Appeal No. UKEAT/0016/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 June 2013
Judgment handed down on 27 September 2013

Before

HIS HONOUR JEFFREY BURKE QC

MR D NORMAN

MR T STANWORTH

THE LEEDS DENTAL TEAM LTD — APPELLANT

MRS D ROSE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR DAVID CUNNINGTON (of Counsel) Instructed by: Messrs Chadwick Lawrence Solicitors 8-16 Dock Street Leeds LS10 1LX

SUMMARY

UNFAIR DISMISSAL

Constructive dismissal

Procedural fairness/automatically unfair dismissal

The Employment Tribunal found that the Claimant had been constructively dismissed. The Respondents put forward 2 broad grounds of appeal.

The first was that the decision of the Court of Appeal in **Tullett Prebon** (2011 IRLR 420) had changed the law and required the Tribunal in a constructive dismissal case in which reliance was placed on the implied term of trust and confidence to find whether the employer had a subjective intention to act in such a way as to permit the employee to terminate the contract. This submission was rejected. On a proper reading of the judgments in **Tullett Prebon**, the Court was not departing from the now long established principle set out in **Woods v WM Car Services**, **Lewis v Motorworld** and **Malik v BCCI** but was reinforcing it.

The second was perversity. Held that perversity had not been demonstrated

HIS HONOUR JEFFREY BURKE QC

The nature of the appeal

1. This is the appeal of the Respondent before the Employment Tribunal, The Leeds Dental Team Ltd, against a decision of the Employment Tribunal sitting, unsurprisingly, in Leeds, presided over by Employment Judge Cox and sent to the parties on 17 April 2012. By that decision the Employment Tribunal found that the claim of the Claimant, Mrs Rose, for unauthorised deductions failed but that her unfair dismissal claim succeeded. She was awarded compensation of £5,000 by way of basic award and £4,205.35 as a compensatory award. The subject matter of the appeal is the Employment Tribunal's conclusion that the Claimant had been constructively dismissed. It was conceded that, if she had been constructively dismissed, the dismissal was unfair.

2. The Respondent has been represented before us by Mr Rees, of Peninsula Business Services Ltd; the Claimant has been represented by Mr David Cunnington of counsel. We are grateful to both for their helpful submissions.

The facts

3. We take the facts from the Employment Tribunal's Judgment. The Claimant's employment began in 1998. She was employed by Mr Temple, a dentist, as a dental surgery assistant. In November 2007 Mr Temple sold his practice to the Respondent company, of which Ms Shafi was and is a director and the owner. The Claimant's employment was transferred to the Respondent pursuant to the **Transfer of Undertakings (Protection of Employment) Regulations**, and she was promoted to the role of practice manager. Also involved in the relevant events were Ms Kendall, who was a director of the Respondent, and

Ms Keane, a dental nurse. Mr Temple continued as the principal dentist in the company's operation.

4. In January 2011 it came to Ms Kendall's attention that the Claimant had not been recording Ms Keane's sickness absence. It is obviously important to any employer to know when an employee is off sick, whether or not there is an entitlement to sick pay; extended or frequent sickness absence needs to be monitored and managed. Two members of staff had previously complained that the Claimant was showing favouritism to Ms Keane. It was decided, therefore, that this apparent action on the Claimant's part should be followed up; disciplinary proceedings were instituted. On 14 January the Claimant was suspended; a hearing was set up for 31 January.

5. On 26 January the Claimant was invited to attend that hearing by a letter that said:

> **"The matters of concern are as follows:**
>
> **You are alleged to have been deliberately taking part in activities which have caused the Company to lose faith in your integrity namely:**
>
> **Repeated and blatant breach of Company rules and procedures in relation to one particular colleague with regards to**
>
> **Breach of sick pay overtime**
>
> **Breach of overtime scheme**
>
> **Breach of protocol regarding unauthorised absence."**

6. The Claimant asked that Mr Temple should act as her companion at the disciplinary hearing; but Ms Shafi refused to allow Mr Temple to play that role because she believed that Mr Temple would be supportive of the Claimant's position. Although the Tribunal made no findings to this effect, it was common ground before us that the hearing on 31 January ended in

disarray when Mr Temple sought to enter the room in which the hearing was taking place and Ms Shafi sought to prevent him doing so.

