Appeal No. UKEAT/0391/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 April 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS R SMITH-TWIGGER APPELLANT

ABBEY PROTECTION GROUP LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SARAH FORSYTH (Representative) Eastbourne Citizens Advice Bureau Unit 6 Highlight House 8 St Leonards Road Eastbourne BN21 3UH
For the Respondent	MR ANDREW HOLMES (of Counsel) Instructed by: Weightman LLP Solicitors First Floor 3 Piccadilly Place Manchester M1 3BN

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE

SEX DISCRIMINATION – Indirect

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

JURISDICTIONAL POINTS – Extension of time: just and equitable

ET rejected claims of maternity discrimination, indirect sex discrimination and constructive dismissal. The Claimant had complained that before she went on maternity leave she had agreed a 1 year flexible working arrangement, for 4 days per week, after which she would revert to her previous FT contract. Another employee, AH was required to work on the fifth weekday, on a fixed term contract of 1 year duration. The Claimant took a second period of maternity leave during which AH was dismissed at the end of her fixed term. The Claimant claimed that to dismiss AH without first telling the Claimant, and to fail to discuss with the Claimant at the end of her agreed period of 4-day working what her plans were for the hours she would work on return after leave, amounted to unfavourable treatment because of her exercising her right to maternity leave. This was rejected both on the merits and for time reasons, since an application was not made until some 8 months after the failures (and, in the case of AH, over 3 months after the Claimant knew of AH's dismissal).

The ET had stated the PCP contended for in one paragraph of its decision, but a different one when it analysed the facts and concluded no such PCP had been applied. In dealing with constructive dismissal it said the "last straw" had been unidentified, when in fact it was clearly identified.

Held: dismissing the appeal, that the ET was entitled to decide as it did on the claim of maternity discrimination; that the inconsistency of the PCP was not material since the two PCPs considered were in context the same, though expressed differently as a matter of linguistics; and that although the ET had erred factually in its approach to constructive dismissal its conclusion on the facts was nonetheless plainly and obviously right.

Observations made about the procedure to be adopted where the parties find it difficult to agree bundles for use at the EAT.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. In a brief decision, promulgated on 8 May 2013, an Employment Tribunal at London (South), (Employment Judge Silverman, Mr Maietta and Miss Edwards), dismissed claims made by the Claimant in respect of her employment.

The facts

2. The background was this. The Claimant had worked full-time as a legal advisor for the Respondent, who provided telephone and e-mail legal advice. She was a solicitor. From April 2011 she arranged, because of her childcare responsibilities, to work four days per week by way of a flexible working arrangement. She then worked Monday to Thursday, although her formal contract remained a full-time one. On Fridays Ms Atkins worked, having been recruited to work on that weekday alone. They were part of a team of nine consisting of 7.6 full-time equivalent employees, a team containing a number of part-time workers.

3. Ms Atkins was recruited on a fixed-term contract due to expire in April 2012. The Claimant's own flexible working arrangements had been agreed for a period of a year, after which it was anticipated that she would revert to full-time working. However, she fell pregnant a second time and took a further period of maternity leave, which lasted from October 2011 until the circumstances arose which led to her resignation in the following September.

4. Whilst she was on maternity leave in April 2012 Ms Atkins, who herself by then was on maternity leave, was dismissed upon the expiry of her fixed-term contract. Secondly, the Claimant made some approaches, informally, to her line manager, a Miss Lau, seeking further flexible working arrangements to suit her new family commitments upon her return. They led

to no resolution satisfactory to her so she made a formal request, under the **Employment Rights Act** provisions in Part VIIIA (flexible working), seeking to make a further arrangement. That was rejected in due course by her line manager, Miss Lau, and the Claimant did not appeal, as she could have done in respect of that refusal.

5. Before the Tribunal she raised claims that she had been discriminated against contrary to section 18 of the **Equality Act 2010**, subjected to indirect discrimination on the ground of sex, that she could claim in respect of the refusal of flexible working and that she had been constructively and unfairly dismissed.

