Appeal No. UKEAT/0034/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 September 2014
Judgment handed down on 6 January 2015

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

WEST SUSSEX COUNTY COUNCIL APPELLANT

MR F AUSTIN RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Peter Doughty (of Counsel) Instructed by: West Sussex County Council Legal Services County Hall - West Street Chichester West Sussex PO19 1RQ
For the Respondent	Mr Francis Austin (The Respondent in Person)

SUMMARY

SEX DISCRIMINATION - Comparison

Unfair constructive dismissal; sex discrimination. The Claimant resigned from his employment with the Respondent following a complaint having been made of his harassing another employee. He claimed that the implied term of trust and confidence had been broken by the employer who prejudged the issue, failed to follow its own policies on disciplinary matters and discriminated against him by reason of his sex. The Employment Tribunal found that the Respondent had discriminated on grounds of sex, and in so doing had behaved in such a way as to entitle to the Claimant to resign and claim unfair constructive dismissal. The employer appealed, arguing that the Employment Tribunal erred in law in holding that the facts found were such as to enable them to infer sex discrimination. It argued that the case should be dismissed as the finding of sex discrimination could not stand, and the Employment Tribunal had found the claim of unfair constructive dismissal made out only on the basis of sex discrimination.

Held: the appeal is allowed to the extent that the finding of sex discrimination is set aside, there being no findings of fact on which to base it. The Employment Tribunal however made clear findings of fact on which they were bound to come to the view that the claim of unfair constructive dismissal was made out, and case remitted to the Employment Tribunal to consider remedy for unfair constructive dismissal.

THE HONOURABLE LADY STACEY

1. This is an appeal by West Sussex County Council in a case in which reasons were sent to parties by the Employment Tribunal (ET) on 14 August 2013. I will refer to the parties as the Claimant and the Respondent as they were in the ET. Mr Doughty, Counsel, now appears for the Respondent, which at the ET was represented by Mrs Gardiner, Solicitor. Mr Austin appears on his own behalf, as he did in the ET.

2. The decision which the Respondent appeals is as follows:

> **"It is the unanimous Judgment of the Tribunal that the respondent unlawfully discriminated against the claimant because of his sex in its conduct of the disciplinary process following a complaint being made about the claimant's conduct. The claimant resigned from his employment as a result of the discrimination and his constructive dismissal claim was well founded and also succeeds. The sum of £168957.29 is awarded to the claimant. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply."**

3. The ET recommends that the Respondent review its policies, procedures and guidance to ensure compliance with the ACAS code of practice and guide on disciplinary and grievance procedures. It recommends training for staff on these matters.

4. The ET identified that the Claimant presented claims of sex discrimination, and constructive unfair dismissal. The term of the contract which the Claimant alleged was breached, leading to constructive dismissal, was the right to have a fair hearing. The ET noted the Claimant's case at paragraph 4 as follows:

> **"(a) he was suspended, not given the reason and kept in [the] dark for over a month as to the full allegations, causing his mental health to deteriorate;**
>
> **(b) the respondent failed to make allowances for a medical condition and took actions to exacerbate his stress and anxiety;**
>
> **(c) the respondent made up its mind he was guilty at outset and then conducted a shallow and one-sided investigation that was not in accordance with its own and Acas' procedures;**
>
> **(d) the respondent failed to provide documentation and failed to interview witnesses as requested by the claimant, making it impossible to mount a defence; and**

(e) the respondent scheduled a hearing date when the claimant was unfit to attend despite knowing he was unfit to attend and that he had been told that he would be fit to attend a month later.

As result the claimant was forced to resign to avoid unfair dismissal and to put an end to bullying.

(f) the respondent favoured a female who complained about the claimant's conduct, amounting to unlawful sexual discrimination."

5. Under the heading 'Law' the ET set out the law on constructive unfair dismissal accurately between paragraphs 10 and 14. It then made the following finding:

"15. The respondent did not advance a potentially fair reason for the dismissal."

6. Between paragraphs 16 and 23 the ET set out some of the law relating to sex discrimination, and some of the case presented to it by the Claimant. It noted that the Claimant relied upon the protected characteristic of sex and that he claimed direct discrimination. The ET directed itself that direct discrimination is defined under section 13 of the **Equality Act 2010** as follows: A person (A) discriminates against another (B), if because of a protected characteristic, A treats B less favourable than A treats or would treat others. At paragraphs 19 and 20 the ET stated the following:

"19. It was the claimant's case that the respondent's treatment was unfair, was designed to favour a female complainant over a male defendant and arises from sex discrimination.

