Appeal No. UKEAT/0511/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 May 2013
Judgment handed down on 27 June 2014

Before

HIS HONOUR JUDGE SEROTA QC

MR I EZEKIEL

MR D NORMAN

THE CHARITY COMMISSION — APPELLANT

MR D R ORBISON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM TOLLEY (of Counsel) Instructed by: Treasury Solicitors One Kemble Street London WC2B 4TS
For the Respondent	MS RACHEL WEDDERSPOON (of Counsel) Instructed by: Regents Solicitors 3rd Floor 82 King Street Manchester M2 4WQ

SUMMARY

DISABILITY DISCRIMINATION

Disability

Reasonable adjustments

The decision of the majority of the Employment Tribunal that the requirement by the Respondent that the Claimant should attend a meeting with his line manager to discuss a return to work constituted a repudiatory breach of contract was unsustainable because it could not be said that, objectively, the Respondent had clearly shown an intention to abandon and altogether refuse to perform its contract with the Claimant.

The Claimant was disabled within the meaning of the **Equality Act**, suffering from an anxiety and depressive disorder. The Employment Tribunal held the Respondent was liable for discrimination on the grounds of the Claimant's disability by failing to make a reasonable adjustment not to require the Claimant to attend the meeting with his line manager. The decision was unsatisfactory because the Employment Tribunal failed to identify the nature and extent of the substantial disadvantage suffered by the Claimant. In those circumstances it was not possible to determine whether or not the proposed adjustment could be regarded as one that was reasonable. The Employment Tribunal had given no explanation as to why this was a reasonable adjustment.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent from the Judgment of the Employment Tribunal at Liverpool, sent to the parties on 3 June 2012 (although it is apparently dated 2 July 2012). The Employment Tribunal was presided over by Employment Judge Robinson, who sat with lay members. The hearing lasted approximately 17 days. The Employment Tribunal's Judgment runs to some 168 paragraphs over 27 pages.

2. The Employment Tribunal unanimously dismissed a number of claims (a) that the Claimant had suffered detriment for having made protected disclosures; (b) that he had been unfairly dismissed by reason of having made protected disclosures; (c) that he had suffered indirect discrimination on grounds of disability.

3. The Employment Tribunal upheld by a majority (a) the claim that the Respondent was in breach of its duty to make reasonable adjustments; (b) the Claimant had suffered an unfair constructive dismissal.

4. The dissentient was the Employment Judge. At this stage in our Judgment, we must make clear that in our opinion, no special respect should be given to the Reasons for the Employment Judge dissenting or any less respect given to the views of the majority lay members.

5. The Claimant sought to include in the bundle a number of additional documents. The Registrar declined to order disclosure of the notes of the Employment Judge. The additional documents have not assisted us in determining matters raised on this appeal, and we note that

there is no cross-appeal by the Claimant. The appeal was referred to a full hearing on the "sift" by Mr Recorder Luba QC on 20 October 2012.

The factual background

6. We take this largely from the Judgment of the Employment Tribunal, but we will concentrate on those matters that are relevant to the findings of repudiatory breach, unfair dismissal and failure to make reasonable adjustments. We will make less reference to the matters that relate to the claims that were dismissed, in the absence of any cross-appeal.

7. The Respondent body is the regulator for charities in England and Wales.

8. At all material times from 1 July 2010 the Claimant was disabled within the meaning of the Equality Act, suffering from an anxiety and depressive disorder. This was determined at a Pre-Hearing Review before Employment Judge Ryan at the Employment Tribunal in Liverpool on 2 September 2011. The Judgment is dated 21 September 2011 and was sent to the parties on 29 September 2011.

9. The Claimant joined the Respondent on 16 June 2008 as a Senior Caseworker in its Compliance and Investigation Department.

10. The second case assigned to the Claimant concerned a charity, African Aids Action, a small charity with funds worth between £10,000 and £12,000. One of its trustees was a Mr Eyob Sellassie. The investigation commenced on 26 April 2008. The Respondent exercised its statutory powers to freeze the charity's bank account. In the view of the Employment Tribunal the Claimant came to believe, and never wavered in his view, that African Aids Action performed no charitable function and should be closed down. The

Claimant had convinced himself that the charity and its trustees were corrupt. The charity and Mr Sellassie complained; the complaint escalated because Mr Sellassie complained to his MP and to the Prime Minister (Gordon Brown). He suggested that the Respondent was targeting African Aids Action because it was a "black charity" and was acting unfairly. There were in fact later proceedings in the Charity Tribunal. Moving ahead in time, we note that at the end of the day the Respondent offered an apology to Mr Sellassie and made a modest ex gratia payment to him of £100.

11. Over a period of time the Respondent investigated the complaints made by Mr Sellassie during the course of which the Claimant was completely exonerated.

12. The Claimant's case was that his communications with Mr Sellassie were hostile and that he was abused by Mr Sellassie. He was advised to put the incidents when he was abused into the accident book, but he declined to do so.

13. In June 2009 Ms Lynn Killoran joined the Respondent and we believe was placed in charge of the Compliance Department. The Claimant fell, therefore, under her direction, although Ms Killoran was not his direct line manager. Without going into details there was a significant difference of opinion between the Claimant and more experienced colleagues and superiors as to how to deal with the investigation into African Aids Action. In the event, and largely for reasons of proportionality, the Respondent determined to end the investigation, and by 29 September a decision was taken by Ms Killoran and Miss Russell, the Head of Investigations and Enforcement, to close the investigation. We assume this must have been in the nature of a recommendation because the formal decision actually taken by the Respondent was made later. The Claimant was extremely unhappy with the decision, and by 7 October 2009 he was complaining that his managers were freezing him out of the

investigation and his role was becoming marginalised, and he was being "humiliated", "undermined" and "victimised".

14. The Claimant, as we have mentioned, complained of abuse from Mr Sellassie with whom he was in communication, and on 13 October 2009 the Respondent appointed another employee to take over the African Aids Action inquiry. The Employment Tribunal was satisfied that the Claimant was taken off the inquiry to protect him from further abuse by Mr Sellassie, and the Claimant's managers were at pains to make it clear that his removal from the investigation was not by reason of any lack of confidence in his ability.

