Appeal No. UKEAT/0108/19/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 January 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR C WILLIAMS — APPELLANT

THE GOVERNING BODY OF
ALDERMAN DAVIES CHURCH IN WALES PRIMARY SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW SUGARMAN (of Counsel) Instructed by: Direct Public Access
For the Respondent	MS LOWRI WYNN MORGAN (of Counsel) Instructed by: Capital Law LLP Capital Building Tyndall Street Cardiff CF10 4AZ

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

DISABILITY DISCRIMINATION

The Tribunal erred in concluding that, because it had found that the conduct of the Respondent which tipped the Claimant into resigning could not contribute to a breach of the implied duty of trust and confidence, his claim that he was constructively dismissed must fail. That would be correct only had it, properly, found that (a) there was no prior conduct by the Respondent amounting to a fundamental breach; or (b) there was, but it was affirmed**.** But if, in such a case, there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed. **London Borough of Waltham Forest v Omilaju** [2005] ICR 481 and **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1 considered.

On the facts found, had the Tribunal applied the law correctly, it would have found that there was a constructive dismissal. It had found that there was prior conduct which contributed to the decision to resign, and which amounted to a breach of the implied term. It could not have properly found that such conduct had been followed by affirmation. A finding of constructive dismissal was therefore substituted. The Tribunal could not properly have found such dismissal to be for a fair reason, as claimed, and a finding of unfair dismissal was also substituted.

While some claims of discrimination pre-resignation had also succeeded, the question of whether the constructive dismissal was discriminatory would be remitted for consideration by the Tribunal.

The Tribunal decided that the withholding of certain information from the claimant in connection with disciplinary charges could not amount to a "practice" for the purposes of a complaint of failure to comply with the duty of reasonable adjustment, because it was not sure that the relevant individual would have so acted in *all* such cases. That was setting the bar too high. The Tribunal should have considered whether there was sufficient element of repetition or persistence in the Claimant's own case, for a practice to be found. **Nottingham City Transport v Harvey** UKEAT/0032/12 considered. **Lamb v The Business Academy Bexley** UKEAT/0226/15 applied. The appeal against this decision was also upheld, and this complaint remitted to the Tribunal for further consideration.

HIS HONOUR JUDGE AUERBACH

1. This is the Claimant's appeal from aspects of the reserved Decision of an Employment Tribunal ("the ET") sitting at Cardiff – Employment Judge Beard, Mr Fryer and Mr Pearson – arising from a 17-day Full Merits Hearing followed by further days in chambers. The Claimant brought multiple complaints under the **Equality Act 2010** regarding alleged treatment during and following the termination of his employment. It was common ground that his employment ended by resignation, but he also claimed unfair and discriminatory constructive dismissal.

2. The Tribunal found that the Claimant was not constructively dismissed. He appeals against that decision. Some, but not all, of the other **Equality Act** claims succeeded. A challenge to the dismissal of one of those claims, of failure to comply with the duty of reasonable adjustment, has also proceeded to this Full Appeal Hearing.

3. The Tribunal's Reasons run to more than 70 pages and are detailed and thoughtful. There were multiple complaints arising from three claim forms, covering events over a significant period of time and requiring lengthy findings of fact. However, for the purposes of what I have to decide, I can give a much shorter overview of the factual context. I take it mostly from the Tribunal's findings of fact, but also from some matters that were confirmed to me at the present hearing as not factually in dispute.

4. The Claimant is a teacher. For many years he worked at the Alderman Davies Church in Wales Primary School. The Respondent governing body of that school was, for the purposes of his claims, his employer. It was admitted that from April 2015 the Claimant was a disabled person by reference to a mental impairment. This particularly affected his reaction to stress and

his demeanour and behaviour in stressful situations. The Claimant attributed this to the continuing aftermath of a road accident in 1986 in which he had suffered very serious injuries. The Tribunal felt it could not say on the evidence that it had, whether he was right about that; but it found that he was, in law, a disabled person from the date of an incident at the school on 23 March 2015, and that the Respondent at least ought to have known of his disability from April 2015.

