Appeal No. UKEAT/0158/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 February 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR M MOSTYN — APPELLANT

S AND P CASUALS LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR IAN PROCTOR (Solicitor) Law 4 Less 331c Harrogate Road Leeds LS17 6QD
For the Respondent	MR PAUL SMITH (of Counsel) Instructed by: Shore Stewart 1 Cavendish Court South Parade Doncaster South Yorkshire DN1 2DJ

SUMMARY

CONTRACT OF EMPLOYMENT - Wrongful dismissal

UNFAIR DISMISSAL - Constructive dismissal

UNFAIR DISMISSAL - Reasonableness of dismissal

The EAT allowed the appeal of the Claimant against a Judgment of the ET dismissing, among other claims, his claim for constructive unfair dismissal. The Claimant had relied on a threat unilaterally to impose a substantial cut in his basic pay (before commission) as a breach of the implied term of trust and confidence. The ET held that the Claimant resigned because of the breach and that the breach was a breach of the implied term, but that the Respondent had reasonable and probable cause for imposing the pay cut. The EAT held that, given that the breach relied on was a significant breach of an important express term (as well as a pleaded breach of the implied term) the ET had erred in law in asking itself whether the employer had reasonable and probable cause for repudiating the contract of employment. It also held that the ET's conditional decision that any dismissal was unfair could not stand. The case was remitted to a different ET for it to consider whether or not the Claimant was unfairly dismissed.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from the Decision of the Employment Tribunal sitting at Nottingham. The Decision was sent to the parties on 3 February 2017. The ET consisted of Employment Judge Vernon, Mrs Rawlins and Mr Pavey. The hearing was held between 21 and 23 November 2016. The Claimant was represented by a solicitor, Mr Proctor, and the Respondent by Mr Smith of counsel. The Claimant and Respondent are represented by the same representatives today. In this Judgment, I will refer to the parties as they were below.

2. The ET dismissed the Claimant's claim of constructive unfair dismissal, direct age discrimination, indirect discrimination on the grounds of religion or belief, and breach of contract (arising from the failure to make a payment in lieu of notice).

3. On the paper sift Langstaff J, the former President, said that on the ET's findings of fact there was a clear anticipatory and repudiatory breach of contract - the decision to impose a reduction in salary. He said that the ET instead of considering this breach of contract, looked instead to see if there was a breach of the implied obligation not to undermine mutual trust and confidence ("the implied term"). He said that something might depend on the way that the case had been argued in the ET although undue prominence should not be given to the implied term as if it were the be all and end all of constructive dismissal, especially when there are breaches of specific terms to be considered. Whether a breach is a repudiatory breach does not depend on whether it is fair to change the terms of the contract, but whether the contract is broken in a sufficiently serious way. Langstaff J then referred to the decision of the Court of Appeal in **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ

121, [2011] 1 QB 323, in particular at paragraph 28. He said that a reduction in pay is almost always, if not always, repudiatory unless it is consented to. He went on to say that there was a strong prospect of success, subject only to the question whether the point was argued in the ET. He observed that the point was in the ET1.

4. The appeal is resisted, in short, on the basis that the appeal raises a new point which was no part of the Claimant's case at the ET and the ET's conclusion that the Respondent did not breach the implied term was a finding of fact with which the EAT cannot interfere, and there is no challenge to the ET's decision that the dismissal was fair. That decision must stand whether or not the ET's decision on the breach of the implied term is overturned.

5. It is convenient, at this point, to refer to the Appellant's Notice of Appeal. In the Notice of Appeal the facts about the cut in salary are recited. Paragraph 13 says this:

> **"13. In dismissing the [Claimant's] claim [for] unfair dismissal the Tribunal held that the employer had reasonable or proper cause to unilaterally change the [employee's] terms and as such had a defence to the [employee's] claim. With respect to the Tribunal it is contended on behalf of the employee that the Tribunal erred in law when it applied the test as to what amounted [to] conduct likely to destroy or seriously damage the relationship of trust and confidence. Further and with respect to the Tribunal, it is also submitted that the Employment Tribunal erred in that on the facts as set out herein, a justification for the decision to unilaterally and so significantly change the employee's terms and conditions could not reasonably be supported/justified."**

6. Although it is perhaps not entirely clearly expressed, it seems to me, and I think that Mr Smith in exchanges, that, particularly in the light of the former President's observations on the sift, this paragraph of the Notice of Appeal is in effect arguing firstly, that the ET erred in its application of the **Malik** test and secondly, in the alternative, that its finding that there was a reasonable and probable cause for this repudiatory breach of the contract of employment was a perverse finding.