15. The decision to terminate the inquiry appears to have been taken formally on about 30 October 2009 on the advice of the Respondent's internal legal department. It is important to record that in paragraph 22 of the decision, the Employment Tribunal record that a legal officer, Ms Millington, advised that the case be closed down "with strong regulatory advice and guidance without making any orders." The Employment Tribunal found explicitly that that was an entirely appropriate position for managers to take in the circumstances and it is from this decision that Mr Orbison's anger, upset and frustration arose. The Claimant was not a party to the decision but he was vociferously highly critical of the decision and simply would not "let go". He made repeated complaints about the Respondent's handling of the investigation and his treatment by Mr Sellassie. The Employment Tribunal was critical of the delay in addressing the Claimant's concerns as to the abuse he had received from Mr Sellassie. As we have noted, the Claimant was removed from the investigation to protect him from abuse by Mr Sellassie.

16. The Respondent had other reasons for wanting to close down the inquiry. It felt vulnerable to criticism of its handling of the investigation by reason of criticism levelled against it in another matter by the Charity Tribunal (the "SIV" case). It also felt vulnerable by reason

of poor legal advice from an internal lawyer that led to the Respondent (through the Claimant) making a winding up order against African Aids Action under section 19 of the Charities Act; an order which the Respondent lacked the power to make. This was in no sense the fault of the Claimant. He was relying on the legal advice he had received.

17. By 28 October 2009 the Respondent had concerns that the Claimant might be suffering from anxiety and stress, and Ms Killoran wrote to him saying that he should record the incidents with Mr Sellassie in the Accident Book and offered him the assistance of Right Corecare, an in-house department offering assistance to employees faced with stressful situations. The Claimant declined to undertake a stress risk assessment and, as we have already said, to record incidents in the Accident Book. The Employment Tribunal was critical of the Respondent's handling of the investigation into African Aids Action and found that it "had not covered itself in glory". It also found, however, that the Claimant had become obsessed with the matter and lost his sense of proportion.

18. On 3 November 2009 the Claimant made a formal public interest disclosure in relation to the Respondent's handling of the investigation into African Aids Action. It was shortly thereafter that he was removed from the case. The Employment Tribunal found in terms (see paragraph 25) that the decision to remove him was not taken as a result of his disclosure.

19. The Respondent undertook an internal inquiry into Mr Sellassie's complaints and concluded that the Respondent was within its rights to initiate an investigation, which was not in any sense motivated by racism. The Claimant was exonerated, but he remained unhappy and continued to complain. On 9 November 2009 Ms Killoran herself took charge of the African Aids Action case, which had escalated so as to become a major headache for the Respondent. She informed the Claimant he was no longer to deal with the matter.

20. The draft of an apology to Mr Sellassie which referred to the Respondent "not reaching the high standard that is expected" upset the Claimant. Ms Killoran explained that this was a reference to the poor legal advice that it was possible to impose a winding-up order under section 19 of the Act.

21. A report, at least in draft form, including the apology was ready to be sent out on 4 January 2010. The terms of the apology incensed the Claimant (see paragraph 52). The Respondent's management believed the report had exonerated the Claimant, but he chose to see it differently.

22. Again, the Claimant would not let up and continued to write to Ms Killoran and suggested that another asset freezing order be imposed against the charity, although Ms Killoran made clear that it was no longer appropriate for the Claimant to be working on the case.

23. A meeting of various officers took place on 4 February 2010 including the Claimant. The meeting was critical of Ms Killoran's management. The Claimant himself says that he had "ranted" at her.

24. The final report was sent to Mr Sellassie, having been amended and settled by Ms Jeanna Pearce, another officer of the Respondent, and the Claimant criticised her in an email, suggesting she had displayed a lack of objectivity. Ms Pearce was upset by this and by the wide circulation of the Claimant's email. This led to Ms Pearce making a complaint against the Claimant. Ms Killoran wished to meet the Claimant informally to discuss the matter, but the Claimant refused to meet her.

25. The Claimant complained that Ms Killoran had not gone through proper procedure in relation to the complaint against him and wanted further information and documents. The Claimant delayed in providing his comments on the report, although the Employment Tribunal noted (paragraph 70) that he had plenty of time to have done so. The Employment Tribunal noted at paragraph 71 that the Claimant suggested he had asked Ms Killoran for a key to her cupboard so that he could get the files but that in evidence to the Employment Tribunal he admitted he had never made that request. We draw attention to this only because the Claimant continues to say it is significant.

26. Mr Barker was instructed to deal with Ms Pearce's complaint. He had done so by 18 March 2010. The Claimant was prepared to discuss his issues about the investigation into African Aids Action with Mr Barker but continued to refuse to discuss them with Ms Killoran. The Claimant's public interest disclosure complaint was investigated by a Mr Locke. Mr Locke recommended *inter alia* that it was necessary for the Claimant to sit down with Ms Killoran and his manager to go through the issues in the report.

27. At this time Ms Killoran suffered a heart attack and her role was temporarily taken over by Miss Russell, who asked to meet the Claimant on 20 April 2010. Ms Killoran was unable to attend because she was on sick leave.

28. Matters became more complicated because Mr Locke's report was leaked and a copy found its way to Mr Sellassie, which caused further embarrassment to the Respondent. On 23 April 2010 the Claimant went on sick leave, suffering from stress and anxiety and he never in fact returned to work. His solicitors asked the Respondent not to contact the Claimant directly while he was medically unfit to work and on sick leave. At this point in time, the

Respondent's occupational health advisors became involved, and the Claimant appealed to the Civil Service Commission in relation to the treatment of his public interest disclosure complaint. We are not certain whether his appeal related to other matters related to African Aids Action or not.

29. The Claimant continued to complain he had not received sufficient support during the handling of the case and the Respondent sought a stress assessment. By June 2010 internal discussions were taking place within the Respondent in relation to a phased return to work by the Claimant, the making of adjustments such as modifying his workload and offering him counselling.

