may affect the balance which has to be struck."**

26. He found, at paragraphs 132/3, that the employers were in fundamental breach of the implied term of trust and confidence and, at paragraph 137, that the employee had broken his obligations of loyalty and fidelity to the extent that, if the employer's had known of it, he would have been dismissed on the spot. Therefore the question arose whether the employee could rely on the employer's breach in those circumstances. At paragraphs 139 to 141 the judge said: –

> **"139. The question is not easy to resolve. I have been referred to some authority and ordinary contractual principles do not seem to provide a clear answer. The breach by Mr Clements preceded the breach by RDF; RDF was not at the time aware of the breach and so the contract continued in force, although RDF clearly did not affirm it. Had RDF known of Mr Clements' breach… it would have accepted it as a repudiation of the contract and (there) would not have been a breach of its implied obligation. Mr Casey argues that the proper analysis is that the contract did indeed continue, it was terminated by Mr Clements accepting RDF's repudiatory breach; the anterior breach by Mr Clements is not forgiven and forgotten, it remains but sounds only in damages. Where, as here, damages is not the essence of either party's claim for relief, I do not accept that such a result is either a satisfactory or equitable solution.**
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> **140. In these circumstances, I am inclined to accept the formulation of Mr Croxford who argues… that where as here the defendant is himself in repudiatory breach of a mutual obligation he is not entitled to accept any repudiation by RDF by reason of his own breaches.**
>
> **141. The alternative way of looking at it is by application of the consideration set out in paragraph 120 above. The point is that if one looks objectively at the relationship between**

RDF and Mr Clements, that relationship had already been seriously damaged or destroyed by misconduct on his part which went to the root of the relationship. The point is one of causation as well as equity. As a matter of causation I would hold that the relationship was destroyed not by RDF but by Mr Clements as a result of his anterior breach of the mutual obligation. It would also be inequitable from Mr Clements if he were able to claim that RDF caused serious damage to the relationship where the relationship in question was already seriously damaged or destroyed by his own conduct."

The judge therefore concluded that the employee could not rely on the employer's breaches, that he had therefore voluntarily resigned and that the restriction in the covenant remain valid for a period of 3 and not 2 years.

27. It cannot be said, in our judgment, that the judge came down clearly in favour of the absolute rule which he canvassed or was inclined to prefer a principle that the court was required to carry out the balancing exercise referred to at paragraphs 120 and 141. He would have reached the same result by either route. In paragraph 140 he referred to two decisions of the House of Lords to which we will come in due course; they did not concern contracts of employment and, as was said in a later decision to which we will come, related to arbitration practice and principle; and we regard it as useful to consider the authorities in the employment field first. We should add that **RDF v Clements** went to the Court of Appeal, we were told, but on different issues.

28. Next in the chronological line is the decision of the EAT in **Aberdeen City Council v McNeill**, to which we have referred above. The EAT, presided over by Lady Smith, reached their conclusion on the basis of an application of what we have earlier called the absolute principle. The claimant was found to have been constructively dismissed by the respondent; he had resigned when disciplinary proceedings against him were pending; the respondent's breaches of contract consisted of their pursuing an investigatory process against him in an oppressive manner. Part of the respondent's case before the Tribunal had been that the claimant

had himself been guilty of fundamental breach of contract and, accordingly, was not dismissed or could not claim to have been constructively dismissed. At paragraph 87 of their judgment, the EAT said:-

> **"The claimant's contract of employment was a mutual onerous contract and that meant that both parties were, under the common law of Scotland, obliged to perform their part of the bargain. If a party to such a contract is in material breach of one of his obligations he cannot insist that the other party perform a reciprocal term. He cannot demand fulfilment of the obligations in which he is creditor unless he has performed or is prepared to perform the obligations which he has himself undertaken and in which he is debtor…"**

They then referred to a number of Scottish authorities and a Scottish textbook on the law of contract. Mr Cooksey did not rely before us on any such broad principle as applying to an English contract of employment; and the EAT went on to refer extensively to **RDF** and concluded, at paragraph 99, that:-

> **"If the claimant was, at the time he resigned, in breach of that implied term, he was in repudiatory breach and not entitled to terminate the contract on the basis that the respondents had themselves breached that implied term."**

29. In **Tullett Prebon v BGC and others** ([2010] EWHC 484 QB) the claimants claimed injunctions and damages against a rival city broker who had recruited a number of the claimants' brokers to join them. The proceedings were complex and the trial, before Jack J, was lengthy. For present purposes, we can set out how the issue which we are now considering arose in simple terms; a number of the broker defendants claimed that the claimants had been in breach of the implied term of trust and confidence and that those defendants were therefore entitled to resign. The claimants' response and the trial judge's reaction to it can best be seen by setting out paragraphs 83 to 85 of his judgment, which are in these terms: –

