Appeal Nos. UKEAT/0093/14/RN
UKEAT/0094/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 3 October 2014
Judgment handed down on 28 October 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

MR B BENYON

MRS M V McARTHUR BA FCIPD

MRS LESLIE MILLIN — APPELLANT

(1) CAPSTICKS SOLICITORS LLP — RESPONDENTS
(2) MR GARY HAY
(3) MR MARTIN HAMILTON
(4) MS ALISON MORLEY

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER JEANS QC (of Counsel) Instructed by: The Appellant
For the Respondents	ANDREW SHORT QC (of Counsel) Instructed by: The First Respondent

SUMMARY

PRACTICE AND PROCEDURE: CASE MANAGEMENT, COSTS

An experienced employment lawyer claimed prior to her resignation that she had been discriminated against on the ground of her sex, and in a second claim of further discrimination and that she was entitled to resign by breach of the implied term of trust and confidence. She relied on 8 specific complaints, of which one alone remained by the time of the appeal. It was contended that the Respondent had conceded at a Case Management Discussion that it had been in breach by conducting no appraisals of the Claimant. **Held**: A List of Issues was not a pleading, but a tool to facilitate a hearing, and could not be approached with the formality one might approach a commercial contract or pleading. Even if it were, the issues list in this case could not be construed as the Claimant contended. Textually, as well as in the context of the List of Issues as a whole, the prior conduct of the litigation and (if permissible, which the EAT thought it was) the later behaviour of the parties as well, it did not contain a concession by which the Respondents and Tribunal were bound unless it was formally resiled from. Nor did the approach of the ET to credibility display an error of logic or approach.

A separate appeal against a later award of costs on the basis the claims were misconceived at the outset and had also been unreasonably conducted was rejected, since it was within the powers of the Tribunal to make.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal, against a decision of an Employment Tribunal at London South (Employment Judge Martin, Ms Brown, Ms Davidson) raises questions as to the interpretation and effects of a list of issues, in one appeal, and as to costs in a second.

The Background Facts

2. The Claimant was an employed barrister with an expertise in employment law, who worked for Capsticks, a firm of solicitors, for over twenty years until February 2011 when she resigned without notice. She became a consultant with partner status in 2007, earning over £150,000 per year. She claimed to have been the victim of discrimination on the grounds of sex, both directly, by harassment and victimisation, and that Capsticks were in repudiatory breach of contract.

3. The claims were made in two separate cases. The first alleged only sex discrimination, and was brought whilst she was still in employment. The second claimed further acts of sex discrimination against her, and unfair (constructive) dismissal.

4. The first claim came before the Employment Tribunal, constituted as above, which for reasons given on 25th July 2011 rejected it. It did so because it accepted the Respondents' account in preference to that of the Claimant. It did not take a favourable view of her evidence or case, and thought her unreliable when her testimony was compared with that which contemporaneous documents showed. It noted that there was an absence of proof of necessary factual ingredients of the statutory tort. It took the view that in general there was a lack of

credibility to the evidence of the Claimant, who in oral testimony and written submission had mischaracterised or misstated a number of matters.

5. Although the Claimant sought to postpone the hearing of her second claim until after an appeal against the findings in respect of the first claim had been determined, that was refused by the Tribunal. That decision itself was not appealed.

The Liability Appeal

6. The first appeal is in respect of the decision which the Tribunal made on the second claim. There is no appeal against its conclusion that the Claimant did not establish discrimination against her, save in respect of its findings relevant to credibility which it is submitted affected both dismissal and discrimination claims. The appeal concentrated upon its rejection of her complaint of unfair dismissal.

7. For a claim of constructive dismissal to succeed it is trite law that (1) the employer has to commit a breach of contract which is so serious as to show that it intends to abandon and altogether refuse to perform the employer's side of the bargain: **Tullet Prebon plc v BGC Brokers LP** [2011] EWCA 131, adopting the words of Etherton LJ in **Eminence Property Developments Ltd v Heaney** [2010] EWCA Civ 1168, para 61, and (2) the Claimant has to resign at least in part because of this breach without, before choosing to do so, behaving in such a way as to indicate an acceptance that the contract should continue notwithstanding the breach. It was common ground that the Tribunal correctly articulated this law.

8. The Claimant relied upon eight matters which, whether taken singly or cumulatively with another or others, showed that Capsticks were in repudiatory breach of their contract with her,

The Tribunal found none did. In the course of the process of the appeal challenges to its decision in respect of all but one of these eight original matters were rejected, and the appeal proceeds in respect of the remaining one alone (the Claimant's complaint that Mr Hamilton, head of the Employment Law team at the date of her resignation, had not carried out an appraisal of the Claimant) more on the ground of process rather than on substance ("The Appraisal Ground"). A second appeal ground challenges the Tribunal's finding that the Claimant's evidence lacked credibility ("The Credibility Ground").

The Appraisal Ground

9. In a letter which the Claimant had received in 2007, which was intended to regulate her continued employment with Capsticks as a consultant with partner status, it was said:

> **"…your performance will be assessed formally on an annual basis against these new criteria and objectives we agree. Your objectives and business revenue target will be reviewed each financial year."**

10. The Claimant's case was that at a case management discussion on 6th September 2011 it had been agreed between the parties in the light of this that it was a contractual term that appraisals would be carried out, and that they had not been.

