Appeal No. UKEAT/0197/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 November 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MS J LOCHUACK — APPELLANT

LONDON BOROUGH OF SUTTON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAKE DUTTON (of Counsel) Direct Public Access
For the Respondent	MS ROBIN WHITE (of Counsel) Instructed by: South London Legal Partnership Gifford House 67c St Helier Avenue Morden SM4 6HY

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

An Employment Tribunal found a series of incidents in which the Claimant's line manager had behaved in what could have been a demeaning and humiliating way towards her, which could have been repudiatory (depending on findings as to the particular context), but did not credit the Claimant's evidence as to her reaction to some of these events, since it was exaggerated and unreal. It used words which suggested that it might have been looking for one reason only for her resignation, and said it was "more probable" that it was to obtain work as a locum social worker at higher pay than it was a response to the Employment Tribunal of which she now complained.

The Employment Tribunal had not directed itself clearly as to the law it would be applying, nor showed that it appreciated that the test for constructive dismissal was satisfied if a repudiatory breach was in part the reason for the Claimant going. Since it appeared to have given some credit to some reaction by the Claimant to the most recent of the insults of which she complained, it may very well have applied the wrong approach (that shown to be erroneous in **Meikle**, **Abbycars**, and **Wright v Ayrshire**).

A submission that whether an employee had responded by resignation to a breach was to be assessed objectively, the test being whether an employee in such circumstances could reasonably have resigned in response to it, was rejected.

The case was remitted to the same Employment Tribunal for determination in the light of further submissions, but no further evidence.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For reasons expressed on 30 September 2013 Employment Judge Tsamados, at London (South), found as a fact that the Claimant, who claimed that she had been unfairly dismissed, had not been dismissed at all and therefore had no claim.

The Background

2. The Claimant was employed for just over a year and a half as a non-qualified social worker. She resigned from the employment on 21 November 2012 by letter but was required to work out her notice, which expired on 18 January 2013. It was only after that that she first said, in any permanent form, that she had resigned because of the way in which her employer had treated her.

3. The Tribunal found that on 22 May 2012 her line manager, Ms Nwaosu, spoke to her in a loud voice in front of other employees (it rejected the expression "screamed at her at the top of her voice") in order to express views about a particular case. Later, she said that Ms Nwaosu had spoken down to her at a one-to-one meeting and therefore indicated a lack of support.

4. In June 2012 compassionate leave in respect of a bereavement had been approved verbally by Ms Nwaosu, but on return from that leave, the Claimant was told the time would be taken out of her annual leave.

5. In July she was shouted at by Ms Nwaosu to "print this out" in respect of a particular assessment: Ms Nwaosu commenting to another social worker that she always had to tell the

Claimant to print out her assessments because her work was so bad that she needed a pen to do the corrections.

6. In September 2012 she was criticised publically by Ms Nwaosu, on this occasion because a particular point was made that her report was good, with the added comment that Ms Nwaosu was surprised because she was expecting the assessment to be bad.

7. In October or November, the date being unclear, Ms Nwaosu came to the door of the tea room, where the Claimant was seated amongst others, and said in a loud voice to the Claimant "Did you know that you failed the NQSW?" She was thus told of her failure, which was itself unusual, in front of other members of staff.

8. The Tribunal thus described that which, objectively viewed, could amount to demeaning and humiliating conduct toward the Claimant by a person who had the ability to bind the employer and whose act therefore was the employer's act. In particular, belittling an employee in front of fellow employees can, depending of course upon the context, amount to conduct which can be held to be in breach of the implied term of trust and confidence (see **Protopapa v Hilton International Hotels Ltd** [1990] IRLR 316).

9. However, the Tribunal also found that the Claimant's evidence about the effect of these incidents upon her was not in general terms to be credited. Thus it did not accept that the effect which the Claimant said the act in May 2012 had had upon her was anything like as great as she had claimed (see paragraph 78) and described her account as "not credible". Similarly the Claimant's evidence as to how the incident in June 2012 affected her was thought "not credible" (paragraph 80). The incident of shouting in July 2012 was not credible,

disproportionate to what happened and unlikely (paragraph 81). The fact that she had been criticised by Ms Nwaosu in September 2012 was accepted, as apparently was the evidence about the way in which the Claimant was told of her failure in respect of the assessment.