7. The hearing was never resumed. After the abortive hearing which we have described the Claimant was told that if she did not attend a rearranged hearing, she would not be paid. Shortly thereafter she went off sick and did not return before resigning by letter. It was not the Respondent's case that the Claimant did not resign with sufficient speed or that she did not resign by reason of the matters that she put forward as constituting constructive dismissal.

Breach of the implied term

8. A number of actions or inactions on the part of the Respondent was put forward on behalf of the Claimant as constituting breaches of the implied term of trust and confidence which entitled the Claimant to resign. The Tribunal considered each separately.

9. The first matter raised by the Claimant was that the Respondent had unilaterally changed her pay date from the last day of the month to the first day of the following month with effect from February 2011. The Tribunal found that this was a technical breach of contract only, was not significant and (in the case of this complaint only) that it did not form any part of the Claimant's reason for resigning from her employment.

10. The Tribunal found at paragraphs 10.2-10.4 of their decision that the refusal of the Respondent to allow the Claimant to be accompanied at the disciplinary hearing was unreasonable and that it contributed to a breach of trust and confidence, leaving the Claimant to have to attend the hearing on her own and under duress. The Tribunal found that Mr Temple was not a "worker" within the meaning of section 230(3) of the **Employment Rights Act 1996**

(ERA) because his contract with the Respondent contemplated that he would not be providing his services as a dentist personally. We have not seen that contract and did not need to see it; for it has not been suggested by Mr Rees that, if, as the Tribunal found, Mr Temple was not a companion who fell within the statutory provisions set out in the ERA, with the effect that the Claimant could not make a separate complaint to the Tribunal of a breach of those provisions, he could not be regarded as an appropriate companion at all. We have set out earlier the Tribunal's finding as to Ms Shafi's reasons for rejecting Mr Temple as a companion; the Tribunal said of that reason and of the refusal to allow Mr Temple to act as the Claimant's companion this, at paragraph 10.4:

> **"The Tribunal considers, however, that it is part of the role of the person who accompanies an individual to a disciplinary hearing to put the individual's case to the employer and respond on the worker's behalf to views expressed at the meeting. That is certainly the function of the person accompanying the worker under Section 10 of the Employment Relations Act [sic] (Section 10(2)(b)). Ms Shafi based her refusal to allow Mr Temple to accompany Mrs Rose on an erroneous view of the scope of the companion's role. The Tribunal also finds that there were no grounds for believing that Mr Temple's presence would prejudice the proper conduct of the disciplinary hearing, and indeed Ms Shafi accepted that in her own evidence. The Tribunal finds that the company's refusal to allow Mrs Rose to be accompanied by Mr Temple at the disciplinary hearing contributed to a breach of trust and confidence, leaving Mrs Rose having to attend the disciplinary hearing on her own and under duress."**

11. The next complaint raised was that Ms Kendall had said something to the Claimant about the difference between her existing statement of terms and conditions and a new set of terms and conditions that the Respondent was proposing to introduce. In those new terms the Respondent was seeking to dispense with any entitlement to contractual sick pay. The Claimant asserted that Ms Kendall had said that the old contract was not worth the paper it was written on. The Tribunal found that Ms Kendall had only said that the contract was out of date because it gave Mr Temple as the employer and that what Ms Kendall had said did not amount to or contribute to a breach of trust and confidence.

12. Next was an issue about sick pay, a topic that was, it would seem, of some concern at the time. The Claimant claimed that she was being disciplined because she had refused to commit to a variation in her contractual terms as to sick pay. If that were correct, the disciplinary process would have been a sham. However, the Tribunal rejected that contention and found at paragraph 10.6 that the disciplinary process arose from the Respondent's genuine concerns about the Claimant's failure to record Ms Keane's sickness absence and other failures of a similar nature and found that there was sufficient evidence that the Claimant had acted improperly to justify the investigation.

13. The next matter arises from the Respondent's handling of the disciplinary process. It is probably most convenient to set out what the Tribunal said on that subject at paragraphs 10.7-10.9, in these terms:

