Appeal No. UKEAT/0125/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 October 2019

Before

HIS HONOUR JUDGE AUERBACH

MR M SMITH OBE DL

MR T STANWORTH

MRS A HEALY — APPELLANT

SLOUGH BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PETER EDWARDS (of Counsel)
For the Respondent	MR SIMON CHEETHAM QC (of Counsel) Instructed by: HB Public Law Harrow Council Civic Centre Station Road Harrow HA1 2UH

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

UNFAIR DISMISSAL – Constructive dismissal

In July 2017 the Claimant wrote to the Respondent complaining of various conduct, which she said amounted to a breach of the implied duty of trust and confidence. This related to the Respondent's handling of a subject access request, a whistleblowing complaint and a grievance raised by her, its handling of an ongoing disciplinary process in relation to allegations against her, and other matters. She indicated, however, that if, by a given deadline, her suspension were to be lifted and disciplinary proceedings withdrawn, then she would withdraw her grievance and subject access request. The Respondent replied that it could not, when a report on the disciplinary allegations was awaited, agree to withdraw the suspension and disciplinary charges at that point. The claimant thereupon resigned.

In a reserved decision following a full merits hearing, the Employment Tribunal dismissed claims of direct race discrimination, victimisation, detriment for having made a protected disclosure, and deduction from wages; and it found that the Claimant had not been constructively dismissed.

Three grounds of appeal proceeded to a Full Hearing.

Ground 1 was that there had been a procedural irregularity because a Tribunal member was asleep, or appeared to be asleep, more than momentarily, at a number of points during the cross-examination of both the Claimant and one of the Respondent's witnesses. On the evidence presented to it, the EAT concluded on the balance of probabilities that this was, unfortunately, factually correct. Accordingly, the fair-minded informed observer would conclude that there was

a real possibility that the fairness of the trial was affected. Accordingly, the appeal was upheld, in respect of the outcome of all the live claims that were before the Tribunal.

Ground 8 and 9, which related to the finding that the Claimant was not constructively dismissed, were also upheld, and the decision on that point would have been overturned, even had Ground 1 not succeeded. This was because the Tribunal erred (a) in inferring that, because of the stance the Claimant took in her first letter in July 2017, it must logically follow that it was only the refusal to lift the suspension and the disciplinary charges, and not also any of the Respondent's earlier conduct, that influenced her decision to resign; (b) in taking into account the fact that, immediately upon resigning, she took up an offer of employment elsewhere, without considering whether, even if the availability of another job had influenced her decision to resign, the conduct of the Respondent had still also played a part in that decision; and (c) in its approach to the significance of the fact that, not long after she resigned, the Claimant applied for another position with the Respondent, to the question of whether the Respondent was in fundamental breach.

In light of the outcome on Ground 1, the matter was remitted for re-hearing before a differently constituted Tribunal.

HIS HONOUR JUDGE AUERBACH

1. This Decision of the three-person panel of Judge and lay members who have heard this appeal is unanimous in all respects. We will refer to the parties as they were in the Employment Tribunal ("ET") as Claimant and Respondent. This is the Claimant's appeal against the Decision of the ET, Employment Judge SG Vowles, Ms A Brown and Mr N Singh, which dismissed her claims of direct race discrimination, victimisation, protected disclosure detriment, for wages and of unfair constructive dismissal. We raised with counsel that it is unclear whether there was also a live claim of constructive discriminatory dismissal. However, nothing turns on that for the purposes of this appeal which, as we will explain, in that respect focuses on the finding that the Claimant was not constructively dismissed at all.

2. Upon consideration of the Notice of Appeal on paper, and following the tabling by the Claimant of an affidavit in support of ground 1, Her Honour Judge Eady QC, as she then was, considered three grounds to be arguable. They are the grounds originally numbered 1, 8 and 9. Grounds 8 and 9 challenge the conclusion that the Claimant was not constructively dismissed. Ground 1 asserts that there was a procedural irregularity, it being alleged that one of the members of the Tribunal fell asleep or appeared to do so for parts of the Hearing. It was accepted by Mr Cheetham, for the Respondent, that if ground 1 succeeded then the Tribunal's Decision could not stand in any respect.

3. The Tribunal's reserved Judgment and Reasons run to some 44 close typed pages, including extensive and detailed findings of fact. For the purposes of this appeal however we can provide a somewhat shorter factual summary drawn from the Tribunal's Decision.

4. The Claimant, who is a solicitor, was employed by the Respondent from 1 December 2011 as Head of Legal Services and Deputy Monitoring Officer. From June 2015 onwards Roger Parkin was her line manager. In July 2016 Mr Parkin became Interim Chief Executive. For a few months in 2015, and then again from August 2016, Linda Walker acted as the Respondent's Monitoring Officer. Her services were provided by a body set up by another Local Authority and referred to as HBPL. HBPL also provided the services of Mike England to the Respondent. In June 2016 he investigated certain issues that had been raised in relation to the Claimant, but the conclusion was that no further action was warranted. In July 2016 he also investigated a bullying allegation against the Claimant. She, for her part, accused the employee concerned of bullying her. Ultimately both allegations were dropped.

5. In August 2016 there was an anonymous allegation of improper conduct by the Claimant. Mrs Walker was appointed to investigate it under the Respondent's whistleblowing policy. In November 2016 the Claimant presented a grievance to Mr Parkin accusing of him of bullying her on grounds of race. In January 2017 the Claimant told a Councillor that another Councillor had expressed support for her progression to Director, if she supported Mr Parkin for Chief Executive, a proposition which the Claimant made clear she regarded as wholly improper. In February 2017 the Claimant presented a grievance to Mr Parkin complaining of bullying, harassment, discrimination, detriment for whistleblowing and other matters. Sarah Johnson, also of HBPL, was appointed to investigate it.

6. There were disputes between the Claimant and Mrs Walker regarding the conduct of Mrs Walker's investigation. Each accused the other of bullying. In the course of her enquires Mrs Walker spoke to four employees who accused the Claimant of bullying but wished to remain anonymous.

7. At the end of February 2017 Mrs Walker delivered her report to Mr England. She considered that there was sufficient evidence to warrant disciplinary charges in relation to certain matters, including the allegations of bullying. She recommended that, in order to encourage staff to come forward openly, the Claimant at that point be suspended. Mr England was of the view that the allegations, if well-founded, would amount to gross misconduct and that there were grounds to suspend the Claimant. Having taken HR advice, he suspended her, and informed her that there would be a disciplinary investigation and of the allegations to be investigated. The suspension letter instructed her not to contact Council members, staff or third parties in her work capacity without his permission. Mr England asked Hugh Peart of HBPL to appoint an investigating officer. He appointed Hayley Norman-Thorpe, also of HBPL.

8. On 3 March 2017 the Claimant emailed the Leader and Deputy Leader of the Council, copying in another Councillor. She raised a whistleblowing complaint alleging various irregular goings on within the Council. On 5 March she emailed the Leader and Deputy Leader with a grievance alleging that she was the victim of bullying, harassment, discrimination and detriment for whistleblowing. The Leader replied that members must not get involved in such matters and that neither he nor the Deputy would be taking any action on her grievance. When Mr England learned of the email of 5 March 2017 he regarded it as a breach of the non-contact instruction in the suspension letter. On 13 March he wrote to the Claimant that this would be added to the investigation as an allegation of gross misconduct. When he learned of the email of 3 March he wrote to the Claimant on 13 April to similar effect, and repeating the non-contact instruction. The Claimant replied referring to her complaints and grievances as protected acts and describing Mr England's response as an act of victimisation.