20. The claimant identified actual comparators:

Mrs Rachel Wood, the complainant; and

Ms Laura Davis, whom [sic] he said was in breach of the respondent's dignity at work policy in that she started a malicious rumour about him and MrsWood"

7. It can be seen from paragraphs 19 and 20 that the question of a comparator was not clearly defined at that stage. Paragraphs 21 and 22 are in the following terms:

"21. The claimant also referred to Mr Hornby as a comparator; however it was pointed out to the claimant that if the protected characteristic of sex was replied up [sic], the comparator had to be (or had to be perceived to be) of a different sex.

22. A hypothetical comparator was identified of a male complainant who complained about a more senior female to whom that person had directly reported during a period of leave by the male complainant's regular line manager."

8. As can be seen from the terms of paragraph 22 there was discussion about a hypothetical comparator and while the description in that paragraph is loosely worded, it is tolerably clear that the hypothetical comparator which the ET had in mind was the more senior female to whom they made reference. The ET must have meant a senior female about whom a male, junior to her, had complained about her conduct while managing him, during a period of leave by the complainant's regular line manager.

Background

9. The underlying facts of the case as taken from the ET reasons are that the Claimant's work with the Respondent started on 18 January 2010 and finished on his resignation on 10 May 2012. His post was Head of Finance.

10. On 24 January 2012, the Claimant was sent home from work due to an allegation of harassment having been made against him. The Claimant had directly line managed the complainant during a period in which her regular line manager was off work on paternity leave. On 25 January 2012 the Claimant was formally suspended and told that he faced allegations of sexual harassment. The Respondent appointed an investigation officer, Mrs Henshaw, who carried out interviews of various people including the complainant and the Claimant. Mr Hornby was the Claimant's line manager and he decided, based on the outcome of the investigation report, dated 9 February 2012, that there was a case to answer in respect of the allegation. On 23 February 2012 the Claimant was informed that the allegation against him was:

> **"Sexual harassment by yourself towards a colleague, which had led to loss of management trust"**

11. The Claimant was certified by his doctor as unfit for work from 27 February 2012 and did not return to work. The Respondent originally scheduled a disciplinary hearing for 2 March 2012 but as the Claimant was unfit, that hearing was rescheduled for 11 May 2012. The Claimant said that he was unfit to attend but expected to be fit, according to medical advice, by 12 June 2012; he requested that the disciplinary hearing be postponed until then. The Respondent refused to postpone or reschedule the meeting. The Claimant resigned on 10 May 2012. In his letter of resignation he made a complaint of bullying by Mr Hornby. That claim was not upheld.

12. The ET narrates the submissions from the Respondent to the effect that there was no fundamental breach of contract and therefore no constructive unfair dismissal. It denied any procedural failings. It was entitled to go ahead with the hearing, having postponed it twice to accommodate the Claimant. The suspension was dealt with reasonably; the investigation was conducted swiftly and sensibly. It was argued that there was no breach by the Respondent, or if there was a breach it was not fundamental. The Claimant had "jumped the gun" by resigning before the hearing.

13. With regard to unlawful discrimination, the submissions of the Respondent were that the Claimant had not identified a suitable comparator; Mrs Wood was not an appropriate comparator as she was the complainant. It was in any event denied that there had been any difference in the treatment between the complainant and the Claimant. Both were interviewed. The complainant was interviewed at her place of work and the Claimant at another office of the Respondent which was nearer to his home. Ms Davis had no formal allegations against her and so was not a comparator; Mr Hornby was not an appropriate comparator because he was of the same sex as the Claimant.

14. The ET noted the Claimant's submissions to the effect that the investigation was completed in a rush because Mrs Henshaw was going on holiday; that the outcome of the disciplinary hearing was inevitable, particularly if he could not attend; that he provided medical evidence in regard to his unfitness to attend. The Claimant argued that if the medical evidence he had provided was not acceptable, then the Respondent should have approached his GP but they did not do so. He argued that Mrs Wood was a comparator as it was the Respondent's policy to treat both parties on equal terms unless and until an allegation is proven. He also argued that Ms Davis was a valid comparator on the basis that she had started malicious rumours, contrary to the Respondent's policy.

15. The Claimant argued that "Mr Hornby was a comparator to Mrs Wood." He argued that Mrs Wood made an allegation against the Claimant which was investigated in full. The Claimant made an allegation against Mr Hornby but there was no report produced about that complaint. There was no apparent investigation either formal or informal.