> **"10.7 Although the decision to suspend Mrs Rose and to begin the disciplinary process was not a breach of trust and confidence the Tribunal does consider that the disciplinary process was then handled very badly.**
>
> **10.8 Mrs Rose had worked for the practice for nearly thirteen years and the Company was aware that Mr Temple had found her an entirely satisfactory employee. When she was promoted to the position of Practice Manager in 2007 she was promoted to the position of Practice Manager in 2007 she was provided with no proper training in her new responsibilities and she inherited no systems for recording absences from work. She had informed Ms Kendall that the reason she had not recorded Ms Keane's sickness absences was because she did not feel it necessary to do so: her understanding was that Ms Keane was entitled to sick pay at her normal rate of pay, so that her wages would not be affected by her sickness absence, making it unnecessary for her to notify the Company's wages administration staff because no adjustment needed to be made to Ms Keane's pay.**
>
> **10.9 The Tribunal considers that in the circumstances any reasonable employer would have invited Mrs Rose to an investigatory interview at which it put to her the allegations of improper conduct so that she had a full opportunity to address them and explain the apparent anomalies in the paperwork. It seems more likely than not that the result of that interview would have been a realisation that Mrs Rose was not competent in her role and needed support and training rather than being guilty of misconduct. What happened in fact was that Ms Kendall's investigation did not involve interviewing Mrs Rose at all. Instead the Company wrote to Mrs Rose on 26 January 2011 inviting her to a disciplinary hearing. That letter said** [already cited above]**. Since there were in fact no 'Company rules and procedures' in relation to the granting of leave for and recording of absence from work, and given Mrs Rose's lack of training in her responsibilities, the Tribunal considers this language to be disproportionate and intimidating."**

14. At paragraph 10.10 the Tribunal found that it was oppressive for Ms Kendall to inform the Claimant that she would not be paid if she did not attend the disciplinary hearing. They said:

> **"The Tribunal accepts that an employer is entitled to require an employee to attend work, and to refuse to pay them if they fail to do so without good reason. Nevertheless, the Tribunal considers it disproportionate for an employer to threaten not to pay an employee if they have indicated that they will not attend a disciplinary meeting when their employer has refused unreasonably to allow them to be accompanied at that meeting by a companion of their choice, as was the case here (see 10.4 above)."**

15. The Tribunal then rejected two further complaints, at paragraphs 10.11 and 10.12, before, finally, finding that the Respondent should have disclosed to the Claimant an overtime sheet for Ms Keane, which it had examined in the course of its investigation and upon which it relied but which the Claimant was never given a proper opportunity to consider.

16. Thus the Tribunal had found that there were the following acts of which the Claimant was entitled to complain as amounting to a breach of the implied term, namely: the refusal to allow the Claimant to be accompanied by Mr Temple; the absence of any investigatory interview before the disciplinary hearing; the Respondent's telling the Claimant she would not be paid if she did not attend the disciplinary hearing, when they expected her to attend without the companion of her choice; and the failure to disclose to her the overtime sheet. Looking at those events together, the Tribunal said this at paragraph 11:

> **"Taking the above findings overall, the Tribunal is satisfied that the Company did breach the implied duty to maintain trust and confidence in the way it handled the disciplinary process. The effect was that Mrs Rose had to face very serious allegations questioning her integrity without having had any prior opportunity to explain her position and having been refused her reasonable request to be accompanied at the disciplinary hearing by the companion of her choice. The Tribunal also finds that a substantial reason for Mrs Rose's resignation was the way in which she had been treated in the course of the disciplinary process. The Tribunal is therefore satisfied that Mrs Rose was dismissed within the definition in Section 95(1)(c) ERA and her unfair dismissal claim succeeds."**

Constructive unfair dismissal – the correct test

17. The principal thrust of Mr Rees' submissions was that the Employment Tribunal had erred in law in failing, in considering constructive dismissal, to make a finding as to the Respondent's intention in acting as they did towards the Claimant. That submission was based on the decision of the Court of Appeal in **Tullett Prebon PLC v BGC Brokers** [2011] IRLR 420 and in particular on the Judgment of Kay LJ, with whom Hooper LJ and Tomlinson LJ agreed, at paragraphs 22-24. The context which the Court of Appeal was considering was one in which individual brokers had left their employment with Tullett Prebon and instead joined a rival company. As part of their resistance to the claims against them of Tullett Prebon they claimed to have been constructively dismissed. Jack J at first instance decided that they had not been constructively dismissed. It was argued on appeal that Tullett Prebon had acted in such a way that the only permissible finding was that there had been a repudiatory breach of the duty of trust and confidence and that the Judge had erred in considering a subjective analysis of Tullett Prebon's reasons for acting as they did, and not on an objective consideration of whether its conduct was calculated or likely to damage or destroy the relationship of trust and confidence. The Court of Appeal rejected these arguments.