The Background

7. The facts found by the ET were that the Claimant had been employed by the Respondent for just under 11 years when he resigned on 31 March 2016. He had a sales job. The Respondent was based in Nottingham. In due course, the Claimant had been appointed to run the Respondent's Manchester showroom. He had never had written particulars of employment or a written contract of employment (see the ET1 and see paragraph 42). His starting salary was £65,000. He was asked to take a pay cut in 2010 to £45,000. He was also paid a small commission. He reluctantly accepted that cut in 2010.

8. He generated, apparently, healthy sales in 2010 to 2012 (paragraph 13). His sales then fell (see paragraph 14). By 2014, the figure was £562,000, compared with £1.5 million in 2010. The Directors sent staff emails every month about the sales figures. The Claimant had been sent many of these between December 2014 and January 2016 showing that his figures were down.

9. In October and November 2015, all staff had individual meetings with the Respondent. They were all told that the Respondent needed to save money. Nothing appears to have happened after that, but, on 3 February 2016, the Respondent's two Directors spoke to the Claimant. In an email dated 19 January they said that they could not carry on like this and the Claimant was told that he would be asked to a meeting at Head Office. It appears that the Respondent's solicitors advised the Respondent not to tell the Claimant anything more about the meeting before it happened.

10. The Claimant was invited to the meeting by a letter dated 15 February 2016. The letter said that the Respondent wished to discuss the Claimant's performance. The Respondent was

very unhappy with the continued fall in sales and the Claimant's inability to improve. A possible outcome was that his pay would be cut. He was told that he could bring a friend to the meeting. The Directors hoped that the matter could be resolved amicably.

11. The Claimant prepared a document for the meeting and took it there. In that he gave reasons for lack of sales, including problems with standards of supply as far back as 2009 to 2010. The ET said that there was no written follow-up from this meeting.

12. On 8 March, an email was sent to the Claimant by mistake. In that email Mr Bajaj told Mr Frost to write a letter tomorrow and to send it to Steve to check. The email went on: "*Mike is costing us on a daily basis. Get it done tomorrow …*".

13. The Claimant wrote to the Respondent the next day. He complained about the meeting on 26 February. He referred to it as a disciplinary hearing. He ended the letter by saying that his contract of employment had been breached. That letter is in the bundle of supplementary documents and it was before the ET. In that letter the Claimant said he had been asked to consider the Respondent's offer to reduce his salary from £45,000 to £25,000. He said: "*I have set out below the reasons why I am unable to consider such a reduction in my basic pay*". He said that changing his salary by such an amount was more than a simple variation in his wage: "*The change proposed for me to agree is so substantial it entitles me to be paid out of my contract*". He said his salary had already been reduced substantially since he had started the job over 10 years previously, and this cut would reduce his salary by 45%. It was an unreasonable reduction. He said that the Respondent was trying to remove him from the business by the cheapest means possible and that that had been confirmed by the email on 8 March. He concluded by saying that the Respondent's actions of the previous week were "*so severe and*

underhand as to allow me to consider my contract as having been breached". The ET summarised this letter briefly in paragraph 25.

14. The Respondent replied on 14 March. It said it would treat the Claimant's letter as a grievance. The Respondent invited the Claimant to a meeting to discuss the grievance on 18 March. The Claimant replied that his letter was not a grievance and that if the Respondent considered that it should be treated as a grievance the Respondent should treat the letter as the basis of a grievance. The Claimant did not think it necessary to go to the meeting on 18 March. The Respondent asked him to reconsider. He replied that he would not. The meeting went ahead. There were no notes of it, the ET observed. The Respondent decided to reject the Claimant's grievance.

15. The Claimant chased the outcome by an email dated 23 March. The Respondent replied by email. The Respondent said that the Claimant's grievance was rejected. The Respondent was extremely disappointed at having raised matters the Claimant could not be bothered to go to the meeting. To chase the outcome a few days later "*beggars belief*". The response went on to say: "*The changes to your contract will therefore be actioned as previously advised*". The Claimant was notified of a right of appeal.

16. The Claimant then resigned on 31 March with immediate effect. He sent what the ET described as "*a lengthy letter*" (paragraph 33). The ET did not summarise that letter. That letter is also in the bundle. The Claimant in that letter said that no reasons had been given for the Respondent's rejection of his grievance. He was therefore unsure what there was to appeal against. His position was now untenable. He thought that he had been discriminated against on the grounds of his age as he was the only person whose salary was to be cut. He was the oldest

A sales representative. It was too expensive for the Respondent to make him redundant and the process was designed to remove him by the cheapest means possible.