16. The Claimant argued that the fundamental breach of contract was a failure to conduct a disciplinary hearing when the Claimant was able to attend. At paragraph 59 the ET state that the Claimant submitted as follows:

> **"… Matters culminated when the respondent scheduled a disciplinary hearing when he was unfit to attend. It was far from a matter of the claimant's discretion whether he was able to attend the hearing; he was medically incapable of doing so. A reasonable employer would have realised that and that was the basis of his constructive unfair dismissal claim. In addition the claimant believed that there was an element of unlawful sexual discrimination for the reasons he had set out."**

17. The ET noted that the Claimant then provided detailed written submissions. They started with the question of suspension, in which the Claimant argued that the Respondent had not followed its own policy. The policy was that a line manager should meet with an employee in person to explain in broad terms the matter of concern if a person was to be suspended. The

policy provides that in exceptional circumstances a person may be suspended in writing without a meeting. The ET found that the policy had been breached because the Claimant was suspended over the telephone. The ET did not accept a submission from the Respondent that the sickness of the Claimant had somehow overridden the suspension. It found that the suspension amounted to a clear failure to follow the Respondent's own policy and to follow the ACAS code of practice.

18. The next allegation was that the Claimant was "kept in the dark". The ET found that the Claimant was told on 25 January 2012 that the nature of the complaint was sexual harassment; he was informed that the complaint was made by Mrs Wood at the investigation meeting on 6 February 2012. The submission from the Respondent was that the Claimant was not told of the identity of the complainer earlier in order to protect Mrs Wood. The ET did not accept that and found there was no reason why the Claimant could not have been informed of the identity of the complainant prior to the investigation meeting. It found that the failure to name her was a breach of the Respondent's own policy

19. The ET then considered the allegation by the Claimant that the Respondent had failed to make allowance for his medical condition. The ET found that there was no evidence that the Respondent addressed the issue of the impact of suspension on the Claimant's medical condition and that it did not review the suspension once it was in place. The Respondent told the Claimant that the disciplinary hearing would go ahead in his absence. The ET found that the Respondent's conduct was unreasonable in disregarding the medical advice and in going ahead and scheduling a disciplinary hearing irrespective of all the information provided.

20. The Claimant alleged that the Respondent failed to provide documentation to him, failed to interview witnesses as requested by him, failed to investigate the allegations made by him and predetermined the outcome of the disciplinary process. The ET found that Mrs Henshaw made notes of her meetings but, contrary to the Respondent's policy, no copies were given to the Claimant for his information. He also argued that fresh allegations were made at a later stage.

21. The ET found that there was a failing to particularise the allegations to the Claimant. It found that the detail of the allegation was never provided to the Claimant prior to the investigation. It found that Mrs Henshaw had sent to the Claimant a draft statement after she had interviewed him, and that she asked him if he wished to add anything, although she pointed out that things that were not discussed at the interview could not be added. The ET found this to be a breach of the ACAS code and of the Respondent's own policy. The breach which the ET identified (paragraph 98) was that the Claimant should have been able to put forward his own position at the investigation stage rather than it being reserved for him to put it forward if a disciplinary hearing was held.

22. The ET found that the Respondent also acted contrary to its own policy by interviewing the Claimant last. The policy required that the investigation officer should meet the person about whom the complaint had been made early on in the investigation.

23. Further the policy provides that the employee will be asked if there are any further people that he wishes to be interviewed, and the decision about whether or not to do so will be at the investigating officer's discretion. The ET found that the Claimant did ask that other people be interviewed but Mrs Henshaw declined, taking the view "it is not part of my remit to

gather information on behalf of [the Claimant]". Further the Chairman of the disciplinary hearing did not let the Claimant call witnesses if they had not previously been interviewed. That was a breach of the policy which states that the employee may present evidence, and call and question such witnesses as they choose.

24. The Respondent re-opened the investigation on 23 April 2012 and the investigating officer was asked to interview four witnesses. The Respondent did not treat the Claimant's allegation about Ms Davis as a complaint, and took no action on it.

Thus, as outlined above, the ET found that the Respondent had failed to carry out its own policies in the investigation of this complaint.