18. Mr Cunnington, on behalf of the Claimant, relied on paragraphs which surround those on which Mr Rees relied, and it is most helpful to set them all out together. Paragraphs 19-27 of Kay LJ's Judgment were in these terms:

> **"19. I am wholly unimpressed by this submission. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is 'a question of fact for the tribunal of fact': [*Woods*] at p415, paragraph 11, per Lord Denning MR, who added:**
>
> > **'The circumstances are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not.'**
>
> **20. In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in**

the recent case of *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168; [2010] 43 EG 99 (CS) (at paragraph 61):

> **'[The legal test] is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.'**

That, it seems to me, was essentially the approach of the judge in paragraphs 105 and 106 of his judgment.

21. I have no doubt whatsoever that the judge was entitled and indeed correct to find that, as a matter of fact, Tullett did not manifest an intention 'to abandon and altogether refuse' to perform their contracts with the brokers – quite the contrary. It wanted to preserve the contracts with the brokers.

22. The central point in this ground of appeal is that it is said that, having correctly directed himself in paragraph 80 of the judgment that the defendant brokers could rely on any conduct of Tullett 'which, *objectively considered,* constituted a breach of its duty not seriously to damage the degree of trust and confidence which each was entitled to have in Tullett', the judge departed from that self-direction by applying a subjective approach when he came to make his findings. In particular, exception is taken to the language of paragraph 106, where the judge said:

> **'Tullett's conduct was not intended to attack the relationship between Tullett and the brokers, but was intended to strengthen it.'**

23. Mr Hochhauser submits that this constituted a subjective analysis of Tullett's reasons for acting as it did and not an objective consideration of whether its conduct was calculated or likely to seriously damage or destroy the relationship of trust and confidence.

24. I do not accept this submission. It assumes that Tullett's intention was irrelevant whereas the central question is whether it had 'clearly shown an intention to abandon and altogether refuse to perform the contract' (*Eminence Property Development Ltd,* at paragraph 61). As Etherton LJ went on to say (at paragraph 63):

> **'*all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker.* This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person."(Emphasis supplied)**

25. There, as here, the matter under consideration was *repudiatory* breach. Mr Hochhauser seeks to draw support from [*Malik*] which was concerned with an action for damages against a former employer, by then in liquidation, for breach of the implied term of trust and confidence. Repudiation was not an issue. In that context, Lord Steyn said (at p.469, at paragraph 60):

> **'The motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for breach of the implied obligation.'**

26. In *Malik*, the breach did not arise from the way in which the employer treated its employees but from the way in which it conducted its business in general. It ran the business in a corrupt and dishonest way and when innocent employees later lost their jobs because of the liquidation, they suffered loss in the labour market because they became associated with their former employer's malefactions.

27. The present case is manifestly different. At its heart, it is concerned with the specific dynamics between employer and employees, not with the indirect effect of corporate behaviour on employees. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract-breaker towards the employees is of paramount importance. I have no doubt that the judge approached this issue correctly. He referred (at paragraph 105) to the question of whether the conduct of the Tullett hierarchy 'considered objectively was conduct likely to destroy or seriously damage the relationship of

trust and confidence between Tullett and the brokers in question'. Indeed in the material passages of the judgment, he referred repeatedly to the need for objective assessment. In order to address the issue of repudiatory breach in the circumstance of this case, it was necessary for him to include an objective assessment of the true intention of the Tullett hierarchy. In so doing, he reached the conclusion that that intention was not to attack but to strengthen the relationship. This was a permissible and, in my view, correct finding, reached after a careful consideration of all the circumstances which had to be taken into account 'insofar as they bear on an objective assessment of the intention of the [alleged] contract breaker' (*Eminence*). All that is clear from the judgment. As it happens, it is confirmed by a perusal of th4e transcript of the proceedings after judgment when the judge was hearing an application for permission to appeal. He said:

> **'A party can still have an intention which may be relevant, but the intention is to be judged objectively … I had it very much in mind that [I] had to have my objective spectacles on."**

19. Mr Rees submits that, in those words, the Court of Appeal changed the law and required Tribunals in each constructive dismissal case to make a specific finding as to the employer's intention in acting in the manner said to amount to a breach of the implied term. **Tullett Prebon** was not cited to the Tribunal, but Mr Rees submits that the Tribunal were bound to but failed to make a finding as to the Respondent's intention as acting as it did. Thus their whole approach to the issue of constructive dismissal in this case was flawed.