> **"83. It was tentatively suggested in [RDF], at paragraph 140 that where an employee was himself in repudiatory breach of his contract of employment he could not accept a breach by his employer to bring the contract to an end…. The ordinary position is that, if there is a breach of contract by one party which entitles the other to terminate the contract but he does not do so, then the contract both remains in being and may be terminated by the first party if the second party has himself committed a repudiatory breach of the contract….**
>
> **84. An alternative approach to how the employee's own misconduct should be taken into account was suggested, and perhaps preferred… in *RDF*, namely that the employee's conduct may have so damaged the mutual relationship of trust and confidence that the employer's conduct is of little effect. I refer to paragraphs 120 and 141 of the judgment. But I think that this breaks down on analysis. I accept that the relationship is a mutual one, but that means**

> **only that the employer is entitled to have trust and confidence in his employee, and the employee is entitled to have trust and confidence in his employer. If the one is damaged it does not follow that the other is damaged. Nor does damage to the one party's trust and confidence in the other entitle him to damage the other's trust and confidence in him.**
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> **85. In my judgment the conduct of the employee may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him objectively judged, is to be judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question. There may in practice be little difference with the approach suggested by [RDF]."**

30. That decision, too, went to the Court of Appeal; but the point, we are considering did not arise. The point arose again, however, before the same judge in **Brandeaux Advisers (UK) Ltd and others v Chadwick** ([2010] EWHC 3241 QB). The claimant sought orders against the defendant for delivery up of confidential information relating to the claimant's business which consisted of a vast number of documents which she had emailed to her private email address; she had begun to do so in the context of difficulties at work and continued to do so over the following months; and when her conduct came to light, she was summarily dismissed. Jack J found that that conduct was in repudiatory breach of her contract of employment. However, it was argued that in several respects the claimants themselves had been in repudiatory breach and were therefore not entitled to rely on the defendant's breaches. The judge set out, at paragraph 31 of his judgment, paragraph 140 of the judgment in **RDF** and the paragraphs of his judgment in **Tullett Prebon** which we have set out above. His decision on the relevant issue is in paragraph 32 of his judgment, in these terms: –

> **"I have reconsidered these paragraphs and do not wish to change them. So even if Brandeaux were in breach of the mutual obligation of trust and confidence, that would not bar Brandeaux from dismissing Ms Chadwick for good cause. For the relationship was continuing, and for that purpose an accepted repudiation "is a thing writ in water". However, the seriousness of what Ms Chadwick did is to be judged in the context of her employer's conduct towards her in so far as relevant. To take a straightforward example, the seriousness of an employee's conduct in swearing at his superior may be affected by the fact that it was in response to the superior himself swearing at the employee. I would like to emphasise 'so far as is relevant'. Conduct by the employer which does not impact or explain the conduct of the employee will not usually be relevant…."**

31. We were referred by Mr Cooksey to 2 further authorities, **Wilf Gilbert (Staffs) Ltd v Burn** (EAT/0547/07) in which the EAT said that if a party is himself in repudiatory breach of a

mutual contractual obligation he is not entitled to accept the other party's subsequent conduct as amounting to an acceptable repudiation; and **SG&R Valuation Service v Boudras** ([2008] EWHC 1340 QB) in which Cranston J, in response to the argument that the employee defendants should not be allowed to rely on an alleged fundamental breach by the employer in sending them on garden leave because of the employee's own antecedent breaches, said, at paragraph 28: –

> **"At present I remain unconvinced that, while there may be a mutuality of obligation, in particular of trust and confidence, in the employment relationship, there is, in the type the circumstances in this case, and mutuality of breach which justifies applying the approach in these two House of Lords authorities. Rather what I perceive as typical in this type of case is separate, sequential breaches, one by the employee and one by the employer. Moreover, I would be concerned about situations where, if the employee was in repudiatory breach, the employer could take whatever repudiatory breach it wished and the employer could not accept the employee's repudiation as bringing the employment relationship to an end. That could lead to some very undesirable scenarios in the employment relationship…"**

Neither of these citations assists us greatly either in reconciling the authorities, or, if we cannot reconcile them - and we have not found it easy to do so in reaching a conclusion as to what is the correct principle – for reasons to which we will come, we do not regard the two House of Lords decisions relating to obligations to proceed with arbitration as binding upon us in the present context, for the reasons given by Jack J in paragraph 83 of his judgment in **Tullett Prebon**; none of the other decisions to which we have referred is binding on us; all of them command respect.

32. It was with some relief, therefore, that we discovered the judgment of the Court of Session in **Aberdeen City Council v McNeill** ([2014] IRLR 114). The court rejected arguments that the doctrine in Scottish law of mutuality of contractual obligations had no relevance to the application of the statutory test found in section 95(1)(c) of the **Employment Rights Act 1996**; but it held that that doctrine had no application to the facts of the case before it; and, having, at paragraph 31, set out the nature of the implied term of trust and confidence, at paragraphs 32-33 it concluded as follows: –

