Appeal No. UKEAT/0447/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 April 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

CANTERBURY COLLEGE — APPELLANT

MRS H TOPLISS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ELIZABETH MELVILLE (of Counsel) Instructed by: Eversheds LLP Solicitors Kett House Station Road Cambridge CB1 2JY
For the Respondent	MR ANTHONY BERTIN (Solicitor) Employment Relations Solicitors Yewgate Barn Old Road Elham Canterbury CT4 6UH

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

Unfair constructive unfair dismissal.

The Appellant employer argued that the Employment Tribunal had not made findings from which it could conclude that the employee had been constructively dismissed. The Respondent employee argued that the ET had made findings of fact which were not perverse and they should not be altered. **Held**: the ET erred in failing to ask itself the correct question, which is whether the employee acted in such a way as to breach the implied term of the contract between employer and employee. No finding of constructive unfair dismissal should be made unless there are findings to support it, that is findings that the actions of the employer were such as to be calculated, or likely, to destroy the necessary trust and confidence between employer and employee. In this case there insufficient reasons to show that question had been asked. Further the decision made was perverse as there were internally contradictory findings.

THE HONOURABLE LADY STACEY

Introduction

1. This is an appeal by Canterbury College against a decision of the Employment Tribunal, sitting at Ashford in April 2013, with written Reasons sent to the parties on 19 June 2013. I will refer to the College either as "the College", "the employer" or "the Respondent", as the context requires, and to Mrs Topliss as "the Claimant" or occasionally as "the employee", again as the context requires.

2. In the Employment Tribunal the Claimant was represented by Mr Bertin, who has also appeared before me, and the Respondent, that is the College, was represented by Ms Melville, who has also appeared before me this morning.

3. The Employment Tribunal found that it had no jurisdiction to consider the Claimant's claim alleging harassment relating to gender. It found that the Claimant was unfairly dismissed by the Respondent. It dealt also with an appeal by another Claimant against the same Respondent and it dismissed her claim. This appeal is in relation to the finding of unfair constructive dismissal. The Claimant's cross-appeal did not pass the sift, and her application to adduce fresh evidence was refused by the Registrar.

The facts

4. It is necessary, in order to make sense of this, that I narrate something of the factual background.

5. In July 2012 the Claimant and another Claimant presented claims alleging sex discrimination and unfair constructive dismissal. There was a case management discussion in

which the issues, so far as the Claimant is concerned, were set out by the Employment Tribunal as follows:-

(1) Has the claim related to harassment related to sex been presented in time?

(2) If not, would it be just and equitable to extend the time limit?

(3) Did the Respondent fail to protect the Claimant from bullying and harassment by Keith Strong?

(4) Did the Respondent deal adequately with the Claimant's complaints and grievances in December 2011 regarding the behaviour of Keith Strong and did it misrepresent to the Claimant that Keith Strong was leaving the College's employment so as to dissuade the Claimant from taking further a grievance process?

6. The Employment Tribunal noted that, if the answer to either or both the questions above is "Yes", then it had to ask itself if that amounted to a breach by the Respondents of the implied obligation of trust and confidence which the Respondent, as employer, owed to the Claimant as employee. It then had to ask itself, it noted, if the Claimant resigned in response to such a breach and, if so, was she constructively dismissed? Finally, it noted that it had to ask itself, in connection with constructive dismissal, if the Claimant delayed before resigning (and I pause to note that the Tribunal did appreciate that there was more to it delay, but it flagged it up as an issue).

7. The Tribunal looked specifically at the question of harassment related to sex under section 26 of the **Equality Act 2010** and identified the following matters as being matters it had to look at:-

- Did the Respondent engage in unwanted conduct relating to the Claimant's sex in that Keith Strong on 7 December 2011 took the Claimant to an empty classroom, closed the door and started to speak aggressively to her?

- Did the above conduct have the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- Having regard to the Claimant's perception and to all the circumstances, was it reasonable for the conduct to have that effect?
- And, did the Respondent take all reasonable steps to prevent any such harassment?

8. Thus it can be seen that the Employment Tribunal looked at the definition of harassment set out in the Act and set out for itself a number of questions.

9. The Tribunal also asked itself questions concerning section 47B of the **Employment Rights Act 1996**, but that matter is no longer live and therefore I say no more about it.