25. At paragraph 117 the ET turns its mind to a different matter. It states that on or around 26 January 2012, the Respondent became aware of an article in a newspaper known as "The Argus" dated 23 February 2000 which stated that a woman who had suffered five months of sexual harassment from her boss had won her claim for compensation in a Tribunal. Mrs Henshaw read the article and included it in her investigation report. She had asked the Claimant if it referred to him and he confirmed that it did. In evidence Mrs Henshaw told the Tribunal that, in her mind, that confirmed that the Claimant should have understood what sexual harassment was. In her supplementary investigation report she stated:

> **"… the significance of the article is that it is apparent that [the claimant] has been involved in matter [sic] relating to harassment at least twice previously."**

26. At paragraph 120 the Tribunal stated as follows:

> **"120. *The Argus* article is the only place where 'sexual harassment', as opposed to unwanted conduct amounting to harassment was alleged. The Tribunal finds this was instrumental in the respondent categorising the complaint as sexual harassment. The Tribunal finds there was a fundamental failure by the respondent to consider the prejudicial value of the article."**

27. The ET found that the invitation to the disciplinary hearing informed the Claimant that the allegation was of sexual harassment by him towards a colleague, which has led to a loss of management trust. The ET agreed with the Claimant that the outcome was prejudged in the sense that, before the harassment claims had been tested, the Respondent stated that it had lost management trust in the Claimant. The ET found that that gave the impression that the fact that an allegation had been raised, whether upheld or not, led to loss of management trust. It stated that this by itself, could be a breach of mutual trust and confidence.

28. In a matter which turned out to be of some importance, the Tribunal made the following remark at paragraph 126:

> **"126. In addition, the Tribunal questioned the respondent's conclusion that the conduct complained [of] was sexual harassment, rather than unwanted conduct that potentially amounted to harassment. Mrs Wood herself did not use the label 'sexual harassment' although Mrs Henshaw interpreted an inference of that from her."**

The Tribunal found at paragraph 127 that none of the Respondent's witnesses could explain why the behaviour complained of could conceivably be considered to be of a sexual nature and the Respondent failed to use the correct terminology. The ET took the view that the use of the label "sexual harassment" should only be used with due and proper consideration. Conduct which could amount to harassment between people of different sex does not necessarily amount to sexual harassment. It found in paragraph 128 that it "therefore finds and agrees with the claimant that the outcome of the disciplinary process was prejudged."

29. The ET found at paragraph 129 that the re-opening of the investigation did not have much impact. It was not re-referred to Mr Hornby for him to decide afresh whether or not there should be a disciplinary hearing. The Claimant had requested that it all be done again by a fresh investigator. That was not done.

30. Further, at paragraph 130 the ET found that the Claimant's complaint of bullying by Mr Hornby was not dealt with correctly. Mr Hornby could not tell the ET who investigated the matter, and no report was produced, but the Chief Executive dismissed the allegation. The ET found that there was a disregard of the Claimant's allegation as there was no evidence of any form of investigation; whereas Mrs Wood's allegation against the Claimant was investigated in full.

31. The ET under the heading "unlawful direct direct [sic] discrimination"' (paragraph 132) noted that the Claimant had identified his actual comparators and that the Respondent had taken issue with them, all as narrated above. The ET however identified a hypothetical comparator of a male complainant who complained about a more senior female to whom that person had directly reported during a period of leave by the male complainant's regular line manager. The ET went on to note that the Respondent did not address the issue of a hypothetical comparator in its submissions or anywhere else.

32. The ET stated at paragraph 134 that the Claimant had established procedural irregularities which amounted to detrimental actions. It then made the following finding in paragraph 135:

> **"135. At this point the Tribunal is entitled to draw the inference that the alleged less favourable treatment is because of the protected characteristic of sex. The Tribunal considered the response of the respondent to Mrs Wood's complaint and in particular the need for her to be 'protected from potential physical risk' …; together with Mr Hornby's decision making process around gardening leave, suspension, the withholding of the details of the allegation and the finding that the outcome was prejudged. There was also the difference in treatment by the respondent of the way in which it addressed Mrs Wood's complaint contrasted with the claimant's allegation of bullying. Those actions allow the Tribunal to draw an inference of less favourable treatment because of the claimant's sex. In particular, there was no dispute by the respondent that the events in question did occur. The respondent did not attempt to rebut the allegation that the difference in treatment was because of the claimant's sex; it was the respondent's case that the claimant's comparator of Mr Hornby was an incorrect comparator, or that its policy had been followed correctly. The respondent did not attempt to persuade the Tribunal that the different treatment was because of something other than the claimant's sex. The claimant having established facts from which the Tribunal could conclude that the treatment complained of was for a discriminatory reason, the burden then shifted to the respondent to persuade the Tribunal that it acted for a non-discriminatory reason. The respondent has failed to discharge the burden as it has not established a non-discriminatory reason for its treatment of the claimant."**

33. Thus it can be seen that the ET had in mind the test for discriminatory behaviour. It does not explain why a reasonable ET applying law could interpret the failings which it sets out as being related to sex.