B 17. He then summarised what he said had happened. He referred to the meeting on 26 February. He said there had been no written outcome from that meeting and he was left worrying that his salary was being reduced to make it cheaper to make him redundant. He then referred to what he had been told about the meeting on 14 March. He said the letter said that C changes to his salary, which had not been set out in writing but not denied by the Respondent, would be implemented so the Respondent was not open to any appeal about that. In any event any appeal would only be to the Directors who had already been involved. An appeal was D entirely futile.

18. As he had said in his letter of 9 March, he considered that the changes to his contract E were so severe and underhand as to allow him to consider his contract had been breached. He also said that the above facts showed that he could have no trust and confidence in the Respondent's actions. He had asked for assurances and had received none. On the basis of the above, he confirmed his immediate resignation from the Respondent. He added that the lack of F respect with which he had been treated was nothing short of shocking.

19. It is convenient now to refer to the ET1. In the ET1, the Claimant claimed constructive G unfair dismissal. The grounds for the claim set out the Claimant's account of the facts. At paragraph 38 the ET1 said:

> **"38. There was no doubt in the [Claimant's] mind that the Respondents were seeking to terminate him from his employment by implementing an unfair deduction of wages to a salary that the claimant had made clear to the Respondents he was unable to live off or support his family."**

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20. Paragraph 41 was headed "*Claims*". It said that the Claimant claimed unfair constructive dismissal on the basis that the employers had breached his contract "*on the following terms*". Those terms were then listed in paragraph 41. One of the terms listed was "*Using the threat of reducing the [Claimant's] salary*" (see paragraph 41f).

21. The ET3 denied, among other things, the Claimant's account of the meeting of 26 February. It had accepted that the Claimant had been told that solutions had been identified by which the Claimant's basic salary would be reduced by £20,000 but that the commission rate would be increased. The Respondent said it was happy to discuss alternatives, but the capability process would continue in that event. Whereas if the Claimant accepted a cut in salary, that would end the capability process.

22. There was a Preliminary Hearing by telephone on 29 July 2016 attended by a legal advisor for the Claimant and a solicitor for the Respondent. The ET recorded that "*the Claimant's claim is understood*" to be based on an allegation that, by a course of conduct summarised in paragraph 41 of the ET1, the Respondent without reasonable and proper cause had behaved in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant. Paragraph 6 of the case management Order required the Claimant to inform the Respondent and the ET in writing by 12 August, providing full details, if the understanding of the claim, which was set out in the case management Order, was to any extent inaccurate and/or incomplete. I was told by Mr Smith, and Mr Proctor did not correct this, that the Claimant did not respond to that invitation.

23. It is clear from various passages in the ET's Decision, to which Mr Smith took me in the course of his submissions, that the ET understood the claim to be a claim of constructive unfair

dismissal based on an alleged breach of the implied term. That emerges from paragraph 7 in which the ET refer to the case management discussion and say that the issues had been clarified at the Preliminary Hearing in July and that they were recorded at pages 42 and 43 of the bundle and that at the outset of the hearing the parties, through their respective representatives, agreed that the list was an accurate list of the issues to be considered. The ET went on to say that the list formed the basis for the consideration of the case by the Tribunal.

24. Mr Smith also referred me to paragraph 73 of the ET's Decision in which the ET said:

> **"73. As indicated earlier, the issues to be determined were clarified by Employment Judge Camp at the Preliminary Hearing in July of this year."**

And at paragraph 75 in which the ET said:

> **"75. The Tribunal then moved on to consider whether that action of the Respondent amounted to a breach of the implied term of trust and confidence that is implied into every contract of employment. We have to consider that question because that is the term of the contract which the Claimant alleges to have been breached."**

25. Mr Smith also told me, and Mr Proctor did not demur from this account, that Mr Proctor had made it clear at the outset of the hearing that the only term relied on was the implied term of mutual trust and confidence and that he had reaffirmed that point in his submissions. Mr Smith further said that when he began to address the ET on the difference between the express term and the implied term, Employment Judge Vernon cut him short on the basis that the ET was only dealing with the implied term. That led Mr Smith to submit that it would have been wrong for the ET to have taken a different course and to have considered simply a breach of the express term of the contract of employment because that was not the way that the case was put.

26. I note, however, that one of the matters relied on in support of the allegation of constructive dismissal (see paragraph 41f of the ET1) was a breach of an express term, as I

think Mr Smith accepts. I consider that it is clear that an employee can rely on the breach of an express term as part of a case based on the trust and confidence implied term - see paragraph 21(3) of **Lewis v Motorworld Garages Ltd** [1985] IRLR 465 - and that, if in support of a case based on a breach of an implied term, the employee relies on a breach of what is also an express term, the ET is obliged to consider that as part of the case.

27. In paragraph 35 of the Decision, the ET, having set out what it described as the facts that were not in dispute, then dealt with matters that were in dispute. It referred first of all to the Respondent's written capability procedure. It dealt also with the allegations of discrimination which form no part of this appeal.