11. In the Case Management Order dated 8th September drawn up after the hearing by Employment Judge Martin (the same Judge as eventually chaired the Tribunal) it was recorded that the "complaints and issues arising… are as set out in Schedule A …".

12. In Schedule A under the heading "A2" the order reads as follows:

> **" A2 The issues in those complaints are as follows:**

Unfair Dismissal (against Respondent 1 only)

> **1. "Was Respondent 1 [i.e. Capsticks] in breach of the implied term of trust of and confidence (sic) by reason of the following matters?...**
>
> **(b) Martin Hamilton not carrying out an appraisal of Claimant…**
>
> **1A Was the first Respondent in breach of an express term of contract by reason of sub-paragraph 1 (b) above?**
>
> **1B The Claimant asserts that the express term is "*for the avoidance of doubt, your performance will be assessed formally on an annual basis against these new criteria and the objectives we agree. Your objectives and personal revenue targets will also be reviewed each financial year, although it is not anticipated that the personal revenue target will decrease and any increases are likely to reflect increases in our charging rates and/or RPI indexation*".**
>
> **1Bi It was a contractual term that appraisals be carried out no appraisal was carried out since 2007 either by Mr Hay or Mr Hamilton. The consequence being 1(g) and 1(h) above.**
>
> **1C Was such breach a fundamental breach?"**

There were eight further paragraphs, each numbered consecutively from 2 to 9, each of which asked a question. Only 1Bi made what appears to be a statement. The reference within it to 1(g) and 1(h) was a reference to two of the eight matters of which the Claimant had complained from (a) – (h), that at (g) being "calling the Claimant to a disciplinary investigation", and that at (h) "calling her to a disciplinary hearing".

13. The argument for the Claimant on appeal was summarised by HHJ McMullen QC in a judgment on her application under Rule 3(10) for permission to appeal notwithstanding its initial rejection at "sift" stage, in words which set out the essence of the argument with great clarity:-

> **"23. I now turn to the appraisals point. This is simple, and I hope my approach will be consistent. The list of issues includes two concessions by the Respondents in relation to appraisals, and they are contained in paragraph 1Bi viz it was a contractual term that appraisals would be carried out. No appraisal was carried out since 2007 either by Mr Hay or Mr Hamilton. In those circumstances, there would appear to be a breach of the contractual**

> **term, which is summarised in the judgment, and for which I have seen the full contract.**
>
> **24. The Tribunal was bound to approach the case from the list of issues and the concession which was made. And yet it departed from that quite substantially and decided that appraisals were made and therefore it did not need to consider whether there was a fundamental breach. That, it seems to me, is a point which should be made at a full hearing…**
>
> **25. …the Employment Tribunal helpfully guided by a list of issues should stick to it and nothing else, unless it is going to amend it**."

Mr Jeans QC who appeared for the Appellant, reminded us that the importance of agreeing and abiding by a list of issues, not least in discrimination cases, had repeatedly been stressed – for example in **Chapman v Simon** [1994] IRLR 124, and in **Hendricks v Metropolitan Police Commissioner** [2003] ICR 530. There was nothing surprising about the making of a concession, not least because in the Respondent's formal answer to the claim Capsticks had stated that there had been "various ***attempts*** to hold appraisal meetings with the Claimant" and that "there had been ***discussion*** of targets set and work carried out at those meetings", which suggested there had been no appraisal meetings worthy of the description, and the Claimant could also rely upon emails which she had sent in 2009 (before any litigation appeared to be in contemplation) complaining of an absence of appraisals. The list of issues clearly set out a statement of the agreed factual position. There had been no application to amend it subsequently. The Respondent never detracted from it. Questions were asked at the hearing about meetings at which the Respondent said the Claimant and Mr Hay had discussed her work, her objectives and targets for the forthcoming year. That, however, was relevant – not to the question whether there had been any appraisals as such, but because what had not been conceded was whether the contractual breach which had occurred was sufficiently serious to be repudiatory. The Tribunal had simply lost sight of the concession which had been made when it allowed Capsticks to go behind the issues at the hearing, and was diverted away from this

fundamental point when considering the evidence it did as to the meetings, undoubtedly of relevance but not to this issue.

The Tribunal Decision

14. Mr Hamilton became head of the Employment Department in April 2010. The appraisal cycle ran from February to January each year with appraisal meetings being conducted in February or March thereafter. Accordingly, there had been no occasion for Mr Hamilton to appraise the Claimant before she resigned in February 2011.

15. The Tribunal dealt with the eight alleged breaches of contract at its paragraph 40, one by one. Issue "b" was described as: "Martin Hamilton not carrying out an appraisal of Claimant" (see paragraph 12 above). At the case management discussion the Tribunal noted, as part of its record of the issues list but under paragraph A4, that the Claimant had wished to include in issue 1(b) the assertion that Gary Hay failed to carry out appraisals of the Claimant, but that the Respondent had objected to this, since in her originating application she had not made any complaint about Mr Hay, and that the Employment Judge had agreed with the Respondent. Indeed, she significantly noted (at paragraph A5) that no application to amend the claim form was made by the Claimant.

16. The Claimant was representing herself at the CMD. She did so, too, before the Tribunal. At the outset of the latter hearing she made the application to amend the claim form which had not been made earlier, to include the allegation that Mr Hay had failed to undertake appraisals of her. The application was rejected. There is no outstanding appeal against that rejection.