6. The appeal does not deal with the finding in respect of flexible working. That is because there never was any claim which the Claimant could bring. To bring a claim under the flexible working provisions, section 80H of the **Employment Rights Act 1996,** an employee must, in circumstances such as those of the Claimant, first appeal internally to the employer and she did not. She felt, however, that the way in which her employer had handled her flexible working request was unfair, and it was principally that, although not only that, upon which she relied on in a letter of resignation, which she wrote on 18 September 2012.

7. Each of the other conclusions which the Tribunal reached has been appealed. In the course of this Judgment I shall deal with the argument in respect of each ground of appeal and indicate my ruling.

Unfavourable treatment

8. The first ground of appeal was that she had been unfavourably treated due to exercising her right to maternity leave and that the Tribunal had wrongly rejected the claim, both on the

merits and as being out of time. Secondly, it is alleged that the Tribunal, in dealing with the claim for indirect discrimination, contrary to section 19 of the **Equality Act 2010** adopted the wrong PCP, being one for which the Claimant had not contended. Thirdly, the Tribunal erred in its approach to constructive dismissal. Fourthly, that it made inconsistent findings. This was a matter not argued before me orally but contained in the skeleton of Ms Forsyth, who represents the Claimant. And finally that the Tribunal had not followed binding authority which required it to reach a different conclusion.

9. The question relevant to maternity discrimination was whether the Respondent had treated the Claimant less favourably, because of her maternity leave by (1) not informing her that Ms Atkins had left the Respondent's employment in April 2012 and (2) not consulting with the Claimant in relation to the end of her fixed period of flexible working in April 2012. The Tribunal's description of the law, which it did not set out in extensive detail, was not entirely accurate though I think nothing turns upon it. Section 18(4), headed "Pregnancy and maternity discrimination – work cases" reads:

> **"A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave."**

The Tribunal answered, in respect of those two allegations which had been made in respect of the statutory requirements, in paragraphs 18 and 19. They dealt with the merits of the argument. Further, and separately, it thought that the complaints of discrimination in each of those respects were out of time, and it would not exercise its discretion to allow the claims to be presented out of time (paragraph 20).

10. As to the merits, the Tribunal thought the employer was subject to no duty or requirement, express or implied, to inform the Claimant that Ms Atkins's contract had ended.

As for the flexible working arrangement of the Claimant herself, it thought there was no requirement, express or implied, that the Respondent must review or consult with the Claimant about the ending of her fixed-term and flexible working. Ms Forsyth does not assert that there is any contractual right. Her case is more a practical one. She argues that, as a matter of practicality, it is improbable that the Claimant would wish to return from maternity leave with two children to work full-time when with one child she had been working for four days per week only by way of agreed temporary variation to her contract. As a matter of practicality, it would be necessary to talk to her, therefore, about what the arrangements would be upon her return, which at the stage of April 2012 was anticipated, perhaps, to be in July though that was later extended to October.

11. Similarly, though there was no formal job share nor was there any reference in the Claimant's contract to the position of Ms Atkins, Ms Atkins had in reality operated in tandem with the Claimant by covering the week-day on which she was herself unable or unwilling to work. Accordingly, the argument was that the dismissal of Ms Atkins at the end of her fixed-term arrangement would necessarily have implications for the Claimant. It might affect the way in which she would operate her working arrangements or might arrange her working time upon her return.

12. This practical matter meant that the employer should have responded to the impending termination of Ms Atkins' arrangement by talking to the Claimant about it. All it had to do was to say something and see what the Claimant's position was. That would have been a perfectly reasonable position to adopt. Ms Forsyth argued that the Tribunal simply did not ask, as it would be required to do by the terms of section 18(4), whether there had been less favourable treatment or a detriment because of the way in which the employer had behaved, reminding the

court that a detriment is something to which an employee reasonably perceives that they have been subject in the course of their employment. There was no discussion in the Tribunal's Judgment as to the causation question: whether, if there was a detriment, it was suffered by the Claimant because she was on maternity leave. The Tribunal's reasoning was that there was no relationship between the two contracts. As Mr Holmes points out in his reply, if the Claimant had herself ceased to be employed, it would not have affected the fixed-term contract to which Ms Atkins was subject, but more importantly, if Ms Atkins had resigned or left during the currency of her one-day contract, that would not have affected the Claimant. There was no formal job share. There is, in general, no obligation on an employer to discuss with one employee the termination of the contract of another, particularly where there is no formal link between them. I accept those points.