20. At the time of the oral argument before us, it was thought that this might be the first appeal that has come before the Employment Appeal Tribunal in which the suggestion that **Tullett Prebon** has changed the law has been made. It was for that possible reason that we reserved our decision, in order to enable us to respond to the submission with what we hope will be both accuracy and clarity. There has been, it has been discovered, at least one EAT appeal in which Tullett Prebon was considered; but the submission that it changed the law, as Mr Rees asserted, does indeed appear to be new. We do not accept the submission. It is important, in our judgment, that the Court of Appeal was responding to a submission that the Judge had looked at Tullett Prebon's subjective reasons for acting as they did. In the passages in his Judgment that we have cited Kay LJ can be seen to have been emphasising that only

objective intention was relevant, to be ascertained by looking at all the circumstances of the case.

21. Once the concept that unreasonable conduct was not sufficient to constitute constructive dismissal had been firmly established by **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 and that whether there had been constructive dismissal had to be analysed in terms of breach of contract rather than unreasonableness the courts developed the implied term on which the Claimant relied in this case. The classical starting point for that term is to be found in **Woods v WM Car Services (Peterborough) Ltd** [1981] ICR 666, where the Employment Appeal Tribunal, presided over by Browne-Wilkinson J, said, at page 670G-671A:

> **"In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd v Austin* [1978] IRLR 332 and *Post Office v Roberts* [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts*."**

22. In **Lewis v Motorworld Garages Ltd** [1986] ICR 157 Neill LJ said, at page 13D-G:

> **"The conduct must therefore be repudiatory and sufficiently serious to enable the employee to leave at once. On the other hand it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see [*Woods*] in the Employment Appeal Tribunal."**

23. That approach was endorsed by the House of Lords in **Malik v BCCI** [1997] ICR 606 in which Lord Nicholls, at page 610F, said:

> **"In other words, and this is the necessary corollary of the employee's right to leave at once, the bank was under an implied obligation to its employees not to conduct an dishonest or corrupt business. This implied obligation is no more than one particular aspect of the portmanteau,**

general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. Second, I do not accept the liquidators' submission that the conduct of which complaint is made must be targeted in some way at the employee or a group of employees. No doubt that will often be the position, perhaps usually so. But there is no reason in principle why this must always be so. The trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee, in many different ways. I can see no justification for the law giving the employee a remedy if the unjustified trust-destroying conduct occurs in some ways but refusing a remedy if it occurs in others. The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."

24. In **Meikle v Nottinghamshire County Council** [2005] ICR 1 Keen J, with which Thorpe LJ and Bennett J agreed, applied that approach and endorsed the Employment Appeal Tribunal, who had concluded that the test in such cases is not whether the employee has subjectively lost confidence in the employer but whether, objectively speaking, the employer's conduct is likely to destroy or seriously damage the trust and confidence that an employee is entitled to have in his employer. In **Buckland v Bournemouth University Higher Education Corporation** [2010] ICR 908 Sedley LJ at paragraph 25 said that the EAT had correctly applied the test in **Malik**.

25. Mr Cunnington submitted that if the Court of Appeal in **Tullett Prebon** had intended to depart from what is, in terms of employment law, a long and well-established principle; it would have said so in clear terms. While we are inclined to agree with that submission, it is not necessary to rely on it in order to appreciate that the Court of Appeal did not so intend. If the whole of the passage from the judgment of Kay LJ is read together, it can be seen that the principle that all the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract-breaker is no different from the traditional test set out from **Woods** onwards, namely that the Tribunal has to consider objectively whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. In paragraph 27 Kay LJ set out that test,

which the Judge below had applied, and said that the Judge had approached the issue correctly. We respectfully agree. The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of; in pure contract cases in what we may call "the old days" expressions were used such as, "The conduct evinced an intention on the part of the defendant to bring the contract to an end", or "fundamentally to break the contact", so that the other party could terminate it.

26. In our judgment, therefore, there is no difference in practice between the test laid down by the authorities over 30 years since **Woods** and the test adopted in **Tullett Prebon**. It should be noted that **Woods** was cited in **Tullett Prebon** and is expressly referred to at paragraph 19 of the judgment of Kay LJ but is not said to have been in error in any respect.

27. Mr Rees did not suggest that, if **Tullett Prebon** did not change the law, the Tribunal had erred in applying the test which they applied. At paragraph 9 the Tribunal referred to the test in classic **Woods** terms, and there is nothing to suggest that, when they came to their conclusions they applied any other test.

