Appeal No. UKEAT/0474/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 21 March 2014
Judgment handed down on 30 April 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

MR S CLEMENTS APPELLANT

(1) LLOYDS BANKING PLC
(2) MR J SHAWCROSS
(3) MS K GUTHRIE RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MS DAPHNE ROMNEY QC (of Counsel) Instructed by: Ms Gillian Howard 34 Lyndale Ave Childs Hill London NW2 2QA
For the Respondent	MR RICHARD LEIPER (of Counsel) Instructed by: Messrs Dundas & Wilson LLP North West Wing Bush House London WC2B 4EZ

SUMMARY

AGE DISCRIMINATION

CONSTRUCTIVE DISMISSAL

The Claimant, who was in his 50s, occupied a senior role in the respondent Bank. His manager had performance concerns, and thought it time for the Claimant to move on from his role. He did not go about telling the Claimant this in a proper manner (and thereby committed what was part of a cumulative breach of the implied term of trust and confidence): at one stage of their first conversation about it saying twice to the Claimant that "You're not 25 anymore". This was discriminatory on the ground of age, even though not intended in that way. The manager repeatedly denied using those words, and did so before the Tribunal. After subsequent events at work, the Claimant resigned. Though the Tribunal held him entitled to do so, in response to his employer's breach of the implied term by seeking to move him on from one role to another without adopting any proper process to do so, and although it had held the specific words to be discriminatory in themselves, it considered that the use of those words was not a material part of the conduct which amounted to the breach in response to which the claimant resigned. It was **held** on appeal that it was entitled to do so; and a further ground of appeal to the effect that once the Tribunal rejected the manager's denial it should have regarded him as a liar, considered his evidence with much greater care, and concluded that his approach was consciously discriminatory was rejected, since it was for a Tribunal to make what it would of a witness and the fact that he might have lied in part did not mean that he necessarily lied in other parts of what he said. The ET here had taken apparent care.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision of an Employment Tribunal at London Central (EJ Auerbach, Mrs. Patel, Mr. Barber), which for reasons delivered on 28th. March 2013 upheld the claimant's case that he had been discriminated against because of his age, and constructively dismissed, but rejected his case that the dismissal was itself caused to any material extent by any discriminatory act.

2. The appeal at one stage seemed to raise a question of principle relating to constructive dismissal. Where an employer commits a repudiatory breach of contract in respect of his employee, the employee has the option of accepting the breach as terminating his own obligations to continue to perform the contract as he had originally promised to do. Provided he has not acted, by words or conduct, so as to affirm the contract as continuing once he knew of the breach, his acceptance of the repudiation not only puts an end to the contract at common law but is by statute also a dismissal in respect of which he may claim unfair dismissal rights (section 95(1)(c) **Employments Rights Act 1996**). Since the Court of Appeal decision in **Western Excavating v Sharp** [1978] QB761 ordinary contractual principles have applied to such a constructive dismissal. The judgments in **Western Excavating** itself do not expressly state that the employee must resign in response to the breach, though this might be considered implicit; nor does section 95(1)(c) require that the employee resigned in response to a particular breach. However, it has become accepted principle that he must: such that in **Meikle v Nottinghamshire County Council** [2005] ICR 1 Keene LJ said (paragraph 33):

> **"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of their repudiation. It follows that,**

> **in the present case, it was enough that the employee resigned, in response at least in part, to fundamental breaches of contract by the employer…"**

And again at paragraph 39

> **"Once it is clear that the employer was in fundamental breach… the only question is whether [the employee] resigned in response to the conduct which constituted that breach."**

3. To ask whether the resignation was in response to the breach identified by the claimant is to ask the same question as whether the breach was a cause of the resignation. That the search is for *an* effective cause rather than for *the* effective cause and that the test is whether the breach played a part in the resignation is equally now well established (see **Abby Cars West Horndon Ltd v Ford** (unreported) 23rd May 2008; **Wright v North Ayrshire Council [2014] ICR 77**).

4. The question said by the Appellant to be posed by this appeal is whether an employee who resigns because of a course of conduct which the Tribunal is satisfied cumulatively amounts to a breach of the implied term of trust and confidence, and which is therefore necessarily repudiatory (see **Morrow v Safeway Stores [2002] IRLR 9**) can legitimately be said to have resigned in response to some aspects of that conduct, which cumulatively amounts to a breach, but not to other aspects (which viewed in isolation or cumulatively would also be a breach). In the first place, this depends upon the material facts found by the Tribunal.