13. Secondly, it is said that there was a requirement, in practicality and in the context of the reasonable behaviour to be expected of an employer, that the Respondent must consult with the Claimant about the ending of her fixed-term flexible working. There may be very good practical reasons why such conversations take place. But the fact is that, if an agreement is reached that flexible working will persist for a period of time and if that is known to the employee, as it was here, there is no legal obligation resting upon the employer to discuss matters with the Claimant. The Claimant has a right to request further flexible working, which she may exercise. The impetus there comes from the Claimant and not from the employer.

14. Although briefly expressed, the reasons which the Tribunal gave were not in error of law. The Tribunal was, in effect, determining that there was no detriment, it being accepted by Mr Holmes in his argument that, for the purposes of the present case, at any rate, there is no material distinction between the wording of the statute "treating unfavourably" and the more

familiar expression "subjecting to a detriment", which occurs in other parts of the statute. It simply was not reasonable for the Claimant to think that this situation was one which subjected her to a detriment. She was as entitled as she ever had been to discuss the arrangements which would affect her on return to work and she had known throughout, as was the case, that Ms Atkins had been employed for a year and the year had ended, as had her own flexible working arrangements.

15. In any event, the second reason which the Tribunal had seems to me again one which is not easy to attack on appeal. The Tribunal's Judgment can, if anything, be criticised for being far too brief. It said:

> **"20. Quite apart from the fact that the Claimant's claim under this heading is unsubstantiated it must also fail because it was brought more than three months after the act of discrimination alleged. As a solicitor whose job was to advise on employment law the Claimant would be well aware of the relevant statutory time limits applicable to such claims and in these circumstances the Tribunal is not inclined (even if the claim were to be substantiated) to exercise its discretion to allow such a claim to be presented out of time."**

16. The Tribunal did not explore whether any reason had been advanced for the delay. It did not explore the Claimant's argument raised in closing submissions by Ms Forsyth that there was a continuing act. She criticises it before this Tribunal because the Tribunal did not make any finding or consider what had happened within three months of issue of a claim when, on 17 September 2012, the Claimant discovered, she thought, that Ms Atkins had, in conversations leading up to Ms Atkins' dismissal, been told by Miss Lau that she, the Claimant, intended to work full-time. If that had been said, it would be untrue. She never intended to do so. She always hoped to obtain further flexible arrangements. She therefore did not know of this deception, if such it was, exercised on Ms Atkins by Miss Lau, which had repercussions for her, until within three months of the claim.

17. The problem which the Claimant faces on this ground of appeal is that, first, it was not suggested in the Claimant's witness statement that there was any specific reason for her delaying in making her claims. Secondly, that is all the more significant given that, in the ET3, the employer raised the question of time. Thirdly, Ms Forsyth accepts before me that the Claimant did not give any evidence as to why it was that she was late. Her argument was, in effect, that her late discovery of what she thought had happened between Ms Atkins and Miss Lau was a reason. She accepted, however, that it was on 20 August that the Claimant had learned that Ms Atkins had been dismissed. Accordingly it is plain, as it seems to me, that the Claimant knew at the latest by August 2012 that the Respondent had not informed her that Ms Atkins had left the Respondent's employment in April. She also knew and must have known from April itself that it had not consulted with her in relation to the end of her fixed period of flexible working in that month. Both claims were therefore out of time. The most important consideration in determining whether time should be extended under the jurisdiction to do so if it is just and equitable is to be told the reason for the delay, a reason which should, if it be a good reason, be capable of covering the full extent of the delay. Here there was none.

18. It is right to say that Tribunal did not consider the shortness of the period. It did not run through the **Keeble** checklist, derived from **British Coal Corporation v Keeble**, as it might have done. It did not acknowledge what Mr Holmes acknowledges, that there was little if any prejudice to the Respondent in terms of the evidence or the argument. But although very tersely expressed, to an extent which might in another case have been insufficient to meet the statutory requirements, I am satisfied that in this case it represents a sufficient expression of the reasoning given that the parties knew that no reason had been advanced for the delay.