28. There is one further aspect of **Tullett Prebon** to which we must refer. Mr Rees submitted that the Court of Appeal had distinguished **Malik** at paragraphs 25 and 26 and therefore that what **Malik** said about the correct test for constructive dismissal was no longer applicable. Leaving aside whether what was said in **Malik** on this issue was or was not ratio (which was not discussed before us) and, if it were, how the Court of Appeal could depart from

what the House of Lords had said (which was also not discussed), it is clear that **Malik** had been cited or at least at this point of the argument had been used in order to support the submission that subjective intention or motive was irrelevant. The comments made in paragraph 26 of Kay LJ's judgment do not, as we see it, detract from what was said in **Malik** and the earlier cases as to the correct test for constructive dismissal. That test requires Tribunals to consider the facts objectively or to make an objective assessment of the intention of the contract-breaker and to see whether the conduct of the alleged contract-breaker, considered objectively, was conduct likely to destroy or seriously damage the relationship of trust and confidence between employee and employer.

The investigatory interview

29. Mr Rees submitted, so far as this area of the Tribunal's conclusions was concerned, that the ACAS guide on discipline and grievances at work current at the material time and statutorily admissible before the Employment Tribunal did not require an investigatory interview in every case. The relevant paragraph says:

> **"It is important to carry out necessary investigation of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."**

30. He argued that the Tribunal had erred in appearing to reach their conclusion in this area on the basis that such an investigatory interview was compulsory.

31. He made two further criticisms of paragraph 10.9 of the Tribunal's reasons. Firstly, he submitted that the Tribunal's finding that Ms Kendall's investigation did not involve interviewing the Claimant was contrary to the evidence and perverse; secondly, he submitted

that the Tribunal was not entitled to speculate, as they had done, about what would have emerged from an investigatory interview had one taken place.

32. As to the first of these points, there is nothing in the Tribunal's reasons that indicates a view that an investigatory interview is required in every case. The Tribunal expressly said that a reasonable employer would have invited the Claimant to an investigatory interview in the circumstances. Whether the circumstances were such as to require such an interview was a question of fact for the Tribunal. The circumstances that they relied upon were those set out in paragraph 10.8. The Tribunal's factual conclusion as to the need in the circumstances for such an interview has not been demonstrated or even arguably demonstrated to have been perverse. Perversity has to be overwhelmingly demonstrated if it is to be made out; see **Yeboah v Crofton** [2002] IRLR 634, per Mummery LJ at paragraph 93.

33. There was some conversation between the Claimant and Ms Kendall on 19 January. There was a factual dispute before the Tribunal as to what was said; at page 53 of our bundle is Ms Kendall's record of the conversation, but that page also records annotations by the Claimant disagreeing with its content. Mr Cunnington submitted that the Tribunal, in finding that Ms Kendall's investigation did not involve interviewing Mrs Rose at all, must have concluded as fact that Ms Kendall's account of the conversation between them was untrue or that the conversation did not have the status of an investigatory interview. At paragraph 10.8 the Tribunal found that the Claimant had informed Ms Kendall that the reason she had not recorded Ms Keane's sickness absences because she did not think it necessary to do so; so, the Tribunal found that there was some conversation. However, it does not follow that there was an investigatory interview. The finding is that there was a conversation in which the Claimant gave an explanation in relation to the absence of any note of Ms Keane's being off sick, but

there was no finding of anything that could amount to an interview; Ms Kendall did not in her witness statement suggest that there had been one, and the conversation as noted by Ms Kendall does not deal at all with the matters of concern set out in the letter inviting the Claimant to a disciplinary hearing beyond that failure.

34. In those circumstances, there is no basis for the submission that the Tribunal erred or reached a perverse conclusion in finding that the investigation did not involve an interview of the Claimant.

35. It is not necessary for us to determine whether the Tribunal was entering into impermissible speculation in expressing a view about what the outcome of such an interview might have been. If we had to express a view, it would be that the Tribunal were doing no more than expressing industrial reality arising from their experience and knowledge; but the speculation, if impermissible, makes no difference to the Tribunal's conclusions in any relevant respect. The purpose of an investigatory interview with the employee whose conduct is under examination is to permit the employee to know in advance what her alleged failures are alleged to have been and to have the opportunity of explaining them so that disciplinary proceedings may be avoided. That opportunity, on the findings of the Tribunal, was denied to the Claimant.