10. In its findings in fact, the Employment Tribunal found that the Claimant, who was born on 5 February 1962, is a qualified teacher. She became Head of the Faculty of Health and Social Care at Canterbury College on 14 May 2009. It found that that is a large college, which had at that time a substantial campus in Canterbury, about 10,000 students and about 1,600 members of staff. At about the same time as the Claimant was appointed Head of Faculty, Mr Keith Strong was appointed as a lecturer in that faculty. The Tribunal found that he had been an Army physical training instructor and it found that he was described as "outgoing, popular, and egotistical "and also as "well-built with a shaven head and tattoos and assertive and possessing considerable physical presence". The Employment Tribunal found that Mr Strong reported directly to the Claimant. She had a total of three section managers and 65 staff reporting to her.

11. Other staff who became relevant in the Employment Tribunal's findings were Mr Dent, who was the Claimant's line manager, and Mr Cottrell, who was Mr Dent's line manager. The Tribunal found that, shortly before the events with which it was concerned, the Claimant had a good working relationship with Mr Strong. It found that in June 2011 the Claimant applied for a promoted post within the college but was unsuccessful in her application. She decided to apply for promotion elsewhere, and the Employment Tribunal found that in discussions with Mr Strong she understood that, if she was successful, he would apply for her position.

12. The Tribunal found that in November 2011 it was thought that an inspection by the regulator, Ofsted, was imminent. Because of that, the Claimant, perfectly properly, went about putting her house in better order than it was already, but I should say that there is no suggestion that her house was in any sort of poor order. But naturally, as she thought that an examination was imminent, she looked at things.

13. They found that she had always had some concerns about Mr Strong's management ability, as she thought that he tended to appease staff rather than to confront them with necessary issues. The Claimant found from a focus group meeting with students that there were concerns from the students that some lessons were not well-prepared and that some members of staff were giving minimal input to the lessons. They found that there appeared to be a suggestion that late Friday afternoon lectures tended to be cancelled.

14. Having made these discoveries from the focus group, the Claimant gave clear instructions to Mr Strong about the middle of November that he was to take these concerns that she told him about seriously and deal with them appropriately. She was of the view that her instructions had not been followed, and a week later she e-mailed all lecturers and gave specific examples of what had to be done. Mr Strong at that time had been discussing the conduct of another lecturer

with the Claimant, and there was some debate between the Claimant and Mr Strong about whether any action was needed about that person. The Claimant e-mailed Mr Strong on or around 24 November, telling him to issue the lecturer with an informal warning for not being in his class when he was expected to be there.

15. The Claimant had discussed difficulties she perceived in her management of Mr Strong with Mr Cottrell during November 2011. Her concerns centred on class registers, which she thought were not being completed properly. An incident happened on 25 November 2011 in the early morning, when Mr Strong went to the office of the first Claimant in this case, that is the other Claimant, and asked her to tell the Claimant that a class would be empty that day because the lecturer was going to a funeral. Mr Strong told the first Claimant that this was a last-minute thing and he had been unable to arrange cover. The first Claimant was uncomfortable about that because she knew that it was not last-minute and she thought that Mr Strong had known about the intended absence for several days. The first Claimant went to see the second Claimant and tried to be vague, but in the end told her that she felt uncomfortable because Mr Strong was asking her to lie for him.

16. The Claimant was concerned about this and raised it with Mr Dent, saying that she thought that there were misdemeanours that merited commencement of the informal stage of poor performance procedures. She understood that, if she started that, she would be able to set for Mr Strong an action plan giving short deadlines for improvement. She stated that she had some concern that there might be some falsification of registers and, if that turned out to be so, then that might be a disciplinary offence.

17. The Tribunal found that these events, which happened on 25 November, resulted in a substantial and sudden change in the nature of the relationship between the Claimant and

Mr Strong. The Tribunal then made findings about the actions that the Claimant and the first Claimant took over the weekend which followed 25 November. I do not think it is necessary for me to outline them in any detail, but there were e-mails passing between the two Claimants in which the Claimant expressed a view that Mr Strong was in denial, that he was delusional, that he was "a big flanneler" and "a liar". The Tribunal found that those e-mails were unprofessional in their tone and content.