34. The ET went on to note that there had been no direct complaint of sexual harassment by Mrs Wood. It found that Mrs Wood had tried subtly to discourage the Claimant but had never told him that his attention was unwanted. It states at paragraph 137 that had the complainant been the hypothetical comparator, other options such as making the complainant aware of the allegation, sending it for informal mediation or simply telling the individual that the conduct was unwelcome and that it should stop, would have been explored. I can only understand that paragraph to mean that the ET decided that had the complaint been about Mrs Wood giving unwanted attention to a man, it would have been dealt with differently. There is no finding of fact to that effect, nor any note of evidence to that effect being led.

35. At paragraph 138 the ET found that the harassment was unwanted conduct of a sexual nature. It states as follows:

> **"138. … The Tribunal finds that had the complaint been the hypothetical comparator, that the conduct complained of would not have been labelled sexual harassment and the procedural irregularities, which were identified, would not have flowed from the allegation."**

I assume that "complaint" is a transcription error for "complainant". There is however no explanation of the conclusion which the ET reaches.

36. The next finding by the ET is paragraph 139 which is in the following terms:

> **"139. Finally, the Tribunal finds that the acts of direct discrimination were inextricably linked to the claimant's dismissal and were the reason for his resignation.."**

37. The rest of the reasons deal with remedy.

The Respondent's case before the EAT

38. Mr Doughty, Counsel for the Respondent, argued that the ET had found that there was sex discrimination by the Respondent in the way in which it dealt with the Claimant and that he resigned because of that sex discrimination. He submitted that there was no separate finding by the ET of conduct which amounted to constructive unfair dismissal, other than the acts of discrimination. The ET found that the reasons for the actions by the Respondent were all connected with sex discrimination.

39. It should be noted that in the form ET1 the Claimant made two claims, one for unfair constructive dismissal and the other for sex discrimination.

40. Counsel emphasised that no separate findings were made about unfair dismissal, and most importantly there was no cross appeal on the question of constructive unfair dismissal. Thus, he submitted, if the finding of sex discrimination could not stand, there was no finding of unfair constructive dismissal. He argued that the ET had erred in law by making their finding about sex discrimination. His first ground of appeal was that the ET had fallen into error by relying upon a hypothetical comparator without making it clear to the parties that it was doing so. He accepted that there were discussions at the beginning of the case about comparators but he argued that the ET did not indicate at any stage that they were going to use a hypothetical comparator and that they should have done so in order to give proper notice to the Respondent of the case that it had to meet.

41. Counsel's next ground of appeal was that the hypothetical comparator defined in paragraph 132 was not appropriate. He argued that an appropriate hypothetical comparator would be an equivalent female manager who had had complaints of sexual harassment against

her upheld in the past. He referred to section 23 of the **Equality Act 2010** which states that a comparator must not be "materially different". He referred to the conjoined cases of **McDonald v Advocate General of Scotland** and **Pearce v Governing Body of Mayfield Secondary School** [2003] IRLR 512. He argued that if the Respondent had proper notice it would have made that submission and would then have invited the Tribunal to go on to look at the situation through the prism of a comparator of a female manager with a history of sexual harassment allegations, whether they were true or not. He argued that the reason for the Respondent dismissing the Claimant was because of its belief in the Claimant's history of sexual harassment. He argued that it was clear that that belief, whether true or not, influenced the whole process.

42. Counsel argued at ground 3 of his grounds of appeal that having found that the Respondent had categorised the Claimant's behaviour as sexual harassment due to the article in the Argus, the Respondent failed to consider the prejudicial value of the article. He argued that the ET went wrong in failing to consider whether this was in fact the reason for the Claimant's less favourable treatment rather than his sex. He made reference to the case of **Amnesty International v Ahmed** [2009] IRLR 884.

