Appeal No. UKEAT/0144/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 November 2014

Before

HER HONOUR JUDGE EADY QC

MR D J JENKINS OBE

MRS M V McARTHUR BA FCIPD

MR P D COX — APPELLANT

NORTHERN DEVON HEALTHCARE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW EDGE (of Counsel) Free Representation Unit and MR PHILIP COX (The Appellant in Person)
For the Respondent	MR GRAHAM WATSON (of Counsel) Instructed by: Bevan Brittan LLP Kings Orchard 1 Queen Street Bristol BS2 0HQ

SUMMARY

UNFAIR DISMISSAL

Constructive dismissal

Compensation

Constructive Unfair Dismissal - Compensatory Award – Limitation on Period of Future Loss

The Employment Tribunal had been entitled to reach the conclusion that the Respondent would fairly have dismissed the Claimant for some other substantial reason after a further 12 weeks. That finding comprehended the background findings in the Claimant's favour and did not amount to an impermissible short-cut.

Constructive Unfair Dismissal - Compensatory Award - Contributory Conduct

The Employment Tribunal reached conclusions that were entirely open to it both as to the culpable nature of the Claimant's conduct (that he had made clear he intended to pursue an external campaign to embarrass the Respondent) and as to the relevant chronology, the Claimant having made clear his intention prior to the Respondent's instruction to him to move to a different department (the repudiatory breach in issue in this case).

HER HONOUR JUDGE EADY QC

1. We refer to the parties as the Claimant and the Respondent as they were below. This is the hearing of the Claimant's appeal against the Judgment of the Exeter Employment Tribunal ("the ET") (Employment Judge Roper sitting with members) on 5-7 December 2012, sent to the parties on 11 December 2012. The Claimant appeared before the ET in person, but has had the benefit of representation today by Mr Edge, of Counsel (acting as a representative of the Free Representation Unit), albeit that the Claimant has also addressed us himself. The Respondent had been represented throughout by Mr Watson, of Counsel.

2. By its Judgment, the ET found that the Claimant's loss would be limited to 12 weeks, from the date of his constructive dismissal, given that he would in any event have then been fairly dismissed by the Respondent given the irretrievable breakdown in trust and confidence between the parties. The ET further reduced the Claimant's award by 50% to reflect the contribution to the dismissal arising from the Claimant's culpable conduct.

3. The Claimant now appeals both the limitation on the period of loss and the reduction for contributory fault.

The Background Facts

4. From June 2002, the Claimant was employed by the Respondent as a Maintenance Worker in its Estates Department. He raised various grievances which he had not considered to be satisfactorily resolved and thereafter made a whistleblowing disclosure to the Respondent's HR Director on 27 April 2006. There were various failings on the part of the Respondent under its whistleblowing policy in handling the Claimant's disclosure and it only provided him with

feedback on his complaint on 22 May 2008, some two years after it had been raised. Moreover, although the Claimant's disclosure had raised serious health and safety issues, potentially impacting on patients and staff, the Respondent referred the matter to its internal auditors but did nothing further. As time went by, the Claimant came to believe his disclosures were being ignored and he became frustrated and anxious.

5. Meanwhile, around November 2007, the Respondent's Chief Executive informed the Director of Facilities in the Estates Department that recent audits had been carried out as a result of disclosures by a whistleblower in that department. The Facilities Director, in turn, announced, at a general meeting of his workforce, that an audit had completely exonerated the Estates Department management of allegations made by a member of the workforce. He said those allegations had given rise to unrest and bad feeling, and interviews were therefore being carried out to find out who the whistleblower was.

6. The Claimant complained to the HR Director, observing he was being put in the position of either having to lie or to breach his own confidence, precisely the kind of dilemma the Respondent's whistleblowing policy was supposed to prevent. He sought to raise further grievances, including a failure to properly investigate his complaints and to comply with the whistleblowing policy.

7. It seems that the Respondent thought that the Claimant did not wish to continue in his employment and the Facilities Director wrote to him on 19 November confirming the termination of his employment. That led the Claimant to file his first ET1, complaining of unfair dismissal and detriment because of raising protected disclosures. He also pursued an internal appeal but, meanwhile, went public with his complaints, raising matters in the media

and with various regulatory authorities. This was at a time when the Claimant was not bound by any contract of employment with the Respondent.

8. The internal appeal concluded that the decision to treat the Claimant's employment as at an end had not been reasonable, and the Claimant was restored to the payroll, backdated to 19 November 2007. There then followed various discussions and communications between the Claimant and the Respondent as to arrangements for his return. Ultimately they were unable to reach an agreement and, on 15 May 2008, the Claimant tendered his resignation, complaining of constructive dismissal because the Respondent was not prepared to reinstate him into the role which he understood had been offered to him and he had accepted.