19. The point made in paragraph 20 about the Claimant being a solicitor who advised on employment law is dealing directly with the question of whether there was any good reason for delay. The conclusion plainly is that there was not, in the Tribunal's eyes.

20. Finally, a discretion as in deciding whether or not to extend time is one which a Tribunal has considerable latitude in determining. It will be upset on appeal only if there is a clear error law in the making of the choice which a discretion represents. I cannot see that there has necessarily been any such error here. The error, if it be one, in the brevity of expression is not itself singled out for particular comment. Accordingly, both on the merits and on time, the section 18(4) claim and appeal must fail.

Indirect discrimination

21. The **Equality Act** provides by section 19(1):

> **"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if --**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with person with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aims."**

22. The PCP in issue in this case was variously stated, leading up to the Tribunal hearing. By the time it came to the Tribunal hearing itself, the PCP was as set out at paragraph 16.2, "Does Respondent apply a PCP that Claimant had to work full time?"

23. That was the way in which the matter had been most recently formulated. However, when the Tribunal came to deal with its decision at paragraphs 21-22, it restated the PCP in

different terms. It was now "an alleged requirement that the Respondent requires its employees to work full time".

24. Ms Forsyth's point is simple. The Tribunal here had acted inconsistently. In its reasoning it had addressed a PCP which was not being advanced. It now referred to "employees" and not just "the Claimant".

25. She is right in that, as Mr Holmes concedes, at least as a matter of formal language. But in reality there is no difference between the two PCPs. If one focusses upon the PCP set out at paragraph 16.2(a) of the Judgment, a PCP that the Claimant had to work full time, this can only with very great difficulty be brought within section 19. That is because the PCP is defined linguistically as a requirement that the Claimant worked full time. It would apply only to her. It could only come within section 19 if it also applied to any other employee in a reasonably similar position. The PCP must apply actually or potentially, to persons "with whom B does not share the characteristic" in order to come within the statute. But that would then be someone other than the Claimant. But then the PCP would be that "some employees had to work full time". This is very similar to that considered at the Tribunal's paragraph 21, to the extent that I think there is no material difference between them.

26. It had not been agreed by the Respondent, contrary to that which is stated in some of the documents, that the PCP identified had applied to the Claimant. That was in issue. The Tribunal gave full reasons for concluding that there was no such PCP. Ignoring for the moment the somewhat sterile theoretical linguistic point that, as expressed, the PCP was limited purely to the Claimant and could not therefore apply to others, the points made by the Tribunal all showed, as a matter of fact, that there was no general requirement for employees to work full-

time and that they might work part-time. The first point indeed related to the Claimant herself, who had been allowed to work part-time when she last actually worked for her employer. The Respondent had advertised for part-time employees. Ms Atkins worked part-time, and 11 of the 48 advisers employed by the Respondent also worked less than full-time. Accordingly the Tribunal rejected this claim on the basis that it did not get off first base because there was no such PCP as the Claimant asserted.

27. The first issue for a Claimant will always be to establish that there is a provision, criterion or practice which is capable of coming within section 19. The Claimant here failed to do so. The reasoning of the Tribunal seems to me sufficient.

Constructive dismissal

28. As to constructive dismissal, the argument made here was that in her letter of resignation, in her witness statement and in her skeleton argument, the Claimant had said that Miss Lau had said to Ms Atkins that the Claimant wanted to return to work full-time and that her job share would expire in April, and that she said this in order to dismiss Ms Atkins when it was simply not true that the Claimant wished to return to work full-time. She had discovered this, as she said in her letter of resignation, the day before resigning such that it had been the final straw. Taken together with the way in which the employer had dealt with her flexible working request, there was a fundamental breach of the implied term of trust and confidence. The fact that the flexible working request had not been taken to appeal and therefore had not been gone through the formal procedures did not affect the principle that it was the way in which the employer dealt with the matter that could be relied upon by the Claimant. The Tribunal, dealing with the constructive dismissal, set out the facts and its conclusion centrally in paragraph 30. It considered in detail the letter of resignation which itself is detailed. It said:

> **"Taken together, and in the light of both the oral and documentary evidence before the Tribunal the letter does not demonstrate either that there has been a single breach of contract so grave that it required the Claimant to resign immediately in response to it nor a series of breaches which together with an unidentified 'last straw' created a fundamental breach. In a number of cases throughout her career with the Respondent the Claimant had threatened to resign if her requests were not made... and in her act of resigning she appears to have fulfilled that threat of her own volition and in the absence of any discriminatory conduct or other breach by the Respondent. The Tribunal therefore concludes that the Claimant's resignation was a voluntary act on her own part and that she was not constructively dismissed and her claim for unfair dismissal fails."**

29. Mr Holmes accepts that the Tribunal's Judgment is not the finest piece of legal drafstmanship, but said on good authority that it does not necessarily have to be. He accepts that there is an error of fact in paragraph 30. The Tribunal talk about "an unidentified last straw". A last straw had in fact been identified. That was indeed the discovery, in these terms of 1:

> **"...the fact that Kayi [Miss Lau] told Heather I wanted to return to work full-time and that her job share would expire in 2012 in order to dismiss her when the reverse was true and Kayi knew it is the final straw."**

30. The Tribunal did therefore less than justice to the argument and evidence before it. It might be criticised also, though Ms Forsyth did not make this point, for asking whether there was a breach of such a nature as to "require" the Claimant to resign when the matter is one of entitlement. What I think the Tribunal meant to convey was the latter rather than the former. The essential reasoning, as I see it, of the Tribunal was that there had been a precedent breach or series of events which, taken together, could or might amount to a breach of the implied term of trust and confidence prior to the last straw which it thought un-identified.

31. I confess that during the course of the argument my mind has fluctuated on this ground of appeal. The question of whether there is a constructive dismissal arising out of a breach of the implied term of trust and confidence requires a focus on the employer's behaviour towards the employee. An employer must not conduct itself in such a manner as is calculated or likely to destroy or damage the relationship of trust and confidence between employer and employee

without good and proper reason. Mr Holmes has persuaded me that what was in fact being relied upon here, as shown by the resignation letter, was the failure of the employer in dealing with a number of informal, and one formal, requests for flexible working to accede as much as the Claimant would have wished to those requests. He points out that there is actually a statutory procedure for pursuing flexible working requests, and there has been no suggestion pursued to this level that the Respondent did not operate that system.

32. He is right in saying, in my view, that that is not a complete answer to there being no breach. It is possible to conceive some situations in which an employer may behave in bad faith or with dishonesty, for instance, in the way in which it approaches a request for flexible working, and the absence of an appeal and the absence of a breach of the letter of the statute is then of no significance when it comes to evaluating whether there has been a fundamental breach. The breach would not so much be a failure to accede to a request for flexible working but would be a failure of straight dealing by the employer. Such a failure between employer and employee is always likely to damage the relationship of trust and confidence between them. There were suggestions here that there had been bad faith in the way in which Miss Lau and the Respondent had approached the question of flexible working. The basis for that was that there were so many staff employed on such flexible terms that the employer could not pretend that it was really necessary for the Claimant to work full-time.

33. In support of this line of attack, Ms Forsyth points to what is said at paragraph 18. There, having said there was no duty or requirement, express or implied, that the Respondent had to inform the Claimant of the ending of Ms Atkins' contract, the Tribunal went on to observe that "the duties carried out by Ms Atkins could have been performed by any other member of the Respondent's team". If that was the case, then it should have been open to the Respondent to

have permitted flexible working. The last straw was capable of being a breach of contract on its own.

34. Though it seems to me the Tribunal was in error in paragraph 30, I have asked whether its decision was, on the evidence available, and on its other findings of fact, nonetheless plainly and obviously right. I have finally been persuaded that it was. That is for these reasons.