18. On the Monday following those events, that is 27 November, Mr Strong responded to the Claimant's invitation to a meeting to say that he gladly welcomed any meeting to discuss areas where he could improve his section of the college.

19. A meeting did take place between the Claimant and Mr Strong, and the Claimant's view was that Mr Strong was aggressive throughout that meeting. He asked her to hand over to him any notes that she had prepared for the meeting and the Claimant's position was that she did hand them over because she felt intimidated into doing so. The Employment Tribunal found, from evidence from Mr Cottrell, that it would be normal, in such a situation, for a person to ask for and to see notes that were made for such a meeting.

20. The outcome of that meeting, however, was that the first Claimant was asked by Mr Strong what she had been saying. In order to ask her about that, Mr Strong went to the room where the first Claimant was and found other people there, one of whom was just leaving. As the other person left, Mr Strong asked him to lock the door behind him, which meant that he was left in a room with the first Claimant. The first Claimant gave evidence before the Tribunal that she found that Mr Strong was aggressive towards her and she described him as "subtly menacing". Mr Strong's position, according to the Tribunal, was that there had been a miscommunication or a mixed communication and that he hoped that matters could be clarified.

They found that he did apologise to the first Claimant later for the way in which he had spoken to her that day.

21. Matters progressed, and of course the second Claimant was aware of what had happened between the first Claimant and Mr Strong. Mr Strong asked one of the administrative officers in the College why she had been at a meeting and she explained that she was just there to take notes.

22. On 6 December the Claimant met with Mr Dent and Mr Cottrell to discuss performance issues that she should raise in respect of Mr Strong. By this time Mr Strong had indicated that he wished to resign. The Claimant said that she would wish him to leave at the end of term, which would have meant that his period of notice would have been cut. The next day, that is 7 December, the Claimant was alone in her office when Mr Strong came in. He asked her to go with him to a classroom, and she did. He took her to an empty room, and she gave evidence to the effect that she thought he had asked her to go there to show her that the room was in a mess. But she said that it turned out that he wanted to talk to her in the room to show that it was empty and said that there could be reasons why a teacher was meant to be there but was not there. She described him as starting a diatribe about how there are legitimate excuses when tutors are not in their rooms and that, when she had been auditing matters and had found that people were not in their rooms, it did not mean that they were drinking tea at home. The Claimant said, in her witness statement, that Mr Strong stared at her and made her feel uncomfortable and was red in the face. She had the impression that he was trying to provoke her and she said that she did not want to discuss this matter and went to the door and got out of the room as fast as she could.

23. The Claimant spoke with Mr Cottrell about this on the following day and told him that she had felt unwell because she felt physically threatened. Mr Cottrell then met with Mr Strong and told him that he was being suspended with immediate effect pending an investigation. In his letter confirming that suspension he stated that that was not a punishment but was a protective suspension while investigation was carried out and that it would be reviewed on 15 December 2011. Mr Cottrell appointed two investigating officers. These investigating officers interviewed Mr Strong and both Claimants, as well as the administrative assistant who had been involved in these events.

24. Mr Cottrell had an informal meeting with the investigating officers before the report was completed and, from that, he understood that they would recommend no disciplinary proceedings were required. Mr Cottrell met Mr Strong and his union representative on 16 December and informed them that the suspension was lifted.

25. At this time Mr Strong had resigned but indicated, in early January, to Mr Cottrell that he would like to continue on a half-time basis. It was found that he accepted that he could not work with the Claimant but he would accept a temporary contract while opportunities were explored.

26. There was some discussion that Mr Strong might be able to work within the Business Faculty, which was a different faculty from that which was headed up by the Claimant.

27. The Employment Tribunal found that there was at that time a desire by the College to get what was described as the "army covenant", which was essentially a contract with the Army for college education from people coming home from Iraq. It was said to be an important matter

because it was a big contract and one which the College wanted to get. The College perceived Mr Strong as being an attractive lecturer for the Army, as he himself had Army experience.

28. On 6 January Mr Cottrell wrote to the Claimant, telling her that the investigation had concluded and had found that there had been no intention on the part of Keith Strong to intimidate but that the investigating officers found that he had created an environment that was uncomfortable. They had recommended that no disciplinary action should be taken even though the investigators did recognise the Claimant's perception that she had been at the receiving end of intimidating behaviour.