43. Counsel submitted that the burden of proof does not shift in a case simply because the facts give rise to the possibility of discrimination. The ET must have evidence from which it could conclude that discrimination could have occurred. The Tribunal should take into account all evidence relevant to the establishment of a *prima facie* case of discrimination. He referred to the case of **Madarassy v Nomura International Plc** [2007] IRLR 246. He referred also to the case of **Shamoon v Chief Constable of the RUC** [2003] IRLR in which it is suggested that it may be easier for an ET to ask itself the reason why something happened. His argument was

that the importance of The Argus article is that it caused the Respondent to treat the Claimant as it did. The reason why for that treatment was not the protected characteristic of sex, but the prejudice created in the minds of those who read The Argus article. He argued that the procedural irregularities carried out by the Respondent flowed from the allegation being labelled sexual harassment and could not be on the grounds of sex but must have arisen from the prejudice created by The Argus article. The ET erred in law by drawing inferences of less favourable treatment due to sex which were contrary to their findings of a non-discriminatory explanation in paragraphs 117 to 120, which narrated Mrs Henshaw's discovery of the newspaper article and her opinion then formed that the Claimant had been involved in sexual harassment allegations in the past. The ET finding in paragraph 135 that a failure to follow procedure was discriminatory was an error of law because there were no other findings to support that conclusion. He referred once again to the case of **Ahmed** and to the reference by Lord Justice Underhill in that case to the case of **Seide v Gillette Industries Ltd** [1989] IRLR 427. Counsel accepted, in discussion, that if he was correct in that, a claim for unfair dismissal might have reasonable prospect of success.

44. Counsel's position was that the case should be dismissed and not remitted to another Tribunal. He argued that was so because it was obvious from the findings that the reason for the treatment of the Claimant was nothing to do with the Claimant's sex, but was in fact the article in The Argus. He appreciated that meant that the unfair dismissal claim would be lost. He argued that as the Claimant had not put in a cross-appeal, nothing could be done about it.

Discussion and Decision

45. The ET considered the question of unfair dismissal first. It sets out the law on constructive dismissal from paragraph 10 onwards. At paragraph 15 it states the following:

> **"15. The respondent did not advance a potentially fair reason for the dismissal."**

46. The ET sets out findings and conclusions from paragraph 61 onwards. It finds at paragraph 114 that there was a fundamental flaw in the Respondent's process of investigation in that it did not appreciate that there were witnesses who were relevant to the accusation made, whom the Claimant wanted to be interviewed. The ET found that to be a breach of the Respondent's own procedure and of the ACAS code and of natural justice. At paragraph 125 the ET found that the outcome of the disciplinary procedure was prejudged in that before the harassment claims had been tested the Respondent stated that it had lost trust in the Claimant. It noted that the impression given was that the fact of an allegation being raised led to a loss of management trust. The ET stated that that in itself could be a breach of mutual trust and confidence. Just before paragraph 131 there is a heading "unlawful direct direct [sic] discrimination" and it seems that the ET considers that matter between paragraphs 131 and 139. At paragraph 139 the ET states the following:

> **"Finally, the Tribunal finds that the acts of direct discrimination were inextricably linked to the claimant's dismissal and were the reason for his resignation."**

47. The judgment of the ET is in the following terms:

> **"It is the unanimous Judgment of the Tribunal that the respondent unlawfully discriminated against the claimant because of his sex in its conduct of the disciplinary process following a complaint being made about the claimant's conduct. The claimant resigned from his employment as a result of the discrimination and his constructive dismissal claim was well founded and also succeeds. The sum of £168957.29 is awarded to the claimant. …"**

48. The terms of the ET1 show that the Claimant made a claim for unfair dismissal and a claim for sexual discrimination. In the narration given by him of the background and details he sets out a chronology of events which he offers to prove which culminates in him stating the following:

> **"On the 10th May I offered my resignation to the Chief Executive as I would certainly be dismissed at a hearing the following day that I was not fit to attend. I regard this as constructive unfair dismissal."**

He then follows that assertion with a bulleted paragraph in which he states that he believes that the treatment he received from the Respondent was unfair and that the unfairness arose from sexual discrimination. He repeated, briefly, some of the chronology and repeated his assertion that the Respondent made up its mind at the outset. He repeated his assertion that he was forced to resign, which he believed amounted to constructive dismissal. He ended by stating that he believed that the Respondent deliberately favoured a female Claimant over a male defendant and that that amounted to unlawful sexual discrimination.