5. In April 2015 the Claimant was suspended because of what he was told was a child protection matter. He was given no further information at that point. The Local Authority were informed, but at a certain point it was decided that no further action would be taken by Social Services or the Police. In July 2015 the Claimant's suspension was lifted and he was allowed to return to school, but not to teaching duties, while the school proceeded with a disciplinary investigation.

6. However, in or around September 2015 he was asked to organise a sports day, which led to him developing severe symptoms of stress, being sent home pending medical investigations and ultimately never returning to actually work in the school again. In October 2015 the Claimant was told that the child protection allegation was of his having manhandled a child, but he was still not told the identity of the child or of the person who had reported the allegation. In November 2015 the Claimant raised a grievance complaining about a number of aspects of the handling of the matter thus far. The disciplinary process was put on hold whilst some, although not all, of the matters raised by the grievance were investigated.

7. Shortly after he was suspended, the Claimant had consulted his union. Prior to doing so he had downloaded a large number of documents from the school's systems, in order to give the

union a picture of what he believed was the background of poor treatment of him leading up to the suspension. In February 2016 the Head Teacher, Mrs Matchett, came to know of this conduct and the Claimant was re-suspended and a second disciplinary investigation was begun, the allegation being of breach of the data protection policy applicable to the school.

8. It appears that it also came to light that some document had, at some point, been shared between the Claimant and a fellow teacher who was also the trade union representative at the school, Mrs Sydenham, and this discovery led to her too being made the subject of an investigation of her own alleged breaches of the data protection policy.

9. The matters considered in the grievance investigation were not upheld and a grievance appeal in May 2016 was also unsuccessful. The Claimant understood that the disciplinary process would now recommence, and he sought further information for these purposes, including, again, the names of the child and of his accuser; but this was declined. On 13 June 2016 the Claimant wrote a letter complaining of this and of other aspects of his treatment up to that point, and asserting that he had lost all faith in his employer treating him properly. On 16 June 2016 the Claimant wrote a letter of resignation.

10. The Tribunal said the following about that:

> **"49. On 16 June 2016 the claimant wrote to the respondent indicating that he was resigning giving notice to the next resignation date of 31 August 2016. The letter explains that the claimant's reason for resigning is that he had received a communication from his solicitor indicating that Mrs Sydenham was no allowed to contact him. The reason he understood for that decision was that the respondent wished the investigation to be concluded before allowing any contact as both he and Mrs Sydenham were accused of data breaches which were connected. The claimant had in mind much of the previous treatment which we have set out above as part of an accumulation of events which together he considered were sufficient to amount to a severe breakdown in the employment relationship. His letter offering his resignation contains the following words "just when I thought things could not get any worse I have been told by my solicitor that Mrs Matchett has recently refused to give permission to my colleague, Mrs Sydenham, to contact me to discuss the overlap of our two cases. This is gratuitous cruelty and further abuse of power". The claimant understood that the respondent's reason for this refusal was to ensure a structured investigation a reason which he saw as an excuse and unjustified. We conclude that the trigger for the**

> **claimant's resignation was the discovery of the information about Mrs Sydenham from his solicitor."**

11. There was a considerable aftermath, but I can describe this fairly shortly. Having received HR advice that there were deficiencies and discrepancies in relation to the original investigation into the child protection allegation, the Respondent decided to conduct a further investigation. As I will describe, of particular relevance to this appeal is the following paragraph in the Tribunal's Decision:

> **"52. In between July and 9 September 2016, a hearing was arranged for 23 September 2016 which was postponed so that the second investigation could be undertaken. The claimant had been seeking information about the identity of the child. Mrs Matchett was most reluctant to divulge this information, she told us this was because of her understanding of policy and the position of PASM. However, in an email where she was discussing this issue she made it clear that she was concerned that if the claimant found out the name he would bring pressure bear on the family in some way and seek to show that child A had "lied". In our judgment Mrs Matchett did not believe that she was following a particular policy but was simply trying to keep control of the process, and using social services, who no longer were involved, to justify her decision making. In our judgment Mrs Matchett began to concede this point only at the stage where it became apparent that the employment advice, given in September 2016, was against the approach she was taking."**