28. The ET resolved in paragraph 48 the dispute about what had occurred at the meeting on 26 February. The ET resolved that in the employer's favour. The ET recorded, in this context, that the Claimant had accepted, in cross-examination, that on 26 February he was made an offer of commission as part of the change in salary (see paragraph 48.1). The ET rejected the Claimant's evidence that the meeting on 26 February was a disciplinary hearing (see paragraph 50). The meeting was held to discuss issues in relation to his performance. The ET concluded that the meeting had been an informal capability meeting as envisaged by paragraph 10.4 of the Respondent's relevant policy. Mr Bajaj had mentioned possible changes to the Claimant's remuneration package, which if not accepted would lead to a more formal capability process (paragraph 51.4). In paragraph 52 the ET concluded that the Respondent had not breached its capability policy in the way that it had handled matters and then said, "*in fact, any capability process never really got going prior to the Claimant's resignation*". In paragraph 53 the ET turned to an issue, which had initially appeared to be contentious but which on its findings turned out not to be contentious, which was whether an offer had been made during the meeting

of 26 February to the Claimant of an altered remuneration package comprising a basic salary of £25,000 plus a 5% commission on all sales over £550,000. The ET said, as it had already mentioned, that it had become clear through cross-examination of the Claimant, and despite what he had suggested earlier, that such an offer had been made in the course of the meeting of 26 February.

29. The next factual issue which the ET had to consider was the reason why the Claimant resigned. In paragraph 54, the ET concluded that the Claimant had resigned because he had been told by the Respondent that his remuneration package would be changing, and he had effectively been told in the email of 24 March that the change would be imposed on him. The ET said that that was consistent with the Claimant's evidence (see paragraph 54). The ET went on to consider a rival explanation for the resignation which had been suggested by the Respondent, which was that the Claimant had all along wished to move to London. The ET rejected that rival suggestion. The findings in paragraphs 54 and 55 have some importance, as I shall explain.

30. In paragraph 63 the ET referred correctly to section 95 of the **Employment Rights Act 1996** ("ERA") and to the decision of the Court of Appeal in **Western Excavating (ECC) Ltd v Sharp** [1978] QB 761, which sets out the circumstances in which an employee is entitled to terminate a contract of employment without notice. The Respondent must have committed a breach of contract which is fundamental in nature, the employee must have resigned in response to the breach and the employee must not have waived the breach by affirming the contract.

31. The ET then also referred to section 98 of the **ERA** and set out in full section 98(4) of the **ERA**.

32. At paragraphs 73 to 85 the ET set out its conclusions on the question of unfair dismissal. The ET, as I have already mentioned, referred to the issues as they had been clarified at the Preliminary Hearing. At paragraph 74, the first question the ET asked itself was "*Why did the Claimant resign?*" The ET answered it in this way:

> **"74. … As we have already set out in this judgment, we find that the reason the Claimant resigned was that he had been informed by e-mail that his remuneration package was going to be changed and that that change was going to effectively be imposed upon him. For reasons already given above, the Tribunal rejects the Respondent's suggestion that the Claimant resigned simply because he was planning to leave the Respondent's employment and move to live in London in any event."**

33. The ET went on to consider whether there had been a breach of the implied term. The ET said, as I have already mentioned, "*We have to consider that question because that is the term of the contract which the Claimant alleges to have been breached*" (paragraph 75). In paragraph 76 the ET framed the implied term in accordance with the decision of the House of Lords in **Malik v BCCI SA (in liquidation)** [1998] AC 20. The implied term was formulated in this way:

> **"76. … the parties to the contract 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 which should exist between employer and employee …"**

34. At paragraph 77 the ET said that the implied term has two aspects.

> **"77. … Firstly, the Respondent's action must be such that, objectively viewed, it is calculated or likely to destroy or seriously damage the trust and confidence that should exist between employer and employee. Secondly, the action must be carried out without reasonable or proper cause. Both limbs of the term need to be considered before determining that there has been a breach of it."**

35. In paragraph 78 the ET decided that there had been a breach of the term, in these terms:

> **"78. The Tribunal considered firstly whether the action of the Respondent was calculated or likely to destroy or seriously damage trust and confidence. In our view, the actions of the Respondent were likely to the damage the trust and confidence between employer and employee. In coming to that decision, we have taken into account the following matters:**
>
> > **78.1. Following the meeting on 26 February, no further written communication was made with the Claimant about the terms of the meeting that had taken place;**
> >
> > **78.2. In his letter of 9 March, the Claimant asked for certain assurances to be given by the Respondent about his position and particularly as to his remuneration package;**