The Procedural History and the Employment Tribunal's Conclusions

9. This matter has a long procedural history and this is not the first visit to the EAT. The proceedings were first issued in 2008, following the Claimant's resignation in May 2008. The first Full Merits Hearing took place before the Exeter ET, over five days in May 2009. That Judgment was subsequently the subject of a review by the ET on 30 November 2009. The ET's Judgment at that stage was that the Claimant had suffered detriments as a result of making protected disclosures - for which he was awarded £10,000 by way of injury to feelings - and had been constructively unfairly dismissed but the Respondent could, because of the total lack of trust and confidence existing at that stage, have fairly dismissed the Claimant at the date of his resignation for some other substantial reason. On that basis, the ET limited the Claimant's losses for the constructive unfair dismissal to five weeks' pay in lieu of notice.

10. The detriments found at that stage by the ET are conveniently set out in the Judgment of the EAT (Wilkie J presiding) upon the subsequent appeal (see below). It is notable, however,

that the ET did not find that the Claimant had been constructively unfairly dismissed by reason of his having made protected disclosures.

11. The Claimant's appeal against that Judgment, and the Respondent's cross-appeal, came before a full panel of the EAT (Wilkie J presiding) on 20 January 2011. The cross-appeal was allowed to a limited extent: the EAT holding that the reason for the Claimant's resignation had been the Respondent's refusal to reinstate him into a job in the Estates Department (rather than the breach the ET had found). The appeal was also allowed in part: the ET had erred in failing to characterise the Respondent's unilateral change to the Claimant's work as a fundamental breach of contract. So, it was still the case that the Claimant had been constructively dismissed but there was a different focus in terms of the breach of contract in issue. The EAT remitted to the ET the question whether the constructive dismissal was fair or unfair and any issues relating to remedy. In particular, the EAT did not feel that sufficient reasoning had been provided for the (seemingly surprising) conclusion that the Respondent could have fairly dismissed the Claimant on the day he had resigned in response to the fundamental breach of contract.

12. Those matters duly returned to the ET and, by its Judgment sent to the parties on 6 June 2011, it found that the constructive dismissal of the Claimant had been fair, that there should be no **Polkey** reduction, but that the Claimant's damages should be reduced by 80% due to his contributory conduct. The sum awarded to the Claimant was £10,297.96. The full amount of loss (prior to reduction for contributory fault) was therefore assessable at just over £51,000.

13. That Judgment led to a second appeal and cross-appeal to the EAT. The Claimant appealed against the percentage of the deduction; the Respondent cross-appealed against the period of loss.

14. Those matters came before another full panel of the EAT (Langstaff P presiding) on 30 March 2012. It concluded that both the appeal and the cross-appeal should be allowed: the reasoning of the ET was unclear and inconsistent with its earlier findings; the EAT was unable to understand what the ET had in mind as to what the Claimant had done, which was "incompatible with the continuance of his employment", and when he had so acted. On the cross-appeal, the ET had failed to consider when, in the ordinary course of events, the Claimant's employment might have come to an end. For various reasons, the matter was then remitted to a fresh ET. That remission was made on the following bases: (1) The Claimant had been reinstated with effect from 4 April 2008, but between 17 November 2007 and 4 April 2008 it was unlikely that the ET would hold that either party regarded the Claimant as then being subject to the contract of employment; (2) the reason for the dismissal was that the Claimant was entitled to, and did, accept the Respondent's conduct as repudiatory when the Respondent told him he must work in the IT Department rather than in Estates Management; (3) the public interest disclosures were not the cause of that dismissal; (4) the ET would need to consider whether the repudiatory instruction given to the Claimant was itself caused or contributed to by any blameworthy action of the Claimant; (5) the ET could also consider whether there should be any (and, if so, what) limit to the compensation awarded on the basis that the employer might, in any event, have terminated for good reason at some later stage (that would not be applying **Polkey** - that issue had already been determined - but was simply identifying a date at which the Claimant's loss would stop). The EAT also gave further guidance as to the approach the ET would need to adopt to the question of contributory conduct.

15. The matter thus returned again to the ET. Before the substantive remitted hearing, there were three further case management orders. In that of 1 August 2012, the remaining issues to

be determined were defined as follows: (1) whether, within the meaning of section 123(6) of the **Employment Rights Act 1996** ("ERA"), the dismissal - in the repudiatory instruction given to the Claimant - was to any extent caused or contributed to by any blameworthy action of the Claimant; (2) whether - starting with the schedule of loss - there should be any (and, if so, what) limit to the compensation awarded before any deduction in respect of the possibility that the employment relationship might have terminated for good reason as some later stage; (3) whether there was any contributory fault and, if so, what was the proper assessment of it.