30. The Claimant's medical notes of 1 July 2010 reveal that he was saying at this time already that his position was untenable and he would be seeking to establish that he had been constructively dismissed.

31. On 5 July 2010 the Claimant's solicitors (Regents Solicitors) wrote to the Respondent a letter headed "Letter before Action". Regents Solicitors asked for correspondence and communication to be addressed to them and that the Claimant "most certainly should not be contacted by you while he is medically unfit for work". Regents Solicitors sought disclosure of various documents and information. Regents Solicitors informed the Respondent it had been instructed to make a claim to the Employment Tribunal that the Claimant had been subject to a detriment as a result of his public interest disclosure. His complaints were that his complaint against Mr Sellassie was sidelined, that he had been repeatedly misled and unsupported by the Respondent, and unfairly subjected to threats of disciplinary procedure. He had been subjected to periods of stress, which had caused high blood pressure, psoriasis, and work-related stress and had had to endure public humiliation and criticism while being denied a fair opportunity to

respond. On 16 July TSol replied. They confirmed having advised the Respondent only to channel communications about the Claimant's dispute through TSol and that they should not contact him directly about the dispute now that he had instructed solicitors. However, there were various matters outside the dispute including his continued employment and sickness absence that TSol suggested should be the subject of direct communication with the Claimant and it asked whether Regents Solicitors were content to agree to this. The letter was treated as a grievance.

32. On 20 July 2010 the Claimant issued his first ET1 complaining that he had suffered detriment as a result of having made a protected disclosure. The detriments he is asserted to have suffered are those set out in the letter of 5 July. It is important to note that, contrary to what the Claimant has asserted during this appeal, the ET1 makes no reference whatever to Ms Killoran, who is not a party. There was no reference to her in the letter of 5 July, again contrary to what the Respondent asserted before us.

33. On 26 August 2010 the Respondent informed the Claimant that his manager, Mr Williams, was being transferred to another department and that Ms Killoran would now be his manager. The Employment Tribunal, at paragraph 113, noted that as at this date the Claimant had made no complaints about Ms Killoran as his manager. On 2 September 2010 she wrote to the Claimant suggesting they might meet to explore the possibility of placing him on lighter duties, shorter hours, and part-time work, and any other recommendations put forward by occupational health would be implemented. The Claimant was warned of the consequences of continued absence from work and that the Respondent could not support open-ended absences. He was invited to a meeting on 8 September, accompanied by his trade union representative. The Claimant asserted that this amounted to disciplinary action; the Employment Tribunal at paragraph 118 found that it was not disciplinary action but the

Claimant was simply being told what his position would be, and the Respondents was within their absence from work procedure, which had now reached the stage 2 part of the process. This elicited a response from Regents, which the Employment Tribunal found "rather surprising... a suggestion that it puts unreasonable and unnecessary pressure on him." Regents also suggested that it was "entirely inappropriate for Ms Killoran to attempt to contact the Claimant because she was involved in the current proceedings in the Employment Tribunal". TSol wrote to Regents concerning management ill-health procedures and implementation of reasonable adjustments, maintaining it was entirely appropriate in the circumstances for Ms Killoran to write directly to the Claimant inviting him to a stage 2 meeting under the managing ill-health absence policy and to consider reasonable adjustments. As the Claimant wanted some of these matters dealt with in writing, Regents was asked to supply details of the acts of victimisation, bullying and unfair treatment relied upon, particularising specific incidents and individuals involved. No such details were ever forthcoming.

34. The Employment Tribunal then set out in some detail the correspondence that took place in October and November. On 1 October 2010 Regents wrote to TSol making clear that correspondence addressed to the Claimant should be channelled through Regents:

> **"This is entirely proper and reasonable given the nature of the complaints that our client has in relation to your client and specifically in relation to Ms Killoran. We have made our views entirely clear in earlier correspondence in relation to Ms Killoran's conduct of the matter to date and her continuing involvement with this case. Until such time as she is removed from responsibility for managing our client, communication will continue to take place through this firm."**

35. On 13 October 2010 the Claimant's GP, Dr Nuttall writes in relation to the request that the Claimant should attend a "stage 2" meeting, which would be face to face with the employers. Dr Nuttall states:

> **"In my medical opinion this would be detrimental to his health. In my medical opinion the current anxiety condition is entirely caused by the conduct of his employers and so a face-to-face meeting with them would clearly exacerbate his medical condition which is already quite considerable."**

The Employment Tribunal considered that "It seems to us that Dr Nuttall had no basis for asserting that the Claimant's anxiety condition was "entirely caused" by the Respondent's conduct as this seems highly contentious". We agree.

36. On 14 October 2010 Dr Kennedy, occupational health advisor, reported on a consultation with the Claimant on 12 October 2010. He notes that there had been "no improvement in the Claimant's state of health and he remains stressed and anxious due to perceived work-related issues." This is a more appropriate formulation than that used by Dr Nuttall. Dr Kennedy confirmed that the Claimant was unfit to work in any capacity and the long-term prognosis was uncertain:

> **"...until the perceived work-related issues have been resolved, there is no prospect for a satisfactory return to work. The timescales of possible return are impossible to estimate as they depend on resolution of all of the outstanding work issues. David appears to be of the view at the present time that his situation as he perceives can only be resolved by a Tribunal as he is of the view that further contact with immediate management is unlikely to be impartial and independent. In my own personal point of view medically there is no reason why he should not take part in further meetings with interested parties to try and resolve the current impasse."**

37. On 15 October 2010 TSol wrote:

> **"The last occupational health report dated from June 2010 since which time, although the Respondent endeavoured to discuss the matter with the Claimant, he had frustrated all attempts by the Respondent to manage his sickness absence and discuss and implement reasonable adjustments and modifications recommended by occupational health. The Respondent would await the forthcoming occupational health assessment and insists on the Respondent's right to take steps to manage the Claimant's absence. Ms Killoran would remain as the Claimant's manager. She was the most appropriate senior manager to manage his sickness absence and would remain in the line management chain when he returned to work. If the Claimant feels it would be beneficial my client would be willing to arrange mediation to seek to address some of the issues and concerns he has raised in relation to Ms Killoran."**

38. Dr Kennedy's occupational health report, dated 14 October 2010, arrived after this letter. Dr Kennedy opined that the Claimant was stressed by reason of perceived work-related issues and believed that any meeting with immediate management was unlikely to be impartial and independent but there was no medical reason why he could not take part with interested parties to try and resolve the impasse. He suggested that unless management could appoint an independent and impartial person to break the deadlock there seemed little prospect of change in the current situation. We note that neither Dr Nuttall nor Dr Kennedy suggest that Ms Killoran specifically is the problem.