49. The ET3 completed on behalf of the Respondent set out in 41 paragraphs a narrative of events concerning allegations of sexual harassment which the Respondent claimed to investigate. The Respondent explains that the Claimant became ill; time was passing and in view of the stress caused by that it was necessary to try to resolve the situation as soon as practicably possible for all involved. The Respondent never resolved to go ahead with a hearing at a time when it had been advised that the Claimant was unfit to attend. The Respondent then received a letter of resignation from the Claimant the day before the hearing was due to take place. The Respondent denies any pre-judgment of the outcome of the investigation and denies having failed to carry out a proper investigation. It denies that it forced the Claimant to resign. The Respondent then deals with the allegation of sex discrimination, taking 3 paragraphs to do so. It asserts that the Respondent did not discriminate and that the Claimant having failed to identify a comparator has no reasonable prospect of success in the claim of sex discrimination.

50. It is clear from both forms that the Claimant claimed that he was constructively unfairly dismissed because of the way in which the Respondent dealt with a disciplinary process brought against him and that the Claimant claims that the Respondent discriminated against him by reason of his sex in the course of that disciplinary process. The Respondent appreciated that and spent the majority of its response in explaining why it was not correct to say that the Claimant was constructively unfairly dismissed; it also asserted that there had been no discrimination on the basis of sex.

51. Before the EAT Counsel argued that the article in the Argus was the reason why the Respondent proceeded as it did. It categorised the allegations as sexual harassment because of the article. It was nothing to do with the sex of the Claimant. Counsel accepted that the witnesses had said at the hearing before the ET that they were not affected by the article but he argued that it was plain that they were. Counsel maintained that no ET properly directing itself in law could have found that the Respondent discriminated against the Claimant on grounds of his sex.

52. The Claimant lodged lengthy written submissions. He argued that the Respondent had taken a keen interest in the use of comparators throughout the case, making applications prior to the full hearing to have the sexual discrimination claim struck out on the basis that the Claimant had not identified an appropriate comparator on his application form. At the start of the original hearing, according to the Claimant there was a detailed discussion instigated by the Respondent about hypothetical comparators. When the judgment was issued, the Respondent applied to the ET for a reconsideration of that judgment citing the same grounds as in the appeal to the EAT. The application for review was refused on the basis that the ET held that

the Respondent should have known that a hypothetical comparator would be used from all that was said at the hearing.

53. The Claimant argued that at the original hearing much reference was made to the article in the Argus, which led him to provide detailed information on the allegations and the outcome, in particular that neither allegation had been made out. The Respondent did not seek to refute that. Therefore the Respondent was now seeking to dispute for the first time that there had been claims of sexual harassment made against the Claimant in the past which had been upheld. Even if the Respondent was seeking to argue that the existence of the claim whether upheld or not was relevant, the Respondent had not argued previously that the existence of the claims had any bearing on the actions of the staff dealing with the allegation made by Mrs Wood. It had never been argued that they had any influence at all on the actions of the Respondent. At the original hearing he had cross examined three witnesses for the Respondent, Mr Hornby, Mrs Henshaw, and Mrs Saunders. Each had denied being influenced by the previous allegations which they regarded as irrelevant. The Respondent was, the Claimant asserted, now seeking to change position radically and to argue that the existence of the claims was of importance. Counsel for the Respondent accepted that the position he now took up was different from that taken up in the original hearing. Counsel argued that the ET made clear findings that the allegation against the Claimant became sexual harassment because of the prejudicial nature of the article. It was clear from the findings in fact that whether the allegations in the article were true or not they strongly influenced the way in which the Respondent reacted to and dealt with the complaint.

54. The basis for the constructive unfair dismissal claim is found in paragraph 139 of the judgment where the acts of discrimination are linked to the resignation. Counsel accurately

pointed out that although various breaches of procedure identified under subheadings identified in paragraph 61 of the judgment no separate findings are made of any breaches of contract other than in paragraph 138, which is in the following terms:

> **"138. The Tribunal therefore finds that once the respondent became aware of the allegation by Mrs Wood via Mr Harrison (Mrs Wood confirmed that she wished to pursue the issue formally to Mrs Saunders) that it assumed the harassment was unwanted conduct of a sexual nature. Furthermore, it finds that the reason for the less favourable treatment of the claimant, compared with that of Mrs Wood or a hypothetical comparator, was because of the claimant's sex. The Tribunal finds that had the complaint been the hypothetical comparator, that the conduct complained of would not have been labelled sexual harassment and the procedural irregularities, which were identified, would not have flowed from the allegation."**

55. As I understood him, Counsel argued that the ET did not find that together or separately the breaches of procedure amounted to a fundamental breach of contract giving rise to a constructive unfair dismissal based on a breach of trust and confidence. He argued that this was borne out by the reason for the Claimant resigning being identified as direct discrimination, which were said by the ET to be inextricably linked to his dismissal [sic] and "were the reason for his resignation" (paragraph 139.) He argued that if there had been no finding of discrimination, then the unfair constructive dismissal claim could not stand as the Claimant would be resigning in response to treatment that was not discriminatory and was not found to be a breach of contract in its own right.