Thus any question whether Mr Hay failed in breach of contract to appraise the Claimant was excluded (at least from paragraph 1(b)).

17. So far as the allegation which the Tribunal was considering was concerned the Tribunal found at paragraph 40 (b) (xii):

> **"The Tribunal is satisfied that Mr Hamilton believed that the Claimant had been properly appraised by Mr Hay (even if this was not actually the case) and that his obligation to appraise her did not arise until February or March 2011."**

18. It follows that on the breach as alleged, which the Tribunal had refused to expand by amendment to include allegations about Mr Hay, the Tribunal rejected the Claimant's case on the facts. In a second paragraph numbered 40 the Tribunal expressly made that finding. It did not decide whether the breach was fundamental, since it had determined there was no such breach: but it went on to find as a fact in paragraph 43, in answer to the question whether the Claimant resigned in response to any such fundamental breach as she alleged, that: -

> **"….. the reason the Claimant resigned was to avoid the possibility of having a dismissal on record rather than in response to any alleged breach of contract whether expressed or implied by the first respondent. The first Respondent's actions were not in breach of any express or implied term"**

19. In the light of a clear finding on the pleaded matter, which the Tribunal had not permitted to be extended, that there was no breach, and in addition in the light of the finding as to the reason for the Claimant's resignation, in terms which excluded it having been in response to any breach if it had occurred, the appeal seems very unpromising, even if Mr Jeans were right about the proper interpretation of the list of issues.

20. However, the Tribunal went further than (on one view) it needed to. It actually concerned itself with the question whether there had been an appraisal at all. It found that there had been a

number of meetings at which the Claimant's past performance, the clients she acted for and her objectives were discussed – there was just one meeting which eventually was in dispute, in respect of which it accepted the Respondent's case that the meeting had taken place: as to that it rejected the Claimant's argument that Mr Hay had falsified a notebook by inserting a record of a meeting on the relevant date which had (on the Claimant's case) simply not occurred at all. In cross-examination the Claimant had agreed that she had had meetings to discuss appraisal issues including objectives. She maintained that there was no "appraisal" as required because an appraisal form was not completed and signed by both parties: that a formalised appraisal was necessary to give her a grade. The Tribunal rejected this argument too - the express term requiring appraisals did not oblige the employer to record it on a particular form - and commented (paragraph 40 (b) xi):

> **"Although the wording of this issue [i.e. issue (b) which related to Martin Hamilton not carrying out her appraisal] does not include whether Mr Hay actually carried out appraisals, the Tribunal felt it was appropriate to make findings of fact. The Tribunal finds that on the balance of probabilities Mr Hay did conduct appraisals with the Claimant."**

21. As Mr Short QC (who had represented the Respondent at the Case Management Discussion and at the Employment Tribunal Hearing, where the Claimant was in person) rightly pointed out, the Claimant's case depended on the premise that in the list of issues there was an agreed statement of fact to the contrary.

22. We would add that the appeal proceeds on the assumption that a list of issues, drawn up at a case management discussion, is a document which has the same function and effect as a pleading, so as to require formal amendment if it is to be changed, notification that a party resiles from it if that is the case, and the like.

23. We are clear that on both points the appeal is in error.

24. We cannot interpret the schedule to the case management order, setting out the list of issues, as containing an agreement between the parties that as a matter of fact no appraisal had been carried out since 2007 by either Mr Hay or Mr Hamilton.

25. First, we do not think that a list of issues demands to be construed as if it were a formal contract, pleading or statute. Rather, it is a useful tool to allow a Tribunal to case manage a hearing so as best to ensure justice between the parties. As Mummery LJ said, with the agreement of Patten LJ and Foskett J in **Parekh v London Borough of Brent** [2012] EWCA Civ 1630 at paragraph 31:-

> **"A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the outcome of discussions between the parties or their representatives and the Employment Judge. It the list of issues is agreed then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v Short UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see Price v Surrey CC UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in Hart v English Heritage [2006] ICR555 at [31] to [35] case management decisions are not final decisions. They can therefore be re-visited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.**
>
> **32. While on the matter of appeals I would add that, if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law. If the list is not agreed and it is contended that it is an incorrect record of the discussions, or that there has been a material change of circumstances, the proper procedure is not to appeal to the EAT, but to apply to the employment tribunal to reconsider the matter in the interests of justice."**

26. Whether the focus is upon the textual wording of paragraph 1Bi, whether it is taken in the context of the whole of Schedule A, whether the matter is to be judged by the broader context of what happened between the parties and the Tribunal before and at the CMD, whether it is to be judged by the way in which the parties themselves by their conduct indicated they understood the issues list, or whether it is to be regarded as a list which would as a general rule limit the issues (as Mummery LJ recognised at paragraph 31 of **Parekh**) but critically did not have slavishly to be followed where to do so would not do justice between the parties, the matter simply cannot be construed as the Claimant would now have it. We shall deal with each of these in turn.

27. We do not accept that a list of issues is to be construed by the objective outsider, as might be the case if it were a commercial contract, as if set in stone and not to be understood by the actions of the parties thereafter. Rather, what should be made of it is the meaning which it can reasonably be taken to have conveyed to the parties and the Tribunal in the particular case in which the list appears: it is a tool for each of them and enables their focus to be placed on the central disputes between the parties.