9. From March through to early July 2017 Mrs Norman-Thorpe pursued her investigation, including meeting with members of staff who had made bullying allegations against the Claimant and twice with the Claimant herself. When Mr Peart became aware of the Claimant's 5 March 2017 email he appointed Noopur Talwar, an HBPL lawyer, to investigate it. The Tribunal found that he was not aware of the 3 March email, which was overlooked. Ms Talwar prepared a report, which was considered by Mr Peart, who found no grounds to uphold the complaints which it considered. There was a grievance appeal hearing before a three-person panel on 7 June 2017. On 26 June Mr Peart wrote to Mr England alleging that the Claimant had cast doubt on the integrity of the whole panel, including particular serious remarks about one member, Neil Wilcox. He suggested that this appeared to involve serious breaches of the Respondent's code of conduct, warranting disciplinary investigation. On 27 June Mr England wrote to the Claimant informing her that these allegations would be added to Mrs Norman-Thorpe's investigation. Mrs Norman-Thorpe's meetings with the Claimant were on 29 June and 3 July 2017.

10. There was then correspondence in July 2017 which the Tribunal set out in full as follows:

> **"48. On 11 July 2017 the Claimant wrote to Mr England as follows:**
>
> **"Re: Disciplinary Investigation/March Grievance/ Whistleblowing Complaint**
>
> **I write in relation to the above matters.**
>
> **I summarise below a chronology of the Council's conduct towards me which I believe to be a series of breaches of contract by the Council and a course of conduct which, when taken together cumulatively, amounts to a breach by the Council of the implied duty of mutual trust and confidence, which the Council owes me as my employer. This conduct leaves me in an untenable position, whereby I appear to have no choice but to resign from my position and seek legal redress at the Employment Tribunal. Before taking this step, I am writing to set out my concerns and give you an opportunity to seek to repair the relationship of trust and confidence.**
>
> **1. I made a Subject Access Request in respect of my personal data held by Linda Walker, in December 2015. To date, despite me having made a formal complaint to the ICO, the Council has not complied with my requested data. The ICO has recommended that I seek a Court Order against the Council.**
>
> **2. On the 1st March 2017, I was suspended from work, to enable the Council to investigate 3 disciplinary allegations against me, which I have been told could amount to gross misconduct. No preliminary investigation was carried out as required by the Council's Disciplinary Policy. The investigation is now complete and although it is clear to me that there is no evidence of gross misconduct on my part. I remain suspended and no decision has been taken with regards to the disciplinary process. This delay has caused me**

considerable stress and uncertainty, which could have been avoided if the matter had been dealt with in a fair and timely manner.

3. On the 3rd March 2017, I lodged a whistleblowing complaint, concerning matters I had already raised prior to my suspension. To date, there has been no investigation into this complaint by the Council. This is in breach of the Council's policy.

4. On the 5th March 2017, I lodged a grievance against you, Roger Parkin and Linda Walker, in respect of your behaviour towards me. I was first interviewed about this grievance on the 2nd July 2017. This delay is in breach of the Council's policy and the ACAS Code of Practice. The grievance should have been dealt with quickly, especially given that it raised issues regarding the appointment of HB Public Law to investigate my February grievance and to conduct the disciplinary investigation. Failing to give me a reasonable opportunity to obtain redress in respect of the grievance is a serious breach of contract.

5. I wrote to you on the 3rd April 2017, requesting that my suspension be reviewed, as required by Council Policy and you unreasonably refused my request, in breach of Council Policy. Any objective review of my suspension and the allegations put to me, would find both to be manifestly unreasonable, given the lack of evidence to support the Council's case against me.

6. On 27.6.2017, you brought further allegations against me, arising out of my February grievance in relation to Neil Wilcox sitting on the Grievance Appeal Panel. However, you failed to inform the Disciplinary Investigator that there was a finding of bullying against Linda Walker in respect of that Grievance and also that the Panel expressed criticism of the fact that my March grievance was still outstanding. Your withholding of key relevant information to the investigator shows that you were not acting in an impartial or fair manner. This further undermines the employment relationship between me and the Council.

7. To date, you have provided no explanation as to why all my emails to and from Linda Walker in relation to the RB matter have been removed from my inbox on the Council's email system. Given the lack of explanation by the Council, it is sadly clear to me that they were removed by the Council in an effort to prevent me from being able to respond to the disciplinary allegations 2 and 3. This unfair treatment has hampered my ability to properly prepare for the hearing, and defend myself in respect of those allegations.

8. Despite my many attempts to enter into a dialogue with you, you have steadfastly refused to reply to any substantive correspondence from me leaving me in a position whereby I feel unfairly isolated and disrespected.

I have set out above some key breaches of Council policies, processes and procedures, on the part of my employer and some examples of the unfair course of conduct I have been subjected to by the Council. The Council has made many additional breaches and treated me unfairly in many other ways (for example as set out in my various grievances). However, I do not seek to go into all of the detail of all of the unfair treatment towards me in this letter.

I am deeply disappointed by the unjustified processes which have been and are being followed. I have broader concerns around why these processes were commenced. I cannot escape the conclusion that the reason why I have been treated in this way is that I blew the whistle. The impact of all of this on me has been enormous. I believe that unless you take prompt action to remedy the situation my position at the Council will be untenable, and under the circumstances, I would be entitled to resign without notice by reason of the Council's conduct.

I reserve all of my legal rights in this regard.

Despite the conduct set out above, I would like to preserve my employment at the Council and repair the employment relationship as far as possible. To this effect, in order to remedy the breaches set out above, I request the following from the Council, by 4.00pm on Friday 14th July 2017:

a) My suspension to be lifted for me to return to work, as Head of Legal with immediate effect; and

b) The disciplinary proceedings to be withdrawn in their entirety.

If terms a) and b) above are agreed to within the timeframe provided, then I will agree to withdraw my existing grievances and subject access requests, in the interests of repairing what is, under present circumstances, becoming an irreparable employment relationship.

However, if the Council does not agree to my two requests and continues to treat me in this hostile and degrading manner, then, for the sake of protecting my health and wellbeing, I will have no choice but to resign in response to the breaches of contract and course of conduct set out above, which taken together cumulatively amount to a repudiatory breach of contract on the part of the Council.

I look forward to hearing from you by Friday 14th July 2017.

Please preserve all documents, communications (electronic, hard copy, or otherwise) relating to the content of this letter."

49. On 14 July 2017 Mr England replied to the Claimant as follows:

"Dear Amardip

Thank you for your letter of 11 July.

I understand that Miss Norman-Thorpe is currently in the process of drafting her report. I understand that your view is that there is no evidence of gross misconduct on your part, but I have not yet received Miss Norman-Thorpe's report so am unable to comment. Given the stage in the procedure we are at, I do not think it is appropriate to carry out a review of your suspension at this time. However, I will do so immediately that I am in receipt of the disciplinary investigation report.

I therefore cannot agree to lift your suspension and withdraw the disciplinary proceedings with immediate effect. I note that you believe that the Council's conduct amounts to a breach of the implied duty of trust and confidence. I do not accept this. However, there are several matters in your email which I wish to look into, including what you say about your whistleblowing complaint not having been investigated.

I understand that the disciplinary process is stressful for you and would like to remind you that support is available to you to assist with this if you wish. Please let me know if this is the case.

50. On 17 July 2017 the Claimant sent a letter of resignation to Mr Parkin as follows:

"Dear Roger Parkin

Resignation with Immediate Effect

Please treat this letter as formal notice of my resignation from my position as Head of Legal at Slough Borough Council (the Council), with immediate effect. I am resigning by reason of the Council's conduct towards me, which, as set out in my letter to Mike England dated 11 July 2017, has put me in an untenable position whereby the Council has given me no choice but to resign from my position in response to a series of breaches of my employment contract by the Council.

Mike England's email to me dated 14 July 2017 confirms the Council's refusal to remedy the breaches set out in my letter dated 11 July 2017. This was the 'last straw' in a continuing course of conduct towards me, by the Council (as set out in my letter to Mike England dated 11 July 2017), which taken together cumulatively constitutes a repudiatory breach of the implied contractual term of mutual trust and confidence.

For the sake of my own health and wellbeing, I cannot tolerate this conduct and accept the Council's breaches of my employment contract any longer.

For the avoidance of doubt, today will be the last day of my continuous employment with the Council."