> **"32. In the present case it is now accepted on behalf of the appellant that he was guilty of gross misconduct, in that at a time considerably before the initiation of the investigation he had used sexist remarks to female employees and had permitted a 'laddish' culture to prevail in his department. If that had been known at the time, the respondents might have elected to treat such misconduct as a sufficiently material breach of contract to warrant dismissal. Alternatively, they might have withheld performance of their obligations to provide work and pay salary by, in effect, suspending the appellant until he tendered proper performance of his contractual duties, eschewing such remarks and toleration of such culture. That alternative would have been an application of the remedy of retention, based on the mutuality principle. Neither of these events occurred, however. The respondents' obligation to maintain mutual trust and confidence remained in place. It continued in place throughout the investigation carried out by the respondents. The employment tribunal held that the manner in which that investigation was conducted breached the respondents' obligation of trust and confidence. In those circumstances the notion that the principle of mutuality of contract debars the appellant from founding on a claim of constructive dismissal on the basis of the respondents' breach of their obligation of trust and confidence in the conduct of the investigation is erroneous.**
>
> **33. …. The Employment Appeal Tribunal concluded (at paragraph 99) that, because the appellant was at the time when he resigned in breach of his implied duty trust and confidence, he was in repudiatory breach and was not entitled to terminate the contract on the basis that the respondents had themselves breached that implied term. This involves a misunderstanding of the parties' rights. As noted above, if the respondents had rescinded the contract on the basis of the appellant's breach (assuming that the breach was sufficiently serious), that would have precluded future performance of the substantive obligations and the appellant would not have been in a position to rescind the contract. That is not what happened, however. The respondents continued with a very detailed investigation of the appellant's conduct in a manner that was held by employment tribunal to amount to a material breach of their duty of trust and confidence towards the appellant. The appellant rescinded the contract on the basis of that breach. The fact that the appellant was himself in breach of contract did not prevent him from relying on the respondents' breach as a ground of rescission because, obviously, rescission does not involve the enforcement of the substantive provisions of the contract. It is enforcement of the substantive provisions that is prevented by the remedy of retention. That is as far as the remedy goes; other rights and remedies are not precluded. The fundamental error in the Appeal Tribunal's reasoning, as expressed in their judgment, was to hold that the appellant's breach of contract disabled him from founding in any way on the respondents' breach of contract. That is not what the remedy of retention achieves; the respondents' duty of trust and confidence remained, notwithstanding the appellant's breach of contract, and the appellant was entitled to found on the respondent's breach of their duty as amounting to constructive dismissal…"**

33. This conclusion was summarised in paragraph 36. In these words: –

> **"I am of opinion that the appellant has established his first ground of appeal, and that the prior repudiatory breach of contract on his part did not disable him from terminating the contract by reason of the respondents' conduct towards him."**

34. The Scottish law doctrine of retention plays no vital part in that conclusion; nor does the Scottish approach to the principles of mutuality; see paragraph 22 of the leading judgment; it is clear that the term "rescission" is used where an English lawyer would use the word "repudiation", or, to be more accurate, the words "bringing the contract to an end by accepting a repudiatory breach". It is true that the English authorities which we have set out above find no place in the judgments of the Court of Session; but since they do not point to a clear

principle, that is neither surprising nor of particular significance. In our view, the central core of the passages in the Court of Sessions' judgment which we have set out embodies what we would respectfully accept as the correct principle in English law, namely that while a contract of employment subsists, the obligations which that contract imposes upon the parties continue to subsist; some of those obligations may in certain circumstances, be in suspense or not enforceable; for example, if an employee goes on strike, there is no obligation to pay him while he is on strike; but the obligation of trust and confidence which lies on each party to a contract of employment are not suspended or put in abeyance because one party has broken that obligation. If one party commits a fundamental or repudiatory breach of that obligation and the other does not accept that breach as bringing the contract to an end, whether because he does not know about the breach or otherwise, the contract continues. We repeat the trite observation that an unaccepted repudiation is a "thing writ in water". If the party which had the right to bring the contract to an end did not do so (whether or not he knew of that right) and was himself in fundamental breach of contract, simultaneously or subsequently, it would then be open to the originally offending party to accept that repudiation and bring the contract to an end. If the originally offending party was an employee who subsequently brought a constructive dismissal claim based on the employers' subsequent breach, the Employment Tribunal would inevitably be invited to and would have to consider reducing compensation, if the dismissal were shown to be unfair, by 100% or by a lesser proportion as appropriate if it were established that, because of the employee's original breach he could and, if the employers had known about it, would have been fairly dismissed in any event.

35. What we have set out in the above paragraph is no more than what we suspect would have been the reaction to the issue under discussion of those experienced in the law and practice of unfair dismissal, whether Scottish or otherwise; and that reaction is now to be founded on the

judgments of the Court of Session in **McNeill**. In our view, the tentative steps in the English decisions to which we have referred in a different but inconclusive direction should not deter us from what we regard as the appropriate principle, as set out in those judgments which we respectfully follow. We do not accept Mr Cooksey's argument that the Court of Session's judgment should not be followed because its reasoning can only apply where Scottish law is to be considered; nor is the conclusion unsound because the English House of Lords authorities to which we referred to earlier were not cited.

36. Mr Cooksey relies on those 2 authorities, (although it is not said that the second adds anything to the first); and we must now turn to consider them. In his further submissions he relies on the 2 House of Lords decisions to which we referred earlier for the correct principle of law, as he puts it, namely that a party who is in repudiatory breach of a mutual contractual obligation is not entitled to accept a repudiation by the other party. Those 2 decisions are **Bremer Vulcan v South India Shipping** (1981) AC 909 and **Paal Wilson v Partenreederei** (1983) 1 AC 854.