28. Nonetheless, if the Schedule were to be read objectively as if it were to be construed as a commercial contract, we would not interpret it as the Claimant now seeks. What is said at 1Bi comes in a Schedule headed "The Issues". On the face of it, therefore, the list does not purport to set out agreed facts. Quite the opposite. It is there to set out matters which are in dispute. A2 of which 1Bi forms part (its proper citation is better expressed as "Schedule A, paragraph A2. 1Bi") begins by stating "the issues… are as follows…". This makes it plain that what is within A2, and the nine numbered paragraphs within A2, are supposed to be issues, one per paragraph. The obvious purpose of dividing the Schedule into nine numbered paragraphs is to

separate nine issues one from another. Issue one is the only issue which has additional paragraphs linked specifically with it, as 1A and 1B. This came about, we are told, because the Claimant asked at the CMD that they be added, and proffered the wording. So far as carrying out appraisals is concerned, the issue at A2 1(b) refers only to Martin Hamilton. It relates only to an alleged breach of the implied term of trust and confidence. The purpose and effect of paragraph 1A, which follows paragraphs 1(a) – (h), is to add the same matter as alleged in 1(b) as an alleged breach of an express term of contract, thus following best practice[1]. Paragraph 1B is clearly linked to 1A, for its opening words are "the Claimant asserts that the express term…", which is a reference back to paragraph 1A. Paragraph 1Bi does not come under a separate letter heading: rather, the use of a sub-number clearly indicates that it is subordinate to and dependent on 1B. It too therefore refers back to 1A.

29. Thus far, therefore, the list reads that the question for the ET to resolve is whether there has been a breach of a term which the Claimant asserts to the effect (in the opening words of 1Bi) that "it was a contractual term that appraisals would be carried out." Paragraph 1B contains assertions by the Claimant. It is written in a different form from each of the other issues: each of those asks a question. This invites the Tribunal to examine the Claimant's assertion, said to be (if established) a breach of contract. It is to be read as asserted rather than agreed fact.

[1] If an express term governs a matter in issue, it is as a general rule far better for the express term to be relied upon rather than the implied term of trust and confidence, for the former allows for the separate and careful consideration whether there has been a breach and whether if so it is fundamental, whereas the latter can only be established as a breach if the matter complained of indeed is something which (per **Tullet Prebon v BGC**) shows an intention to abandon and altogether refuse to perform the contract, since it is, if established as a breach, inevitably repudiatory (**Morrow v Safeways Stores** [2002] IRLR 9; **Omilaju v London Borough of Waltham Forest** [2005] 1 ICR 481), and rolls together the issues of breach and repudiatory effect, with a potential to be misleading.

30. The wording for which the Claimant contends makes no sense. If 1Bi recorded an agreement that there was a contractual term which required appraisals to be carried out and that none was, it would be agreed that Capsticks were in breach of contract: and there would be no need for issue 1A to be expressed at all, since it would be resolved by agreement. The only question would be that in 1C, which would then have to be re-cast by saying such as "the Respondent being in breach of a contractual term that appraisals would be carried out, and none having been, was the breach a fundamental one?". 1Bi, if a matter of agreement, also contains an agreement that the consequence of the agreed lack of appraisal was that the Claimant was called to a disciplinary investigation on 17th December (1(h)) and a Disciplinary Hearing thereafter (1(g)). Since the Issues List was drafted such that calling the Claimant to each was said to be a breach of the implied term, but was not said to be a breach of the express term, these words are out of place in any admission. Moreover, it is unrealistic to think that Capsticks were here agreeing that the firm was at fault in failing to arrange an appraisal, and despite having itself been at fault nonetheless sought to discipline the Claimant (who – it would be agreed if her contention is right - was not at fault in this respect) because of it.

31. On a purely textual approach therefore we could not construe 1Bi on its own terms as does the Claimant.

32. The correctness of our textual construction of the clause itself is emphasised when having regard to the whole of the Schedule within which the relevant paragraph occurs. That Schedule contains a paragraph A4. This does not expressly say what is in issue, as those matters in A2 are stated to do, but identifies what is not in issue. It is a record of the Claimant's attempt to widen the allegation at A2 1(b) so as to include an allegation that Gary Hay failed to carry out the appraisals of the Claimant, and the decision that this was not permitted to be an issue. If

the Claimant was not allowed to raise as part of an issue whether Gary Hay failed to carry out appraisals, then it would be inconsistent to read A2 1Bi as including the statement, by concession, that Mr Hay had in fact carried out no appraisals at all: there would have been no need for the Respondent to have objected to the proposed insertion, nor for these allegations against Mr Hay carefully to have been kept out of the issues to be considered. The fact of the concession would have been relevant to the application, but was not referred to. The fact that it is specifically recorded that no claim could be made to the effect that Gary Hay had conducted no appraisals shows that it could not have been contemplated by the parties that the words of A2 1Bi should be read as conceding that, in fact, he had not conducted any.

33. Next, if a concession had been made, we would have expected it to have been recognised and recorded as such, in common with general practice. No such note was made.

34. The case management discussion sits within the broader context of the case as a whole. The ET1 did not assert a failure in breach of contract on Gary Hay's part to make an appraisal of the Claimant. It did, however, assert that "the Claimant had never had an appraisal since Gary Hay had taken over the department". In response to this, Capsticks denied at paragraph 9 of the Grounds of Resistance that the Claimant had not had an appraisal since 2007. The denial of the negative asserts the positive. Accordingly, the Respondent's formal position was that there had been appraisals. The Claimant's draft List of Issues, undated, in advance of the CMD did not assert that Gary Hay had failed to carry out an appraisal: but by an email of the night before the case management discussion the Claimant sent Mr Short a "final draft of my List of Issues", which sought to re-word issue 1(b) to read: "Martin Hamilton and Gary Hay not carrying out appraisals of C". It was this that was rejected in A4.