11. The Tribunal found that the Claimant posted the resignation letter, and that the Respondent only became aware of it when she referred to having resigned in an email to members of 24 July 2017. In paragraph 52 of its Reasons the Tribunal said this:

> **"In the meantime, the Claimant had been seeking alternative employment since March 2017. In fact, unknown to the Respondent, the Claimant had secured a post as Senior Planning Lawyer with Newham Council. The Tribunal was shown a contract of employment between the Claimant and Newham Council which stated: "This agreement is made on the 30th day of June 2017" although the Claimant did not sign the contract until 20 July 2017. However, her start date was 17 July 2017, the same date as her letter of resignation."**

12. On 31 July 2017 Mrs Norman-Thorpe sent Mr England her report, which the Tribunal described as lengthy and detailed and running to some 1,400 pages overall. Her findings, which the Tribunal set out more fully than we do, included that the Claimant had bullied and harassed members of staff, that her emails to Councillors of 3 and 5 March 2017 were breaches of instructions and that she had made offensive, abusive and/or intimidatory and derogatory remarks. She considered that these breached various of the Respondent's codes, and recommended that each of them amounted to gross misconduct.

13. The first claim form, presented to the ET on 10 May 2017, raised claims of direct race, religion or belief and sex discrimination and victimisation, detrimental treatment on grounds of protected disclosures, and for equal pay and unlawful deduction from wages. A second claim form presented on 2 October 2017 complained of unfair and discriminatory constructive dismissal. It asserted that, by virtue of the matters raised in the letters of 11 and 17 July 2017 and in the first ET claim, the Respondent was, when the Claimant resigned, in breach of the implied duty of trust and confidence. The equal pay claim was later withdrawn and the direct discrimination claim ultimately only pursued by reference to the characteristic of race, being the Claimant's Asian ethnic origin.

14. The Tribunal set out the law in relation to each of the claims, citing relevant statutory provisions and leading authorities. These self-directions are not criticised, as such.

15. The conduct complained of as amounting to direct race discrimination was the act of suspension. Various comparators were relied upon, some of whom were in fact also suspended. The Tribunal considered in detail the circumstances relating to each of the others who were not suspended, but found them in all cases to be materially different. It found that the reasons for Mrs Walker's decision to recommend suspension, and Mr England's to carry it out, were those given in Mrs Walker's report and their evidence, and in no way because of race. The Tribunal found that the Claimant's grievances of 15 November 2016 and 8 February 2017 were both protected acts. The act of victimisation complained of was again the suspension, which the Tribunal concluded was not because of either of those protected acts.

16. The Tribunal found that the conversations the Claimant had had with Council members, and then at a meeting with Mr Parkin and the Leader, on three dates in January 2017, all involved her making protected disclosures, as did her complaint of 3 March 2017. The first detriment complained of was once again the suspension, which the Tribunal was satisfied was not because of any of these protected acts. It found that Mrs Walker and Mr England were both in fact unaware of the January conversations.

17. The second detriment complained of was Mr England's email of 13 April 2017. The Tribunal found that he had decided that the Claimant's email of 3 March 2017 should form the subject of a further disciplinary allegation, because of the fact of her having thereby communicated with members contrary to his instruction, and not because of its content. Applying

Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500, this was not therefore conduct done on the grounds of the Claimant having made any of the protected disclosures.

18. The wages claims arose out of exchanges the Claimant had with Mr Parkin in July 2016, after she had secured an offer of employment with Redbridge London Borough Council. She claimed that she had been persuaded to stay with the Respondent, by an offer from him to match the salary being offered by Redbridge, but which was never honoured. The Tribunal found that Mr Parkin had promised to do what he could, but that he had no authority himself to award her such an increase, a fact of which she would have been aware. This claim therefore failed.

19. In relation to constructive unfair dismissal the Tribunal cited Section 95(1)(c) **Employment Rights Act 1996** and cited, and fairly summarised, the principles emerging from **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27, **Hilton v Shiner Limited** [2001] IRLR 727, **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 and **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1 (CA). It noted that the Claimant's resignation letter of 17 July 2017 referred to her letter of 11 July and Mr England's response of 14 July.

20. We need to set out in full the Tribunal's reasoning in relation to the constructive unfair dismissal claim, which then followed:

> **"154. In the Claimant's letter dated 11 July 2017, she refers to eight matters which she said amounted to fundamental breaches of contract which breached the implied term of trust and confidence. However, she offered to withdraw her existing grievances and subject access requests and that would include alleged breaches number 1 to 8, if Mr England would comply with her request to:**
>
> > ***"(a) My suspension to be lifted for me to return to work, as Head of Legal with immediate effect; and***
> >
> > ***(b) The disciplinary proceedings to be withdrawn in their entirety."***
>
> **155. In his reply dated 14 July 2017 Mr England refused to lift the suspension and withdraw the disciplinary proceedings as he was awaiting Mrs Norman-Thorpe's report which was due imminently.**
>
> **156. In these circumstances, it was clear from the contents of the Claimant's letters dated 11 July 2017 and her resignation letter of 17 July 2017 that she resigned in response to Mr**

England's refusal to lift the suspension and withdraw the disciplinary proceedings rather than any of the matters which had gone before. She was prepared to put those matters behind her if her request was granted.

157. The decision in *London Borough of Waltham Forest v Omilaju*, as confirmed in *Kaur v Leeds Teaching Hospital NHS Trust*, that it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfied the final straw test.

158. In this case, the Tribunal found that the suspension and disciplinary proceedings had a reasonable and proper cause, as also did the decision by Mr England not to lift the suspension or withdraw the disciplinary proceedings until he had received Mrs Norman-Thorpe's report.

159. Mrs Walker's report contained detailed allegations of wrongdoing supported by apparently reliable evidence, which in turn supported the suspension, continuation of the suspension and the continuation of the disciplinary process to await receipt of Mrs Norman-Thorpe's report.

160. Accordingly, the Tribunal found that, viewed objectively, there was no breach of trust and confidence in response to which the Claimant resigned and that her alleged "last straw" had a reasonable and proper cause and could not amount to a breach of trust and confidence.

161. In considering the reason for the Claimant's resignation, the Tribunal also took account of the fact, as described above, that the Claimant started a new appointment at Newham Council on the same date as she submitted her resignation to the Respondent.

162. During cross-examination, it was put to her she had mentioned nothing about a new appointment in her witness statement and she replied that there was "no need to do so". It was put to her that the reason for her leaving was because she had a new job. She denied this and said that she was hoping a "light bulb" would come on regarding how she was being treated. When asked whether she would have left on 17 July if she had not had the job at Newham Council to go to, she replied that she would not have left on 17 July in that event.

163. Additionally, in her witness statement, Mrs Nagra said that in August 2017, the month following her resignation, the Claimant applied to the Respondent for the post of new Chief Executive. However, she was not shortlisted.

164. In these circumstances, the Tribunal could not accept that there had been a breakdown of the term of trust and confidence between the Claimant and the Respondent, nor could she have thought that there was such a breach. The Tribunal considered that the test of whether the employee's trust and confidence had been undermined in an objective sense, was not satisfied.

165. The complaint of unfair constructive dismissal therefore fails."

21. We turn to the live grounds of appeal. Ground 1 is as follows:

"Ground 1; serious procedural irregularity

7. There was a serious procedural irregularity during the course of the hearing. One of the members of the ET was asleep for considerable periods of time when the witnesses were being cross-examined. It was the lady member, Ms A Brown. She kept falling asleep during the afternoons of 3 and 4 July 2018, when the claimant was being cross-examined. She then fell asleep again during the afternoon of 4 July 2018 while the respondent's key witness, Ms Walker, was being cross-examined. She then fell asleep again during the afternoon of 5 July 2018, when Ms Walker's cross-examination continued (Ms Walker's cross-examination finished at the end of the afternoon session of the hearing on that day)."

22. The guiding principles which apply where a procedural irregularity of this type is alleged to have occurred are well-established and clear. They were authoritatively stated by the Court of

Appeal in **Stansbury v Datapulse Plc & Anor** [2004] ICR 523 and have recently been reviewed and restated by the Employment Appeal Tribunal ("EAT") in **Science Museum Group v Wess** UKEAT/0260/18. We were also referred to the discussion of certain aspects in **Podkowka v The Royal Borough Kensington and Chelsea** UKEAT/0433/12, **Whitehart v Raymond Thomson Ltd** EAT 11 September 1984 and **Shodeke v Hill and Others** [2004] UKEAT/0394/00.