37. In the former, the Defendant was the purchaser from the Claimant of 5 bulk carriers manufactured by the Claimant in Germany under a contract which was governed by German law but contained an arbitration clause providing for arbitration in London. The Defendant complained of a series of defects in the vessels and eventually commenced arbitration proceedings in London. After a prolonged delay in which the arbitration proceedings were not progressed, the Claimant issued proceedings in the English High Court seeking an injunction to restrain the Defendant from proceeding with the arbitration and/or a declaration that the arbitrator had power to dismiss the Defendant's claim for want of prosecution.

38. The Claimant succeeded at first instance in the Court of Appeal; but the House of Lords allowed the Defendant's appeal. By a majority the House concluded that the High Court did not have power to control or supervise the conduct of a private arbitral process, as it did in the case of domestic civil proceedings, and that the principles which provided for the striking out of a court claim for want of prosecution, as set out in such familiar cases as **Allen v Sir Alfred McAlpine** (1968) 2QB 229 and **Birkett v James** (1978) AC 201 did not apply by analogy to private arbitration.

39. Lord Diplock, having in his speech set out that conclusion, then put forward a 2nd reason why the Claimant could not obtain the relief sought. He held that it was a necessary implication from the parties having agreed that the arbitrator should resolve their dispute that both parties were under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay; and, at page 987 G he said: –

> **"In the instant case….. The respondents were content to allow the claimant to carry out voluntarily the preparation of detailed points of claim. They never made an application for directions to the arbitrator and none were made by him. For failure to apply for such directions for so much time had elapsed that there was a risk that a fair trial of the dispute would not be possible, both claimant and respond and were in my view in breach of their contractual obligations to one another; and neither can rely upon the other's breach as giving him a right to treat the primary obligations of each to continue with the reference as brought to an end. Respondents in private arbitrations are not entitled to let sleeping dogs lie and then complain that they did not bark"**

40. Lord Edmund-Davies and Lord Russell agreed generally with Lord Diplock. Lord Fraser and Lord Scarman dissented, but were in a minority. The principles upon which the appeal was to be decided are to be found in the speech of Lord Diplock.

41. Mr Cooksey submits that the relevant principle is to be derived from those parts of that speech to which we have referred. However, in our judgment, although Lord Diplock relied on general contractual principles to reach the conclusion he expressed at page 987, the ratio of his conclusion and therefore of the decision of the House of Lords on this issue is confined to the

specific case of the mutual obligations of the parties to a private arbitration and to the extent to which one party can seek a remedy to prevent the continuation of the arbitration when neither has pushed the arbitration forward. We respectfully conclude that Lord Diplock's conclusion does not purport to be of wider effect. If a wider principle applicable to all contracts in general or employment contracts in particular was properly to be derived from what Lord Diplock said, it is surprising that, in the employment cases to which we have earlier referred, there was or could have been any doubt as to the law; yet in Tullett Prebon Jack J described the **South India** case and **Paal Wilson** case as unhelpful in an employment situation. With that we respectfully agree. The latter case does not, in our judgment, take Mr Cooksey's argument further than the former.

42. Accordingly, the Tribunal in the present case erred in law in their conclusion that the Claimant was barred by his own antecedent breaches of contract from establishing a claim that he had been constructively dismissed. It was for the Tribunal to decide whether the Respondents' conduct on which the Claimant relied as entitling him to treat the contract of employment as repudiated was such as to enable him so to treat it. In other words, the Tribunal should have considered in the familiar way whether the Claimant's constructive dismissal claim was, on the facts, established. They did not do so, for the reasons we have examined in detail; they took the course they did on an erroneous view of the law.

43. Mr Cooksey sought to persuade us that, on the Tribunal's findings of fact, the Claimant was guilty of such serious and blatant abuse of his position that, if the balancing exercise canvassed in the recent English authorities were to be carried out, only one result could be achieved, namely that which the Tribunal did achieve. In our judgment there was no such balancing exercise to be carried out; and we need not take that point any further.

Issue 1: procedure

44. We do not believe that it is either necessary or helpful, in the light of our conclusion on issued 2, to consider at any length the arguments that the Tribunal should not, as a matter of procedure, have entertained the Respondents' application to strike out at all. We agree with Ms Prince that the Tribunal were not correct to say, as they did at paragraph 14, that the law as to the Tribunal's power to stop a hearing at the end of the case of the first party had been most recently and comprehensively reviewed in **Logan** (see above); in **Wiggan v RN Wooler and Co** (EAT/0542/06), **Logan** was considered and reviewed by the EAT, Underhill J sitting alone. The tribunal had struck out the claimant's unfair dismissal claim as having no reasonable prospect of success. Underhill J, having said that the principles set out in **Clark v Watford Borough Council** (EAT/43/1999), remained the correct approach for tribunals considering whether to dismiss a case on the basis of no case to answer or otherwise at half-time, went on to say that the fact that the tribunal was asked to exercise its power to dismiss on the basis of no case to answer or to exercise its power to strike out on the basis that there was no reasonable prospect of success made no difference to the substantive question.