16. By its Judgment, the ET awarded the Claimant the sum of £3,643.82 in compensation for unfair dismissal. It accepted the Respondent's case that the Claimant would have been dismissed fairly within a period of 12 weeks because of an irretrievable breakdown in trust and confidence. It therefore limited the Claimant's loss to 12 weeks from the date of dismissal. On the question of contributory conduct, the ET rejected the Respondent's contention that matters pre-dating the Claimant's reinstatement on 4 April 2008 could be blameworthy conduct: those matters could not have contributed to the dismissal and/or had taken place at a time when the parties did not consider the Claimant to be under a contract of employment. To the extent the Respondent relied on matters post-dating the re-engagement and the letter warning the Claimant that he should follow its policies for the future, the ET did not accept the Respondent could rely on matters of which it had not known at the time; those could not have contributed to the constructive unfair dismissal. On the other hand, the ET found the Claimant had expressed an intention to "finish what he had started" and the Respondent's refusal to allow him to return to his former department was at least contributed to by his express assertion that he would not abide by the Respondent's policies and instructions and (effectively) that he intended to continue with his campaign involving external agencies. That amounted to culpable conduct, which had contributed to the unfair constructive dismissal to the degree of 50%.

17. There was then a subsequent application for a reconsideration made by the Claimant, which was considered at a hearing before the ET on 1 September 2014. The ET refused that application, confirmed its original decision and ordered the Claimant to pay £1,700 of costs to the Respondent in respect of the application.

The Appeal

18. Meanwhile the Claimant had pursued a challenge to the ET's Judgment to the EAT, initially on the basis of a lengthy Notice of Appeal considered at an all-parties Preliminary Hearing before a full panel of the EAT (HHJ McMullen QC presiding) on 21 August 2013. It was at that stage that Mr Edge first appeared for the Claimant, then under ELAAS, and, with his assistance, the Grounds of Appeal were amended, leading to the following three grounds of challenge that were permitted to proceed to a Full Hearing:

(1) that the ET erred/made a perverse finding that the Respondent could have dismissed the Claimant fairly within 12 weeks of his resignation on the ground that there had been an irretrievable breakdown in mutual trust and confidence;

(2) that the ET erred/made a perverse finding in holding that the Claimant (i) by stating that he intended to finish what he had started, had shown an intention not to follow a reasonable management instruction of the Respondent to comply with its policy, and (ii) had thereby acted in a blameworthy or culpable manner which contributed to his constructive dismissal;

(3) that the ET erred/made a perverse finding that the Claimant's aim in raising or continuing with the external complaints appears to have been to embarrass the Respondent rather than safeguard patient safety.

There was a further limb to the third ground of appeal, which also raised a question as to the adequacy of the ET's Reasons. The McMullen EAT utlised the **Burns-Barke** procedure, which led the ET to provide a further and fuller explanation of its reasons under cover of a letter dated 5 September 2013. That was accepted as providing sufficient reasoning, albeit that the Claimant still took issue with the conclusion reached.

19. After a further Preliminary Hearing (Wilkie J sitting alone), this matter was set down for a Full Hearing on the three grounds set out above.

The Relevant Legal Principles

20. The relevant statutory provisions are contained at section 98(1), (2) and (4) of the **Employment Rights Act 1996**:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
>
> **(a) the reason (or, if more than one, the principal reason) for dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this section if it -**
>
> **(a) …,**
>
> **(b) relates to the conduct of the employee,**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

And, further, at section 123(1) and (6) of the **Employment Rights Act 1996**:

> **"(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all**

> **the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
>
> **…**
>
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**

21. As observed by Langstaff J in his earlier Judgment in this case, the test in section 123(6) of the **1996 Act** raises a question of causation; what has to be caused is the dismissal. Where the dismissal is constructive, the focus must be on why it was that the employer committed what must have been a fundamental and repudiatory breach of contract. As the employer was in repudiatory breach, that must inevitably mean that the employer was, to that extent, at fault and responsible for the dismissal which occurred. It would still be open to the ET, however, to find that the employer's breach of contract was caused to some extent by the blameworthy conduct of the complainant. If so, the ET would need to be clear as to what it found to be the conduct in question. In this case it was important to note that, from 19 November 2007 until late March/early April 2008, the Claimant might legitimately have considered himself not to have been employed.

22. Returning to section 123(1) of the **1996 Act**, the loss to be awarded is that suffered in consequence of the dismissal, insofar as it is attributable to action taken by the employer. If the ET takes the view that the employee would in fact have been dismissed fairly for some other reason in due course, then that will limit the period for which loss will be awarded. Here the ET was not concerned with this point as it might arise under **Polkey**, where the matters that led the employer to dismiss unfairly might have in fact have permitted a fair dismissal. Rather, the question was, as identified by the ET at paragraph 48 of its Judgment, "whether there might have been a subsequent fair dismissal for some other good reason and if so when". The ET's

finding was that the other good reason would be some other substantial reason, namely an irretrievable breakdown in trust and confidence.