23. The salient points are as follows. First, where there is a factual dispute as to what actually occurred at the ET Hearing, it is incumbent on the EAT to make the necessary findings of fact, drawing on the evidence presented to it. That evidence may consist of statements gathered from one or more members of the ET which presided at the Hearing, as well as others witnesses from whom statements may be tabled by the parties. Members of the Tribunal will not be cross-examined at the appeal Hearing, but the parties' witnesses may be if that is sought.

24. Secondly, the principle to be applied is analogous to that which applies where the allegations is of apparent or actual bias. The parties are entitled to a fair Hearing before a Tribunal each member of which is sufficiently alert and concentrating on the matter in hand. If it is alleged that on one or more occasions one of the Tribunal members was not, or did not appear to be, sufficiently engaged, the question is whether the fair-minded and informed observer would, in light of the facts found, conclude that there was at least a real possibility that the fairness of the trial was affected. If so, that would vitiate the Decision even in a case where it was unanimous, and even if the Tribunal could otherwise properly have reached the Decision that it did, and there was no other apparent error of law.

25. As to whether in this area there is some *de minimis* or similar principle that may be invoked, in **Shodeke v Hill** the following was said:

> **"98. The basic principle of that decision is clear, namely that justice must be done and be seen to be done; and that the justice purportedly administered by a manifestly inattentive tribunal may deserve the criticism that it was neither justice nor seen to be justice. The case in question was a two-day case, with the evidence justifying the conclusion that Mr Eynon had misbehaved on both days. The present case was a 28-day case. Does Stansbury establish that proof, for example, that one of the tribunal members was asleep for, say, three minutes on each of two of the 28 days is sufficient to entitle the losing party to have the decision set aside and a re-trial ordered? If so, it would appear to establish a principle whose consequences could in some cases be devastating, particularly if, for example, the moments of proved inattention were exclusively during parts of the case which could not rationally be regarded as having any impact one way or the other on the ultimate decision: for example, during the unnecessarily extended reading by counsel from a demonstrably irrelevant law report. In such an example, we question whether the informed and fair-minded observer would regard the member's brief inattention as inevitably fatal to the quality of the decision. As it seems to us, it will always be a question of fact in all the circumstances of the case whether the nature and extent of the proved inattention will be sufficient to require the conclusion that the hearing was an unfair one whose decision cannot be allowed to stand."**

26. In **Science Museum Group v Wess** the EAT observed in relation to this passage:

> **"69 I do not think that this passage in Shodeke was intended to soften, or is at odds with, the guidance in Stansbury, which the EAT faithfully reviewed. The EAT in Shodeke did not use the language of a *de minimis* test, nor do I think it is particularly helpful to think about this area in that way. Realistically, there may be cases where, during the course of a hearing, a Judge or member's attention briefly wanes or lapses, but no harm is done. The matter is acutely fact sensitive, and depends, in each case, entirely on a careful finding and evaluation of what happened: the nature and extent, and what was going on at that point in the proceedings. It is not the case that any and every lapse of attention must affect the fairness of the trial. But either what happened in a given case is such that it undermined the fairness of the trial – applying the Stansbury guidance – or it did not. This passage in Shodeke does no more than envisage a particular type of scenario in which that might be found not to be the case. But if, in the given case, the fair-minded and informed observer would conclude that there was a real possibility that the fairness of the trial was affected, then the decision cannot stand."**

27. Finally, although either or both of them may well do so, a party is not bound to raise the matter with the ET itself, during the course of a Hearing itself, as a necessary condition of later raising the issue as a ground of appeal.

28. Before turning specifically to the evidence that we had about what is said to have occurred during this particular ET Hearing we need to give an overview of the Hearing itself. It took place in July 2018. Eight days were available. The Claimant was represented by counsel, Mr Hyams, instructed on a direct access basis. The Respondent was represented by Mr Cheetham QC. His instructing solicitor, Ms Eccles of HBPL, also attended the Hearing.

29. The Tribunal spent the first day, Monday 2 July, and the morning of the second day, Tuesday 3 July, reading. In the usual way it had therefore read all the witness statements, and live witness evidence consisted, after each witness had been sworn and adopted their statement as evidence-in-chief, of cross-examination, re-examination and Tribunal questions.

30. On the afternoon of 3 July the Tribunal began hearing evidence from the Claimant. Cross-examination of her continued on the morning of 4 July and into the afternoon that day, finishing at just after 3pm. The Claimant had another live witness to call but it was agreed, because of her availability, that the Tribunal would next hear from the first witness for the Respondent, Mrs Walker. Cross-examination of her began that afternoon, and continued through the next day, Thursday 5 July. The Tribunal did not sit on Friday 6 July. Further witnesses were heard, and closing submissions were received, over the four days of the following week. The Tribunal reserved its Decision, which it deliberated in chambers on 1 and 2 August 2018, and which was sent to the parties on 12 September.

31. Neither of the parties elected to cross-examine any of their opponents' witnesses at the Hearing of this appeal. Our task was therefore to make findings of fact drawing on the whole body of evidence that we had, on the footing that the evidence of each witness was, as such, unchallenged. We proceeded on the footing – and there was nothing in the statements to cause us to doubt it in any case – that each witness had given us their honest recollection, but recognising that even the most clear and vivid memories can be mistaken or confused.

32. We should add that Mr Cheetham, who was a witness for the Respondent, also appeared for it at this Hearing, but of course his *evidence* was confined to his witness statement. What he said as a representative did not amount to evidence although he did confirm one or two undisputed

points: where the witness table was in the Tribunal's Hearing room, and that Mr Hyams had not had a note-taker with him. We were also told at the start that there had been no issue or concern raised at all, as to any possible issue of conflict, in terms of Mr Cheetham having given a statement and also appearing as a representative today.

33. In summary, the evidence of the various witnesses was as follows. We had an affidavit from the Claimant. At paragraph 15 she referred to what happened on Tuesday 3 July:

> **"15. On Tuesday the 3rd July, Ms A Brown, was observed by me to be asleep. She was resting her head on her hand, on an arm, which was upright. She had clearly dozed off. I was shocked at what I observed and as I was asked to locate a particular page in the bundle, I dropped the particular folder I was asked to open, on the desk before me, to try and make enough noise to awake Ms Brown. I believe she must have been asleep for around 10 minutes when I noticed she had woken up 1 was unable to observe her the whole time because of the nature of my cross examination which required me to go Through a number of pages in the various bundles."**

34. The Claimant went on to say that her son, who was at the Hearing that day, informed her at the end of the day that he had also observed Ms Brown asleep on more than occasion during the course of her cross-examination. The Claimant also said that she raised the matter with Mr Hyams, who told her that he had not seen it, and with the usher, who suggested she speak to her counsel. She also said that Ms Brown was again observed to be asleep during her cross-examination on the afternoon of 4 July, with eyes closed and head rested on her hand on an upright arm; and then again during the cross-examination of Mrs Walker that afternoon.

35. The Claimant also said that she noticed Mr Cheetham direct his instructing solicitor's attention to Ms Brown. She added:

> **"22. Before the start of the sitting of Thursday 5 July Mr Hyams advised me of a conversation Mr Cheetham had with him. Mr Cheetham asked if Mr Hyams had noticed whether Ms Brown was asleep in court and if not he wanted to alert Mr Hyams to this. It was clear from this that Mr Cheetham was aware of the issue with Ms Brown but had not alerted the court to do it nor did he wish to do so."**

36. Further on, the Claimant said that again in the afternoon on 5 July Ms Brown was asleep. "My husband recorded the length of time Ms Brown was observed as being asleep and he confirmed it was for 15 minutes during the critical questioning of Mrs Walker by my counsel."

37. Carol Clegg, a former employee of the Respondent, also gave a statement on behalf of the Claimant about what she observed when she attended the Hearing on 5 July. Of Ms Brown she said: "On the afternoon of Thursday 5 July, I observed that Ms Brown had fallen asleep during the cross-examination of Mrs Walker. It was not a momentary lapse. She was clearly in a relaxed state of slumber with her arms supporting her head for a considerable period."