> **78.3. The Claimant then sent a further e-mail chasing the outcome of a grievance meeting that had occurred on 18 March 2016 following which he received a very short, and in our judgment, a very curt e-mail informing him that pay changes were to be imposed upon him;**
>
> **78.4. In our judgment, that amounted to a significant alteration to his remuneration package which was a package he had enjoyed for a period of some 6 years by that stage and represented a change which was to be imposed on him with very little by way of consultation."**

36. The ET then said in paragraph 79, that it had gone on to consider whether that action was taken by the Respondent without reasonable and proper cause. The ET said "*We considered a number of matters to be important, in particular the context in which that action was taken*". In paragraph 80, the ET said this:

> **"80. The context was this: there had been dwindling sales figures for the sales staff but especially for the Claimant by that stage over a protracted period of time. The Respondent believed the Claimant was not taking any steps to improve his sales performance. The offer of an altered remuneration package had been made to him on 26 February. Following that date, no alternative proposals were forthcoming from the Claimant for a period of 10 days, despite the Claimant accepting in evidence that the Respondent was expecting him to go back to the Directors with any alternative suggestions of his own. In our judgment, his failure to revert to them was effectively stifling any consultation process that may have taken place. Finally, the Respondent believed that the Claimant was, therefore, playing no active part in the process, nor in the grievance process which had been initiated by the Claimant's letter of 9 March."**

37. In paragraph 81 the ET said that for all those reasons, and in that context, it had concluded that the Respondent had "*reasonable and proper cause for taking the action it did in sending the email on 24 March*". The ET went on to say, in paragraph 82, that in light of that conclusion the Claimant had not proven that there had been a breach of the implied term of confidence and he had therefore not proven that there had been any breach of any fundamental term of his contract of employment, and as a result of that he could not prove he had been dismissed within the meaning of section 95(1)(c) of the **ERA** because dismissal was a necessary precursor to any finding of unfair dismissal. It followed that the unfair dismissal and the wrongful dismissal claims failed.

38. In paragraph 85 the Tribunal went on to deal with the question of fairness.

> **"85. The Tribunal also finds that, even if we had found that there had been a dismissal in the circumstances set out above, we would have gone on to find that it was a fair dismissal on the basis that the reason for the action of the employer was related to the Claimant's performance, that it was therefore related to his capability, and that the actions taken for the reasons we have already outlined would have been within a range of reasonable actions open to a reasonable employer in the circumstances."**

Discussion

39. Mr Proctor submitted that the appeal raised a simple point. He argued that the ET should not have gone into questions about whether it was reasonable to cut the Claimant's pay. He said that that was not a "new" point. He accepted that if it were a new point the Claimant would be in some difficulty. He submitted that the ET understood that it was dealing with a claim for constructive unfair dismissal as was apparent from various passages in the Decision. The imposition of a cut in salary was both a breach of an express term and was also a breach of the implied term. He submitted that the ET had erred in paragraph 79 onwards in the Decision when it had considered the question of "*reasonable and proper cause*". The ET had really asked whether the breach of contract was reasonable, and they should not have done so.

40. He referred later in the hearing to the decision of the Court of Appeal in **Buckland v Bournemouth University Higher Education Corporation** (the decision that was adverted to by the former President on the paper sift in this case). In paragraph 18 of that decision, the Court of Appeal set out the issues. The first issue was whether the test for a fundamental breach of contract on the part of the employer was a conventional contract test or a range of reasonable responses test. There were further issues on that appeal which I do not need to refer to. The Court of Appeal then went on to consider the issue which I have just described. In paragraph 22 the Court of Appeal referred to the "*proliferation of recent authority and dicta*" on the issue, "*not all of it consistent*". The Court of Appeal endorsed the reasoning of the EAT on this issue. It was as follows:

> **"(1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Mahmud* test should be applied [*Mahmud* is another name for *Malik*].**
>
> **(2) If applying the *Sharp* principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed.**
>
> **(3) It is open to the employer to show that such dismissal was for a potentially fair reason.**
>
> **(4) If he does so, it will then be for the Employment Tribunal to decide whether dismissal for that reason, both substantively and procedurally … fell within the range of reasonable responses and was fair."**

41. In paragraph 23 Sedley LJ said this:

> **"23. To the EAT's reasons one can now add the remark of Underhill P in *Amnesty International v Ahmed* [2009] ICR 1450, paragraph 70, in relation to the EAT's decision in this case, that he was "sympathetic to the contention that it is unhelpful to introduce into the concept of constructive dismissal a conceptual tool devised for an entirely different purpose"."**

42. Both counsel in that case accepted that formulation, but the Court of Appeal recorded that Mr Galbraith-Marten had contended that the "range of reasonable responses" test formed part of the **Mahmud** exercise at stage 1, as well as of the fairness issue at stage 4, if that were reached. Sedley LJ unhesitatingly rejected that submission. He said that it ignored what the EAT clearly and correctly meant when it spoke of "*the unvarnished **Mahmud** test*". That test was an objective test: "*A breach occurs when the proscribed conduct takes place*".