23. Such an irretrievable breakdown in trust and confidence can amount to "some other substantial reason" for section 98 purposes. A finding of that nature can, however, give rise to difficulties, as identified by the EAT (Underhill J, as he then was, presiding) in **McFarlane v Relate Avon Ltd** [2010] ICR 507. See also the concerns expressed by Langstaff J in **Governing Body of Tubbenden Primary School v Sylvester** UKEAT/0527/11/RN. In particular, loss of trust and confidence should not be used to avoid the scrutiny that would otherwise be required in conduct dismissal (see **BHS v Burchell** [1978] IRLR 379); it is not a label that can simply be relied on to avoid a proper assessment of the circumstances which lead up to and gives rise to the loss of trust and confidence in question.

Submissions

The Claimant's Case

24. On behalf of the Claimant, Mr Edge reminded us that the Claimant's section 47B **ERA** complaints (detriment) were upheld by the ET and that Judgment had never been overturned. The detriments so found included an attempt to discredit the Claimant, a failure to have proper regard to the necessary confidentiality to be afforded to whistleblowers, and a general failure to follow the Respondent's own whistleblowing policy, leaving the Claimant in suspense for nearly two years. That had been the direct cause, as the ET had found, of the Claimant's frustrations and anxiety, which gave rise both to further grievances and subsequently to disclosures to outside bodies, all of which had led to the breakdown of trust and confidence. Moreover, following the Claimant's re-engagement, the Respondent had continued to subject the Claimant to detriment by producing a report which described his concerns as

"unsubstantiated and vexatious". Thus, there was a direct causal link between the detriments to which the Claimant had been subjected and his raising of disclosures to outside bodies and the breakdown of trust and confidence. This was significant.

25. The main difficulty in this case was the ET's repeated finding that the Claimant's employment would inevitably have ceased in any event, immediately after or within a short period of time after his resignation, due to the fact that trust and confidence had broken down. It was the Claimant's case that the Respondent was responsible for the breakdown in trust and confidence: it was its conduct in subjecting the Claimant to detriments on the grounds of his protected disclosures which had caused him to believe his disclosures were not being taken seriously, and that led to his raising matters with outside bodies and the subsequent breakdown in trust. In those circumstances the Respondent should not be permitted to rely on its own culpable conduct to argue that the Claimant would have been dismissed in any event.

26. Turning to the specific grounds and addressing ground 1, the perverse finding that there would have been a fair dismissal within 12 weeks, Mr Edge complained that the ET made no attempt to address the argument that the Respondent was to blame for the loss of trust and confidence; it had simply failed to engage with the Respondent's defaults and had thereby failed to address the specific questions identified by the EAT and had fallen into the error identified in the **McFarlane** and **Tubbenden** cases. It had identified the breakdown in trust and confidence but had then failed to analyse how that position came about and/or whether a dismissal for such a reason would have been fair in all the circumstances. The ET had failed to follow through on the guidance laid down by the EAT both under the first and second appeals. To the extent that what it was really finding was a conduct issue on the part of the Claimant, then it would have needed to go through the appropriate tests. The real issue for the

Respondent in this case had been whether the Claimant had refused to obey a lawful instruction; that should have been treated as a conduct issue, but it never considered it as such. The fact that the Respondent had not felt able to rely on the failure to obey a lawful instruction alone suggested that it was recognised as insufficient by itself.

27. Turning then to ground 2, the failure to follow the reasonable management instruction and contributory fault, Mr Edge reminds us that an employee does not commit an act of misconduct should he refuse to comply with an illegal or unreasonable instruction (**Payne v Spook Erection Ltd** [1984] IRLR 219). The ET had to find whether the instruction given here was reasonable and lawful. It then had to consider whether the Claimant's conduct amounted to a refusal and, if so, whether he was culpable. It needed to make those findings on the basis of the parties' correspondence, in particular whether the Claimant genuinely and reasonably believed he had reached an agreement with the Respondent that he would be entitled to continue his external complaints. If he did, his conduct could not be culpable. The first question for the ET was, therefore, whether the Claimant reasonably held that view. The ET also needed to consider whether the Respondent's policy prohibited disclosures to external parties and was lawful, given the provisions of the **Employment Rights Act**, and as to whether the Respondent's media policy was lawful (the Claimant's case was that the Respondent's media policy cut across his rights and was unlawful and that the instruction given to him was either unlawful or unreasonable). Only then could the ET reach a conclusion as to whether there was a reasonable instruction to the Claimant. As the ET did not have sight of the media policy, it would not have been able to reach a final conclusion on that point.