38. The Claimant's husband, Kevin Healy, also gave a statement in her support. Of 5 July, when Mrs Walker was cross-examined, he said:

> **"5. On the 5th July 201,8 the cross-examination of the Respondent's main witness Mrs Walker was continuing from the afternoon of the 4th of July.**
>
> **6. I witnesses Ms Brown falling asleep during the course of the day.**
>
> **7. In the hour leading up to the lunch break, I saw Ms Brown fall asleep on a number of occasions for periods of between 20 seconds and a minute. I could clearly see that Ms Brown was not concentrating on the questioning. This was evidence from the fact that when Counsel would direct the witness and the Bench to a particular document, Ms Brown would only reach that document sometime after other members of the bench and after Counsel had made reference again to it. Consequently, when counsel was reading out an extract Ms Brown would still be turning the pages of the Bundle trying to find it.**
>
> **8. After lunch this continued in a similar vein until later in the afternoon, when her periods of sleep extended. I noted the time of the longest period, and this was just under 20 minutes."**

39. He also saw Mr Cheetham apparently alerting his solicitor to Ms Brown falling asleep. He (Mr Healy) also raised the matter with the Claimant's counsel. He said that he observed Ms Brown again falling asleep during the cross-examination of another witness, Mr England, on the afternoon of Monday 9 July.

40. Mr Hyams, the Claimant's counsel at that Hearing, gave a short statement indicating that he did not himself observe Ms Brown asleep. But he continued:

> **"2. ….However, my client's son Thomas and her husband Kevin both mentioned to me that they had seen it after which Mr Cheetham counsel for the Respondent in the presence of Miss Eccles his instructing solicitor asked whether I'd seen the lady lay member asleep and I said that I'd not done so, but that I'd been told by my client's family members that they had seen it. Mr Cheetham and Miss Eccles that they had themselves seen it."**

41. For the Respondent there was an affidavit from Mr Cheetham. He said this:

> **"3. First, it is correct that, while Mr Hyams was cross-examining one of the Respondent's witnesses, 1 noticed that the female lay member was having difficulty staying awake. I drew this to the attention of my solicitor, Caroline Eccles, I cannot now remember what time this occurred or on what day of the hearing, but I do recall mentioning this to Mr Hyams during the next break. I did not know whether he had noticed it and I wanted to give him the opportunity to raise it with the Judge, if he felt it appropriate.**
> **4: I did not refer to this matter again during the hearing either directly or indirectly, and I cannot now recall whether Mrs Clegg mentioned it to me (as she claims in her witness statement).**
>
> **5. Secondly, I disagree with the suggestion that the lay member was regularly sleeping and for periods of up to 20 minutes- I cannot say I was watching her throughout, but it seems to me inherently unlikely that this occurred without the judge, Mr Hyams, Ms Eccles or myself noticing."**

42. Employment Judge Vowles gave a statement that he did not see Ms Brown asleep, nor have any reason to suspect that she was asleep or not paying attention to the evidence. He added that his attention was focused to the front. In addition, he would not normally observe the conduct of the members either side of him, unless, for example, one of them passed him a note or asked a question of a witness. Mr Singh gave a statement observing that the Judge was seated between him and Ms Brown, and that he (Mr Singh) did not see her fall asleep.

43. Ms Brown set out in a statement that she had been appointed as a lay member in 1995. She said:

> **"4. I have attended many training sessions and have sat as a lay member regularly and frequently; I consider my listening and concentration skills to be acute having had much practice to refine these skills over the years. I approach my Employment Tribunal duties seriously, professionally and diligently.**
>
> **…..**
>
> **8. I vigorously deny that I was asleep at any and all times/days as alleged. Had there been any suspicion whatsoever that I was asleep, thus flawing the proceedings, the parties' legal representatives would surely have reported this at the time and the proceedings would surely have been halted. The accounts given in relation to my conduct in the affidavit/statements made by the Appellant (10 December 1018), Mr Healy (23 January 2019) and Ms Clegg (23 January 2019) are mistaken; they are wrong."**

44. She also said that it would have been impossible for her to make the copious 58 pages of notes that she did, and referred to copies being attached to her statement. In fact for some reason we only had with her statement copies of her numbered pages 19 to 58. However, in any event, as we will explain, nothing turned on this omission. She further observed:

> **"10. My style of note taking is to note the question asked of any witness, and to record the reply noting too any document(s) and the relevant page bundle number to which we may be referred. My personal notes are not a perfect verbatim, minuted record of proceedings but are comprehensive and detailed enough to assist me in making meaningful contributions during the Employment Tribunal's deliberations which indeed they did during our deliberations which took place after the parties to the proceedings had left and on the afternoon of 11 July, 12 July and 1 August 2018. I enclose the 58 pages of my notes made between 2pm 3 July and 11:28pm 10 July 2018.**
>
> **11. Whilst I am concentrating and making notes, my head is, of course, bent over and my posture can include me resting my chin on my hand whilst I am writing. In addition to making notes I usually/typically spend time 'actively' listening and observing any witness giving evidence and generally observing all those persons present In the Tribunal room."**

45. She set out an analysis, drawn from her notes, of the sitting times and bundle and witness statement references that she had recorded day by day. She concluded:

> **"14. In summary. I completely refute the Appellant's, Ms Clegg's, Mr Healy's and Mr Hyams' allegations that I was asleep during the above proceedings, I have presented evidence above that I was paying full and detailed attention to the proceedings at all times."**

46. Following a request from the EAT Registrar, we were also provided with a copy of Employment Judge Vowles' notes. Mr Singh was by this time indisposed and in his absence the Judge was unable to locate his notes among such material as had been retained.

47. The following were the principal submissions on ground 1. Mr Edwards remarked on the fact that the only witness statement for the Respondent came from Mr Cheetham. There was none from Ms Eccles – although there was a letter from her saying that the Respondent relied on the evidence of Mr Cheetham – nor from any of the Respondent's witnesses who took part in the Tribunal Hearing.

48. Mr Edwards stressed that he did not invite us to draw any adverse inference from the lack of other evidence, but merely made the point that the only evidence from the Respondent's side was that of Mr Cheetham. Mr Edwards suggested that Mr Cheetham's evidence, that he had on one occasion observed Ms Brown having difficulty staying awake and raised it with Ms Eccles, did not *contradict* the evidence of the Claimant, Mr Healy and Mrs Clegg, that they had all at different points observed Ms Brown asleep, and seen Mr Cheetham draw what he saw to Ms Eccles' attention. While Mr Cheetham's statement challenged the suggestion that Ms Brown had been asleep for up to 20 minutes on one occasion as implausible, he had acknowledged that he, Mr Cheetham, had obviously not been observing her all the time. Mr Healy, however, was specific that he had seen this and had timed it; and the Claimant and Mrs Clegg also had seen her sleeping for significant periods.

49. Mr Edwards said that the evidence from Mr Healy about what he saw on 9 July was consistent with the picture he painted of what he had seen the previous week. We interpose that, although 9 July was not mentioned in this ground of appeal, Mr Cheetham did not object to that evidence being considered, as such. Mr Edwards submitted that the Judge had frankly acknowledged that his attention was focused to the front. In periods when Ms Brown was asleep she would by definition not be attracting his attention by passing a note or questioning a witness. Mr Singh was inevitably of limited assistance, given where he was sitting.

50. As for Ms Brown, she might simply be unaware that she had fallen asleep from time to time. She had accepted that she had adopted the posture of resting with her chin on her hand, although she said this was whilst she was writing. She did not say, however, that she adopted this posture or closed her eyes, in order to concentrate more intently on the evidence, or anything

of that sort. She described a different approach when she wanted to focus particularly intently on what a witness was saying.