10. Against this background of fact the Tribunal had to determine whether or not the Claimant had made out a case that she had been constructively dismissed. Her case was that it was these actions which had, at least in part, caused her to resign. The law is, in my view, clear. For there to be a constructive dismissal there has to be a breach of contract by the employer towards the employee, which is of sufficient severity to be regarded as repudiatory. This must be established objectively: it cannot be established simply because a Claimant says how she felt about what had happened. The question for the court, if the contract term said to have been broken is the implied term of trust and confidence, is whether the employer has conducted itself in such a way as was, without reasonable or proper cause, calculated or likely to destroy or damage the relationship of trust and confidence which the employer and employee should each have in the other (see a number of authorities, notably **Malik v BCCI** [1997] IRLR 462 HL).

11. If a Tribunal is satisfied that there is such a breach (bearing in mind that in order to reach that conclusion it must be satisfied that the breach is serious, since any breach of the implied term of trust and confidence will inevitably be repudiatory: see **Morrow v Safeways Stores** [2002] IRLR 9) it will have found the first essential requirement in favour of the Claimant. This Tribunal rightly reminded itself at paragraph 63A (originally a rogue 87 was inserted between paragraphs 63 and 64, which in argument we have called 63A), the conduct needs to be repudiatory in nature for there to be a breach of the implied term of trust and confidence. It

noted, correctly, that that tallied with the requirement that the damage be *serious* potential damage to the employment relationship as opposed to merely potential damage.

12. Having determined that there is a breach of contract which is repudiatory, a Tribunal will have recognised a position in which the employee has a choice. The employee may choose to continue in employment despite the breach. Alternatively the employee may accept the repudiation by the employer as putting an end to the contractual relationship between them. In other words the employee would be entitled to resign and could claim constructive dismissal. This choice, however, has to be exercised to be effective. Thus the law is that the employee must, at least in part, resign because of the employer's breach of contract. To resign entirely for other reasons is not to exercise the option of accepting the repudiation. Thus, there may be situations in which, although an employer is in repudiatory breach, the employee's reasons for leaving have nothing whatsoever to do with that breach, and therefore there is no constructive dismissal.

13. In **Meikle v Nottingham County Council** [1995] ICR 1 the Court of Appeal made it clear that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and (at paragraph 33)

> **"… that the employee may leave because of both those breaches and another factor, such as the availability of another job."**

Keene LJ went on to say in the same paragraph:

> **"The proper approach … 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 the 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 NCC."**

14. In **Wright v North Ayrshire Council** [2014] IRLR 4 the EAT repeated and emphasised that approach. It had too often been the case that the words of Keene LJ had not been emphasised to or adopted by Employment Tribunals. The search which the Tribunal had factually to undertake was not to see whether there was a cause, and if so what that cause was, but to ask the critical question identified by Elias J, as President of the Employment Appeal Tribunal, in **Abbycars (West Horndon) Ltd v Ford** [2008] All ER (D) 331 at paragraph 34:

> **"It appears that the crucial question is whether the repudiatory breach played a part in the dismissal."**

The Tribunal Decision

15. The Tribunal, having found the facts summarised above, set out the law it was to apply. The parties to the appeal make no criticism of the law insofar as it is set out by the Tribunal except that the Tribunal did not remind itself of the principle in **Meikle**, nor did it refer to **Wright v Ayrshire**, perhaps for the very good reason that by then that case had not been reported. But undoubtedly **Abbycars** had. So also had the earlier case also relied upon in **Wright**, of **Logan v Celyn House Limited** [2012] All ER (D) 04. In short, all the law was one way.