The Background Facts

5. The Claimant was head of Business Continuity at the Respondent's Bank ("Lloyds"), answering to the Second Respondent, a Mr Shawcross. He resigned by letter on 12th July 2012, on notice due to expire on 11th October 2012. In that letter he accused Lloyds of having repudiated his contract of employment by breaching the implied term of mutual trust and confidence by (amongst other matters) making discriminatory comments to him, seeking to push him out of his role for "someone younger" than him, and lying continuously about what

Lloyds (through Shawcross) had said to him on 5th. January 2012. He said that his complaints had been fully detailed in a grievance hearing and in two existing claims to the Employment Tribunal.

6. The reference to 5th. January 2012, and to making discriminatory comments, referred to what had happened on 5th. January 2012. On that date Mr Shawcross had spoken to the Claimant, and during the conversation indicated concerns about both the way in which the Claimant had managed progress in respect of a major project (IT Disaster Recovery) and how he had responded to challenges from Audit. He raised the idea that the Claimant should move to a different role within the Bank. The Claimant said that twice during the conversation Mr Shawcross had said to the Claimant that "you're not 25 anymore".

7. As to this allegation the Tribunal did not initially indicate a firm conclusion: it first spoke, at paragraph 25, of Mr Shawcross having raised the proposal that the Claimant move "in one form of words or another". It recorded that the Claimant raised a grievance about the use of those specific words: Ms Guthrie (the third Respondent) rejected it on the basis that she was simply unable to determine whether the words had been said or not. Mr Shawcross absolutely and consistently denied it. There had been no witnesses to the conversation itself. The Tribunal however went on to examine the probabilities of the rival accounts being accurate between paragraphs 140 and 144 of its judgment, concluding in these terms at 145:

> **"Ultimately we could not be sure and we had to decide this question by weighing up all the evidence we had on the balance of probabilities. Making due allowance for the hearsay and potentially self-serving nature of some of the evidence, we found that the overall picture that emerged was one in which it was distinctly more likely that Mr Shawcross had indeed made the disputed remarks than that he had not; and, on that basis, we found that he did."**

Nonetheless, the Tribunal rejected, as a matter of fact, that he used the words because he wished to replace the Claimant with someone younger. They were made simply as part of his

efforts in the course of discussion to persuade the Claimant to his point of view that it was now time for him to move on from a role in Business Continuity.

8. Because of the way Mr Shawcross approached the conversation of 5th. January, the Claimant thought that he was being told that he was too old for the job; and he thought that he knew the identity of a younger person who it was intended should take over from him – a Ms Nicola Nichol, who had from June 2010 held an appointment as head of Audit Group, Security and Fraud division. The bank actually had in mind appointing a Mr Brooker as Director of Business Continuity, a post at a higher grade than the Claimant, and not Ms Nicol; and in fact he was very much of an age with the Claimant. Contact had been made with Mr Brooker in October 2011, and he was interviewed in early January 2012 very shortly after the 5th. January meeting with the Claimant. The bank intended that although he would be formally offered a role in Information Risk, it would extend to Business Continuity as well: and when it did there might then be no more need for someone in the Claimant's position (paragraphs 120,123).

The Tribunal Decision

9. The Tribunal rejected the Claimant's general case that there had been age discrimination: Lloyds did not seek to move the Claimant from his then current post because of his age. However, the specific remarks on 5th. January about it being difficult for the Claimant "because he was not 25 anymore" were accepted as discriminatory. The basis for this was that the remarks were at least in part made because of his age – they would not have been said to him had he in fact been appreciably younger than he was. Though made as part of an effort to persuade the Claimant to agree to change that did not alter the fact that they were made at least in part because of age. They were detrimental because the Claimant considered them so. Age discrimination was thus made out, but to that extent only.