29. At that time the Claimant understood that Mr Strong had resigned and she responded to the content of the letter by saying: "The outcome is fine with me". Mr Strong then decided that he was being discriminated against and that there was a personal vendetta against him. He lodged a grievance.

30. During the month of January the Claimant e-mailed various persons within the Business Faculty and within the College generally to ask them to let her know where and when Mr Strong would be working so that she could avoid bumping into him. He was off sick with a chest infection from 9 January and, as I have said, he lodged a grievance on 17 January.

31. On 26 January the Claimant e-mailed Mr Cottrell, expressing concern at Mr Strong's constant appearance in the College. The Tribunal found that Mr Dent was of the view that the Claimant was aggravating things to a position which was becoming untenable and was causing him a great deal of stress.

32. On 27 January Mr Strong wrote to request that he be allowed to withdraw his resignation and be considered for appointment to a half-time post. The Claimant wrote an e-mail saying that she had not done anything further because she thought that he was leaving: that is, that Mr Strong was leaving. She said that his conduct made her feel totally undermined and ignored. She said that she was worried when she left the College at the end of her working day that Mr Strong would be waiting for and that made her feel vulnerable.

33. Mr Hill, who was in the Business Faculty, by this time thought that the Claimant was victimising or harassing Mr Strong even though he knew that she did not see it that way. The e-mails from the Claimant continued and, by 23 February 2012, she was e-mailing that she had seen Mr Strong on the campus despite being told that he would not be working on the particular day when she had seen him.

34. Mr Cottrell found the situation had become intolerable. He said that the Claimant had spoken on the subject on an almost daily basis and he felt that he was constantly listening to complaints about the organisation and having to placate her.

35. Mr Strong's grievance against the second Claimant was not upheld. The Claimant went off sick at the end of February, sending in a medical certificate from her GP, who said that she was not fit to work because of "medical treatment". The Claimant resigned on 31 May 2012. In her resignation letter, she said that she had been bullied and harassed by Mr Strong.

36. Having set out that factual background, the Employment Tribunal found that there was no jurisdiction for the gender discrimination claim because it was out of time. There is some relevance in this for the unfair dismissal claim, because the event that was said to be harassment happened on 7 December, and the Employment Tribunal found, therefore, that it should have

been presented in terms of the statute by 6 March at the latest. In so doing, they were finding that there was an incident of harassment, which happened on 7 December.

37. When it came to unfair dismissal, the Tribunal correctly directed itself that the principal case which it required to consider was that of **Western Excavating Ltd v Sharp** [1978] QB 761. I will have a little more to say about whether or not the Tribunal actually applied the principles from that case. I merely note at present that it did note that that case was relevant.

38. The appeal to the Employment Tribunal was sifted by the President, who took the view that it should proceed to a full hearing and he stated that:

> **"There may have been an unfortunate confusion between the principles applicable to a claim for harassment under the Equality Act 2010 and the very different approach to constructive dismissal, which is (a) entirely contractual and (b) concerns relationships between the Claimant and her employer, not fellow employees."**

The Respondent's case

39. The argument before me on behalf of the College was to the effect that the Employment Tribunal had misdirected itself and had erred in law. It was argued by Ms Melville that the Employment Tribunal had found in paragraphs 209 and 210 of its Reasons that harassment was continuing until 30 January 2012, but she said there was no factual finding to support that. Ms Melville referred to those paragraphs and noted that, in paragraph 2010, the Tribunal referred to a combination of two elements, namely harassment and failure to bring it to an end. She submitted that that did not make sense, because the harassment was a one-off occasion on 7 December, as was found by the Employment Tribunal deciding that the deadline for a claim under the **Equality Act** was 6 March, that is three months later. Ms Melville accepted that an act of harassment could create a situation which had a continuing effect on the work environment and which the employer had a duty to consider, but she said that was not the

situation that had been found to pertain here. She argued that the wording of paragraph 210 was clear, that the Employment Tribunal referred to "continuing harassment". But they had no findings in fact to support such a conclusion. She submitted fundamentally that the Employment Tribunal had to ask itself the question whether the employer had acted in such a way as was calculated or was likely to destroy the necessary relationship of trust and confidence which should exist between parties to a contract of employment. She argued that they had not done so. She argued that this was one of the unusual cases in which a ground of appeal of perversity could be met. She said that, in paragraphs 193 and 194, the Employment Tribunal found that the investigation by the employer of the Claimant's grievance was reasonable. That was important, she argued, because the outcome was that no disciplinary action was recommended against Mr Strong.