16. Having then recognised the questions it had to answer, it did not make any finding about whether the conduct it had objectively identified was or was not repudiatory in nature, whether the incidents were taken individually, or collectively. It did, in that respect, say at paragraph 86:

> **"Given that this is a last straw case without the last straw there would appear to be no basis on which the Claimant has grounds to resign claiming a constructive dismissal. The Claimant's [sic] submits that this does not prevent a constructive dismissal from standing."**

17. This comment was made because the Claimant had complained that after she had handed in her notice she was told that she would not be given a reference without working out the

notice in full. That was said to be the "last straw" as the Tribunal understood it. The submissions for the Claimant may have led it to that conclusion since at point 7 in the Claimant's closing submissions there was a suggestion that this was a "classic" last straw case. However, the issue in the issues list before the Tribunal was clear. That was (issue 6) "Are the matters as the Claimant alleges individually or cumulatively a repudiatory breach of the implied term?". What mattered was the evaluation of what had happened up until the Claimant's letter of resignation was submitted, after which no further breach would cause her to resign because she had already done so. The incidents which took place before that letter are those which I have set out above. It was for the Tribunal, if it wished, to give its value judgment on those incidents, whether taken singly or collectively, and if collectively, whether some of them together amounted to such a breach.

18. The main reason why the Tribunal did not accept that the Claimant had resigned in response to the breach was set out in paragraph 93. Evidence had been given by Ms Thompson for the employer, whose evidence in general terms the Tribunal preferred in all matters on which there was a conflict with that of the Claimant, to the effect that (see paragraph 45) the Claimant had explained that she was moving on because she wanted to experience another local authority and that money was a deciding factor. The Tribunal accepted that there had been a discussion about that.

19. The Tribunal had before it a Claimant who was saying that part of the reason at least for her dismissal, her resignation, was that she had been treated in the degrading and humiliating way she had. It also had to take into account the evidence of Ms Thompson as to the reasons for moving on given in this conversation. The Employment Judge said, paragraph 93:

> **"In all the circumstances I find on balance of probability that the Claimant resigned when she did more probably because she wished to undertake locum work so as to earn more money. I accept that she had difficulties with Ms Nwaosu which she had reported to Ms Thomson with**

> **regard to one incident but had otherwise not raised. However, I find her evidence as to the handful of incidents to be overstated and exaggerated. She did not raise these matters at the time of her resignation, in her resignation letter or in specific terms in subsequent correspondence prior to bringing these proceedings. I do not find the matters that she sets out as the events on which she resigned to be the reason for her resignation."**

20. Mr Dutton, who appears on behalf of the Claimant, argues, first, that the Tribunal was in error of law here because it was looking for *the* reason. That was the expression it used. This was compounded by the failure of the Tribunal to set out any of the applicable law. It may very well have thought that it should identify the principal reason, as opposed to identifying all the operative reasons, of which the repudiatory breach might be one. He further submitted that whether or not there was a reason for resignation was to be determined objectively and not subjectively, as the Tribunal plainly had. The test he propounded was:

> **"Could a reasonable employee in the circumstances in which the employee was actually placed have resigned at least in part to the repudiatory conduct?"**

He maintained that this was the appropriate test to apply and, if so, the Tribunal could not have failed but to have held that the resignation here was at least in partly in response to what could very well be repudiatory conduct. He submitted this followed logically from the decision in **Meikle** at paragraphs 33 and 37. It was supported, he submitted, by the reference in **Wright v Ayrshire**, where at paragraph 10 the Judgment says "The common law approach looks at the conduct of the parties objectively."

21. He submitted that it was incoherent, and causative of considerable practical difficulty, that the test as to whether there had been a repudiatory breach should be objective, whereas the question whether an employee had resigned in response to that breach was to be approached subjectively. When the recent decision of this Tribunal, in the case of **Mruke v Khan** UKEAT 0241/13/DM, Judgment 25 July 2014, was pointed out to the parties, he took time to consider that case. It was one in which the Tribunal had rejected a claim for constructive unfair

dismissal in which the Claimant, who was a migrant domestic worker, had not been paid the national minimum wage to which statute entitled her, that being undoubtedly a repudiatory breach of contract by her employer. She had left the employer's service, alleging a number of breaches of contract toward her. She did not, however, give evidence to the Tribunal as to the reason for her leaving. The reason could not, in the view of the Appeal Tribunal, safely be inferred from the surrounding circumstances as having been the failure to pay the money to which she was entitled in law. It could have been some other reason. The Tribunal was thus entitled to conclude that it had no sufficient evidence as to the actual reason for the employee leaving. If, in that case, the principle for which Mr Dutton contends in the present case had been applicable, there would undoubtedly have been a finding that (objectively viewed) the Claimant had resigned because of the repudiatory breach.