51. Mr Edwards submitted that Ms Brown's notes included a number of sections where questions or answers were left blank. He took us to one example, where the Judge had, in the same time window during the course of Mrs Walker's cross-examination, recorded around 37 or more questions and answers, when in the corresponding passage in her notes Ms Brown had only recorded around 11. Mr Edwards stressed that he did not invite us to draw an inference from these gaps in her note-taking that Ms Brown must have been sleeping during the gaps. However, he said that what could not be said was that her notes plainly demonstrated that she could not have been sleeping, because she had meticulously captured every single question and answer. He therefore invited us to conclude that Ms Brown's and the Judge's notes were of no assistance, either way.

52. Mr Edwards invited us to find that Ms Brown was asleep during parts of the cross-examination of both the Claimant and Mrs Walker, over the course of the five sessions over which the two of them gave evidence over two and a half days. These were crucial parts of the evidence. They could not fall within any exception derived from the discussion in **Shodeke v Hill** and **Science Museum Group v Wess**.

53. Mr Cheetham submitted that in this case the EAT had a range of evidence before it. Leaving aside Ms Brown herself, three witnesses did not see her apparently sleeping: the Judge, the other lay member and the Claimant's counsel. Mrs Clegg said she saw her sleeping for a considerable period on 5 July, and the Claimant and her husband said they saw it happen for longer periods and on numerous occasions. Ms Brown's evidence was also important, and needed

to be given due weight. She herself had vigorously denied sleeping. Mr Cheetham himself had only seen a one-off episode. He suggested that the EAT should consider whether, if there had been a very much more extensive episode of sleeping, it was likely that this would have gone unnoticed by both counsel and the Judge. He accepted that the EAT had to come to the best view it could on the balance of probabilities.

54. Mr Cheetham accepted in his written submission that, the more critical the finding as to whether Ms Brown was actually asleep, how often and for how long, the more likely the conclusion that the fairness of the trial was affected. However, if the EAT found, for example, taking the evidence as a whole, that she gave the appearance of being inattentive on only one occasion, then the Respondent would submit that this was an apparent lapse of attention which did not affect the fairness of the trial. Mr Cheetham however fully accepted in oral submissions that, even if we could not be sure that Ms Brown was asleep on every occasion when it appeared to observers that she was, if there was a consistent appearance given by her of being asleep, this would be liable to affect the fairness of the trial, because of the appearance created.

55. Our reasoning and conclusions to what factually occurred are as follows. The evidence of the Claimant, Mr Healy and Mrs Clegg presented a clear and consistent picture that Ms Brown was unfortunately observed to be asleep more than once during the course of the Claimant's cross-examination and that of Mrs Walker during the five periods identified by the witnesses over the course of 3, 4 and 5 July. Whilst they varied as to the length of the episodes or estimated length that they each observed, they all described someone who appeared to be dozing or asleep for at least up to a minute or two at a time, rather than someone briefly nodding or momentarily distracted or drifting, or a one-off episode.

56. This picture is reinforced by the evidence that the Claimant raised her concerns with her counsel and the usher, and the evidence that her son, her husband and Mrs Clegg all raised concerns with her. These reports are of course not independent evidence of what actually happened, but they are evidence of the degree of concern engendered in each of them by what they said they had seen. So is the Claimant's evidence that she at one point dropped a folder on the witness desk to make a noise, and Mr Healy's evidence that he at one point tried coughing loudly. This is further reinforced by Mr Cheetham's evidence that he on one occasion observed Ms Brown having difficulty staying awake, and that he was moved to draw the matter to the attention of his solicitor and to mention it to Mr Hyams.

57. We do not rely additionally on Mr Healy's evidence regarding what he says he saw on 9 July, bearing in mind that this was the following week. However, it is certainly not inconsistent with the picture painted by the other evidence, of the episodes covered by this ground of appeal.

58. We see some force in Mr Cheetham's observation that it is implausible that Ms Brown fell asleep for a continuous stretch of 20 minutes without more people noticing. However, Mr Healy was specific in his evidence that he was watching and timing. Even if he was not entirely accurate, and she was not continuously asleep for as much as 20 minutes, as opposed to perhaps intermittently over a period, Mr Healy's own overall evidence in any event supports the conclusion that there were regular and significant episodes in which she did fall asleep on a number of occasions and for more than just a few seconds. Mr Cheetham's evidence does not contradict or undermine that picture.

59. The fact that neither the Judge nor the other Tribunal number, Mr Singh, saw anything, also does not undermine that picture. Because the three Tribunal members were sat on the bench

in a row, it could easily have escaped their attention. Nor is it implausible that this occurred without Mr Hyams noticing, given particularly that, as direct access counsel he had no one to help him keep a note during the Claimant's cross-examination, and his attention would no doubt have focused on Mrs Walker when he was cross-examining her.

60. The cross-examinations of the Claimant and Mrs Walker were extensive and over significant periods. The fact that Ms Brown took many pages of notes, including cross references to documents and witness statements when referred to, does not show that the periods of periodic sleeping or inattention observed by these witnesses cannot have occurred, nor that they must have been consistently overstated, even if Mr Healy's reckoning that there was one episode lasting a continuous 20 minutes may not have been wholly accurate.

61. Counsel both agreed, as do we, that Ms Brown's and the Judge's notes do not help either way. Gaps in her recordkeeping do not show that she was sleeping during those gaps, but nor do the copious notes and references that she recorded show that she was not.

62. We have carefully considered Ms Brown's detailed statement, which is indeed categoric. We accept that statement as entirely sincere and that she firmly believes and is sure that she did not fall asleep or lose attention at any point. However, even a firm recollection can be mistaken. Further, it is possible for a person to fall asleep during the course of a Hearing for a period or periods of a minute or two, or even longer, without fully realising that they have done so.

63. We also recognise that it is possible that, with eyes shut and chin rested on her hand, she may have given the appearance of being asleep, without that always actually being the case on every such occasion. However, in any event her evidence cannot outweigh the cogent and

consistent picture painted by all of the other evidence before us. On the balance of probabilities, we are bound to conclude that there were several episodes, during the course of the evidence of these two witnesses over these three days, when Ms Brown either fell asleep or dozed off more than momentarily, and at least for up to one or two minutes at a time, or at the very least gave every appearance of having done so on all of these occasions.

64. The evidence of both of the Claimant and Mrs Walker was important. The two of them clashed over the conduct of Mrs Walker's investigation. It was Mrs Walker's conclusion that the Claimant had a case to answer for gross misconduct and her recommendation that the Claimant be suspended for the next phase of the disciplinary process.

65. Applying the guidance in the authorities, the fact that Ms Brown was asleep, or gave every appearance of having fallen asleep, several times during the course of their evidence, and more than momentarily on each occasion, would be bound to cause the reasonable and fair-minded observer concern, that there was at least a real possibility that the fairness of the overall Hearing was affected. That is bearing also in mind, we repeat, that sufficient active engagement was required on the part of all three members of the Tribunal. The fact that its Decision was in all respects unanimous can make no difference.

66. We are therefore unfortunately bound to conclude that the conduct on the part of Ms Brown alleged is found to have occurred, and therefore that ground 1 succeeds. As Mr Cheetham acknowledged, were we so to find, and because this aspect affects the fairness of the overall Hearing, and hence of the Tribunal's Decision as a whole, its conclusions dismissing all of the complaints must inevitably be overturned by us.

67. As the Tribunal's Decision as a whole must therefore be overturned, that includes the Decision that the Claimant was not constructively dismissed, regardless of whether there is any merit in grounds 8 and/or 9. However, since we have heard them both fully argued, we will set our conclusions in relation to those grounds as well.

68. Ground 8 is expressed in the Notice of Appeal in the following headline terms:

> **"13. ….**
>
> **Ground 8: taking into account, when determining that the claimant was not dismissed constructively, the irrelevant factor of the claimant's response to the conduct of the respondent on which she relied in saying that she had been dismissed constructively; alternatively, wrongly looking for the 'effective cause' of the claimant's resignation."**

69. This is then developed in the following paragraphs, which we need not set out in full. However, this ground in summary comprises two distinct strands, although there is an element of interplay between them. The first is that the Tribunal erred, in deciding whether the Claimant was constructively dismissed, in taking into account the fact that she had found, and taken up, other employment immediately upon her resignation. Alternatively, that it erred by inferring that this meant that she could not have been constructively dismissed.