40. Ms Melville took me to the report of that grievance, which is in the papers, to show that the events were not the most serious instance of harassment, in her submission. While that submission may very well be correct, the essence of the point is that the Employment Tribunal found that the investigation of the complaint was reasonable and, perhaps most importantly, that its outcome was reasonable. That can be seen from paragraph 194, which is in the following terms:

> **"Having considered all the evidence concerning the investigation and its outcome we have concluded that it was reasonable."**

41. Thus Ms Melville submitted that the Employment Tribunal then had to ask themselves, in the context of a 'no discipline required' outcome, a large College with 10,000 students and in excess of 1,000 staff, was the employer by re-engaging Mr Strong on a different contract acting so as to be destructive of the relationship of trust and confidence necessary between it and its employee? Ms Melville argued that one had to remember that, as the outcome was 'no

discipline needed', no-one had ever said that Mr Strong should be subject to discipline, never mind being dismissed. So Ms Melville argued that it was absurd that, because he had resigned and then had been re-engaged, there was said to be a breach of contract as regards the Claimant, whereas if he had not resigned, then he would still have been there but apparently there would have been no breach because no-one said that he should have been dismissed. Ms Melville argued that the Employment Tribunal had acted perversely, in light of their findings at paragraph 193 and 194, in going on to find that, in some rather undefined way, there had been a breach of contract as regards the Claimant. Ms Melville then referred to affirmation, and that of course would be relevant only if there is a breach in the first place. Ms Melville referred to the paragraphs at the end of the Reasons from 212 onwards in which she argued that the Employment Tribunal set out a number of neutral factors and then, she said inexplicably, found that there had been no affirmation of the contract. She said that there was internal inconsistency in the Employment Tribunal's findings, and for that referred to paragraph 162, which is in the following terms:

> **"...We are quite unable to find on the limited evidence presented to us that either of the Claimants was under a disability such as to prevent them giving adequate instructions to their solicitor long before the date on which their claims were in fact presented."**

That was in the context of the harassment claim, but Ms Melville relied on it to show that the Tribunal had found, as a fact, that the Claimant was capable of instructing a lawyer. She argued that, standing that finding and standing that there was no explanation of why there was a delay in the Claimant in resigning, and while she appreciated that delay itself is not determinative of the affirmation question, she nevertheless argued that it is a relevant circumstance. Her argument was, as I understood her, that the Tribunal had not explained why they found that there was no affirmation. By way of internal consistency, she also drew my attention to the decision made by the Tribunal about the other Claimant, which was that she had affirmed the contract by delaying between 28 November and 20 February. Ms Melville accepted that there

was a factual difference between the two Claimants in that the first Claimant was not off sick. She said that there was an obvious inconsistency in the Tribunal's reasoning.

42. Ms Melville argued that the Employment Judge had erred in deciding that the College had acted unreasonably in re-engaging Mr Strong, as that is not the test. The correct test, she submitted, is whether it acted in such a way as was calculated or was likely to destroy or seriously damage the relationship of trust and confidence between the parties. Ms Melville argued that, if it had asked itself that question, it could not have answered it in the affirmative.

43. Ms Melville argued on the question of disposal that I should allow the appeal and then determine for myself that there had been no unfair constructive dismissal. If I was not with her on that, then I should still allow the appeal but should remit to a new Tribunal in order that the question of unfair dismissal only be litigated again.