22. In my view, there is no substance in Mr Dutton's contention so far as this is concerned. A reason for resignation has necessarily to be the actual reason the Claimant has. To establish it requires evidence. It needs the Tribunal to assess whether it accepts the word of a Claimant who says, after the event, that she or he resigned because of a particular breach by the employer. But it does not require the Tribunal to find whether objectively she should be regarded as having that reason such that, irrespective of what were the actual reasons for her going, nonetheless the Claimant should be said to have a reason which she simply did not have, purely because that is what the reasonable Claimant would have.

23. This latter approach, to my mind, would be contrary to the way in which the law has been understood and applied throughout the legal history of contractual breach and repudiation, in which, as I have set out above, the question is whether the party suffering a repudiatory breach made a choice. A choice is not something to be assessed objectively, on the basis of what it

would be reasonable to expect or how a person would probably act. It is to be assessed by asking what choice the Claimant actually made. Objective fact is relevant, since it may help a Tribunal to assess whether the Claimant actually made the choice the Claimant says the Claimant did. It may establish that an alleged choice was not the actual choice. But it is not in any sense determinative: the enquiry is into what the reason actually was for the Claimant leaving. As the judgment in **Wright v Ayrshire** points out, there may be other reasons too. There is no need to find a predominant or effective or main reason, so long as acceptance of a repudiatory breach is at least part of the reason for leaving.

24. Returning, then, to the present case. Ms Wright, who appears for the Respondent as she did below, submits, in an effective and succinct argument, that the Tribunal here had a stark question to resolve. Did it accept (in its terms, "credit") the Claimant's account that she resigned at least in part because of the breach? She asks me to read paragraph 93 as resolving that question. The second, third and fourth sentences of paragraph 93 all relate to the Claimant's overstatement and exaggeration. The Tribunal was here, she submits, explaining why it came to the conclusion that the reasons she gave in evidence to the Tribunal for having resigned were not actually any part of her real reason. The Tribunal did not commit the error of saying "the principal reason", implying that there were others. She had said, in her response to the closing submissions of the Claimant, that the test was whether the breaches or any of them had been "the cause of her resignation to any extent". The Tribunal was thus alerted to the proper test.

25. She submitted that given the careful way in which the Tribunal had separated what had happened, on the one hand accepting the actions by the employer, and on the other concluding that it could not or could not entirely accept the Claimant's reactions as being accurately

expressed, it was here grappling with whether it accepted evidence, ultimately self-serving, which the Claimant gave as to her reasons for resigning. So understood, paragraph 93 correctly applied the law. At least no error of law could be demonstrated from within it.

Conclusions

26. My mind has swayed in both directions as to the proper construction of the Tribunal's Decision. It must be read as a whole. Particular sentences should not be subjected to over-close analysis. The use of the words "the reason" suggests only one, but it does not necessarily indicate that the Tribunal searched for one, as opposed to one amongst a number of reasons. The words at the start of paragraph 93 use the words "more probably because", which suggests doubt and hesitation and suggests that there was a balance to be struck between possible competing reasons for leaving. Although the Respondent has correctly identified a number of occasions when the Tribunal was critical of the Claimant's credibility, it did not reject the factual evidence which she alone gave in respect of the incidents which it recorded.

27. Indeed, in respect of the last of the incidents in time before the resignation letter was written, that referred to at paragraph 83 (and referring to paragraph 34 and paragraph 82) the Tribunal appear to be crediting not just the facts of what the employer did but to an extent the reaction to which the Claimant deposed.