10. The Tribunal examined whether there had been a constructive dismissal from paragraph 219 onward. At 225, it summed up the matters it had referred to:

> **"We found that, viewed as a whole, there was here a cumulative course of treatment, culminating in the timing and manner of the communication and announcement of Mr Brooker's extended appointment, which did amount to a cumulative breach of the implied duty of trust and confidence."**

The matters which it had set out in the preceding paragraphs, which were summarised in paragraph 225, did not expressly include the reference to age made on the 5th. January. They did however, include a specific reference to the 5th. January – noting that on that date Mr Shawcross:

> **"conveyed to the Claimant for the first time that he had concerns about his performance serious enough to call into question that he should remain in his current role… Mr Shawcross effectively took a calculated risk that he could persuade the Claimant to see things his way, but that was not a proper way to go about the matter and the decision undoubtedly did some real harm to the employment relationship…"**

11. At paragraph 227 to 231 the Tribunal examined the reason for dismissal and asked if it had been 'tainted' by age discrimination. At 228:

> **"We … found that the remarks about not being 25 any more made at the 5 January 2012 meeting amount, as such, to acts of direct age discrimination. Was that sufficient to taint the constructive dismissal with being a discriminatory dismissal? We found the answer to that question to be finely balanced. We reminded ourselves that it is sufficient for the purposes of a discrimination claim, that the protected characteristic be a material contributory reason for the adverse treatment in question. It does not have to be the principal reason. However, while we found the specific remarks about not being 25 any more to amount to detrimental and less favourable treatment because of age, we did not find the Claimant's age to have been to any degree a factor influencing Mr Shawcross' desire to move the Claimant out of his role nor any other aspect of his conduct at the meeting. Nor did we find any age discrimination at work in relation to any of the other treatment which contributed to the constructive dismissal.**
>
> **229. How the Claimant was treated, overall, at the meeting on 5 January 2012 was certainly a contributory part of the overall treatment that amounted to constructive dismissal. As we have recorded, in his email of 20 March 2012, and during the grievance process, the Claimant highlighted the age discrimination issue; and we found that he did believe not only that Mr Shawcross wanted to replace him with Ms Nichol, but that in part, that was because of age. However, standing back, we also found that the main concern driving the Claimant, was the fact that Mr Shawcross wanted to get him out of**

his role, for, so far as the Claimant was concerned, no good reason, and, possibly, out of the business altogether.

230. While the Claimant's resignation letter mentioned the age issue, it was part of the wider issue of Mr Shawcross having been determined to remove him from post. Further, by that time Ms Nichol's resignation had been announced; and we have no doubt that what was, in fact, the final straw for the Claimant, was the news that Mr Brooker was to be Director of Business Continuity, which the Claimant saw as the de facto implementation of his own demotion. There was no suggestion that the Claimant perceived there to be any age-related issue as between him and Mr Brooker. Mr Leiper also noted that when, during his cross-examination, the Claimant recited all the things that the Respondents had done which drove him out, he did not mention the age-related issue from the 5 January meeting. Though we did not attach much positive weight to that, it was consistent with this not being a material factor ultimately affecting the Claimant's view of the position.

231. Standing back, we concluded that there was no general age discrimination on the part of Mr Shawcross, and that, by the time of the Claimant's decision to resign, the age-discriminatory remarks about not being 25 any more that had been made at the 5 January 2012 meeting did not form a material contributing element of the cumulative treatment undermining trust and confidence which led to that decision. We therefore, ultimately, concluded that the constructive dismissal was not tainted by age discrimination."

Grounds of Appeal

12. The grounds are directed towards securing a finding that the discrimination identified at paragraph 203 was a cause of the dismissal which the Tribunal found established as a contractual breach at paragraph 225. To do so the Claimant has to demonstrate that in the passages just set out there was an error of law.

13. The Notice of Appeal took five headline points:

(1) "**Section 136 of the Equality Act 2010 and Kuzel**", arguing that the Tribunal erred by holding that it could make findings of fact which had not been advanced by the Respondents as part of their case, and had wrongly applied **Kuzel v Roche** [2009] ICR 799 (see paragraph 93);

(2) "Shifting the burden of proof", namely that the judgment did not make it clear whether and if so how it applied the burden of proof provisions in section 136 **Equality Act 2010**;

(3) "Failing to consider the consequences of its finding that the Second Respondent (Shawcross) made the age discriminatory remark "you're not 25 anymore" to the Appellant on 5 January 2012": this ground, summarised as "lying" in submissions, was to the effect that once the Tribunal had concluded, as set out above, that the probability was that, contrary to his repeated denials, Mr Shawcross had in fact used those words, the Tribunal should have approached his evidence thereafter with extreme caution - they had effectively convicted him of lying to their face, and should not have been so prepared to accept other parts of his evidence;

(4) "Failure to take any or any proper account of the lies told by the Respondents and their witnesses in their evidence": the Tribunal should have made inferences from this in favour of discrimination being the reason; and finally

(5) "Age Discrimination tainting the Appellant's resignation": arguing that the Tribunal had failed to apply the test of whether the discrimination in question was "more than minimal": or alternatively, that the conclusion the Tribunal reached was perverse.