35. First, I do not read the second last sentence of paragraph 18 as Ms Forsyth does. Rather, as Mr Holmes submits and I accept, the point being made here was not a point which differed from that set out at paragraph 12 where the facts were dealt with, but was dealing with an argument about whether there was any necessary relationship between the contract under which the Claimant worked and that under which Ms Atkins worked. The point made was to emphasise that there was not.

36. Secondly, Ms Forsyth confirms that she did not suggest to Miss Lau in evidence that there had been any bad faith or dishonesty on her behalf. It was not therefore open to the Tribunal properly to make the finding to that effect upon which this argument would depend.

37. Thirdly, therefore, I have concluded that the Tribunal was entitled to conclude that there was no breach: that is, unless the "unidentified" last straw now having been identified might have made a difference. If it had been capable of doing so, I would have allowed this appeal and remitted the matter to the Tribunal for it to determine whether that was in fact the case upon a proper appreciation of the facts. But I am satisfied, having been taken to the evidence, that it could not be. That is because the view which the Claimant had formed was not borne out by that which Ms Atkins herself had to say. At paragraph 9 of her witness statement she said of

the conversation which was reported to the Claimant that Miss Lau had explained that the job share was coming to an end because the Claimant was returning in July and would be returning to her full-time position:

> **"She said that although not physically returning until July (I heard June) her contract would revert to full-time from April and mine would end."**

38. There is nothing in that description to suggest that Miss Lau misrepresented the intention of the Claimant. The realities of the Claimant's position were open to Ms Atkins and the Claimant and Miss Lau to consider. There was no suggestion made there by Ms Atkins that she was told erroneously of the Claimant's intention. In the chairman's notes of evidence, page 13, there was a discussion of minutes of a meeting between Atkins and Lau at which the words were said. They were regarded as a fair reflection of the meeting and they do not bear out the suggestion that the Claimant's intention was spoken to. What is said, after accepting the minutes, was that Ms Atkins was told that the Claimant was returning on a 5-day week basis. She believed the Claimant would be working five days a week. The Claimant would be returning in July and her contract would revert from April. She acknowledged in answer to a question from the Tribunal, page 14, that she had assumed that the Claimant wanted to return full-time. The formal position on the contracts was, of course, that the Claimant was returned to full-time work as from April, albeit that she was on maternity leave from it. The accurate position was that she would revert to full-time work subject of course to any further agreement there might be between the Claimant and her employer as to a flexible working arrangement. There was, therefore, nothing in what Ms Atkins had to say which seems to be capable of being a breach of the contract between the Claimant and the Respondent.

39. It must also be borne in mind that conversations between Ms Atkins and the Respondent are conversations between a third party to that contract and the Respondent and do not directly

involve the Claimant. There may be some situations in which what is said between one employee and the employer may be said to amount to a breach of the implied term of trust and confidence in the contract between another employee and the same employer, but those situations will be rare. On the available evidence, this did not seem to be one of them. If therefore the last straw is regarded, as it is often is, as something which is not in itself a fundamental breach but can amount when taken with earlier matters to being one, this would not qualify since there were no earlier breaches to which it might be added. If it is said that it was itself a breach, labelled as a "last straw" rather than simply called "a breach", because it is the matter which finally tips the employee from a position of indecision into one of determined resignation, it could not be that either: a conversation in which the facts were broadly correctly represented by the employer to another employee could not in the circumstances of this case amount to a fundamental breach of the contract between the Claimant and the employer. It would not show that the employer intended to abandon and altogether refuse to perform its contract with the Claimant.

40. Whilst acknowledging, therefore, the deficiencies of the way in which the Tribunal dealt with the issue of constructive dismissal, I have ultimately concluded that the decision to which it came, on the basis of the other facts which it accepted and the background facts as a whole, was plainly and unarguably right.

Inconsistency

41. Ground 5, which was not as I said pursued in oral submissions before me, was to the effect that there was inconsistency or inconsistencies between parts of the Judgment. The inconsistencies rely upon the difference between paragraph 18 and paragraph 12, on which I have already commented, coupled with the reference in paragraph 13 that Miss Lau's

justification of her refusal of the formal request for flexible working ultimately made was that the e-mails and calls which she was employed to answer did not start to diminish in volume until after 5.30pm. It seemed to me that there was no true inconsistency, for the reasons which I have given.