28. On 21 January 2013, three days after the Claimant left, she wrote a letter which said at paragraph 4:

> **"Because of the degrading and inhumane treatment I received from management, I was left with no option be [sic] to tender my resignation (with a notice period fully served)."**

The Tribunal referred to that at paragraph 90. It regarded the terms as "somewhat strident". It thought the terms were "overstated". But Mr Dutton points out that it did not reject them as lacking some kernel of truth. Accordingly, it appeared that the Tribunal, in approaching its decision at paragraph 93, had credited to some extent the Claimant's speaking of the conduct which had occurred towards her and of her reaction to it. Given that she had stated that she had some reaction to it, a matter which was acknowledged by the Tribunal when it referred at paragraph 82 to the Claimant's appreciation of what had happened in September as having been coloured by "her experience in July 2012", which again showed that at least to some extent it accepted her evidence that she had been affected by what had happened, it becomes entirely unclear whether the central paragraph at 93 was assessing which of two rival and distinct contentions the Tribunal was preferring as the major cause of the resignation, therefore taking them into account in reaching a balance as between the two to determine which was the reason, or whether it was intended to go so far as to exclude the Claimant's evidence that she had resigned for the reason which she had given.

29. I would have expected the Tribunal to say in clearer terms that it rejected her evidence as having no truth if it did. It may have done so. But my reading of what it said leaves me in considerable doubt as to whether it applied the correct test. If I am in that position, then the Tribunal has, in my view, failed clearly to state why the Claimant has lost and therefore is in error of law at least to the extent of not setting out its reasons clearly. It follows that, in my view, the Tribunal's decision is one which cannot stand.

30. The next question is whether the Tribunal, in what it said at paragraph 86, effectively and properly precluded there being any constructive dismissal in this case. Neither party seeks to contend that paragraph 86 is sufficient on its own to do so.

31. Because this case will be remitted to the Tribunal, I should say something about it. Mr Dutton submits that the expression "last straw" may be appropriate in one of two situations. One is that it is the additional piece of the picture which makes all the difference, taken cumulatively with what has gone before, a usage which derives from the expression "the straw which broke the camel's back". But, he submitted, it may also be used in another sense. Thus he referred to **Logan v Commissioners of Customs and Excise** [2004] IRLR 63 in which at paragraph 30 the last straw doctrine had been stated in terms of a series of actions on the part of the employer cumulatively amounting to a breach of the term, although each individual incident might itself not do so, but in which the judgment at paragraph 31 went on to say:

> **"That case also established another important issue of principle stated by Glidewell LJ at p.469 in these terms:**
>
> > **'If the employer is in breach of an express term of a contract, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a … start … of a series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms? In my judgment the answer to this question is clearly "yes".' "**

In other words the effect there is to resuscitate the effect of previous actions so that, taken together with the latest action, it can be said that there has been a breach of contract.

32. I do not think it necessary to resolve a case of constructive dismissal by analysing what is meant by "last straw". The issue which needs to be addressed is whether there has been a repudiatory breach. That may be obvious even if only one incident has occurred. It may only be clear when a number of incidents are taken together, where it is the effect of those incidents taken together that amounts to a breach. If some of the alleged incidents are found not to have occurred, a Tribunal must have regard to those which it has found did occur and ask objectively whether, in the particular context of the case, they amounted to a breach of contract and

whether, in the particular context of the case, that breach was so serious as to be repudiatory. It may be that an employee puts up with a breach of contract which is, properly analysed, repudiatory because he would prefer to retain his employment rather than be cast adrift on the labour market. In such a case he might very well spend a period of time without taking any action, or actually take positive steps which would indicate that he wished the contract to continue notwithstanding the breaches which had occurred. But they would remain breaches. A failure to elect to treat a contract as repudiated does not waive such breaches. It merely declines to make the choice. If a later incident then occurs which adds something to the totality of what has gone before, and in effect resuscitates the past, then the Tribunal may assess, having regard to all that has happened in the meantime - both favourable to the employer and unfavourable to him - whether there is or has been a repudiatory breach which the employee is now entitled to accept. If so, and if the employee resigns at least partly for that reason, it will find in that case that there has been a constructive dismissal.