14. The oral argument was confined to consideration of the last three of these, running (3) and (4) together: the first two were not pressed. Ms Romney QC, who appeared for the claimant, accepted that where the Tribunal identified the reason why acts had been done, appeal to the burden of proof provisions was then otiose, although she initially had set out in her skeleton argument to challenge the approach taken by Elias J. in **Bahl v Law Society** [2003] IRLR 640 (especially at paragraph 101) and by Langstaff J in **Birmingham City Council v Millwood** [2012] Eq. L.R. 910, (paras. 25-27) if necessary to do so, and to argue that the approach of the Court of Appeal in **Kuzel** recognised that discrimination cases fell into a special class, requiring a close application of the burden of proof provisions in a way which might be unnecessary in cases which (like that considered in **Kuzel** itself) were not

discrimination claims, and in which the Tribunal could simply focus on identifying the reason for the conduct in question, without getting too hung up on the burden of proof.

15. Ms Romney, eschewing "perversity" as a ground although that had been argued in the Notice of Appeal, argued that even on the basis of the Tribunal's findings the dismissal was tainted by discrimination. In summary, the discriminatory remarks were made, they were said as part of persuading the Claimant to stand down from his then post, the conduct of Mr Shawcross included making those remarks, damaged the relationship (it would have been sufficient had it been likely to do so) and was compounded by the absence of any explanation for his saying so. The making of the remarks was part of a course of conduct. To extract the remarks from being an integral part of that course of conduct made no sense.

16. Under the heading of "Lies" Ms Romney QC argued that the Tribunal did not deal with the implications of its finding that Mr Shawcross had actually said that which he denied saying on 5th. January 2012. She submitted that the conclusion of the Tribunal, though not expressed in these terms, was undeniably that therefore Mr Shawcross had lied in his evidence to it. It was not a one-off lie, since it followed that the Claimant's evidence that Mr Shawcross had said to him on 20th March 2012, by reference to the age discriminatory remark of 5th. January "I was only joking" was true, and Mr. Shawcross's denial of that too was false. The fact that he had lied was intricately bound up with the process of seeking to remove the Claimant from the job he was doing to a different one, and gave rise to the inference that he had indeed intended the remark to be a deliberate reference to age: if it was non-discriminatory, why would he deny it? Thus the credibility of his denial that age had anything to do with his desire to move the Claimant from his post was in question. In the light of this, the Tribunal should have scrutinised the evidence with very considerable care, and explained its reasoning more fully. In particular, the remark to the effect that the claimant was "no longer 25" was accepted by the

Tribunal to have been inherently discriminatory. When considering if an act of discrimination had occurred (the general allegation being that the bank had sought to move the Claimant from his post in Business Continuity because of his age) it was necessarily an error for the Tribunal not to ask what was the reason for the lie, since it could so obviously have been that he did not want to admit to discrimination As Ms Romney memorably put it: "If you can't raise an inference of discrimination from discrimination, what else can you raise it from?". Surely, she submitted, the burden of proof must have passed – but other than in paragraph 90 there was no indication to show that the provisions of section 136 had been applied, let alone honoured.

17. In answer to the "lies" point, Mr Leiper submitted that if a Tribunal found that a witness had deliberately set out to mislead it would have to approach his evidence with caution. But there was no suggestion here that the Tribunal were blind to the faults of witnesses. Its approach was meticulous and careful (words used, I note, by Mr Justice Mitting on the Sift of this case, when he thought the appeal raised no arguable point of law). It might be a different case had the Tribunal found that Mr Shawcross was an egregious liar, but it did not. In any event, the "lying" - which the Tribunal did not characterise as such - did not detract from its approach to the overall decision. As Lord Hope pointed out in **Hewage v Grampion Health Board** [2012] ICR 1054, SC at paragraph 32:

> **"…it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as for the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."**

18. Mr Leiper also drew attention to Lord Hope's observations in paragraph 26 in the same speech:

> **"It is well established, and has been said many times, that one ought not to take too technical a view of the way an Employment Tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."**