70. The second strand is to the effect that the Tribunal erred in its approach to the Claimant's indication, in her letter of 11 July 2017, that if her suspension were lifted and the disciplinary proceedings withdrawn, then she would withdraw her grievances and subject access requests. Specifically, it erred in inferring from this that she resigned in response solely to the refusal to take those two steps, rather than in response also to any of the matters that had gone before.

71. Ground 9 is that the Tribunal erred, in paragraph 164, in taking into account its view of whether the Claimant had herself subjectively lost trust and confidence in the Respondent. This

was said to be contrary to the principle in **Tolson v Governing Body of Mixenden Community School** [2003] IRLR 842.

72. We consider first ground 8. As to the first strand, Mr Edwards cited **Meikle v Nottinghamshire County Council** [2005] ICR 1 and **Wright v North Ayrshire Council** [2014] ICR 77. He said that where the employer is in fundamental breach, the employee is entitled to resign in response to it and to immediately move into alternative employment that they may have been able to secure. As to the second strand, he submitted that the whole rationale of the last straw doctrine is that an employee may rely on conduct in response to which she has not so far resigned, together with the last straw when it comes, as then founding her claim of constructive dismissal. He cited **Omilaju** and **Kaur** in support.

73. Mr Cheetham submitted that the Tribunal had properly found that the Claimant resigned in response to the failure to lift her suspension and revoke the disciplinary charges. In addition, it properly found that this conduct had reasonable and proper cause, and so did not amount to a breach of the implied term. There was nothing wrong with this reasoning. The Tribunal also permissibly found that the availability of other employment to go to was a factor in the Claimant's resignation. As nothing about her resignation was referable to any breach of contract by the Respondent, the Tribunal could not be criticised for taking this into account.

74. Our conclusions on this ground are as follows. First, it seems to us that there was an error in the Tribunal's reasoning at paragraphs 154 to 156. **Omilaju** confirms that conduct which, by itself, could not properly be viewed as amounting to a breach of the implied term can, taken together with other prior conduct, contribute something to a cumulative breach, so long as it is

not entirely trivial or innocuous. It may in that case provide a last straw. We observe that that relatively low threshold must also apply to each of the preceding straws.

75. Further, the fact that the employee has, until the last straw, soldiered on and not resigned, does not prevent her as such from seeking to rely on the cumulative impact of all the straws taken together. **Kaur** confirms that even if, by the time of the last straw that prompts the resignation, the previous conduct had already cumulatively crossed the threshold of establishing a fundamental breach, the employee can still rely upon it, together with the further last straw event, even though she may have affirmed the fundamental breach earlier established. The additional conduct relied upon does not, as it is said, fall into an empty scale.

76. In this case, the Tribunal did not reason that *because* the Claimant had not resigned prior to the decision not to revoke her suspension or abandon the disciplinary process, *therefore* she could not, thereafter, rely on those matters as contributing to a fundamental breach. It did not, we think, make that particular error in quite that way. Nevertheless, there was an error which was, we think, simply one of what we would call deductive reasoning. It was as follows. The Tribunal, it would appear, inferred, simply from the Claimant's stance that, had the suspension been lifted and disciplinary process been withdrawn, she would no longer seek to rely on the matters going before, that *therefore*, when Mr England declined to take those steps, and she *then* resigned, she must have done so only in response to that decision. The Tribunal seems to have regarded this as a logically inevitable inference.

77. However, whilst this *could* have been correct, it was not *necessarily* correct, and it was not in fact the stance that the Claimant took in her correspondence. In her resignation letter she said she was resigning in response to, as she put it, "all the breaches." The Claimant *could* have

logically taken that view, with the failure to lift the suspension and the disciplinary charges, coming on top of the previous matters, being the conduct that she said tipped her into resignation. Whether that *was* factually true was, we stress, a matter for the appreciation of the Tribunal. However, the error was to treat to it as a matter of logical deductive *necessity* rather than specific fact-finding.

78. We have considered, however, whether this error would have meant that the Tribunal's conclusion on this point could not stand, had this been the only ground of appeal. As to that, the Tribunal correctly noted, citing **Hilton v Shiner**, that conduct for which there is reasonable and proper cause cannot amount to a breach of the implied term. Where a fundamental breach is said to come about by cumulative conduct, it must, we think, follow, that any individual aspect or episode of conduct relied on, for which there is reasonable and proper cause, cannot count towards the cumulative effect. In addition, where the last straw relied upon has reasonable and proper cause, this cannot therefore be relied upon to establish a cumulative breach at that point. Further, **Kaur** confirms that, where there has already been an established fundamental breach, which has been affirmed by the employee "soldiering on", this will still be available to weigh in the scales if there is some further incident which can relied upon. However, even in such a case, the ability to rely on that further incident would then be dependent on some further incident occurring which would be capable of contributing something more. However, a further incident could not do so, if there was reasonable and proper cause for it.

79. Had the Tribunal found that, prior to the decision in July to decline to lift the suspension and the disciplinary charges, the point of a fundamental breach had not yet been reached, it would then in any event have been right to conclude that the Claimant could not rely on that decision to complete a fundamental breach, given its unchallenged finding that that decision had reasonable

and proper cause. However, in oral submissions Mr Edwards said that there was no clear finding by the Tribunal as to whether the threshold of a fundamental breach had already been crossed, still less any finding that, if it had, the Claimant had affirmed such a breach.

80. In those circumstances, he said, the possibility would remain that the Tribunal might have found that, even though the decision to decline to lift the suspension and disciplinary charges had proper and reasonable cause and could not be relied upon, nevertheless a fundamental breach had already been established, which had not been affirmed. So it might have been open to the Tribunal to find that this earlier conduct contributed to the Claimant's decision to resign. Therefore, it could not be ruled out that the Tribunal could have found the contention that she resigned in circumstances amounting to a constructive dismissal, to be well founded.

81. We were persuaded by that analysis and submission. Therefore, had the only ground of appeal been the first strand of ground 8, and given the error that we had identified, we would not have been in a position to say that *for sure* the outcome was in any event not affected, and the matter would have had to be remitted to the ET.

82. We turn to the second strand of ground 8. The authorities are, we think, clear. The Tribunal must first decide whether there has been conduct amounting, individually or cumulatively, to a fundamental breach of contract on the part of the employer and which has not been affirmed. If there has, it must then decide whether that breach was an effective or material contributing cause of the employee's decision to resign. It does not need to be the sole or the main cause. It is sufficient if it played a part; see in particular the very full discussion and analysis in **Wright v North Ayrshire Council** [2014] ICR 77 as follows:

> **"10. It is a pity that the Tribunal was not referred to Court of Appeal authority rather than the EAT authority which *Jones v Sirl* represents. In *Nottingham County Council v Meikle* [2005] ICR 1 the principles of constructive dismissal are comprehensively discussed. It is**

now perhaps the leading authority at Court of Appeal level in respect of constructive dismissal, though mention might also be made of the case of *Bournemouth University Higher Education Corporation v Buckland* [2010] EWCA Civ 121, [2010] ICR 908 CA, in which the Court of Appeal re-emphasised that the approach to be taken in a case of alleged constructive unfair dismissal is the common law contractual approach and not an approach which more generally looks at the fairness or merits of the case. The common law approach looks at the conduct of the parties objectively. Thus in *Meikle* in the judgment of Keene LJ at paragraph 33 this was said:

"It has been held by the EAT in *Jones v Sirl & Son (Furnishers) Ltd* that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other; see the *Western Excavating* case. The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of the repudiation …"

11. *Jones v Sirl* itself is a case which unhappily lends itself to an interpretation of the words "the effective cause" as if the search was for the principal or main cause rather than simply a breach which a response to which in part led to the resignation. In the judgment of the Appeal Tribunal delivered by Judge Colin Smith QC it is said at paragraph 10 that the Industrial Tribunal must look to see whether:

"…the employer's repudiatory breach was the effective cause of the resignation. It is important, in our judgment, to appreciate that in such a situation of potentially constructive dismissal, particularly in today's labour market, there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of his contract of employment entitling him to put an end to it. Thus an employee may leave both because of the fundamental and repudiatory breaches, and also because of the fact that he has found another job. In such a situation, which will not be uncommon, the industrial tribunal must found out what the effective cause of the resignation was, depending on the individual circumstances of any given case."