28. Further, the ET did not explain why the Claimant's statement - that he intended to finish what he had started - amounted to a refusal to comply with the Respondent's policies. He had

already spoken with external bodies at a time when he had not understood himself to be bound by any contract of employment and had no need to continue to do so. That statement was equally consistent with a statement of intent as to internal procedures. It was also important to have regard to the chronology. The Respondent's letter of 1 May 2008, which communicated its decision that the Claimant should return in a different role in a different department, was a decision that had in fact been made earlier, as was demonstrated by the Respondent's internal e-mail of 25 April 2008, well before the Claimant's statement on 6 May 2008 that he intended to finish what he had started. The statement, therefore, could not have contributed to the repudiatory breach in deciding to move the Claimant to a different department, a point picked up by the Langstaff EAT in its Judgment. For the ET to find that that statement contributed to the constructive dismissal must therefore be perverse.

29. Finally, turning to ground 3, that the ET had reached a perverse conclusion as to the Claimant's aim being to embarrass the Respondent. Given the background - that the Respondent had failed to address the Claimant's genuine internal disclosures for two years and then had sought to name and shame the Claimant and to discredit him as vexatious - and given the EAT guidance that the ET needed to analyse why the Claimant had been prompted to raise his external disclosures, this finding was simply perverse.

30. In addition the Claimant addressed us in person and submitted that the Respondent, through these proceedings, had been permitted to tell lies as the proceedings went by. Its position had changed and that had fed into the ET's findings. The agreement to finish pursuing his grievances was a fundamental agreement he had reached with the Respondent, and that was the background to his statement that he would finish what he had started. That was consistent with what had been agreed and had been accepted by the Respondent at a meeting on 14 April

2008. In that regard, he handed to us a letter of that date which he had written to the Respondent, where he had set out his condition for any return to his employment, stating that he would not be returning to work until he had finished what he had started.

The Respondent's Case

31. Responding first to the Claimant's submissions, the Respondent noted that there was a finding (paragraph 33) as to what had been found on the internal grievances; his statement of intention related to his external complaints. The ET was concerned with his external campaign, not any intention to pursue internal complaints. That was significant because the Respondent's case was always that the internal complaints were of a different nature (potentially amounting to protected disclosures) to the subsequent external complaints (which did not).

32. Further, by way of preliminary observation, the Respondent noted that (in the Reconsideration Judgment) the ET had clarified, in support of its conclusion that the Claimant had been seeking to embarrass the Respondent, that he had not been a credible witness and it simply did not believe that his principal motivation was to safeguard patient safety or staff.

33. Turning then to, first, the third ground of appeal, the Respondent urged that we should bear that general point in mind. We should, further, consider that ground of appeal first because it would be difficult to challenge the ET's conclusion on an irretrievable breakdown in trust and confidence if we upheld the finding that the Claimant had the intention of embarrassing the Respondent. The ET had been entitled to take into account the Claimant's actions in this regard during the period of time prior to his reinstatement; albeit he was then not under a contract of employment, his various actions were relevant to motivation. If the ET reached a permissible conclusion in that regard, it broke the chain of causation with the

Respondent's earlier conduct. It was, further, a legitimate finding on the facts. The ET picked up what had happened when the Claimant was not an employee and saw what he had done; he was needlessly engaging external authorities on a repetitive basis. He then continued to campaign externally - making approaches to the Environment Agency and also copying a dossier to another newspaper - after he had returned to his employment and after the Respondent's instruction. The ET was thus entitled to find that this evidenced an intention to embarrass the Respondent and it was plain that it did so (see its Reasons and the supplementary reasons provided in response to the direction from the EAT). That was a view the ET was entitled to reach on the evidence before it; it was entitled to take into account what it found to be the Claimant's motivations in the external disclosures.

34. On the second ground - the reasonable management instruction point - again this had to be seen against the background of what the Claimant had done before. The instruction referred to two relevant policies, the whistleblowing policy and the speaking to the media policy. Whilst accepting that the latter appeared not to have been before the ET and that policies should not limit lawful disclosures, neither point was in fact relevant: the Claimant had not maintained that his 2008 disclosures had been protected disclosures. More substantively, the policies did not restrict him in the way alleged. They laid down a process by which concerns could be raised internally but not the raising of complaints externally in an unlawful way. In any event, it was legitimate to ask the Claimant to comply with management policies which applied to all employees. The Claimant, it should be noted, was not saying that he did not know whether or not the instruction meant he could make lawful disclosures. He simply went ahead and made his disclosures in any event. The phrase "finish what he had started" related to his communications with the external agencies (see paragraph 34 of the ET Judgment) not his internal grievances. Moreover it did not refer to the original complaints that he had raised,

which were protected disclosures, but to the communications made when he was acting as a member of the public not an employee. Asserting that he would continue to carry out that campaign demonstrated that he did not consider himself bound by policies that should have applied to him as an employee.