39. On 29 October 2010 TSol made a final attempt to broker a return to work and, as recommended by occupational health, for a meeting to be chaired by an independent senior manager, Ms Jane Adderley. Ms Adderley was a Diversity Officer and trained mediator. However, if the issues between the parties were to be addressed, it was essential that Ms Killoran had to be in attendance. TSol complained:

> **"My client has already gone the extra mile to try and facilitate a return to work for your client. Regrettably, your client has, to date refused to engage constructively with it to try and achieve a successful return to work."**

Regents Solicitors' response was that the Claimant would attend a meeting chaired by Ms Adderley provided that he was not required to be in the same room as Ms Killoran and communicate with her directly. The meeting was to take place at a neutral venue and not at the Respondent's offices and that the meeting should take place in the spirit of co-operation and did not form part of a formal process. In particular, it was not considered to be a "stage 2" meeting pursuant to the Respondent's disciplinary process. The Claimant was to be accompanied by a trade union representative and a full agenda provided at least seven days in advance. The meeting should not last more than two hours. On 8 November 2010 TSol replied, confirming that the meeting to be chaired by Ms Adderley would not constitute a formal meeting and

would not be considered a stage 2 meeting but an attempt to resolve the issues which the Claimant maintains precluded his return to work. However, for the meeting to have any chance of resolving the Claimant's work-related issues, it was:

> **"...essential that Ms Killoran participate at appropriate points in this meeting but if the Claimant remained unwilling to take steps to repair his working relationship with Ms Killoran, his line manager, there was no prospect that the meeting would result in any progress towards a successful return to work."**

40. On 24 November the Claimant repeated he would not even consider Ms Killoran being in the same room as him. TSol responded that Ms Killoran was the Head of Compliance and irrespective of whether she was the Claimant's direct line manager, she would still be involved in his working day. It was therefore imperative that he resolved his difference with her "if he is to assimilate back into the team without undermining authority". The meeting was set for Monday, 6 December and Regents were informed that Ms Adderley was prepared to have a brief pre-meeting alone with the Claimant so that she could explain to him how she was to proceed, and then Ms Killoran could join the meeting later to deal with the work-related issues.

41. The response of the Claimant was to send a letter of resignation on 25 November 2010 suggesting that the Respondent had acted in a manner seeking to frustrate his return to work so the meeting never took place. The Employment Tribunal noted (paragraph 139) that despite the Claimant's expressed view of Ms Killoran she had given him "an excellent reference".

The decision of the Employment Tribunal

42. The Employment Tribunal firstly set out the facts summarised above. It then directed itself as to the law, in particular to the provisions of the **Employment Rights Act** dealing with protected disclosures (section 47B), section 103, dealing with unfair dismissal by reason of having made a protected disclosure (section 103A). It directed itself as to what were qualifying

disclosures, the need for the Claimant to have a reasonable belief that the Respondent was failing to comply with the legal obligation or that a crime had been committed (section 43A(1)(a)(b) and (c)). It then directed itself as to the requirement of good faith and as to the meaning of "detriment" by reference to **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] ICR 337. It directed itself in relation to constructive dismissal and section 95(1)(c) of the **Employment Rights Act**.

43. It went on to direct itself in relation to constructive dismissal at paragraphs 151 and 152.

> **"151. There are three strands to a constructive unfair dismissal. First that there should be, not just a breach of contract, but a fundamental breach of a contract going to the heart of the relationship; secondly that the employer's breach caused the employee to resign and finally that the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive unfair dismissal.**
>
> **152. Constructive dismissal often crops up in whistle-blowing cases, as in this case given that a protected disclosure may strain the relationship between the employer and the employee and if the employer reacts in a hostile way to that whistle-blowing then the claimant may well succeed in showing that the employer has undermined the mutual implied term of trust and confidence. There can of course be a course of conduct by the respondent which cumulatively amounts to a fundamental breach entitling the employee to resign but in those circumstances there must be a last straw incident which must be a the very least mistreatment of the claimant."**

At paragraph 153 the Employment Tribunal directed itself in relation to discrimination on the grounds of disability and the reversal of the burden of proof (see section 136, Equality Act) once facts are established from which the court could decide, in the absence of any other explanation, that an unlawful act of discrimination has taken place.

44. We do not consider that there has been error in the Employment Tribunal's self-direction as to the law, although it might not have been as complete as desirable. The Employment Tribunal recognised that in order to determine whether or not there had been a failure to make reasonable adjustments it was necessary to establish what provision, criterion or practice (PCP) had been put in place by the Respondent which left the Claimant at a substantial

disadvantage. At paragraphs 155-156 the Employment Tribunal set out the various reasonable adjustments that have been put in place. The Employment Tribunal noted that the main complaint was the insistence that the Claimant meet with Ms Killoran as a pre-cursor before he could discuss returning to work (see paragraphs 156 and 157); we draw particular attention to paragraph 157(3) that the reasonable adjustment was said to be "allowing the Claimant not to attend a meeting with Lynn Killoran". The Employment Tribunal then went on to refer to section 13 of the Equality Act that defines discrimination; section 15, the discrimination arising from disability; and section 19, which applies where a PCP which is discriminatory is applied to the employee.