12. The first claim form was presented in November 2016. There were disciplinary hearings in May and June 2017. In respect of the data protection matter the disciplinary panel considered that the Claimant was guilty of gross misconduct and (notwithstanding, I interpose, that he was no longer employed), that he should be dismissed. He was sent a letter to that effect. In respect of the child protection matter the panel concluded that the evidence did not support a finding of guilt. However they were nevertheless initially minded to issue a warning, but, following advice (and again notwithstanding that the Claimant was no longer employed), it was decided that a training requirement should be imposed. The second claim form followed. An appeal against the decision in relation to the child protection decision failed. An appeal against the decision in relation to the data protection decision led to the substitution of a final written warning. The third claim form followed. The second and third claim forms included claims of victimisation.

13. The Tribunal was, throughout its Decision, repeatedly, and in various language, highly critical of the Respondent. The following is not a complete list but gives the flavour in summary. The Tribunal found that Mrs Matchett was not fully *au fait* with the disciplinary and grievance procedures, was in a number of matters motivated by a desire to exercise control over what happened, and approached issues relating to the Claimant's alleged conduct as performance matters, rather than evincing empathy or concern for his health difficulties. It also found that the governing body were unaware, or ignorant, of the procedures governing them; and it could not be certain that any of their actions were *intra vires*. It criticised the handling of the decision to suspend the Claimant and the decision to hive off some of the elements of his grievance for later consideration. It found that there were problems with the grievance process, which the appeal against grievance did not provide the means to correct. It was critical of the approach taken to whether, or when, the Claimant should be told each of: the gist of the child protection complaint, the identity of his accuser and the identity of the child.

14. Some **Equality Act** claims succeeded and some failed, either because they were out of time or on their merits. As I have noted, the Tribunal also concluded that the Claimant was not constructively dismissed. I will come presently to its reasoning in relation to that.

15. The Notice of Appeal contained eight grounds. Following initial consideration on paper by Lavender J, and then a Preliminary Hearing before HH Judge Stacey, grounds one, two, three, six and eight were allowed to proceed to a Full Hearing. I will continue to use those numbers.

16. Grounds one, two and three challenge the ET's conclusions that the Claimant was not constructively dismissed, and hence the dismissal of the unfair dismissal claim. Ground eight relies on the same challenges to the finding that the Claimant was not constructively dismissed, to challenge the dismissal, on that basis, of the discriminatory constructive dismissal claim. Ground six challenges the dismissal of one of the claims of failure to comply with the duty of reasonable adjustment.

17. Before the ET, the Claimant had a non-lawyer professional representative, Ms Watson. Mr Sugarman of Counsel has appeared for him on this appeal. The Respondent was represented before the ET, and again on this appeal, by Ms Wynn Morgan of counsel. I have had the benefit of reading skeleton arguments and hearing oral argument from them both today.

18. I turn first to grounds one, two and three. When summarising the claims raised by the first claim form the Tribunal said this about the claim of unfair constructive dismissal:

> **"4.1.1. The claimant complains of constructive unfair dismissal relying on his treatment in general over a significant period ending on 16 June 2016. The last straw, he argues, arose upon his discovery that Mrs Sydenham had sought permission to speak to him and that permission had been refused."**

19. The Tribunal went on to set out the various complaints of discriminatory treatment during employment raised by the first claim form. These were variously said to amount to failure to comply with the duty of reasonable adjustment, harassment related to disability and/or discrimination arising from disability. Apart from the first, relating to an alleged failure to provide support in September 2014, all of them related to aspects of the handling of, or matters otherwise connected with, the disciplinary and grievance matters that I have described. The Tribunal then described the complaint of discriminatory constructive dismissal in this way:

> **"4.1.2.35. The last item in the schedule is dated 31 August 2016. The complaint is one of constructive dismissal which it is contended, amounts to discrimination arising from disability. Once again reference is made to the claimant's impaired concentration and**

memory and a propensity to become ill when stressed. No further details are given. The respondent denies the claimant was dismissed and also denies that there was any unfavourable treatment which arose in consequence of the claimant's disability. The respondent also relies on justification.