43. The Court of Appeal recorded that Mr Galbraith-Marten accepted that without demur but that he had submitted that conduct of an employer, which is said objectively to have broken the contract of employment, is often conduct which the Claimant alleges was in fundamental breach because it was unreasonable. That, he submitted, must entitle the employer to show that it was not - in other words to argue that it lay within the band of reasonable responses. He accepted that that had the effect of replicating the same issue at stages 1 and 4, but all that meant was that by the time stage 4 had been reached, if it was reached, the job had been done. The Court of Appeal rejected that submission in short in paragraph 27, holding that it could not stand with the authority of **Western Excavating v Sharp** "*in which this court counterposed the*

objective test and the unreasonableness test of constructive dismissal and held in clear terms that the former was the correct one".

44. In paragraph 28 Sedley LJ said this:

> **"28. It is nevertheless arguable, I would accept, that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement. Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, if indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part."**

45. Mr Proctor further submitted that if the decision of the ET in this case stood, it would amount to a green light to an employer who wished to reduce wages and who wanted to submit that that nevertheless did not undermine the relationship of trust and confidence between the employer and employee. Where he submitted the conduct relied on was the imposition of a salary cut and therefore a breach both of an express term and of the implied term, the ET should not ask whether the employer has reasonable and probable cause for imposing that change. The ET had erred in law and had erred in applying the law to the facts and the EAT should interfere. He further submitted that in light of that, the findings in relation to unfair dismissal could not stand. He pointed out that the ET had held that the reason for the dismissal was capability and yet they had also held that the capability process never really got going before the Claimant's resignation.

46. As I have foreshadowed, Mr Smith, opposing the appeal, makes three main submissions. First, he submitted that the point taken by Langstaff J on the paper sift is a new point of law and that the EAT should not, on well recognised principles, permit it to be argued on an appeal. When I asked the parties for assistance on this point earlier in the week, Mr Smith provided me by email with a very helpful note summarising the effect of the authorities on this issue. Mr

Smith further submitted in his skeleton argument that whether a contract has been repudiated is a question of pure fact for the ET, relying on the statement by Lord Denning MR in **Woods v W M Car Services (Peterborough) Ltd** [1982] IRLR 413. In exchanges with me in the course of oral argument he modified that position and accepted that it was a mixed question of fact and law, and that even if the ET had apparently directed itself correctly in law the EAT was able to intervene in an appeal on a point of law if the test in **Edwards v Bairstow** [1956] AC 14 is met. Mr Smith's third submission was that there had been no challenge to the ET's alternative conclusion that the Claimant's dismissal was not unfair. That decision would stand whether or not the ET's finding that there had been no repudiatory breach was sound.

47. His first submission was based on his contention that the implied term had been "exclusively relied on" and that what was described as the new point, the point identified by Langstaff J, concerns the express term providing for pay. I do not accept that this characterisation of the claim is complete. Paragraph 41 of the ET1 asserts that various steps taken by the employer amounted to a breach of contract. There was no reference at that stage to any implied term and paragraph 41f referred expressly to "*Using the threat of reducing the [Claimant's] salary*", but, as I have explained, the way in which the case was put to the ET and from which Mr Proctor does not resile, is that the implied term was breached by that conduct.

48. Mr Smith accepted, in the course of his oral submissions, that the term about salary is essentially an express term of the contract of employment, that the allegation in paragraph 41f of the ET1 was an allegation of breach of that term and that a threat unilaterally to reduce salary will be a repudiation "in almost every case". He accepted, in line with the passage from **Buckland**, which I have already read, that it is an error of law to apply a reasonableness test in answering the question whether or not the contract has been breached. He submitted, however,

A that there was a difference between applying the reasonableness test in that way and applying the test as the ET applied it here. On examination, however, it seems to me that any such difference is extremely elusive.

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49. I put to Mr Smith what seems to me to be a paradox which is that if the Claimant had relied exclusively on an express term in the contract of employment, he would have succeeded in showing that the contract had been repudiated but that he failed in showing that it had been C repudiated because he relied on the implied term. Mr Smith's response was that it was "unusual". I suggested to him that the law was incoherent if that was the outcome. His response was that that approach turned on how the employee had labelled the breach. In this D case the employee had, in Mr Smith's phrase, "nailed his colours to the mast" of the implied term and was to be fixed with the consequences. In my judgment, that is an unattractive submission; but of course the question is not whether it is attractive or not, but whether it is E legally correct. Overall Mr Smith's point was that the ET was only permitted to deal with the case in the way that the case had been put and that they were not to be criticised for having dealt with the case in precisely that way.