The Claimant's case

44. Mr Bertin began by reminding me that the Employment Tribunal had heard the evidence and had seen the witnesses and had made findings in fact. He reminded me that it is a high test to be met by any appellant who seeks to argue that there has been perversity in a decision, all as is set out in the well-known case of **Yeboah v Crofton** [2002] IRLR 634. In this case Mr Bertin submitted that the Employment Tribunal had found that the Claimant found Mr Strong's actions to be intimidating and the Employment Tribunal found that she was entitled to find his actions intimidating. He submitted that plainly an environment can be held to continue after an incident has happened and is not continuing, but the environment can be continuing. He argued that an employer has a duty to protect his employees from harm and he argued that in this case the factual matrix was that the Claimant was left to think that Mr Strong was going to be leaving the College. She was, as she put it, "fine with that" in that she did not pursue an appeal

against her grievance being dismissed when she thought that he was going to leave. Mr Bertin pointed out, however, that the College knew that there was at least a possibility that Mr Strong was going on to stay on in some capacity or another from the beginning of January onwards. Mr Bertin argued that the question in this case is not about the behaviour of Mr Strong in isolation. It is about the reaction by the employer to the effect that the behaviour of Mr Strong had on the Claimant. It was clear, he argued, that the Claimant protested throughout the whole of the period with which we are concerned: that is, from the end of November until she went off sick, about Mr Strong's presence on the campus, thereby making it clear to her employer what effect this was having on her. He argued that the college had allowed her to labour under a misapprehension, though of course Mr Bertin accepted that the Employment Tribunal had found, at paragraph 199, that there had been no evidence of a misrepresentation. I should quote paragraph 199 to make clear the finding. It is in the following terms:

> **"There is a substantial body of evidence, set out above, that Mr Cottrell was aware as early as 5 January 2012 that there was some possibility that Mr Strong might be redeployed beyond January 2012. We cannot, however, accept that the failure of the Respondent to inform the Claimants of the possibility of a future decision whereby Mr Strong might be redeployed amounted to a misrepresentation on its part."**

45. As I have said, Mr Bertin argued that no matter there was no misrepresentation, the employer still knew that the employee was upset by the presence of Mr Strong, and it should have taken that into account. He also made reference to paragraph 149 of the Reasons in which the Claimant's own evidence about her medical condition was set out. That paragraph notes that the Claimant, in her witness statement, said that her doctor advised her that she was suffering from ongoing stress, anxiety and reactive depression. While it is not entirely clear at what time she was told that, she was referring to the end of May when giving that evidence.

46. Mr Bertin repeated before me the submission he had made to the Employment Tribunal, which is set out at paragraph 153.5, which is to the following effect:

> **"The Claimants had forborne from raising any complaint or grievance regarding the outcome of the investigation into Mr Strong's conduct towards them because it was their understanding he would be leaving the Respondent within three weeks. That was reasonable on their part."**

47. Mr Bertin submitted before me that the employer knew that. He said that the College knew that there had been a pattern of behaviour in that there were two incidents of Mr Strong intimidating Claimants by taking them to a room and speaking to them there, and he also referred to paragraph 184 of the Reasons in which it was noted that there was an earlier episode, which I have referred to at the beginning of this judgment, on 28 November when Mr Strong demanded the notes from the Claimant. Mr Bertin's position was that it was perfectly clear that there was some sort of behaviour from Mr Strong which the Respondent and others had found intimidating and, as I understood him, he argued that the employer should have kept that in mind when deciding what to do about Mr Strong.

48. On the question of affirmation Mr Bertin submitted that the College had evidence of ill-health from 28 February onwards despite the fact that the medical certificate was in rather unusual terms because it simply said "Medical treatment". But nevertheless he argued that they did have that evidence and that the Tribunal was entitled to come to the view that, in light of all of the circumstances including ill-health, the Claimant had not affirmed the contract.

Conclusions

49. I have come to the view that the Employment Tribunal did err in law in their consideration of the question of unfair dismissal. I accept the arguments that Ms Melville has put before me. It seems to me that the Employment Tribunal did not consider properly whether the behaviour of the College was such as to be likely to destroy or seriously damage the trust of the employee. The test for constructive dismissal is different from the test for harassment and,

while the Employment Tribunal were correct to look at the statutory definition of harassment and to use it to define what the facts here amounted to, they had, in my opinion, having done so to consider a rather wider set of facts when looking at constructive dismissal.