35. Accordingly, even if regard could not be had to the way in which the parties after the case management discussion showed what they understood by the List of Issues, and even if a list has to be construed as if it were a formal contract, I would hold it cannot bear the meaning the Claimant now seeks to ascribe to it. The meaning it was intended to convey to the parties is clear from its wording, the context revealed by the whole document itself, and that document set in the context of the litigation.

36. However, the behaviour of the parties thereafter also confirmed it. The attempt to amend the originating application, which failed, showed that the Claimant did not understand there to have been a concession which would have rendered the amendment nugatory. No objection was taken by the Claimant (who it is relevant in this regard to note was an experienced advocate before employment tribunals) when there was cross-examination of her as to whether she had been appraised: nor did the Tribunal question it, which tends to show that the Tribunal too did not regard the issue as determined by concession. In the Claimant's Witness Statement, which formed her Evidence in Chief, she repeated her assertion there had been no appraisals but made no reference to any concession such as might have been expected had she thought there to have been one. Mr Hay gave evidence. He said that he did appraise the Claimant. The Claimant did not object that this was contrary to a concession. Indeed, his cross-examination by her is noted to have begun with the question by the Claimant: -

> **"You say you held appraisal meetings and give dates, and review meetings. I suggest that this is incorrect, untrue, and that we did not have the meetings…"**

37. Nowhere in the submissions made either in writing or orally by the Claimant was it suggested that at the case management discussion the Respondent had made a concession that there had been no appraisals by Gary Hay.

38. Even after the hearing before the ET had concluded, it was not asserted that there had been a concession until late on in the process of appeal. The original Notice of Appeal, dated 26th June 2012, drafted by the Claimant herself, asserted that the Tribunal erred in law in finding that appraisals were carried out in accordance with the contractual documents. The error of law was said to be that the express term required her performance to be assessed against objectives, and that this was not done because amongst other things no appraisal form had been completed by Mr Hay - hence the Claimant did not know precisely what her objectives were. She criticised the Tribunal, rather, for making a finding that did not relate to an issue in the case (arguing that it should not have concerned itself with whether Mr Hay did nor did not conduct appraisals because the issue was about Mr Hamilton). The amended Notice of Appeal (19th September 2012) also does not assert a concession.

39. The understanding that the parties would have had of the issues list construed objectively, contextually, in context of the Schedule in which it appeared and in the general context of the litigation prior to the case management discussion is therefore confirmed by the evidence that until late in the appeal process the parties understood that no concession had been made and that it was open to the Tribunal therefore to draw its own conclusions in the matter.

40. Even if that were wrong, in the light of the case law – in particular **Parekh** at paragraph 31 - the Employment Tribunal did not have to stick slavishly to the List of Issues. Its purpose was to facilitate the Tribunal in adjudicating justly on the real dispute between the parties in accordance with the law. If, in doing that, that Tribunal thought it was appropriate to depart from the List of Issues, it would have been no error of law. The Tribunal said expressly it thought it was appropriate to do so, before carefully setting out its own factual conclusions from

the evidence as to what Mr Hay had done. Further, whether Mr Hay had conducted appraisals was potentially relevant to deciding issue A2 1(b), because if he had conducted none it would be hardly reasonable to conclude Mr Hamilton should have thought the opposite.

The Credibility Appeal

41. At paragraph 60, subdivided into 6 full length sub-paragraphs, the Tribunal said what it had taken into account in reaching its general conclusions on credibility, which at paragraph 59 it had said were based solely on the evidence and the demeanour of the witnesses the Tribunal had heard in the second claim – it had not relied on the findings it made in hearing the first claim (though, as it happens, those findings were to the same effect). Throughout the judgment it additionally indicated where it did not accept what the Claimant had said.

42. The first two sub-paragraphs of paragraph 60 related to the Claimant persevering with an improbable allegation that Mr Hay had fabricated documentary evidence to show that a meeting had occurred on 28th May 2009, by not only making a record of it in a notebook, but creating an entry before and after that record, relating to other events which were in fact chronologically before and after 28th. May 2009. The thrust of these sub-paragraphs is that the Claimant was a person who would refuse to accept the obvious, and continued to maintain the unarguable was true despite cogent evidence to the contrary. The fifth and sixth sub-paragraphs also relate to matters which tend to show that the Claimant could not be trusted to give a careful, reliable and balanced account. It is the third and fourth sub-paragraphs which form the focus of the appeal on this point. They relate to appraisals. The Tribunal found that the Claimant asserted that no appraisals took place but that as the evidence unfolded it became abundantly clear that meetings had taken place which had discussed the very matters which were supposed by the contract of employment to be covered in appraisal meetings. At paragraph 60.4 it recorded her agreement

that she had never given a completed self-appraisal form to Mr Hay, despite it being her obligation to do so in advance of a meeting scheduled to discuss her appraisal. She said she never did so because he did not ask her to (from evidence given earlier it appeared that she had gone to meetings with a completed form, but had never handed it over).