Failure to apply precedent

42. Next, it is said that the Tribunal failed to apply binding precedent. As a matter of principle, a Tribunal must follow precedents which state a principle applicable to the case before it. It is said first that the Tribunal did not observe the principle set out in **Paul v Visa International Service Association** [2004] IRLR 42. In that case, Mrs Paul was absent on maternity leave when the department in which she worked was re-organised so that two new posts were created. The claimant was not informed of the posts nor that she might have had an opportunity to apply for one of them. The Tribunal found that the employer had committed a fundamental breach of the implied term of trust and confidence by failing to inform the claimant of that opportunity. There is here no principle which is applicable to the facts of this particular case. The principle was that the Employment Tribunal was entitled to come to the conclusion that there had been a fundamental breach of contract because the employer had, on the facts of that case, broken the relationship of trust and confidence by failing to tell the claimant of a job opportunity which was and should have been held open to her.

43. This case is not on all fours factually. Moreover it is not a case in which there was a challenge to a Tribunal's entitlement to conclude that there had been a fundamental breach by reason of a failure to inform an employee of something material to their employment. The Tribunal here actually reached the opposite decision. It must be remembered that cases

particularly dealing with issues of fundamental breach are always likely to turn on their own particular facts. There is only a limited extent to which previous decisions may be of service.

44. A second case said not to have been followed was that of **United Bank v Akhtar** [1989] IRLR 507. It is said that that demonstrates that the employer should not exercise its discretion in such a way as to prevent the employee from carrying out his part of the contract. The way in which the employer behaved here, submits Ms Forsyth, was that it effectively prevented or made it difficult for the Claimant to perform her side of the contract because she simply could not reasonably be expected to do so full-time when she had two children.

45. The principle in **United Bank Ltd v Akhtar** is that an employer should not exercise a discretion affecting an employee in a capricious and unreasonable way. In **Akhtar** the discretion was whether or not to invoke a mobility clause. It was exercising it in an impermissible way to require an employee over the course of a weekend to up sticks and move home some distance. That case is far removed, on its facts, from the present. It is for the Tribunal to evaluate whether there was a capricious exercise of discretion by the employer. The decision is one of fact, or mixed fact and assessment. The Tribunal came to a conclusion here on the facts, though briefly expressed, that there was no breach. It was entitled to.

46. Accordingly the appeal is dismissed.

47. I should not let the opportunity pass, however, of making one comment. At the outset of this appeal I was faced with having to consider two separate bundles, one prepared by the Respondent and one by the Appellant. Both parties have rightly apologised to me for this and I have accepted their apologies. I want to make it clear to those who read this Judgment with an

eye to future cases that it is in general unacceptable that the parties should fail to co-operate over the contents of a bundle. It imposes significant difficulties for the staff of this Tribunal. It can create problems for Judges and, in particular lay members, in negotiating bundles, particularly where skeleton arguments reference separate bundles, giving different references. The parties are obliged by the Practice Direction and by order to agree a bundle. If there is any dispute between the parties, then the view this Tribunal will generally take is that is for the Claimant to lodge a bundle which contains the core documents that are identified in the Rule and Practice Direction. If there is any disagreement about what should be contained thereafter, it will normally be because one party or the other objects to certain further documents being bundled. There are limits to the number of documents which are likely to be relevant to an appeal. These are set out in the Practice Direction. Within those limits, the Claimant should, in preparing the bundle, ensure that those documents which the Respondent wishes to rely upon are contained in the bundle, by addition if need be, even if the Claimant thinks the suggestion is not appropriate. The bundle should not, however, exceed the limits stated in the Practice Direction without the approval of this Tribunal. If it turns out that documents are unnecessarily added, and following these observations are accepted by the Appellant, though under protest, then if any additional expense is caused to the Claimant or, as it may be, the Respondent, that can be capable of founding the basis for an award of costs and the parties are reminded they might be at that risk.

48. None of this is intended by way of further criticism of the parties before me, whose apology has been frank and is fully accepted. It is made for the guidance of future cases.