33. Finally, for completeness, the Tribunal here has not made any finding, in terms, as to whether the conduct which it did find established amounted to a breach such as would justify resignation. It must apply the test which is set out clearly in **Wright v North Ayrshire** and in **Pearce v Receptek** [2013] UKEAT 0553/13 (see paragraphs 12-13), but I am unable to say, nor is it argued before me that, on that test and these findings of fact, it would be wrong in law to conclude that there had been repudiatory behaviour by the employer. There may have been. But all depends upon the evaluation by the Tribunal of those acts, seen in context.

Disposal

34. It follows that, in my view, the Tribunal may well have adopted the wrong approach in reaching its conclusion at paragraph 93. It might have adopted the correct approach. But, for

the reasons I have given, it is unclear. The Tribunal hearing this case on remission (for it will be remitted; both Counsel now agree on that) will have to consider the facts by application of the proper test. Was any repudiatory conduct by the employer part of the reason for the Claimant resigning? That involves two matters. The first is the identification of whether the conduct was repudiatory, applying the test, which is trite law, which I have set out, and second involves finding the actual reason or reasons which the Claimant had.

35. Mr Dutton asks that the matter be remitted to a fresh Tribunal. Miss White opposes that. I reject Mr Dutton's submissions. He bases himself upon paragraph 46 of **Sinclair Roche Temperley v Heard & Anr** [2004] IRLR 763. As to the considerations there identified it seems to me proportional, even though this case was a short case, for the matter to be remitted to the same Tribunal. The principal reason that Mr Dutton argued against that was what he called "second bite", and the concern that the Claimant might feel that the Tribunal had decided the issue. In my view the real problem is a failure to demonstrate adequate reasoning by the Tribunal: from the words it used, it may well have had entirely justifiable reasons for reaching a conclusion properly in law, or it may well have applied the wrong test. There can be trust, in accordance with paragraph 46.6 of **Sinclair Roche Temperley v Heard**, in the professionalism of this Tribunal to approach the evidence it has already heard in the light of any further submissions that the parties may wish to put before it so as to answer the questions which I have posed which arise out of that evidence and its evaluation, and if it applied the right test to make it clear what were the reasons for its initial decision or, if it should recognise that it applied an erroneous test by looking for a principal, or "the" reason to the exclusion of others, then what its conclusion is.

36. Accordingly this case is remitted to the same Tribunal to determine the issues between the parties in the light of further submissions but no further evidence.

37. A point arose between the parties as to whether the incident about which the Tribunal speak under the heading "October/November 2012" occurred before or after the Claimant's letter of resignation. Some of the facts tend one way; some the other. I have not found it necessary to resolve this issue for the purposes of this appeal, but the Tribunal may wish, if it considers it relevant, to resolve that in the light of the further submissions of the parties, clarifying which it intended and the extent, if any, of any uncertainty as to the precise date in relation to the letter of resignation.

Costs

38. The successful Claimant asks for the costs of this appeal. As has recently been held by the Appeal Tribunal in another division, where an appeal succeeds, then although it remains a matter of discretion, the costs paid by the successful Claimant will in general be repaid under the rule, which provides that if the Appeal Tribunal allows an appeal in full or in part, it may make a costs order against the Respondent, specifying that the Respondent pay the Appellant an amount no greater than any fee paid by the Appellant under a notice issued by the Lord Chancellor (Rule 34A(2A) of the **Employment Appeal Tribunal Rules 1994**). Here the Claimant has succeeded. Miss White argues that the full amount of the fees paid, which are £1,600 in total, should not be repaid much of the argument advanced was unnecessary for the appeal to succeed.

39. Whereas I have some sympathy with that argument, because the central point was really the simple question whether the Tribunal's Judgment should be read as indicating that it may

have applied the wrong test and it was therefore unnecessary, as a starting point, to explore whether the Tribunal was right or wrong in its approach to whether there had been a repudiatory breach and whether it was right or wrong in its approach to whether there had been a last straw, it is right to say that the Claimant did address both. This was in case the appeal, though succeeding on one ground, did so only for the appeal to be denied because, in any event, it could not succeed given findings on the other two points. Exercising my discretion in this particular case, though not without some sympathy for the way in which the appeal has been somewhat extended by points which were ultimately without substance, I have concluded that the Respondent should pay the Claimant £1,600, refunding the fees.