45. Had the absolute rule that the Claimant could not succeed in his constructive dismissal claim because he had himself been guilty of repudiatory breach of the contract of employment existed, as the Tribunal believed to be the law, this was, in our view, one of those rare cases in which the Tribunal would have been entitled to entertain the Respondents' application at half-time and to have considered that it should succeed, whether on the basis of "no case to answer" or on the basis of "no reasonable prospect of success"; but in the light of our conclusion that the absolute rule did not apply, the Tribunal should not and, no doubt, if they had understood the law to be as we have set it out, would not have reached a conclusion on the merits of the

constructive dismissal claim without hearing all the evidence on both sides and would not have acceded to the Respondents' application at the end of the Claimant's case.

46. In these circumstances it is not necessary for us to say any more about the procedural issue.

Issue 3: Article 8

47. It might be said that, in the light of our decision that the Tribunal's conclusion that the Claimant's constructive dismissal claim should be struck out at the halfway stage was based on an error of law, the Article 8 issue which arose in the course of the Tribunal's consideration of the strike-out application does not now need to be decided by us and would have to be considered afresh by the same or a different Tribunal, if or when there is a full hearing on the merits. We take a different view; the Article 8 issue is likely to arise in the further hearing; the arguments have been placed fully before us; and we believe it to be important to respond to those arguments.

48. The Claimant, by Ms Prince, attacks three aspects of the Tribunal's conclusions on this issue. She submits that: –

1. The Tribunal erred in concluding that the Claimant could not rely on Article 8 because the Respondents were a hybrid authority and the emails on which they rely were not sent in the course of its public functions.

2. The Tribunal was wrong to conclude that the Claimant had no expectation of privacy and that, in any event, that conclusion did not necessarily lead to a conclusion against him on this issue.

3. Even if the Claimant's rights under Article 8 were not infringed by the searching of his emails, the use of his emails in disciplinary proceedings was in breach of those rights.

These arguments potentially give rise to a 4th point, namely the extent to which the evidence as to the contents of the Claimant's emails were admissible in a court or tribunal if they had been obtained in breach of the Claimant's Article 8 rights. The parties had not addressed that issue in their skeleton arguments; its potential relevance emerged as the arguments before us developed; and, therefore, after the oral arguments were completed, we invited counsel to provide us with written submissions on the point. They did as asked; and we are grateful to them for taking on that additional task.

49. We will take the 4 points which we have outlined in the order in which we have set them out.

The Respondents' functions

50. Ms Prince does not challenge the Tribunal's conclusion that the Respondents were a hybrid authority and that the Claimant's emails sent to external recipients on which the Respondents sought to rely were not sent in the discharge of the Respondents' public functions. Her argument is that, as a result of the decision of the Court of Appeal in **X v Y** ([2004] IRLR 625), which does not appear to have been cited to the Tribunal, the Tribunal should not from those factual conclusions have derived the further conclusion that Article 8 did not avail the Claimant. Article 8 of the convention incorporated into domestic law by the **Human Rights Act 1998** and set out in Schedule 1 of that Act is as follows: –

> **"1. Everyone has the right to respect for his private and family life, his home and his correspondence.**
>
> **2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention**

> **of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"**

and section 3 of the 1998 Act provides that:-

> **"so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights "**

51. The factual and legal situations in **X v Y** were very different from that which the Tribunal had to consider in the present case. The claimant was employed by the respondent charity, working with young offenders. He was cautioned by the police for an act of gross indecency with another man in a toilet to which the public had access. He did not disclose this to the respondents; when it came to light some time later, he was dismissed for gross misconduct and claimed that he had been unfairly dismissed and dismissed in a manner inconsistent with respect for private life under Article 8; he also relied on Article 14, which is not relevant for present purposes. The Court of Appeal, considering his appeal from the EAT, where his appeal against the dismissal of his claims by the Tribunal had failed, had to consider in the case of a respondent upon whom the Convention did not impose direct rights, the extent to which section 3 of the 1998 Act and Article 8 should have affected the Tribunal's approach to their decision as to the fairness or unfairness of the dismissal. At paragraph 50 of his judgment, with which Dyson and Brooke LJJ agreed, Mummery LJ gave as a short answer to the question that the claimant's acts did not fall within the ambit of Article 8 at all because they occurred in a place to which the public had access; but he went on to consider the position on a wider basis; at paragraph 53 he drew attention to the fact that the claimant did not assert a cause of action under the 1998 Act and had no such cause of action; it was not unlawful for the respondent as a private employer to act in a way which was incompatible with Article 8; and at paragraph 54 he said: –

> **"What is 'private life' depends on all the circumstances of the particular case, such as whether the conduct is in private premises and, if not, whether it happens in circumstances in which there is a reasonable expectation of privacy for conduct of that kind."**