43. Mr Jeans QC complains that a failure to complete a self-appraisal form could not logically affect the credibility of the Claimant – she had freely admitted that she had not handed over a completed form.

44. The way that the appeal was addressed in the re-amended Notice of Appeal at ground 1.4 was that the Employment Tribunal erred by holding that the Appellant's credibility was damaged by her assertion that appraisals had not taken place and by her not having completed a self-appraisal form. The error in those conclusions was said at paragraph 1.4 to have been that it was contrary to the matters agreed in the List of Issues; perverse, since the "admitted failure to carry out appraisals from 2007" meant that no objectives had been set against which performance could be assessed; and perverse because neither the assertion that appraisals had not taken place nor the feature that the Appellant had not completed a self-appraisal were matters which could rationally bear on the Appellant's credibility. This ground continued:

> **"the absence of appraisals was common ground on the List; and the absence of a self-appraisal (which was itself a consequence of the lack of objectives was in any event undisputed by the Appellant (as the Tribunal noted) and thus irrelevant to her credibility".**

45. This is a repetition of the argument about a concession made at the CMD, which we have already rejected. However, the ground goes further. The evidence which the Tribunal found in respect of Issue A2 1(b) at paragraph 40(b) of its decision set out the Claimant's evidence as to

the appraisals. It recorded (paragraph 40(b)(iv)) that the Claimant had printed off an appraisal form of which she had completed the first part (her self-appraisal), tucked it into the back of her notebook and taken it to a meeting with, but never given it to, Mr Hay. The Tribunal commented that that was "surprising" since the Claimant knew she should send it in advance. Yet (paragraph 40(b)(v)) she wrote in December 2008 (to a Mr Middleton) to complain that she had never completed such a form or been asked to sign anything about an appraisal, whilst saying nothing to indicate to the Respondent that she had actually completed her own part of the appraisal form. It is this behaviour which (taking the Tribunal judgment as a whole) caused the Tribunal concern. She insisted upon the proper and only definition of an appraisal meeting as, in effect, being one after which a formal appraisal record was produced. Without such a record there had been no "appraisal". Yet she had made it difficult by her own actions for this to happen.

46. "Credibility" may include an assessment of the reliability of the Claimant's evidence as a whole. If her point as to appraisals was (as in our view the Tribunal was indicating was its understanding) that a formal written record of an appraisal meeting, its outcome and the objectives set during it had to be produced was necessary to meet the contractual obligations of the parties, then it might be thought that a frank and open witness would say so to her employer at a relevant time rather than, as appears, hiding from the employer that this was her actual contention. We consider that this was capable of being taken into account in assessing whether the Claimant was being fully open and not obfuscatory when reporting on this and other matters which had occurred.

47. In any event the Tribunal found what was amply sufficient for its findings on credibility to stand.

48. Accordingly, we dismiss the appeal in respect of liability. There is no answer to the points which made the appeal appear unpromising to us, as we said in paragraph 19, nor any reason to think that the Tribunal's approach to the issues was mistaken.

The Costs Appeal

49. By a decision, reasons for which were promulgated on 5th July 2012, the same Tribunal which heard the liability hearings acceded to an application by Capsticks for costs in relation in both claims to be assessed by the County Court on a standard basis.

50. Rule 40 of the Employment Tribunal Rules of Procedure applicable to the application provided materially by Rule 40 that:

> **"(1) …**
>
> **(2) A tribunal… shall consider making a costs order against a paying party where, in the opinion of the tribunal… any of the circumstances in paragraph (3) apply. Having so considered the tribunal… may make a costs order against the paying party if it or he considers it appropriate to do so;**
>
> **(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."**

51. Rule 41(2) provides that a tribunal may have regard to the paying party's ability to pay when considering whether it should make a costs order and also when determining how much that order should be.

52. There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a

manner referred to in Rule 40(3); but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule 41, the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.

53. It is common ground on the appeal that the tribunal's self-direction in law as to its powers was correct.

54. It took the view that the bringing of both claims was misconceived at the outset and that there had been unreasonable conduct by the Claimant in continuing to pursue them. Accordingly, what we have described as stage 1 was satisfied, and the Tribunal was entitled to consider then whether it was appropriate to make such an order. It considered the Claimant's means in so doing (paragraph 16). It was not satisfied that it had full and accurate evidence of those means, but concluded that she had considerable equity in her house and a good earning potential. It took into account in deciding whether it was appropriate to make the order that there had been no costs warning; and dismissed an argument that if the claims were misconceived Capsticks would and should have asked for a hearing to consider a strike-out or deposit order. On the other side of the balance it took account of the fact that the Claimant was a barrister with over 20 year's experience, and therefore should have been well aware that her claims were legally misconceived. The evidence to support them was lacking.

55. HHJ McMullen QC permitted the costs appeal to proceed to a full hearing, it appears, because if the appeal on the issue of liability were to succeed there would be an obvious basis

for reviewing the costs award, which was adjectival to it. However, he did not restrict it merely to a contingent appeal, and the remaining appeal points arise because of the way in which the Tribunal reasoned further aspects of the decision that it was appropriate to make a costs order.