35. Finally, turning to ground 1 - the question of the limitation of loss to 12 weeks - the ET was entitled to find there had been a loss of trust on both sides, and morale had been affected in the Estates Department. It was similarly entitled to find that the Claimant intended to continue to pursue the external complaints which (it had expressly found) were intended to embarrass the Respondent. The ET had looked at all the facts and found that continuing intention on the Claimant's part. It was difficult to imagine how any return to the Estates Department would work, and the Claimant would not countenance working elsewhere. The Claimant's lack of trust in the Respondent might have been a part of the constructive dismissal, but the Respondent had a lack of trust in the Claimant because it could not trust him given his stated intention of continuing with his external complaints. The Claimant had lost his case that this was a whistleblowing dismissal; it was not. His later conduct might have been linked to his earlier sense of frustration and anxiety - and that might have related to the Respondent's failure to properly deal with his original protected disclosures - but the ET had moved on from those and was concerned with the 2008 disclosures, which had not been found to be protected disclosures.

The Claimant in Reply

36. In reply, Mr Edge urged that it was important not to conflate the issues: the constructive dismissal question and the question of a subsequent fair dismissal. Accepting that the dismissal was not by reason of the Claimant's protected disclosures, if a subsequent dismissal was by reason of a breakdown in trust and confidence, the ET still had to ask why there had been that

breakdown. Here the Respondent had done very little to mend the relationship, but the ET had made few findings on that point and had failed to make findings as to the precise nature of the lawful instruction given.

37. The Claimant himself again further addressed us by way of additional submissions, observing that the Respondent's position had changed again.

Discussion and Conclusions

38. We start by considering the ET's conclusion on the limitation of loss. That point had been the focus of consideration by the Wilkie EAT, when it ruled that any proper consideration of remedy must address the issue whether there would have been a fair dismissal at some point and, if so, when. At that stage, the ET Judgment under consideration had concluded that there was a total and mutual loss of trust and confidence to the extent that, by May 2008, there was no prospect of the Claimant's employment continuing and the Respondent had made extensive and bona fide efforts to redeploy the Claimant; had the Claimant not resigned, he would have been dismissed and would have been paid five weeks payment in lieu of notice. In considering that conclusion, the Wilkie EAT observed:

> **"… that … is, on the face of it, a startling proposition to contend that the employer would have fairly dismissed the Claimant on the very day that … he resigned in response to a fundamental breach of contract so as to limit compensation to the period of contractual notice beginning on that day. We point out that it is clear from the correspondence that the Respondents had by no means set their face against the Claimant returning to the estates department, albeit they anticipated that there would have be some assistance from external mediation. It would be surprising if it were to be open to a Tribunal to conclude that the events after the letter of 13 March were such as to foreclose that option. A further issue for the Tribunal to consider is the likely time taken to complete any relevant NHS dismissal/appeal procedures." (paragraph 54)**

And at paragraph 55 it goes on:

> **"… we are acutely aware we did not conduct the hearing, we did not hear the witnesses and we have only had sight of a limited amount of the documentation. It is, therefore, open to the Tribunal to reach that decision if it properly can on the basis of a fully reasoned decision. Equally, the other options: that the remedy is at large, or is limited in time, or there should be a deduction for contribution, are all open to the Tribunal upon reconsideration after remission."**

39. The Langstaff EAT did not depart from the observations made by Wilkie J. It accepted that the ET might find there to be a limit to the compensation awarded, allowing for the possibility that the employment relationship might have terminated for good reason at some later stage. Allowing that the focus of the Langstaff EAT guidance was on the question of contributory fault, it further (relevantly) observed:

> **"… the Tribunal focused, as it has done throughout both of its decisions, upon what it has identified as a total and mutual loss of trust and confidence. We consider that this finding is misplaced. Where, at any rate, an employer is a sizeable undertaking, the relationships within a department of that employer between one employee and another employee, even if the second is in a senior position to the first, may be such that trust and confidence is lacking as between the two of them. That is not the same as the employer which employs both losing trust and confidence in either." (paragraph 25)**

40. We turn then to the ET's Judgment. The ET plainly had in mind that any subsequent termination of the employment relationship could only limit compensation if it was for good reason; which must mean a statutorily fair reason for section 98 **ERA** purposes. It concluded that there had been an irretrievable breakdown in the working relationship between the Claimant and the Respondent for the reasons it sets out in paragraph 48, as follows:

> **"We deal first with the matter as to whether there might have been a subsequent fair dismissal for some other good reason, and if so when. Certain key findings of fact above lead us to the conclusion that there was an irretrievable breakdown in the working relationship between the claimant and the respondent. These are that the claimant himself admitted to the respondent, and admitted to us, that he did not trust the management of the respondent and/or the respondent generally; that the claimant was pursuing a campaign of complaints against the respondent the aim of which appears to be to embarrass the respondent rather than to safeguard patients or staff; that the repeated complaints had had a significant impact on the Estates Management Department, which included a disproportionate increase on both the workload and the stress levels of those working in the Department; that the respondent had concluded that it did not trust the claimant to try to achieve a workable relationship within the Department; that the claimant refused to work in any other department; that the claimant had shown an intention not to be bound by direct reasonable management instructions and the respondent's policies by deliberately flouting an instruction to follow those policies; and the respondent's desire to avert any further potential damage to its reputation."**