He continued in paragraphs 55 and 56 as follows: –

> **"55. The cause of action under section 94 of the ERA and the alleged interference with Article 8 are based on the conduct reason for the applicant's dismissal.**
>
> **(1) If the dismissal of the applicant was for his "private" conduct, that will be relevant to the determination by the employment tribunal under s.98, of an unfair dismissal claim against the employer, whether or not the employer was a public authority. In either case the tribunal has to decide whether the dismissal for that reason was a sufficient reason for the dismissal and was fair.**
>
> **(2) If the dismissal of the applicant was in circumstances falling within Article 8 and was an interference with the right to respect for private life, it might be necessary for the employment tribunal then to consider whether there was a justification under Article 8(2) for the particular interference. As explained below, Article 8 and Article 14 may have to be considered by tribunals in the case of the private sector employer, as well as in the case of a public authority employer, by virtue of s.3 of the HRA. Justification involves considering whether the interference was necessary in a democratic society, the legitimate aim of the interference, and the proportionality of the interference to the legitimate aim being pursued.**
>
> **(3) On questions of justification the tribunal should bear in mind the complexity of employment relationships. In addition to the right of the employee under Article 8 and Article 14, the employer, fellow employees and members of the public also have rights and freedoms under the Convention.**
>
> **56 ….. Under s.3 of the HRA the employment tribunal, so far as it is possible to do so, must read and give effect to s.98 and the other relevant provisions in Part X of the ERA in a way which is compatible with the Convention right in Article 8 and Article 14."**

52. At paragraph 63 Mummery LJ gave the following guidance:-

> **"As indicated earlier, it is advisable for employment tribunals to deal with points raised under the HRA in unfair dismissal cases between private litigants in a more structured way than was adopted in this case. The following framework of questions is suggested –**
>
> **(1) Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.**
>
> **(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.**
>
> **(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.**
>
> **(4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.**
>
> **(5) If there was, is the dismissal fair, tested by the provisions of section 98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right ?"**

53. It is not necessary for us to set out further passages of that judgment; we have read and considered that judgment as a whole.

54. In the present case, following that guidance: –

1. The Claimant does not seek to rely on any cause of action under the HRA in general or Article 8. It is not his case that he was unfairly dismissed for acts which formed part of his private life; he claims that he was constructively dismissed, as set out in his ET1. His claim as there put, was not based on any breach by the Respondents in obtaining the emails; see paragraphs 78/79. His claim was based on the Respondents' failure to follow a fair procedure in the investigation and handling of the disciplinary process, as a result of the protected disclosure he had made about breach by the Respondent's Vice-Chair of commercial confidentiality.

2. Article 8 became relevant because the Respondents sought to use the Claimant's own breaches of contract as a defence to the complaint of constructive dismissal.

3. Thus paragraph 58 of Mummery LJ's judgment in **X v Y** was not directly in point. The Claimant was not dismissed for any reason which could be said to have been an unjustified interference with his private life. Had he not resigned and if the disciplinary proceedings had continued, he might have been dismissed for such a reason; but he was not.

4. In considering the Article 8 issue in the guise in which it did arise, the Tribunal ought to have considered and would, had **X v Y** been put before them, no doubt, have considered whether the accessing of the Claimant's emails constituted an unjustified interference with his private life; but they would on the facts have inevitably come to the conclusion that, in the circumstances, it did not. The Claimant had used the Respondents' email system in breach of the policy, which he had himself devised, to communicate with his

lover in the manner described by the Tribunal at paragraphs 3.8 and 3.9 of their judgment. To describe reliance by the Respondents on what they had discovered the Claimant to have done, having regard to Article 8, as an unjustified interference with the Claimant's private life when they were legitimately investigating the Claimant's conduct in the circumstances which we have earlier described appears to us to be untenable.

55. Accordingly, while our reasoning is not the same as that of the Tribunal, who did not have the advantage of seeing **X v Y**, the conclusion reached by the Tribunal was, for the reasons we have set out thus far, not in error.

Reasonable expectation of privacy

56. Ms Prince submitted that the Tribunal had erred in law in concluding that the Claimant had no expectation of privacy in relation to his emails sent to his lover on the Respondents' system. She argued, relying on the authority of **CC v AB** ([2008] 2 FCR 505), that an intimate or sexual relationship is a matter in respect of which such an expectation exists; accepting that in that case the defendant was seeking to publicise details of a sexual relationship between his wife and the claimant which had been conducted entirely in private, she referred to **Niemietz v Germany** ([1992] ECHR 13710/88) in which the European Court of Human Rights had indicated that the concept of private life may extend to business activities, and to **Peck v UK** ([2003] ECHR 44647/98) in which that court said, at paragraph 57: –

> **"Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by art 8. The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature…"**

Article 8 was applied in that case to protect the claimant against disclosure to the police and public of CCTV footage of the claimant in a public place in circumstances which did not indicate the commission of any crime and which went beyond what he could possibly have foreseen.

57. In **Halford v UK** ([1997] IRLR 471) and in **Copland v UK** (ECHR 62617/00) the ECHR indicated that emails sent from work could fall within the concept of private life and could carry with them an expectation of privacy. Therefore, it was argued, the Tribunal ought to have concluded that such an expectation existed or at least was capable of existing in the present case. It was necessary to look at the Respondents' email policy and consider whether its terms were such that such an expectation was or might be excluded in this case and also to look at the Information Commissioners Office "Employment Practices Code" published in 2005.