56. The material parts of the judgment read as follows:-

> **"In relation to the second claim the Tribunal finds that this was clearly misconceived i.e. had no reasonable prospect of success. This was without a doubt the situation from when the judgment in the first claim was promulgated on 25th July 2011 if not before. The findings in that case were clear, yet the Claimant relies on evidence she put forward in the first claim in her second claim despite the clear findings of fact in the first claim which did not support her case. For example, the clear findings of the Tribunal in relation to the auditing of her files which was that it was proper and reasonable for the Respondent to have undertaken the file audits in circumstances where there had been client complaints and clear difficulties with file management. Even if there had been no complaints the Respondent would have the entitlement and right to audit the files of its lawyers.**
>
> **27. In relation to the constructive unfair dismissal claim the Claimant relies on the matters she complained of in the first claim as being a continuing act as which culminated in her resignation (sic). However, clearly, as the Tribunal found that the Respondent had not acted improperly in any way, it follows that they were not in breach of contract and therefore this aspect of her claim was found to fail."**

57. In determining the first stage question, the Tribunal referred to its overriding impression of the Claimant that she was not prepared to countenance the possibility of a non-discriminatory explanation for any of the conduct of the Respondents, even when common sense dictated that she should (Paragraph 12); and that there was no evidence that any of the acts of which she complained were made or done on the grounds of the Claimant's sex (paragraph 13). Some events she claimed to have occurred had not: but those which had were reasonable actions of the employer:

> **"14. The Claimant was aware of the explanations of the Respondent long before the Tribunal hearings as they were provided to her in response to the various grievances that she raised concerning these matters and in their pleaded response to the claims. The Claimant did not at any stage of the proceedings have an adequate response as to why the non-discriminatory explanations of the Respondents were not acceptable. The Claimant showed that she was unwilling to abandon any of her arguments even in the face of**

> **uncontroversial evidence to the contrary. For example, the Claimant insisted on continuing with her claim that Mr Hay had falsified his notes that he said were contemporaneous and which clearly were contemporaneous. The Claimant was given the opportunity to consider his original notebooks and reconsider her position in relation to this overnight, but still argued this point which was plainly unsustainable."**

This led to the twin finding that the claims were misconceived from the outset and the Claimant had acted unreasonably in continuing to pursue them. It therefore relied upon not just one, but two of the grounds set out in Rule 40 by reference to which a cost order might be made.

58. Mr Jeans QC argued that this paragraph betrayed a fundamental error of approach. The Tribunal's approach, in considering that the Claimant did not have an adequate response as to why non-discriminatory explanations were not acceptable, should have countenanced those explanations and (paragraph 24) had failed to discharge an unexplained "evidential burden" was fundamentally at odds with the proper approach to discrimination. A claimant does not bear an evidential burden in meeting an employer's explanations for treatment which she has alleged to be discriminatory. She does not have to rebut explanations – it is for the Tribunal to decide whether it accepts them.

59. To take into account, as the Tribunal did in its paragraph 26, that the Claimant was to be regarded as acting unreasonably because she had relied on evidence she put forward in the first claim in her second claim, despite clear findings of fact was wrong on two counts. First, the decision in the first claim was subject to appeal at the time of the second. The Claimant applied to adjourn the second proceedings pending appeal, on 21st February and 25th April. The applications were rejected, and the hearing began on 30th April 2012. The appeal was not heard, and dismissed, until over a year later. It was unreasonable to condemn the Claimant for maintaining matters she had asserted as fact during the first hearing, for she could hardly

disavow them without compromising her integrity. In any event, there was a limited degree of factual overlap between the two claims. The overlap related to a letter from Alison Morley: in the first claim it was said that Alison Morley telling the Claimant that her working practices were to be discussed at one or two meetings was an act of sex discrimination; in the second claim that the contents of the letter insofar as they concerned a meeting between the Claimant and Morley to discuss "issues" was in breach of the implied term of trust and confidence.

60. Finally, the decision was perverse since given the pending appeal against the first decision and/or the overlap in the two sets of proceedings no reasonable tribunal could have required the Appellant to accept or concede disputed facts found in the first decision or penalise her for doing so. He argued additionally that having regard to the absence of a cost warning or deposit order the conclusion that costs be awarded against the Appellant was perverse.

61. We do not accept these arguments.

62. First, the first claim in its entirety, and the second claim insofar as it related to sex discrimination, required the Claimant to show that at the very least that there were facts from which a court would decide in the absence of any other explanation that Capsticks had contravened the provisions of the **Equality Act 2010** in respect of sex discrimination. It has become so well established as to be trite that the bare facts of a different status and a difference in treatment are insufficient to achieve this: they only indicate a possibility of discrimination (see per Mummery LJ at paragraph 56 of **Madarassy v Nomura International plc** [2007] EWCA Civ 33; [2007] ICR 867). There was no more evidence than that in the two claims.

63. Although there was reference to a Mr. Irons, of whom it was said that he did not face discipline despite having been criticised in public by a Deputy Coroner, a ground of appeal in respect of this in relation to the second claim was not permitted to proceed to a full hearing, being finally rejected at a hearing under rule 3(10) of the EAT rules by HHJ McMullen QC. No comparator was relied upon in the first claim. There was no actual comparator for us to consider, therefore: the case therefore depended on there being an hypothetical comparator. Though it is the Tribunal's decision and not ours to make, we agree entirely with the Tribunal that from what we have seen of the papers there was no hint that any of the actions done by the Respondents of which the Claimant complained were taken against her because she was a woman. Mr Jeans suggested that it might nonetheless be reasonable to advance a claim – not least because discrimination is frequently concealed by an employer, and the inadequacy of explanations for particular conduct against the Claimant could be sufficient to allow the Claimant to say that there was more than a bare assertion of difference of gender and difference of treatment. If so this might require the Tribunal to consider the explanation which (on this analysis) would inevitably be found wanting and therefore it would demonstrate discrimination. In **Anya v University of Oxford** [2001] ICR 847, C.A. Sedley LJ at paragraph 25 had referred to the great difficulty or knowing whether a witness was telling the truth or not, but that even if he were, a witness might be credible and honest but mistaken. In a discrimination case where everything had to turn on the particular facts, circumstances and inevitably the nuances of evidence it could not be regarded as misconceived to test the evidence in the way the Claimant did.