19. In my view, the "lying" ground, whether or not associated with an appeal to the burden of proof provisions, cannot succeed. A Tribunal is obliged to find the facts. Its function has been likened to an industrial jury: in criminal trials, juries as primary fact finders are repeatedly told by judges that in the case of any witness they may accept all, reject all, or accept some and reject the rest of that which any witness says. The fact that a witness is untruthful in respect of one matter does not carry as a necessary implication that the witness is untruthful as to others. It raises the possibility that he might be, but it is always likely to be too cavalier an approach for a fact-finder to reject all of that which a witness says merely because on one point he is thought clearly to be telling an untruth. What is required is a careful and conscientious examination of all the facts. It is not the usual case that a witness is so discredited in his testimony that a Tribunal considers that it must reject all that he says, unless persuaded by corroborating independent evidence that in some respects it is accurate. Far more usual is the case where for a variety of motives or reasons or problems of recollection, a witness will be unreliable in part, but reliable in other parts. I am wholly satisfied that the Tribunal here were under no misapprehension about the evidence. It is clear that they examined it critically. It was for the Tribunal to decide what the reasons were for attempting to move the Claimant on from his post. It was not left in a state of uncertainty such as that referred to by Lord Hope in **Hewage**. It was clear as to the motive of Mr Shawcross, notwithstanding its own conclusion that the Claimant's account of the conversation of 5th. January was on balance of probabilities to be preferred.

20. The Appellant's argument, if accepted, carries with the danger that a finding on balance of probability that one account is preferred has to be translated into a conclusion that the witness deliberately lied, to be used as a foundation stone for further arguments about the probabilities of other evidence. This is to elevate it to a status which logically it cannot have. A 60% likelihood that X is the case, and if X is taken to be established, a 60% likelihood that Y

is then the case gives mathematically the result that Y is only 36% likely to have occurred. Evidence cannot, however, be reduced to mathematical formulae: the appeal to percentages is only to demonstrate that facts have to a greater or lesser extent uncertainty about them, which uncertainties can only be resolved ultimately in the conclusions of the fact finder, provided only that he approaches the matter properly in accordance with the law. It is for the Tribunal to judge the overall effect of the evidence, having regard to all its uncertainties and infelicities, in order to establish on balance of probabilities whether a factual finding legally necessary to satisfy a rule as to liability has been made out.

21. The Claimant here submitted (paragraph 20, Ms Romney's skeleton argument) that he was not contending that one act of discrimination ineluctably led to the conclusion that other alleged acts were proven. However, where such an act was committed then lied about, and is closely interlinked with other complaints, an Employment Tribunal should be "very cautious in ascribing a motive to a Respondent which the Respondent has not given himself". This falls short of an assertion that an Employment Tribunal cannot do so. For it to act contrary to the principle asserted by the argument, there would have to be irrefutable evidence that the Employment Tribunal had not been cautious. There is none.

22. It is not for the Appeal Tribunal to re-assess the evidence of a witness, short of perversity or material misapprehension of fact. It is enough to dispose of the appeal on this ground to hold that the decision was one of fact, open to the Tribunal.

Repudiatory Breach

23. Ms Romney argued that the Tribunal had found at paragraph 225 that there was a cumulative course of treatment which amounted to a cumulative breach of implied duty of trust and confidence. She submitted that it was unclear why discriminatory conduct was part of the

breach which amounted to a repudiation of the contract, whilst simultaneously not constituting part of the Claimant's decision to resign. Second, she submitted, in concluding that Mr Shawcross had no discriminatory motive for his desire to move the Claimant out of his role, the Tribunal was addressing the wrong question: that was whether there was a breach of trust and confidence, which had to be objectively viewed. The resignation letter had mentioned the age issue (paragraph 230): why, therefore, was it not treated as part of the reason for accepting the repudiatory conduct of the employer as terminating the contract? In any event, there was a clear finding that when he met a Mr Mapp in March the Claimant had told him about the comment made on 5th. January. The grievance was rejected on 8th June 2012. It found insufficient evidence that the offensive remark had been made. It was on 12th July 2012, following that, that the Claimant resigned. There was thus a clear link between the words used on 5th. January and the resignation: evidence that it was a concern which repeatedly surfaced. To conclude otherwise was wrong or perverse.