45. It is important to note the findings made by the Employment Tribunal at paragraphs 162 to 172. It is probably helpful to set these out, rather than summarise them (163-172):

> **"163. He is an intelligent man who knows his way around this area of the law (i.e. whistle-blowing). This obsession has led to him almost overwhelming his senior managers with emails, commentaries and discussions about the Charity.**
>
> **164. A sense of proportion went out of the window yet proportionality was the watch word as far as his senior managers were concerned. This was a Charity worth very little and a disproportionate amount of time was being spent, not only on dealing with Mr Orbison's queries about the Charity, but also over the Charity .itself.**
>
> **165. Senior managers recognised that, Mr Orbison did not.**
>
> **166. He also was over anxious to praise his line manager, Mr Williams yet some of the fault lay at Mr Williams' door in not properly managing Mr Orbison and recognising certainly in the early stages that Mr Orbison was being verbally abused by Mr Sellassie and that it was causing Mr Orbison some distress which built up over time.**
>
> **167. We also noted a tension between the Liverpool office and the other offices, especially the London office of the Respondent. There was tension, in particular between the workers on the ground like Mr Orbison and their immediate managers and those more senior managers who could perhaps see the bigger picture.**
>
> **168. The respondents did not cover themselves in glory both in relation to AAA and in Mr Orbison's dealings with the charity. Senior managers were protective of their own decisions and they were anxious about the mistakes that had been made when dealing with the trustees of the charity.**
>
> **169. There were also delays in dealing with matters which prevented a quick resolution of Mr Orbison's problems.**
>
> **170. In part this was because of Mr Orbison's insistence on dealing with issues himself virtually on a daily basis. But it was also because Mr Sellassie himself upped the stakes by involving, not only his MP, but also the Prime Minister's office. Senior managers felt pressurised from all sides.**

171. Insofar as we have to decide this matter we have no doubt that the respondents were not trying to avoid their statutory obligations as Mr Orbison suggests but experienced managers were genuinely trying to deal with the matter in the way that they thought best. That happened to be contrary to the way in which the inexperienced Mr Orbison wanted it dealt with.

172. The likes of Mr Locke and Jeanna Pearce became involved, not because Mr Orbison was pushing the boundaries but because Mr Sellassie would not let go either and took the respondents to the Charity Tribunal. This case was played out in the shadow of the judgment of the Charity Tribunal against the respondents in the case of "Siv".”

46. Paragraph 174 is important:

“174. There was no causal link between any of the treatment received by Mr Orbison and any of his protected disclosures. If Mr Orbison perceived that he suffered a detriment it certainly was not because he had made such a disclosure. The response of the senior managers, in particular Mr. Locke and Ms Pearce, were centred on dealing with Mr Sellassie's complaint.”

47. The Employment Tribunal exonerated the Claimant of having made his disclosures in bad faith (paragraph 178). They believed his criticism of the management was appropriate but he was obsessed about African Aids Action and that led him to become over-critical of decisions being made. The Employment Tribunal found explicitly that his dismissal was not connected to this “whistleblowing”, paragraph 179:

“179. However, his dismissal was not connected to the whistle-blowing. Once the claimant was absent ill it was always going to be difficult for him to return. We do not think his own solicitors helped by suggesting, presumably both to Mr Orbison when advising him but also early on in Mr Orbison's absence, to the respondents that he was going to push for constructive unfair dismissal. No potential last straw had occurred at that point. Similarly the respondents put in place all reasonable adjustments requested save for one which was in effect to not have Lynn Killoran's involvement in line managing the claimant.”

48. Paragraph 182 is of considerable significance because no finding was made against Ms Killoran that could justify the Claimant’s refusal to meet her other than the fact that she was party to the decision not to pursue the investigation against African Aids Action, paras 180-182:

“180. The claimant had had few problems with Lynn Killoran until the moment when it was suggested she would be the person involved in a meeting to get him back into work. Lynn Killoran came across as a mild-mannered woman who was dealing with a difficult employee and a difficult trustee in Mr Sellassie. Indeed the pressure was so much for her that her own health suffered. Our impression was that the claimant felt she was ineffective.

181. Mr Orbison's ire, even when giving evidence to us, was aimed at Miss Russell Ms Pearce and Mr Locke. Indeed he said himself that Lynn Killoran when she phoned him at home

> **whilst he was ill was .very pleasant to him and he had no problems with the content of the telephone call, Just the fact that she rang him.**
>
> **182. We concluded that the only reason for him taking that stand was because, it was she, together with Miss Russell, who made the decision not to pursue the AAA Charity in the way that Mr Orbison wanted. That was, in short, Miss Killoran's only crime."**

49. At paragraph 184 the Employment Tribunal concluded that the Claimant had made qualifying disclosures in good faith and hence they were protected but that he had "suffered no detriment linked to those disclosures" so he had not been told to "put up or shut up". He was not sidelined. He was not subjected to disciplinary procedure because of the disclosure but because he had questioned Ms Pearce's objectivity. His work had not been publicly criticised. Mr Orbison had a sense of grievance but, in short, it was not a justifiable one. At paragraph 185 the Employment Tribunal said:

> **"185. The claim for indirect discrimination and discrimination arising from the disability fail for all the above reasons and because no provision criterion or practice put the claimant at any disadvantage when compared with others. Anybody in the circumstances the claimant found himself would have been dealt with in the same way by the respondent senior managers. As regards the Section 15 claim, there was no unfavourable treatment of the claimant."**

50. At paragraph 186 the Employment Tribunal concluded there was one issue on which it could not agree:

> **"186. The majority (Mr. Walking and Mrs. Williams) found that imposing the condition that he must meet with Miss Killoran was a breach of his contract which alone goes to the heart of the relationship and destroyed the implied term of trust and confidence. In particular, TSol's attitude was that it was the claimant's problem and it was for him to sort out. The majority felt that was unreasonable and there should have been an adjustment put in place to allow him simply to meet with Miss Adderley and see where that discussion led before imposing a. meeting with Miss Killoran upon the claimant.**
>
> **187. Therefore the majority felt that there had been a constructive unfair dismissal and a breach of the Section 20 duty to make a reasonable adjustment."**