41. The ET found that any conclusion by the Respondent that there had been irretrievable breakdown in mutual trust and confidence would not be whimsical or capricious; it would be entitled to find that was a substantial reason. The ET took on board the point made by

Langstaff J that it would not be simply enough to find a breakdown in the relationships in one department when this was such a large employer. It expressly found, however, that:

> **"… it is clear to us that the claimant had no intention of moving to any other department against a background of an unworkable relationship in his department." (paragraph 49)**

42. The Claimant objects that previously the Respondent had put its case on the basis that it had understood he was not insisting solely on returning to the Estates Department. We do not consider that to be a fatal objection: the ET was entitled to reach its own conclusion on this point; it had, after all, had the benefit of hearing from the Claimant himself. Moreover, it was here projecting forward as to what would have taken place in the future for the purpose of determining what loss actually flowed from the constructive unfair dismissal. On that basis the ET concluded that the Respondent could reasonably take the view that there was an irretrievable breakdown in trust and confidence generally between the parties which amounted to a potentially fair reason for dismissal. It felt that due process in this regard would take 12 weeks (there is no appeal before us as to the period) and concluded:

> **"51. For these reasons we find on the balance of probabilities that the claimant would have been dismissed within a period of about 12 weeks because of this irretrievable breakdown in mutual trust and confidence. In our judgment dismissal in these circumstances would be within the band of reasonable responses open to the respondent when faced with these facts. It is not for us to substitute our view for that of the respondent, and we do not do so, but we find, bearing in mind the size and administrative resources of the respondent, that any such dismissal would be fair and reasonable in all the circumstances of this case.**
>
> **52. We therefore limit the claimant's loss to 12 weeks from the date of dismissal, because we consider this to be just and equitable in accordance with section 123(1) of the Act."**

43. The question for us is whether the ET was entitled to take that view.

44. We first note what the Claimant has not sought to argue before us. It has not been suggested that really what the ET was doing was making a **Polkey** finding, which was not open to it. As the Claimant must thus accept, the ET was not looking at what had happened but what would have happened if the Respondent had not instructed the Claimant to return to a position

in the IT Department. It concluded that it would then have fairly dismissed the Claimant for some other substantial reason.

45. Was the ET thereby avoiding the scrutiny that would otherwise have been required if it had found that the reason for the future termination of the contract would be related to the Claimant's conduct? We do not believe so. In fact the assessment it undertook was analogous to that it would have been required to adopt under **Burchell**. Doing so, it found that a conclusion on the part of the Respondent that there had been an irretrievable breakdown in trust and confidence would have been neither whimsical nor capricious. There would have been reasonable grounds for that view, which would have been arrived at after a reasonable process taking a further 12 weeks. The conclusion that the Claimant would thus have been fairly dismissed for some other substantial reason was one that the ET tested expressly against the range of reasonable responses (paragraph 51). Adopting the label "some other substantial reason due to an irretrievable breakdown in trust and confidence" did not amount to a shortcut in these circumstances.

46. That said, we can see it might be arguable that the ET could have applied the label of conduct; certainly some of the findings it made would justify that. We can see, however, why it chose to reflect the rather more complex factual matrix it was dealing with in this case in the way that it did; particularly where some of the other matters that had caused the breakdown had taken place when the Claimant was not an employee and where some aspects of the Claimant's conduct could be attributed to his feeling of grievance and anxiety as a result of the Respondent's earlier treatment of him. Far from failing to recognise the background culpability on the part of the Respondent (as the Claimant has contested on this appeal), in our Judgment, the finding of irretrievable breakdown in trust and confidence comprehends precisely that.

47. Our reading of the ET's Judgment is that it was taking on board all that had gone before. Taking due account of the background, it then looked at the picture that would have faced the Respondent moving forward. It recognised that - notwithstanding the actions of the Claimant the ET itself had characterised as having been undertaken in bad faith (see paragraph 22) - the Respondent had continued to deal with his various internal grievances and discussed redeployment opportunities with him and his trade union representative. In our judgment, the ET approached this issue, fully took on board the complexity of the narrative. The conclusion reached was one which was, allowing for a permissible element of speculation, fully open to the ET on the basis of its primary findings of fact and with which it is not for us to interfere.

48. We then turn to the question of contributory conduct, which encompasses both the second and third grounds of appeal. As we have observed, the question for the ET was what caused the dismissal? Why was it that the employer committed what was a fundamental repudiatory breach of contract in this case? Here the repudiatory breach - as the Langstaff EAT characterised it in its remission Judgment - was the Respondent's instruction that the Claimant must thereafter work in the IT Department and not in the Estates Management Department.