24. Mr Leiper responded by noting that the complaint was as to the relevance of the discriminatory behaviour on 5th. January to the breach of the term of trust and confidence. Ms Romney had accepted that the Tribunal had not misdirected itself as to the test of materiality which it applied at paragraph 231. Her complaint was that, on the facts the Tribunal could not have come to the conclusion it did: she was asserting perversity, and no other error.

Discussion

25. The Tribunal's reasoning must be identified. It was careful not to say that the discriminatory words of 5th. January were actually part of the breach it held repudiatory. Rather, what it said about 5th. January 2012 was that Mr. Shawcross's approach was not a proper way to go about telling the Claimant that there were concerns about his performance serious enough to call into question whether he should remain in his Business Continuity role.

The Tribunal did not separately identify the discriminatory act as part of that breach. Rather, the Tribunal found a breach in the employer adopting a course of conduct which entirely concerned the way in which it had approached seeking to move the Claimant out of his current role, and to appoint someone else.

26. This was a point the Tribuinal returned to at paragraph 229: the "main concern" driving the Claimant was the fact that Mr Shawcross wanted to get the Claimant out of his role, for no good reason so far as the Claimant was concerned: it was how he was treated overall on 5th. January, rather than in the specifics of the conversation, which contributed to the constructive dismissal. The same approach is apparent in the opening words of paragraph 230.

27. At paragraph 231 it concluded that, in reality, the age discriminatory remarks were trivial (not material) in the cumulative course of conduct.

28. The issue posed for the Tribunal's consideration was not whether there was a repudiatory breach. That the Tribunal had found. It was whether discrimination, as such, was a cause of the dismissal. On its findings, it was not. Although there was discrimination, and although I would be inclined myself to think that viewed alone and objectively it might have been a repudiatory breach, by the time of the resignation far more had happened. The Tribunal here did not fall into the error of concluding that it had to look for *the* effective, as opposed to *an* effective, cause of the resignation. The effective cause was the breach. The breach was contractual. It was not also an act of discrimination, in respect of which the Claimant could sue for damages on the footing that it was.

29. The heading to the Tribunal's discussion paragraphs 219 to 234 was not just "constructive dismissal", but had the additional words "and the dismissal-related claims". The

real question for determination was whether the resignation was because of the discrimination in any real causative sense. The conclusion that it was not was one of fact: a robust approach has to be taken by courts and tribunals to determining whether of not a particular act has caused or materially contributed to a given effect, for the purposes of determining which of two parties should suffer a given loss – here, the damage caused to the claimant by the discrimination for which he could claim compensation. The Tribunal thought carefully about whether, here, for those purposes, the discrimination involved in telling the claimant he was no longer 25 had played any material part in the breach in response to which the claimant resigned. It did so by asking (appropriately) whether it had "tainted" the dismissal. Its conclusion that it did not was one of fact, as to which Mr. Leiper is right to say that, in the absence of any error of approach, the high hurdle of perversity would have to be overcome before it could be upset on appeal.

30. As to Ms Romney's argument that it must have been part of the breach, objectively viewed, such that it was wrong for the Tribunal to consider the reasons why Mr. Shawcross used the words he did (since it was the reasonable perception of what was being said, rather than the reason why it was said, that was critical in asking whether it was a contractual breach) the answer is that the Tribunal did not regard it as any more than a trivial part of the breach it identified, if indeed it thought it any part at all. It took an overall view of what happened on 5th. January, placing the age remarks in context. The expression of a desire that the claimant should move, because of under-performance, was what objectively risked damage to the relationship of trust and confidence, when taken together with later events. It was entitled to take an overall view. So viewed, it was open to the Tribunal to decide as it did as to the materiality (overall) of the words in creating that impression. It was accepted that the Tribunal's approach to materiality was not in error. This was not a case in which the Tribunal wilfully ignored an obviously contributing act of discrimination as causing the resignation. In order to decide that the discrimination was not the cause of the resignation, the Tribunal had to be satisfied, on the

facts that it was in no material part such a cause. It thought long and hard about that matter and explained its reasoning with care. In the event, I cannot say that it erred in law in the conclusion it ultimately reached.

31. The answer to the question posed in paragraph 4 above, interesting though the question is as a matter of principle, therefore lies here in the facts, seen (as they always have to be) in context.

32. It follows that on the grounds, whether as originally advanced, or as argued before me, the appeal fails and is dismissed.

33. Finally, I should like to pay tribute to the high quality of the argument before me from both advocates.