51. The Employment Judge added:

> **"188. The minority member felt that the claimant could have agreed that the involvement of senior managers would resolve his problems and Mr. Robinson found that the respondent's requirement that the claimant should meet with Miss Killoran was entirely reasonable. It was essential that someone dealt with his management issues. Miss Killoran was as well placed as**

anyone to do it. If the claimant had a poor relationship with senior management it had to be addressed. Just meeting with Miss Adderley (who at no time would have managed him in the future) and not senior management, would not have dealt with any disadvantage. Moreover, asking him to meet with Miss Killoran in the comfortable and relaxed way agreed could never be a breach of contract even less a fundamental breach. No matters leading up to his resignation together amounted to a breach of contract and in any event there was no last straw incident which amounted to mistreatment of him. Consequently the minority decided all the claimant's claims fail."

Notice of appeal and arguments in support

Breach of contract

52. It is submitted that the Employment Tribunal applied the wrong test in determining if there had been a repudiatory breach of contract. It had applied a test of reasonableness rather than asking whether the Respondent had objectively displayed an intention to refuse performance of the contract. Our attention was drawn to the decision of the Court of Appeal in **Tullett Prebon v Capital BGC Brokers** [2011] IRLR 420 and in particular those passages citing passages from the Judgment of the Court of Appeal in **Eminence Property Developments Ltd v Heaney** [2010] EWCA Civ 1168.

53. It was submitted that on the contrary the Employment Tribunal had found that the Respondent's actions had been rational and designed to secure the Claimant's return to work. The Respondent's actions were supported by medical evidence and were incapable of amounting to a repudiatory breach of contract. The sole reason for requiring Ms Killoran's attendance was to address the Claimant's management issue and to attempt to secure his work in the Compliance Department, which was headed by Ms Killoran.

54. We were referred to those passages in the decision of the Employment Tribunal we have just cited including the fact that the Claimant had had few problems with Ms Killoran until the moment it was suggested she would be the person involved in the meeting to get him back to work and that her "only crime" in the Claimant's mind was that she, together with Miss Russell, had made the decision not to pursue the African Aids Action charity in the way that the

Claimant wanted. The facts suggested, as they had in the **Tullett Prebon** case, that the intention of the Respondent was not to attack the relationship with the Claimant but to strengthen the relationship.

55. It was submitted there was no breach of the implied term of trust and confidence. It was based entirely on the assertion that TSol considered that the reluctance of the Claimant to be in the same room as Ms Killoran was his problem and for him to sort out. However, the evidence on its findings did not support there having been any breach of the implied term of trust and confidence.

56. The Respondent set this out in detail in paragraph 21 of its skeleton argument. (i) The Respondent had obtained an occupational health report that the Claimant's return to work would depend to a large extent on management's ability to resolve all of the outstanding perceived work-related matters. (ii) The Claimant was told on 26 August 2010 that Ms Killoran had become his manager, she having returned to work after sick leave. Prior to this point the Claimant had made no complaints about Ms Killoran. (iii) Neither the Letter before Action nor the first ET1 lodged by the Claimant mentioned or even obliquely referred to Ms Killoran. (iv) Neither the report from Dr Nuttall nor from Dr Kennedy suggested that it was Ms Killoran specifically that presented any problem for the Claimant's return to work. (v) The Respondent had made clear it would implement reasonable adjustments if appropriate regardless of whether the Claimant was disabled or not. (vi) The Respondent arranged a meeting to be chaired by an independent senior manager, Ms Adderley, and TSol explained why it was essential for Ms Killoran to meet with the Claimant (vii) The Respondent accepted all conditions placed by the Claimant save one, namely his insistence that he should be required to be in the same room or communicate with Ms Killoran, including the meeting be held in a neutral venue, would be informal and not part of any stated procedure. (viii) The Claimant had few problems with

Ms Killoran until the moment it was suggested she should be the person involved in the meeting to get him back to work (ET 180-181). Ms Killoran was a mild-mannered woman dealing with a difficult employee and a difficult trustee (180). The Claimant's ire even when giving evidence to the Employment Tribunal was directed at others not at Ms Killoran. (ix) The only reason why the Claimant took his stand against Ms Killoran was because she was one of the managers who had made the decision not to pursue the African Aids Action charity in the way that the Claimant wanted. This was, as the Employment Tribunal had put it, her only crime.

57. Alternatively, it is said by the Respondent that the findings that there had been a repudiatory breach of contract and a breach of the term of trust and confidence was perverse.

Breach of section 20 of the Equality Act

58. At paragraph 185 the Employment Tribunal had found that there was no PCP that put the Claimant at a disadvantage as compared to others; this was inconsistent with the later finding that there was a PCP which would not have avoided this. The step of allowing a meeting with Ms Adderley before imposing a meeting with Ms Killoran would not have avoided any "substantial disadvantage" and therefore was not reasonable. The Employment Tribunal had not identified a substantial disadvantage to the Claimant caused by requiring him to attend a meeting with Ms Killoran, nor had it explained why not requiring him to have attended such a meeting would have been a reasonable adjustment.

59. We were referred to the **Rowan** guidelines [2008] ICR 218 at paragraph 27. The Employment Tribunal had failed to follow the schematic approach provided by those guidelines and accordingly was in no position to determine that the Respondent had failed to make a reasonable adjustment.

60. It was submitted that the reason the Claimant would not meet Ms Killoran had nothing to do with his disability but was because he disagreed with her decision to close down investigation into African Aids Action, a decision the Employment Tribunal found was entirely appropriate for the managers to have taken.