36. For these reasons, we reject the criticisms of the Tribunal's conclusion on the investigatory interview issue.

The letter of 26 January

37. Mr Rees submitted that there was nothing disproportionate or intimidating about that letter, which we have set out above, and that the Tribunal's conclusion about it at the end of

paragraph 10.9 was perverse. We are wholly unpersuaded by that submission. Mr Rees accepted that the Tribunal had rightly said that there were no company rules and procedures other than those which arose from historical practice. He did not satisfactorily explain the tenor of the language used, e.g. "blatant breach". It was, in our judgment, open to the Tribunal to conclude that the adjectives that they used correctly described the letter. That was a matter for them. A reasonable Tribunal might very well conclude as this Tribunal did, about the letter, having regard to the tone of the letter and the fact that the Claimant was a long-serving employee who was not said to have had any previous disciplinary problems. It was open to the Tribunal to reach the view about the letter of 26 January which they set out at the end of paragraph 10.9.

Paragraph 10.10

38. Mr Rees argued that the Tribunal ought not to have regarded Ms Kendall's telling the Claimant that she would not be paid if she did not attend the disciplinary hearing as contributing to a breach of the implied term without considering and making a finding upon the Respondent's intention in so acting; he said that the Tribunal should have asked whether the Respondent intended, in acting as Ms Kendall did, to break the contract and should have considered that they were acting in good faith. This submission illustrates with some clarity the problems that may arise if attention is too closely focussed on the need to ascertain the intention of the employer by a misinterpretation of the principles set out in **Tullett Prebon**. The subjective intention of the employer is not relevant, as indeed Kay LJ's judgment makes clear. It was not necessary for the Tribunal, either in the context of this area of fact or in relation to the others that we have considered – and we say that because the subjective-intention argument was introduced by Mr Rees into his submissions on paragraph 10.9 of the Judgment – for the Tribunal to consider or make any finding as to the Respondent's subjective intention.

39. In the alternative, Mr Rees submitted that the finding against the Respondent in paragraph 10.10 was perverse; he drew our attention to the principle that, if an employee refuses to attend work when required or to do work required of him, within the bounds of his contract of employment of course, he is not entitled to be paid as long as the requirement made of him was a reasonable one. We accept that principle without hesitation and without the need for authority for the purposes of this appeal. However, the Tribunal, if paragraph 10.10 is read as a whole, can be seen not to have decided that it is always unreasonable for an employer to say that an employee will not be paid if he does not attend a disciplinary hearing, they found that in this case it was disproportionate for the Respondent to threaten not to pay the Claimant if she did not attend the hearing when the Respondent had unreasonably refused to allow the Claimant to be accompanied at a disciplinary hearing by the companion of her choice. That refusal, they had found, was unreasonable for the reasons set out in paragraph 10.4. There was no issue of principle here; these were matters of fact that were for the Tribunal to evaluate. It cannot be said that no reasonable Tribunal would have reached the view that this Tribunal reached on this issue.

Overall

40. In his Notice of Appeal Mr Rees, having addressed the point of principle and then the detailed findings of the Tribunal to which we have referred, put forward the argument that the Judgment as a whole was flawed because there had been the failure to ascertain the Respondent's intention. We have dealt with that point already and do not need or intend to repeat what we have said. Orally he further submitted that the criticisms made by the Tribunal of the Respondent's conduct towards the Claimant could not be said to amount to a fundamental breach of contract entitling the Claimant to resign and that the Tribunal's

conclusion in the Claimant's favour was perverse. We have been through those of the individual criticisms that Mr Rees criticised; all of them were criticisms that the Tribunal were entitled to make. We refer again to paragraphs 19 and 20 of Kay LJ's Judgment in **Tullett Prebon**; whether there has been a repudiatory breach is a highly context-specific question. It is one of fact. It was, in our judgment, plainly open to the Tribunal on the facts to regard those aspects of the Respondent's conduct of which they were critical, taken together, as amounting to a repudiatory breach, particularly, as the Tribunal set out in paragraph 11, when serious allegations were made which challenged the Claimant's integrity without her being given any proper opportunity before disciplinary proceedings to explain her position, and when her reasonable request to be accompanied by Mr Temple at the disciplinary hearing was unreasonably rejected. The high threshold for a perversity challenge has not been passed in this case.

Conclusion

41. For the reasons we have set out, this appeal fails and must be dismissed.