58. Paragraph 1.1 of the Respondents' 'Internet and Email Acceptable Use Policy', dated May 2006 and produced by the Claimant, provided that the policy document outlined the Respondents' terms and conditions relating to access to the Internet and external emails and that all users of the Respondents' computer systems were bound by it. Paragraph 2.8 provided that any misuse of the Internet or email would be subject to disciplinary action. Paragraph 4.1 provided as follows: –

> **"All (the Respondents') email is recorded on the Cryoserver. You can search for all email you have sent and received. Email cannot be deleted from this system and it is possible to search this system in the event of an investigation. Therefore, please use Outlook email in a professional manner. If you wish to send personal email, you may prefer to use web-mail, such as Yahoo, Hotmail, or as provided by your own ISP…"**

Paragraph 4.4 said: –

> **"Communications will be monitored for a variety of reasons as explained at Section 7.3. Employees should not assume electronic communications are totally private. Employees should communicate confidential data in other ways."**

And paragraph 4.5 said:-

> **"The e-mail facility must not be used for inappropriate purposes, i.e. of a nature that might cause offence to others or bring (the Respondents) into disrepute. The following are examples of inappropriate use. However, this is not an exhaustive list. Emails should not … be used for transmitting, retrieving or storage of … materials that are obscene or pornographic;….have contents, or contain material that may reasonably be considered in bad taste."**

Paragraphs 4.9 to 4.11 provided that: –

> **"4.9 Employees will be allowed to use e-mail for personal use if they observe the rule set in this section. These rules apply equally if the facility is used on (the respondents) premises or remotely, e.g. from a private house or other premises.**
>
> **4.10 All personal e-mails should be clearly marked in the "subject" box that they are PERSONAL/PRIVATE, to prevent others from inadvertently accessing such messages, for example, if your e-mails are auto forwarded to another individual whilst you are on holiday.**
>
> **4.11 E-mail communications, in general, cannot be guaranteed to be private/ confidential and should not be treated as such. However, e-mails marked PERSONAL/PRIVATE will not be opened unless in accordance with the E-mail Protocol and with the direct authority of the Director of Resources."**

None of the relevant emails in this case were marked PERSONAL/PRIVATE.

59. Paragraph 7.4 provided that lawful monitoring would be undertaken to safeguard employees as well as protect the interests of the Respondents and of their customers and to ensure that employees act in accordance with policies and procedures, and to investigate unauthorised use.

60. The Code to which Ms Prince referred us is not legally binding, but provides guidance to encourage good practice. Although the Tribunal did not have it before them and Mr Cooksey on behalf of the Respondents objected to Ms Prince's reliance upon it before us, we have read and considered the points from it which Ms Prince made. We do not intend to set out the passages on which she relied in this already lengthy judgment; we need only say that in respect of obtaining access to emails, other than on a regular basis, for the purposes of an employer's business, the Code does not in our judgment advance the Claimant's case; it contemplates that

an employer may check emails sent by a particular worker in order to ensure the security of the system or to investigate an allegation of malpractice: see page 66.

61. In our judgment it is clear from **X v Y** and from **CC v AB** that whether or not there was an expectation of privacy in an individual set of circumstances must depend upon the facts of each individual case. We are not persuaded that the Tribunal approached the issue of expectation of privacy on the basis of any erroneous principle or application of the law on the facts. The Tribunal was entitled to take into account the terms of the relevant policy document to bear in mind that the Claimant was the author of that policy and therefore must be expected to have known what it set out, that he could not have expected the emails to his lover containing the material which the Tribunal described and which were not marked PERSONAL/PRIVATE to have been immune from access by the Respondents and that by using "wingdings" as he and his lover had in an attempt to conceal the sexual nature of the emails, he had shown that he knew that his emails might, one day, be read. On this issue, we understand why, after the Claimant's evidence and having seen the relevant documents, including, of course, the policy document, the Tribunal made the decision that the Claimant had no expectation of privacy in relation to the relevant emails; perversity has not been argued; nor has it been cogently argued that there were facts which might have led to a different conclusion if the Tribunal had heard both sides of evidence. The conclusion was one which the Tribunal were entitled to reach.

62. At paragraph 3.11 of their judgment, the Tribunal set out as either an agreed fact or a fact assumed in the Claimant's favour that the emails were initially accessed in order for investigations into the overspend to be pursued and for the Claimant's work to be progressed. Mr Cooksey told us that the Respondents' case was that the emails had originally been accessed in order to deal with a problem as to disrepair of a property with which the Claimant was

dealing. There appears to have been no suggestion that the access to the emails had been initiated because of any knowledge in the Respondents of what they eventually found and took objection to. It does not seem to us, however, that the precise nature of the Respondents' business interest in obtaining access to the Claimant's emails adds any weight to his case.