The Claimant's submissions

61. The Claimant sought to support the case that there had been a repudiatory breach of contract and a breach of the duty to make reasonable adjustments by arguing facts in its skeleton argument not set out in the findings. It sought to adduce additional documents to support the case why it was unreasonable to subject the Claimant to being in the same room as Ms Killoran. We considered that it was too late for us to revisit the factual findings of the Employment Tribunal, in particular that the Claimant's only complaint against Ms Killoran was in relation to having decided to close the inquiry. It was submitted that insofar as repudiatory breach was concerned, the Employment Tribunal had applied the correct test and was entitled to find that there had been a repudiatory breach. We were referred, in particular, to paragraph 186 of the decision of the Employment Tribunal. "The Respondent's attitude had been that it was the Claimant's problem (his unwillingness to meet Ms Killoran) and it was for him to sort out. The majority considered that to be unreasonable, going to the heart of the relationship, and destroying the implied term of trust and confidence".

62. It was suggested that the Employment Judge, in his minority decision, had been wrong to find there was an agreement to meet Ms Killoran. We observe that we can find no such finding.

63. It was suggested that Ms Killoran was a party to the first Employment Tribunal proceedings, and was referred to in the public interest disclosure and in the Claimant's

grievance; we can say now that the Claimant is in error in this regard. Ms Killoran was not referred to in these documents. She was a party to the second set of proceedings and she was apparently dismissed from those proceedings on day 1.

64. It is said that Dr Nuttall had warned against a face-to-face meeting with Ms Killoran; she is not mentioned by name. In relation to the finding, at paragraph 185, that there was no PCP placing the Claimant at a substantial disadvantage, the Employment Tribunal was referring to those complaints except the requirement of a meeting with Ms Killoran. Perhaps the decision was poorly worded, but the intention was clear, because otherwise paragraph 186 would make no sense. The finding at paragraph 185 related only to matters other than that we have mentioned.

65. In relation to the law, it was submitted that lack of reasonableness is a relevant tool in determining whether there has been a repudiatory breach; we were referred to a decision of the Employment Appeal Tribunal in **Burton, McEvoy & Webb v Curry** UKEAT/0174/09. We accept this submission, but as we shall explain later lack of reasonableness is only a tool in determining whether, objectively speaking, the Respondent intended to repudiate the contract.

66. The Claimant also sought to rely on other reasons as to why he distrusted Ms Killoran, not specifically referred to by the Employment Tribunal. We note here that the Claimant's difficulty is the explicit finding that Claimant's own complaint related to a decision relating to African Aids Action.

The Respondent's reply

67. Mr Tolley drew our attention to the fact that in her final submissions Ms Wedderspoon for the Claimant had relied on 16 separate matters which could constitute a repudiatory breach;

only one of these was upheld, namely the requirement that the Claimant should meet Ms Killoran. The Respondent submitted that the Claimant could not have objected to attending a meeting with Ms Killoran on some of the grounds relied on; for example the assertions that she was named in the grievance or in the public interest disclosure, could not stand. Mr Tolley took issue with the suggestion that TSol's letter of 24 November 2010 blamed the Claimant for the deterioration in the relationship with the Respondent; we have to say that is not our understanding of the letter. It was again pointed out to us that there is no specific reference to Ms Killoran in either the reports of Dr Nuttall or Dr Kennedy although it is fair to say that Dr Nuttall advised there should be no face-to-face meeting with the Respondent at all.

Discussion

The law

68. We shall first consider the relevant authorities on repudiatory breach and the implied duty of trust and confidence. We firstly refer to the decision of the Court of Appeal in **Tullett Prebon v BGC Brokers** [2011] IRLR 420. In this case Maurice Kay LJ cited the Judgment of Etherton LJ in the recent case of **Eminence Property Developments Ltd v Heaney** [2010] EWCA Civ 1168 at paragraph 61:

> **"19. The question 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 v WM Car Services (Peterborough) Limited*, [1982] ICR 693, at page 698F, 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" (*ibid*).'"**
>
> **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 (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.'"**

69. Maurice Kay LJ continued at paragraph 25:

Mr Hochhauser seeks to draw support from *Malik v Bank of Credit and Commerce International* [1998] AC 20 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 page 47G):

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

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 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 circumstances 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 the 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.'"**

70. Further authority for the proposition that a breach of the implied term of trust and confidence is necessarily repudiatory is to be found in the Judgment of Underhill J (as he then was) in **Amnesty International v Ahmed** [2009] ICR 1450:

> **"We agree that there is no exception to the rule that only a repudiatory breach will suffice for the purpose of s. 95 (1) (c): so far from this Tribunal having said anything different in Morrow, that seems to be the *ratio* of the decision – see the judgment of Mrs. Recorder Cox at para. 25. However, it is in the very nature of the Malik term that it will only be broken by conduct on the part of the employer which, without reasonable and proper cause, is likely to destroy or *seriously* damage the relationship of trust and confidence. Such conduct will necessarily be repudiatory: see *per* Elias J. in Hagen v ICI Chemicals and Polymers Ltd. [2002] IRLR 31 at para. 55 (p. 39). There is thus no need for a tribunal in a case based on Malik to ask two separate questions – was there a breach ? and if so, was it repudiatory ? – because if the answer to the first is yes the second is necessarily answered too."**

71. If an employer breaches the implied term of trust and confidence, even without the intention of terminating the agreement, the effect of the breach is necessarily repudiatory. The

dicta of Hale LJ in **Gogay v Hertfordshire CC** [2001] 1 IRLR 703, to which we were referred, must be seen in that light:

> **"53. It is now well settled that there is a mutual obligation implied in every contract of employment, not, without reasonable and proper cause, to conduct oneself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1998] AC 20, at p 35A and C,**
>
> > **'. . . 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. . . . 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'. Lord Steyn emphasised, at p 53B, that the obligation applies 'only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . '**
>
> **54. Miss Sinclair for the local authority argues that the breach must be such as to indicate that the perpetrator no longer wishes to be bound by the contract: hence a decision to suspend the employee in circumstances such as these could not be such a breach. This is to confuse the question of whether the term has been broken with whether such a breach entitles the employee to treat it as a repudiation of the contract. It is quite clear that the term may be broken even though the employer does not intend to bring the employment relationship to an end: see eg Malik v BCCI, above; and French v Barclay's Bank [1998] IRLR 646, CA."**

72. In our opinion there can only be a constructive dismissal by reason of there having been a breach of the implied term of trust and confidence if the breach was repudiatory. A breach of the implied term necessarily is.