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50. If the appeal had been run on the "new point" and if Mr Proctor had argued the case differently, I would have been inclined to hold that the new point was a point that the ET was required to deal with, whether or not it had been pleaded. I would have been inclined to hold G that it was required to deal with it because it was squarely raised by two matters. Firstly, the ET's correct self-directions in paragraphs 62 and 63 and their clear findings in paragraphs 54, 55 and 74 in answer to the question "*why did the Claimant resign?*". He resigned because he H had been told that a significant change to his remuneration package was to be imposed on him; one which on any rational view was a substantial one, a "significant" one, as the ET found. I

would have been inclined to hold that the simple question which the ET would have had to answer in the light of that finding of fact and in the light of the statutory language, was whether the imposition of a unilateral, very significant change to the Claimant's salary provided for by an express not any implied term of the contract of employment, in the words of section 95(1)(c) of the **ERA**, led the Claimant to terminate the contract (with or without notice) in circumstances in which he was entitled to terminate it without any notice by reason of the employer's conduct. The ET, in my judgment, simply did not answer that question, but I do not have to decide the appeal on this basis because of the way in which Mr Proctor has argued it on appeal. He argued it on appeal on the basis of the implied term and that is the way in which the case was argued before the ET.

51. In those circumstances, what the ET did was to, first of all, to ask whether the implied term had been breached, to find for all the reasons that it gave (in paragraph 78) that the implied term had been breached and then to go on to consider whether the employer had reasonable and probable cause for that conduct. That question might seem otiose given what, on the ET's clear findings, was a clear repudiatory breach of one of the most important express terms of the contract. Be that as it may, the ET did then go on to ask whether the Respondent had reasonable and probable cause for that repudiatory conduct.

52. I asked Mr Smith, in the course of his oral submissions, whether he was aware of any case in which the reasonable and probable cause aspect of the **Malik** test had been the subject of any judicial discussion. He said that he was not aware of any. In the cases that he referred me to, at any rate, that part of the test seems to be taken as read and as adding very little or nothing to the question whether or not there has been a repudiatory breach in circumstances where the term is found to have been broken. In none of the cases to which he referred me has

A a court held that the implied term was breached and yet gone on to hold that the employer had reasonable and probable cause to do so.

B 53. In my judgment there is real danger if ETs embark on this enquiry. That danger is exposed by the judgment of Sedley LJ in **Buckland**. It is also exposed by the very elusive nature of the distinction between the band of reasonable responses test and the question whether or not there is reasonable and probable cause for a breach.

C

54. It is clear, from the reasoning of Sedley LJ in **Buckland**, that the question of whether there has been a repudiation does not depend on whether the employer acted reasonably. The

D danger in the ET's approach is particularly acute where, as here, the conduct which the ET found was a repudiatory breach was not only a breach of the implied term but was also a breach of an express term. In my judgment, in a case like this, where the implied term is relied on but

E the particular conduct which the employee invokes and which the ET finds to have been a breach of the implied terms is also a breach of an express term and that express term is the important term in relation to salary payment, no question of reasonableness can arise. In my judgment, it follows that the ET erred on the particular facts here given that the implied term

F was relied on but the aspect of the implied term which was invoked was the express salary payment term in asking any questions about reasonableness on these facts.

G 55. I have no hesitation in concluding that no employer can have a reasonable and probable cause for repudiating the contract or for breaching the implied term where that breach consists of the unilateral imposition of a significant pay cut on an employee. In those circumstances, I

H conclude that given that the pleaded breach relied on (see paragraph 41f of the ET1) was, as well as being a breach of the implied term, a breach of that important express term. Not only

did the ET err in asking whether the employer had reasonable and probable cause for that breach, there was only one possible legal answer to the question whether the contract had been repudiated. That answer was "Yes".

56. It follows, therefore, that the appeal against the decision that the contract had not been repudiated must succeed. It follows from that that the Claimant was constructively and wrongfully dismissed.

57. I turn now to consider the ET's conditional finding that the Claimant's dismissal was not unfair. I have set out the rival contentions about that. I consider, as a matter of principle, it is unlikely that that finding can stand in the light of the ET's mistaken approach to the question of constructive dismissal.