50. The starting point has to be the legislation, as this is a statutory construct. The **Employment Rights Act 1996**, by section 95, does set out the circumstances in which an employee will be regarded as dismissed. One of those is set out in section 95(1)(c) where it states that an employee is dismissed:

> **"...if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

51. The question then is what sort of circumstances are those, and those circumstances have been the subject of interpretation over the years. But the case of **Western Excavating v Sharp** in 1978 still sets it out in a way which ought to be recalled. In my opinion, it was correctly put by Ms Melville that it is necessary that the implied term of trust and confidence, which is necessary in the relationship between employer and employee, has to be breached by the employer by its acting in a way which is calculated or likely to destroy or seriously damage that trust and confidence. I am aware that the Employment Tribunal did direct itself at paragraph 168 that it required to look at that case, but it seems to me, in considering the Reasons as a whole, that it did not go on to ask itself the correct question. It is understandable that, in the heat of this case and in the events which were before that Tribunal, that the emphasis was put on harassment and that there was no doubt a lot of evidence and submissions about that subject. In paragraph 207, in its conclusions about the second Claimant, the Tribunal said the following:

> **"However, we are also of the unanimous view that the Respondent, in taking the positive decision to re-engage Mr Strong, so that his employment continued beyond 30 January 2012, caused the intimidating, hostile or offensive environment that resulted from his potential or**

actual presence on the same campus as the second Claimant to be continued. In our view, having regard to all the circumstances of the case, any reasonable employer in the position of the Respondent would have recognised the grave difficulties that would be posed by seeking to continue Mr Strong's employment beyond the date on which his resignation expired. The Respondent had no obligation to find a new post for him, but chose to re-engage him for its own, undisclosed reasons."

52. It seems to me that that paragraph does contain several errors. Taking them in reverse order, the reasons for wishing to keep Mr Strong on were not undisclosed. There were perfectly intelligible reasons, and the College was entitled to weigh the difficulty which had undoubtedly arisen with Mr Strong, on the one side, and his Army connection, which would help them in getting the contract they sought, on the other. They were entitled to consider any difficulties that their employee, the Claimant, had with Mr Strong being on the campus, but even Mr Bertin would not argue that they had to ask her permission to re-engage him. What they had to do was to think about it. And, as Ms Melville has said, they should have thought about it in the context in which they worked, which that of a large organisation with many employees and a large campus.

53. They repeat, in the paragraph I have just quoted, the error that Ms Melville drew attention to in a later paragraph, that is 210, when they seem to find that the harassment continued until 30 January. In my view there is no proper finding in fact for that.

54. As is often the case, the various errors in law merge into one another. It is not usually possible to separate them out and I do not think it is possible in this case. But I do agree with Ms Melville that this is one of the cases, which I accept is an unusual finding, in which there is perversity because the Tribunal have made findings which are simply not supported by the findings in fact that they have made.

55. Lest I am wrong in all of that, I have considered the question of affirmation, which of course arises only if there was a breach of contract. In my view the question of affirmation was not fully explained by the Tribunal. They did take the trouble to refer themselves to the case of **Burton v Northern Business Systems** EAT/608/92 and to take propositions from that, but I am bound to agree with Ms Melville that thereafter they simply set out findings without giving much by way of their reasoning for finding that there was no affirmation. However, in light of the disposal that I am going to make of this case, I propose to say no more about it. The reason for that is that I do not agree with Ms Melville that there are sufficient findings made here for me to determine this case myself.

56. I am conscious that Mr Bertin very properly directed my attention to the overriding objective and to the disadvantage to all if cases appear to go on for a long time, and I am conscious that the events that started all of this happened a long time ago. Nevertheless it seems to me that I am not in a proper position to make findings about the question of whether or not there was a breach of contract in all the circumstances, still less of whether there was affirmation, and therefore I require to remit this case to a Tribunal for the question of unfair dismissal, and I emphasise the question of unfair dismissal only - that is, not the question of harassment - to be decided again. In that situation I should not say any more about the facts.

57. I should say that I am grateful to parties for presenting this morning in a helpful and concise manner, which was certainly helpful to me. These decisions are difficult for those who are involved in them, and I appreciate that Mrs Topliss has had a difficult time, as no doubt have the College. But it has been presented in a helpful fashion to me.

58. I should that there was no submission before me that it should be the same Tribunal and, while I have no difficulty at all with this Tribunal being professional and considering matters

properly, I think justice would be seen to be done by having a fresh Tribunal considering it, as requested by parties.