64. There may be many cases in which a tribunal will be sympathetic, at least at the second stage of its determination as to whether to make an award of costs, to arguments of this type. What, however, they seek to justify is advancing a claim without there being any sufficient

evidence that it could succeed, purely in the hope that something might turn up during the course of the hearing. We think it is misconceived to do so.

65. Further, as Mr Short QC pointed out, in **Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ 1255; [2012] IRLR 78 at paragraph 9 it is recognised as a general rule that a first instance decision maker is better placed than an appellate body to make a balanced assessment of the interaction of a range of factors affecting a court's discretion on costs:

> **"This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details which may relate to the conduct of the parties."**

66. Although we suspect that in many cases, especially where a litigant is unrepresented and where the claim that he or she has been discriminated against has a basis in disadvantageous treatment which might not unreasonably have surprised the claimant and given rise to a suspicion of discrimination, a Tribunal would not regard a costs order as appropriate, nonetheless in this case the tribunal had ample scope to immerse itself in all the details of the case, and to gain the insights to which **Yerrakalva** refers. Moreover, it expressly took into account the Claimant's experience as an employment lawyer which ought amply to have made it clear that she had no sufficient evidence that she had been discriminated against, and was entitled to couple this with its own view, repeatedly articulated (and referred to at paragraph 12 of the Costs Decision) that she simply would not believe there was no discrimination even where she ought to have appreciated she had no evidence of it.

67. Although discrimination cases undoubtedly bring special difficulties, because of the intensely personal nature of the insult (perceived or actual) on the one hand, and the difficulties of proof on the other, they frequently involve the consideration over a long period of time by a tribunal of many allegations, facts and documents. Where a claim is truly misconceived and should have been appreciated in advance to be so, we see no special reason why the considerable expense to which a Respondent will needlessly have been put (or a Claimant, in a case in which a response is misconceived) should not be reimbursed in part or in whole.

68. The absence of a costs warning or deposit order is relevant to the exercise of discretion but it is not a requirement of the rule. The Tribunal here considered the question. Its conclusion was not perverse.

69. The Tribunal considered that having been misconceived at the outset, the claim continued to be conducted unreasonably. Whereas the first claim in its entirety was misconceived at the outset for the reasons we have given, it is more difficult to apply that description to a claim alleging a breach of the implied term of trust and confidence. However, here, we rely heavily upon the approach indicated in **Yerraklava** (see paragraphs 7-9 of that judgment). The sense of the decision in the present case is that the Claimant stubbornly persisted in making allegations even when they were demonstrably shown to be without foundation, and that this approach affected her entire claim. Mr Short took us to a number of instances which he said demonstrated this. An example was contained in paragraph 47.4 of the decision on the first claim – although the Claimant was prepared to accept in cross-examination that if a complaint had been made against someone for whom she was line manager she would have looked at their files to see whether they were compliant with requirements without first informing the

individual of this, yet she complained that it was a breach of the implied term that the same process should be conducted in respect of her when a complaint was received about her own conduct. This was clear from her own words in the first decision: yet she maintained complaints (Complaints (d) and (e)) in respect of the auditing of files in the second hearing. Since this point began with her own acceptance of it in evidence, an appeal would have no effect on its validity. This was the particular example to which the Tribunal referred in its paragraph 26 of the costs decision.

70. Another example was the rejection by the Tribunal of a complaint that an email dated 24th July 2008 was rude and discourteous toward her (paragraph 70, decision on the first claim). Not only was the email sent to all members of the employment department but was, as the Tribunal was fully entitled to find, entirely innocuous.

71. Accordingly, the Tribunal was right that the Claimant did rely on evidence (of some matters) which she had put forward in the first claim when she should have known better, and yet persevered on the same points in the second.

72. In summary, the decision was plainly not perverse. The law was stated correctly. The Tribunal knew the parties and had observed their conduct over a lengthy period. It approached the exercise of its discretion by addressing each of the three stages in turn. The discrimination claims were plainly misconceived, and it was in addition unreasonable to continue to assert them when there was nothing to suggest something would turn up in evidence. That alone entitled the tribunal to make an award in respect of both claims. The Tribunal was in the best position to assess whether the claim of unfair dismissal was also misconceived, and thereafter unreasonably pursued. There is no proper reason to upset its assessment. Though the ultimate

decision might be seen as a hard exercise of its powers, we are quite unable to see that there was any such error of law as would entitle us, whatever costs decision we might ourselves have been inclined to make, to overturn the decision reached by this Tribunal. The exercise of the power was within the broad scope of its entitlement.

Conclusions

It follows that the appeal against liability in respect of the second decision and that in respect of costs are both dismissed.