63. Finally on this issue, we are not persuaded that the finding that there was no expectation of privacy was not conclusive against the Claimant. Ms Prince argued, basing herself on **PG and JH v UK** ([2001] ECHR 44787/98), that a reasonable expectation of privacy was not the only relevant factor in considering whether there was a breach of Article 8 rights. It is true that, at paragraph 57 of its judgment, the European Court of Human Rights said that a person's reasonable expectations as to privacy might be a significant though not necessarily a conclusive factor; but we do not read that judgment as holding that Article 8 rights may be breached even where there is no reasonable expectation of privacy. When such an expectation exists, it does not follow that under no circumstances can the material which may be the subject of the Article 8 rights be looked at or distributed. The circumstances may be such that, as the Tribunal found in this case, at paragraph 18 of their judgment, that the interference with an Article 8 right may be a proportionate means to pursue a legitimate aim. We have not seen anything in the authorities which suggests that Article 8 may be deployed where there is no reasonable expectation of privacy.

Breach by using the emails in disciplinary proceedings

64. Ms Prince submitted that the Tribunal erred in concluding that the Respondents' access to the emails was objectively justified, as they did at paragraph 21 of their judgment. She put forward two errors. The first was they appeared to have decided that issue on the basis that the Respondents had access to the emails to investigate whether there had been any breaches of

their Internet and email policy or breaches of the duty of confidentiality owed by the Claimant; that was not the evidence, as set out in paragraph 62 above. The second error on which she relied was that the Tribunal failed to consider that Article 8(2) only contemplates interference with Article 8 rights if that interference is in accordance with the law; but, she submitted, the Tribunal failed to consider whether the use of the emails was, in accordance with the law; it was not because it was in breach of the **Data Protection Act** and of the provisions of the code to which we have referred.

65. Mr Cooksey objected that those two sources had not been put before the Tribunal and submitted that when access to the Claimant's emails was made for appropriate operational reasons, and the objectionable emails were discovered without a breach of his Article 8 rights, it was apparent that the Respondents' proposed use of those emails was appropriate and not in breach of the law.

66. We can state our conclusion on this issue in brief terms. Nothing which we were shown in either the Act or the Code would have rendered it unlawful for the Respondents to act as they did. Once the emails to which objection was taken were found, without any infringement of the Claimant's Article 8 rights for the reasons we have set out earlier, we can see no basis on which it could be said that those emails, which were blatantly in breach of the Respondents' policy, could not be used in disciplinary proceedings.

The admissibility issue

67. The written submissions of Ms Prince and Mr Cooksey, in response to our request to them to address the issue as to whether, if the information about the Claimant's use of the Respondents' email system which the Respondents intended to use in the disciplinary

proceedings was obtained in breach of the Claimant's Article 8 rights, that information was admissible or inadmissible in these proceedings, are full and detailed; they contain extensive reference to many authorities; counsel have been admirably industrious.

68. From those submissions it appears to be clear that a court or Tribunal has, in deciding the admissibility issue which we have identified, to carry out a balancing exercise which will involve consideration of all relevant factors, including the probative value of the evidence in question and the nature and extent of the activity, which has infringed the right of privacy. See, in particular, **Jones v University of Warwick** ([2003] 1 WLR 954) and **Avocet Hardware v Morrison** (EAT/0417/02/DA).

69. Because the Tribunal decided, for the reasons we have earlier discussed, that there had been no infringement of the Claimant's Article 8 rights, they did not embark (and may not have been asked, at the stage which the proceedings had reached to embark) on that balancing exercise. In the light of our rejection of the Claimant's criticisms of the Tribunal's decision on the Article 8 issues, it may be that, when or if this dispute returns to the Tribunal, that balancing exercise will not need to be carried out; but if it does arise, the Tribunal will have to decide it on the facts and circumstances before them. That being so, we have come to the conclusion that we should not become further involved in considering the parties' submissions as to how that balancing exercise should be carried out and as to what result it should produce. We will, therefore, say no more about it. If the issue does arise, the parties will be fully prepared for it, armed as they will be with the written submissions which counsel have provided; and counsels' work will not have been in vain.

Issue 4: protected disclosure

70. We set out at the beginning of this judgment that the Respondents conceded that the Tribunal's decision as to the claimant's PID claim had been reached in error of law; we accept that that concession was properly made for the reasons set out in paragraph 5 above. Therefore, that claim must be remitted to the Tribunal for reconsideration.

Remission

71. We now come to the last issue which we have to resolve, namely whether the remission should be to the same or to a newly constituted Tribunal. It is important that both the constructive unfair dismissal claim and the PID claim must go back to the Tribunal for reconsideration; to a substantial extent the Claimant's claim has to start again. We have, of course, considered the principles set out by the EAT in **Sinclair Roche and Temperley v Heard** ([2004] IRLR 763); applying those principles, it appears to us that this is one of those cases in which it would be unfair to propose that the same Tribunal should carry out the necessary reconsideration of those claims; the Tribunal reached strong views about the Claimant and his case; and if the remission were to be to the same Tribunal there would, in our judgment, although we fully respect their professionalism, be a strong unconscious temptation to take the same view of the facts as that which they have previously reached; and that would not appear to be just or fair. We have taken into account that evidence which has been given will have to be given again; but we have no doubt that a remission to the same tribunal would not be appropriate. Accordingly we will remit the Claimant's claims for re-hearing by a newly constituted Tribunal.

Conclusion

72. For the reasons we have set out the Claimant's appeal against the rejection of his constructive unfair dismissal claim and against the rejection of his PID claim is allowed; those claims are remitted for re-hearing by a freshly constituted Tribunal.