12. Insofar as that passage suggests that the Tribunal must choose between causes, both of which operate, in order to see which was the predominant one, it is in error. If it is saying that the evidence may leave the Tribunal in a circumstance in which it is plain that the behaviour was not in response to a breach, even though that occurred and even though it was serious, but for some other unconnected reason to the exclusion of a response to the breach, then it would be correct. It is a pity that ambivalence has obscured the principle underlying the decision, which was clearly identified in *Meikle* and is therefore and in any event binding upon this Tribunal.

13. The matter is not entirely clarified by the very last paragraph of the Judgment of *Jones v Sirl* in which the following passage occurs:

"Whilst the breach must be the effective cause of the resignation, it does not have to be the sole cause, and there can be a combination of causes provided that the effective cause for the resignation is the breach."

14. The use of the word "the" demonstrates the importance of the definite article in English language: the indefinite article, "a", or "an", is more appropriate, since it recognises the possibility there may be more than one effective cause, but the word "the" suggests that there is only one.

15. The point does not rest simply on the judgment of the Keene LJ in *Meikle*, a judgment agreed to in that case by Thorpe LJ and Bennett J, but also was put in words which I doubt could be bettered by Elias J as President of the Appeal Tribunal in *Abbey Cars (West*

> ***Horndon) Ltd v Ford*** **UKEAT 0472 07, a judgment of 23 May 2008. At paragraph 34 he set out the passage from *Meikle* which we have cited. He commented:**
>
> **"On that analysis it appears that the crucial question is whether the repudiatory breach played a part in the dismissal."**
>
> **16. He added at paragraph 35:**
>
> **"It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon."**
>
> **That expression of principle was not material to the actual decision of the Appeal Tribunal in *Abbey Cars* but it is one which we wholeheartedly endorse.**
>
> **17. The same point was made in the case of *Mrs Logan v Celyn House Ltd* UKEAT 0069/12 (19 July 2012), a decision of the Appeal Tribunal, HHJ Shanks presiding. There, having cited *Meikle* and *Abbey Cars*, at paragraph 12 the Tribunal said this:**
>
> **"Having regard to those two authorities, and there are others applying the same principle, it is clear to this Tribunal that when the Employment Tribunal asked itself what the principal reason for the resignation was it asked itself the wrong question. It should have asked itself whether the breach of contract involved in failing to pay the sick pay…" [that was the breach at issue in that case]"…was a reason for the resignation not whether it was the principal reason."**
>
> **18. The principle needs to be re-emphasised in the words of Elias J. The issue is whether the breach played a part in the resignation."**

83. Therefore, where it is found that the employee would not have resigned when she did, had she not had another job to go to, that does not by itself mean that her claim of constructive dismissal necessarily cannot succeed. The Tribunal may conclude that there were mixed reasons and that both the employer's conduct and the availability of another job played a part in the decision to resign. What is required in every case is a fact sensitive and specific finding as to whether, even if the employee would not have resigned without another job to go to, the fundamental breach still materially contributed to, or played a part in, her decision.

84. In this case the Tribunal did not approach the matter in that way. It did not refer to this particular line of authorities or state in any form of words that it was applying this test. In paragraph 161 it said that it took account of the fact that the Claimant took up the Newham offer on the same date as she resigned. However, it did not explain how it took it into account. In paragraph 162 it referred to her acknowledgment that she would not have left when she did, had she not had that job to go to, but it did not explain how this affected its view as to what it called

"the reason" for her resignation. Further, the Tribunal had earlier stated at paragraph 156 that the Claimant had resigned in response to the failure to lift the suspension and abandon the disciplinary action. Mr Cheetham said this was a clear finding undisturbed by this later passage. However, the Tribunal says at paragraph 161 that in considering the reason for the Claimant's resignation it "took into account" this fact. It is not clear if it thought, therefore, that *both* the Respondent's failure referred to in paragraph 156 *and* the availability of the other job referred to further on influenced the decision to resign, or if it was only one of them, and, if so, which it was.

85. The reader is not assisted by the fact that the Tribunal appears to move from discussing the reason or reasons for resignation in paragraphs 154 to 156, to whether there was a breach of the implied term in paragraphs 158 to 160, back to the reason or reasons in paragraphs 161 to 162, and then back again to the question of breach in paragraphs 163 to 164.

86. There was, we conclude, a further error of law here in the Tribunal not clearly stating or applying the correct test, when assessing the impact of the Claimant taking up the Newham offer, on the question of whether she resigned, in the requisite legal sense, in response to the Respondent's conduct. Once again, we could not be sure that the ET's unchallenged finding, that the failure to lift the suspension and disciplinary proceedings had reasonable and proper cause, meant that the outcome was bound to be the same. Therefore, had strand two of ground 8 been the only ground, we would have had to remit in respect of the aspects challenged by that ground.

87. Turning to ground 9, Mr Edwards submitted that the Tribunal erred in paragraph 164 in relying on its conclusion that, because in August 2017, not long after her resignation, the Claimant applied for the post of new Chief Executive with the Respondent, she could not have thought that its conduct leading up to her resignation was in breach of the implied duty of trust and confidence.

That, he submitted, was to commit the error identified in the **Tolson** case, of having regard to conduct on the part of the employee, when the sole focus in considering a claim of constructive dismissal should be on the conduct of the employer. That appeared at least to be in part how it was put in the Notice of Appeal, although Mr Edwards placed more emphasis in oral submissions on the first proposition in that ground, namely that the Tribunal had erred by taking into account the Claimant's subjective perception.

88. Mr Cheetham submitted that the Tribunal had not made the error identified in **Tolson**, because it had referred only to what the Claimant thought, not what she did. In addition, it had not made the error of taking into account her subjective view, when determining whether there was a fundamental breach, because it clearly stated in that paragraph that it was applying an objective test.

89. Our conclusions on ground 9 are as follows. Mr Cheetham was right, as such, that a finding about what the Claimant thought would not be an error of the specific sort identified in **Tolson**. However, *taking into account* what the Tribunal took to be her subjective view *would* be an error, because the test of whether there is a fundamental breach is objective, and proof of subjective loss of confidence on the part of the employee is therefore not an essential element. See the discussion in the **Meikle** case at paragraph 37, citing from the speech of Lord Nicholls in **Malik and Mahmud v Bank of Credit and Commerce International** [1998] AC 20.

90. As we have said, Mr Cheetham submitted, however, that this observation about what the Claimant could have thought was not actually relied upon as part of the Tribunal's reasoning. He is right that, in the next sentence, the Tribunal states that it considered the matter in an objective sense. Nevertheless, the Tribunal's reasoning in paragraphs 163 and 164 as a whole is difficult

to follow. It is unclear whether, when it talks of the circumstances in paragraph 164, this is a reference specifically back to 163 or a broader reference back. In any event, in what way the Tribunal considered that the fact of the post-resignation application referred to in paragraph 163 supported the conclusion that there had not even objectively been a fundamental breach at the point of resignation, was not clear. It is possible for a post-termination event to cast some evidential light back on a pre-termination state of affairs, but if that is what the Tribunal thought in this instance, it needed to say more than it did to explain why.

91. Had this been the only ground, it would therefore have been upheld. We would have felt obliged to remit in relation to its implications for the Tribunal's conclusion on the question of constructive dismissal.

92. Accordingly, even had we not upheld ground 1 we would have remitted to the Tribunal for fresh consideration the question of whether the Claimant was constructively dismissed in all its constituent parts. However, for the reasons that we have given the success of ground 1 means in any event that the Tribunal's Judgment can in no respect stand and the matter will have to be remitted for rehearing in respect of all of those claims that remained live at the end of the Tribunal Hearing. The appeal is therefore successful and all matters are remitted for fresh Hearing before a differently constituted Tribunal.