58. However, leaving aside the question of principle it seems to me, in any event, that there are considerable problems with the way in which the ET dealt with the question of unfair dismissal in paragraph 85 of its Decision. The reasoning in that paragraph is, to say the least, terse. The ET found that the reason for the dismissal related to the Claimant's performance and therefore to his capability. The reasoning addressed to section 98(4) of the **ERA** is as follows:

> **"85. … and that the actions taken for the reasons we have already outlined would have been within a range of reasonable actions open to a reasonable employer in the circumstances."**

59. I am unable to avoid two conclusions about this reasoning. The first is that this part of the decision was influenced by the ET's answer to a different question, which is whether the Respondent had reasonable and probable cause for repudiating the contract of employment (a substantive question). And second, that the ET has simply failed to ask the other question posed by the statute, which is whether the Respondent acted reasonably in treating the

Claimant's capability as a sufficient reason for his dismissal. There is not only a difference in test, but the tests are addressing different issues. The reasonable and probable cause test is addressing what the Respondent did in repudiating the contract, but the reasonableness test is addressing a totally different question which is whether the Respondent acted reasonably in treating the Claimant's capability as a sufficient reason for his dismissal.

60. In that context I further take into account the ET's criticisms of the Respondent in paragraph 78 of the Decision, which I have already read, and which were the foundation for its view that the employer had breached the implied term. Moreover, as I have already mentioned and as Mr Proctor pointed out in his submissions, it is very hard to see how a dismissal on capability grounds can be held to be not unfair in circumstances where on the ET's own reasoning, the capability process had hardly got going. Mr Smith, in his oral submissions, said "I see the point" when I suggested to him that there was a potential conflict between the ET's reasoning in paragraphs 78 and 85 of the Decision, but he did not concede that reasoning in paragraph 85 was flawed.

61. There is, in my judgment, no sign in the terse reasoning of paragraph 85 that the ET appreciated what questions it had to address in considering the fairness of the dismissal and signs, as I have explained, that it approached that question in the wrong way. In those circumstances the finding that the dismissal was not unfair cannot stand and the appeal succeeds on that point.

62. In those circumstances, I allow this appeal. The question then arises whether the EAT is in a position, as Mr Proctor in his submissions suggested it is, having set aside the ET's conclusions that there was no dismissal and that the dismissal was not unfair, if there was a

dismissal, to decide the question of fairness. I do not consider that it is. That is pre-eminently a question for the ET and I consider that it is a question that should be remitted to the ET.

63. Two further questions therefore arise. Whether the case should be remitted to the same ET and, in any event, what form the remittal should take. I will hear submissions about that now.

64. I have just allowed the appeal in this case and I have just heard submissions on the question of remittal to the ET. The first issue that arises is whether the case should be remitted to the same ET or to a different ET.

65. Mr Proctor, for the Claimant, submits that it would be unfortunate if the case were remitted to the same ET given the criticisms of the ET's decision in the Judgment and it would not be appropriate when, as he put it, the ET's decision was "so far from the mark".

66. Mr Smith submitted that this was a paradigm case for remittal to the same Tribunal. The findings that the same ET could make relevant enquiries which were informed by the findings that it already made in the case, but the real issue was whether or not it was appropriate for further evidence to be called on this question. It was quite a discrete issue and, in his submission, it should be informed by further evidence.

67. In response, Mr Proctor submitted that the Respondent and the Claimant had both had their opportunity to submit evidence on all the issues at the hearing. The hearing took place some time ago - that is in November 2016 - and the events to which the claim relates are now nearly two years old.

68. I accept Mr Proctor's submission about remittal to the same ET. I consider there is a risk that the ET will have difficulty in approaching the questions - having expressed clear views on them already - with an open mind, but more importantly that there is a risk that the Claimant may fear in that situation that the ET, whatever its professionalism, may not approach them with an open mind and in that situation I consider that the right course is that the issue should be remitted to a different ET.

69. The next question that arises is the form of that remittal. I suggested, as a provisional topic for discussion, that it could be remitted on the basis of the ET's findings of fact, excluding their findings about repudiation and fairness, on the basis of the documents, and on the basis of further submissions. Mr Proctor, in his submissions, was content to adopt that approach. As I have indicated Mr Smith's approach was to submit that there should be a further opportunity for the parties to adduce evidence on the question of fairness.

70. Again, I prefer Mr Proctor's submissions on this question. The case is now quite old. In considering what form the remittal should take it seems to me that I must bear in mind the overriding objective and questions of costs and proportionality. In that situation, given the parties have already had a full opportunity to adduce evidence on the question of fairness, I consider the right course is to remit the case to a different ET but on the basis of the findings of fact made by this ET in the Judgment apart from its findings on repudiation and fairness, on the basis of the documents that were before the ET, and on the basis of the parties' submissions. If the ET feels that it would be helpful to hold a case management conference in advance of the remitted hearing, the ET is of course free to do that.