Disability and reasonable adjustments

73. The relevant section of the **Equality Act 2010** on the duty to make adjustments is section 20:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

74. It is, we think, reasonably understood that in order to constitute a reasonable adjustment within the meaning of the section, the adjustment must be one which will facilitate the employee either remaining at or returning to work. The adjustment must also be reasonable.

75. As we were referred to the **Rowan** guidelines (see **Environment Agency v Rowan** [2008] IRLR 20) it is perhaps helpful to set out that guidance at paragraph 27:

> **"27. It is helpful, therefore, if we restate that guidance to have regard to the amendments to the act:**
>
> **In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:**
>
> **(a) the provision, criterion or practice applied by or on behalf of an employer, or**
>
> **(b) the physical feature of premises occupied by the employer,**
>
> **(c) the identity of non-disabled comparators (where appropriate) and**
>
> **(d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.**
>
> **In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1)without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."**

Conclusions

Breach of contract and breach of the implied term of trust and confidence

76. It seems to us we cannot avoid considering the intention of the Respondent viewed objectively. Accordingly we have to ask whether viewed objectively the intention of the Respondent in calling the Claimant to a meeting with Ms Killoran demonstrated an intention no longer to be bound by the terms of the contract of employment even if it may not have held the intention subjectively so to do. Further, as a general rule, any breach of the implied term of

trust and confidence must be significant and repudiatory. If neither significant nor repudiatory, there will be no breach of the implied term.

77. It seems clear to us on the evidence that we have recited that the entire purpose of the Respondent, viewed objectively and indeed subjectively, was to secure rather than hinder the Claimant's return to work. We accept that the Employment Tribunal found that the Respondent's actions were rational and designed to secure the Claimant's return to work. The Respondent's actions were supported by medical evidence and in our view are quite incapable of amounting to a repudiatory breach.

78. It is too late for the Claimant now to seek to rely on matters other than those that were found by the Employment Tribunal by reference to documents not referred to in its decision. Having regard to the findings of the Employment Tribunal at paragraphs 180-182, there was no possible reasonable justification for the Claimant's refusal to meet Lynn Killoran. The only basis that the Employment Tribunal found for his having taken against her was that he disagreed with her decision relating to the conduct of the investigation into African Aids Action. So in the circumstances, notwithstanding any mental health issues he may have had, his refusal to meet with her was not only unreasonable but could be said to have been irrational. It is impossible in those circumstances to have said that the Respondent in any sense acted unreasonably. All it was seeking to do was to secure the Claimant's return to work. The Employment Tribunal did not identify any criticism of Ms Killoran that might have justified a finding that the Respondent's insistence on her attending the meeting was a breach of contract at all. We bear in mind the Judgment of Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper**

> **appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care,** *British Telecommunications PLC –v- Sheridan [1990] IRLR 27* **at para 34."**

79. In our opinion, the Respondent in this case has made out the overwhelming case that no reasonable Tribunal, on a proper appreciation of the evidence and the law, could have reached this decision.

80. We also agree with the analysis of Employment Judge Robinson in his minority Judgment. We would also add that the letter from TSol at page 186 of 8 November 2010 does not bear the meaning placed on it by the majority.

Disability

81. We accept the submission of the Claimant, made by Ms Wedderspoon, that there is no inconsistency between the finding at paragraph 185 that there was no PCP that put the Claimant at any disadvantage when compared to others and paragraph 186 when the Employment Tribunal found that the PCP of requiring the Claimant to attend a meeting with Ms Killoran required an adjustment to be made, namely that the Claimant be not required to meet with her. It is perhaps fair to say that the decision of the Employment Tribunal is not felicitously worded, but the intention, in our view, is clear from paragraph 186, that paragraph 185 only applied to those PCPs other than that the Claimant should be required to meet with Ms Killoran. In coming to this conclusion we have, of course, had regard to the Judgment viewed as a whole and also to the approach that we take to decisions of the Employment Tribunal following the guidance of Lord Hope in **Hewage v Grampian Health Board** [2012] ICR 1054 at paragraph 26:

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

82. Moving on from there, the Employment Tribunal has not given any reasoning as to why the adjustment not to require a face-to-face meeting would have been reasonable. The Employment Tribunal did not, as was recommended in **Rowan**, identify the nature and extent of the substantial disadvantage suffered by the Claimant. In those circumstances it was not possible to determine whether or not a proposed adjustment could be regarded as one that was reasonable. The Employment Tribunal has given no explanation as to why the proposed adjustment that the Claimant should simply have been allowed to meet Ms Adderley on her own to see where the discussion led before imposing a meeting with Ms Killoran upon him was reasonable, nor as we have said has it identified the nature and extent of the substantial disadvantage suffered by the Claimant. The Tribunal may well have been entitled to find that the Claimant's refusal was unreasonable.

83. In all the circumstances the appeal in relation to the finding that there has been a breach of contract on the part of the Respondent and a breach of the implied term of trust and confidence succeeds. That part of the order of the Employment Tribunal will be set aside. Insofar as the finding of discrimination is concerned, it seems to us that we can do no more than set aside the order of the Employment Tribunal because the Employment Tribunal simply has not made sufficient findings and we cannot say that the Claimant's case would have been bound to fail. As we cannot decide this matter ourselves, we are obliged to remit that part of the Judgment for rehearing in accordance with this Judgment. We have considered carefully whether we should remit the case to the same Employment Tribunal and we bear in mind the principles set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In the light of our decision it might be thought by a reasonable and informed bystander that to ask the same Employment Tribunal to bring a wholly fresh mind to bear might be too big an ask. While we do not for one moment doubt the professionalism of the original Employment Tribunal, in our

opinion, in all the circumstances, the question of whether the requirement that the Claimant attend a meeting with Ms Killoran present was discriminatory should be referred to a fresh Tribunal.

84. It only remains for us to thank counsel for their helpful submissions.