56. Counsel argued that the tribunal had erred in law by failing to consider whether the prejudicial value of the article was in fact the reason for the Claimant's less favourable treatment rather than his sex. He relied on the case of **Amnesty international v Ahmed** [2009] IRLR EAT 884 in which Underhill J stated:

> **"32. … The basic question in a direct discrimination case is what is or what are the 'ground' or 'grounds' for the treatment complained of. That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see [for example] Article 2.2(a) of Directive EU/2000/43 ('the Race Directive'). There is however no difference between that formulation and asking what was the 'reason' that the act complained of was done, which is the language used in the victimisation provisions (eg s.2(1) of the 1976 Act): see per Lord Nicholls in *Nagarajan* at p.576, paragraph 18 (also, to the same effect, Lord Steyn at pp.579-580, paragraph 39)."**

57. He argued that the ET had to take into account all the evidence relevant to the establishment of a *prima facie* case of discrimination. This was a mental processes case in which the thought processes of the Respondent's employees needed to be examined. He argued that the importance of the Argus article was the way in which the article caused the complaint to be led labelled sexual harassment. Thus it was clear that the reason why the Claimant was treated in that way was not the protected characteristic of his sex but the prejudice created in the minds of those who read the Argus article which identified him as having been involved with previous allegations of sexual harassment. He sought to argue that the procedural irregularities flowed from the allegation being labelled sexual harassment and could not be on the grounds of sex.

58. Counsel referred to the case of **Seide v Gillette Industries Ltd** [1980] IRLR 427 in which an employee was moved to a different department to escape anti-Semitic harassment and ended up in the new department being disciplined for non-racial reasons. Just because he would not have been in the second department had it not been for the earlier harassment did not mean that the action against which he complained was taken on racial grounds. In the current case, Counsel argued that the key is whether the sex of the Claimant was the reason why the irregularities occurred. He argued that there were no findings enabling such a conclusion.

59. In discussion, Counsel appeared to recognise that the procedural defects found by the ET were apt to found a claim of unfair dismissal; he did not seek to argue otherwise. His position was that as the Claimant had not made a cross appeal in respect of a finding of unfair dismissal unconnected to sexual discrimination nothing could be done about that.

60. It seems to me that the ET decision has gone awry. On the facts found by the ET they were in a position to make a finding that the procedural defects of the Respondent's disciplinary procedure were such as to break the term of mutual trust and confidence required in a contract of employment, thereby equating to constructive dismissal. They found that the procedures were unfair.

61. On the matter of sexual discrimination, the ET has made findings but it seems to me has been somewhat distracted by a misunderstanding of the nature of the comparator. I accept that Counsel was correct to say that the finding that there was sexual discrimination cannot be upheld on the findings in fact in the written reasons. In order to make such a finding the ET would have required to find that there was evidence to show that a female manager with a background similar to that of the Claimant, including previous allegations of sexual harassment, would have been treated differently from the way in which the Claimant was treated. The ET did not make any findings in fact from which it could draw such an inference.

62. I have considered carefully Counsel's argument that this case should be dismissed. He argued that as there is no cross appeal on the question of unfair dismissal, the only course I can take if satisfied that the ET erred in law in finding discrimination proved, is to dismiss. I do not accept that submission. It would not be in the interests of justice to give effect to it. It is clear from the findings made by the ET that it regarded the actions of the Respondent in the disciplinary process to be unfair; they regarded the Claimant as entitled to see those actions as in breach of the term of mutual trust and confidence necessary in the employment relationship. The Claimant is unrepresented and was not able to address me on the matter of whether a cross appeal was necessary. In all of the circumstances I have decided that the findings made by the

ET are such that a tribunal properly directing itself would be bound to find that there was an unfair constructive dismissal. I shall therefore make that finding.

63. I am also of the view that I am in a position to find that any tribunal properly directing itself would find that the claim for sex discrimination must fail: there are no findings of fact which are necessary for such a claim. Thus I allow the appeal in so far as it relates to sex discrimination only.

64. I remit the case to the same ET to hear submissions and make a decision on the appropriate remedy for unfair constructive dismissal.