49. It is apparent that the ET had firmly in mind the need for a relevant causative link between the Claimant's conduct and the Respondent's commission of the repudiatory breach in question. It was not entitled to reduce the compensatory award by reason of the Claimant's conduct more generally and did not seek to do so. Thus it rejected matters relied on by the Respondent which pre-dated the Claimant's reinstatement on 4 April 2008 (paragraph 54); the Claimant's conduct prior to 19 November 2007 could not have caused the constructive dismissal, because those matters pre-dated the earlier dismissal and the decision that he should be reinstated. Equally the ET did not allow the Respondent to place reliance on matters of

which it had no knowledge when taking the decision that led to the resignation, such as the presentation of a complaints dossier to the North Devon Gazette (see paragraph 56). The ET also had in mind the requirement that the Claimant's conduct would have had to be culpable. Thus it did not take into account the Claimant's conduct when the parties did not consider him to be an employee. It was also careful to note that, when the Claimant sent his further complaint to Environmental Health, he had asserted that he still understood he had agreed re-engagement on terms that included his ability to pursue his external complaints. As such, the ET found, the Respondent had not discharged the burden upon it of showing that this was culpable conduct (paragraph 56 again) and similarly it recognised that the Claimant could not be blamed for a failure to engage in mediation, which had not been formally arranged (see paragraph 57).

50. Against that background, we turn to the ET's finding that the Claimant's statement of his intention to finish what he had started *did* amount to relevant culpable conduct. The ET found that it was culpable not, as the Claimant asserts, as a statement that he intended to pursue his internal grievances but because it was his statement of intent to pursue his external campaign. That external campaign included raising matters with external bodies in a way which had never been found to have amounted to protected disclosures. By asserting this as a condition of his return to work, the Claimant was refusing to be bound by the Respondent's policies, which were applicable to all its employees, and refusing to be bound by the instruction laid down by the Respondent in this regard. The ET's conclusion in this regard goes beyond a simple finding that the Claimant was refusing to obey a lawful instruction. It is a wider finding of culpability that directly fed into the Respondent's decision that the Claimant should not be offered reinstatement into the Estates Department.

51. In reaching this conclusion, we originally felt some disquiet as to the chronology in this matter. We noted the observation of Langstaff J that, if the statement was made by the Claimant on 6 May 2008, that could not have caused the Respondent to behave the way it did on 1 May 2008 (the date of the letter of the Respondent to the Claimant outlining its decision that he should return to a role in a different department). We can also see how the Claimant could trace the making of that decision to an earlier date, given the Respondent's internal e-mail in April 2008. Properly analysed, however, those events did not pre-date the Claimant's statement that he intended to finish what he had started. In truth, as the ET plainly found, that was his position throughout (see, for example, the Claimant's statement to this effect in his letter to the Respondent of 14 April 2008, to which he drew our attention during the course of the hearing). The ET was not resting its finding on one statement of that intention but on the fact that it was the Claimant's intention and his reason for refusing the instruction, as he had made clear throughout in his communications with the Respondent.

52. As for the Respondent's side, it had not started by setting its face against the Claimant returning to the Estates Department (see paragraph 54 of the Wilkie EAT Judgment, set out above). Given the way that events then unfolded, however, that became its position. Contrary to the Claimant's complaint before us, the ET did carefully go through the various communications between the parties. It found that it was after the Respondent had responded to the Claimant regarding his internal grievances that he confirmed (so not his original statement in this regard but a confirmation of his position), by letter of 5 May 2008, that he was going to finish what he had started: that is, to pursue his external complaints. It is at that point, by letter of 6 May 2008, that the ET found the Respondent communicated to the Claimant the instruction that he was to return to a position in the IT Department. Simply picking out one internal e-mail

discussing possible intent at an earlier stage does not, in our judgment, do justice to the fuller assessment of the evidence - documentary and oral - carried out by the ET.

53. Against that background, we cannot say that the ET was not entitled to reach the conclusion that it did as to the chronology (see paragraph 34) and thus that the Claimant's stated intention was a cause of the Respondent's repudiatory breach, which, after all, was not merely the decision to offer the Claimant re-engagement into the IT Department, but the communication of that decision to the Claimant. That is when it decision crystallised and amounted to the repudiatory breach, as found by the ET.

54. For completeness, we also agree with the Respondent that ET was entitled to reach its finding that the Claimant, in continuing with his external complaints, intended or aimed to embarrass the Respondent. It was entitled in that regard to look more widely at the Claimant's conduct over a wider period of time; it was, after all, seeking to assess the Claimant's motivation rather than simply what had fed into the repudiatory breach. Its finding as to contributory conduct was then focussed down into those matters known by the Respondent and taken into account by it when reaching the decision it did to communicate the instruction that the Claimant was to return into the IT Department (the repudiatory breach of contract in question). The ET thus correctly approached this matter as a matter of law and reached conclusions that are not open to challenge before this court on appeal.

55. For all those reasons, we dismiss this appeal.