4.1.2.36. The claimant relies on the same fact of constructive dismissal as amounting to disability related harassment. The respondent denies that any conduct found to have occurred had either the purpose or effect of creating the prohibited environment."

20. After setting out its factual findings in relation to matters to do with the question of whether the Claimant was a disabled person prior to April 2015, and its narrative findings of fact generally, the Tribunal directed itself as to the law. In relation to unfair constructive dismissal its self-direction was as follows:

"72. Section 95 of the Employment Rights Act 1996 provides so far as is relevant:

(1) For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) . . ., only if)—

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

73. The approach to constructive dismissal is set out by Lord Denning in Western Excavating (ECC) Ltd v Sharp 119781 1 All ER 713, 119781 QB 761, 119781 2 WLR 344, CA in which he defined constructive dismissal as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

74. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in Malik v. Bank of Credit; Mahmud v. Bank of Credit (19987 AC 20; 1199713 All ER 1; 119971 IRLR 462; 1199713 WLR 95; 119977 ICR 606 where Lord Steyn said that an employer shall not:

"…without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

75. In this case, we must also pay mind to the fact that the claimant needs to establish his decision to resign on the last straw principle, in that he argues that the whole of the respondent's approach caused him to resign. In Lewis v Motorworld Garages Ltd 119867 ICR 157, Glidewell LJ pointed out that at p 169 F-G that the last action of the employer which leads to the employee leaving need not itself be a breach of contract. In Omilaju v Waltham Forest London BC 1200511 All ER 75 Dyson LJ said at paragraph 21:

"If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine

> ***the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."***
>
> **76. The tribunal is therefore required to decide whether the respondent's conduct in this case could objectively be said to be calculated, or in the alternative likely, to seriously damage confidence and trust between the claimant and the respondent. Thereafter we are required to examine whether the claimant resigned in response to that conduct, and that conduct must include a final event which contributes to earlier actions so as to make the entirety of the conduct, taken together, sufficiently serious so as to damage the relationship of confidence and trust between employer and employee.**
>
> **77. In a constructive dismissal claim the respondent is still required to establish the reason for dismissal. In Berriman -v- Delabole Slate Ltd. 119857 ICR 546 Browne-Wilkinson LJ held that the reason for dismissal is the reason for which the employer breached the contract of employment."**

21. In the concluding section of its Decision the Tribunal addressed the claims of constructive unfair dismissal in the following way:

> **"96.1. The claimant complains of constructive unfair dismissal relying on a last straw, being his discovery that Mrs Sydenham had sought permission to speak to him and that permission had been refused.**
>
> **96.1.1. Mrs Sydenham had sought permission to speak to the claimant before the results of the investigations, both in respect of her and the claimant, into data protection matters had been concluded.**
>
> **96.1.2. Given that there were issues potentially connecting the claimant and Mrs Sydenham in those investigations, it was not unreasonable for the school to ask that they did not communicate before the conclusion of the investigations.**
>
> **96.1.3. In our judgment the claimant in his letter of resignation indicates that he understood the reason for the refusal to be connected to the data protection investigation.**
>
> **96.1.4. The respondent's actions in preventing contact were, therefore, innocuous.**
>
> **96.1.5. On that basis the decision in Omilaju indicates that the action cannot contribute to the previous actions of the respondent. There is much in the actions of the respondent prior to this that the claimant could have relied upon, individually or cumulatively, to found a breach of the implied term, however he relied upon this action. For that reason, we cannot say that his resignation was tendered because of a breach of the implied term.**
>
> **96.1.6. The claimant was not dismissed within the meaning of Section 95(1)(c) and therefore his claim of unfair dismissal is not well founded and is dismissed."**

22. The Tribunal addressed, further on, the claim of discriminatory constructive dismissal in the following way:

> **"96.25. The last item in the schedule is dated 31 August 2016. The complaint is one of constructive dismissal which it is contended, amounts to discrimination arising from disability. On our finding there was no dismissal and, therefore, there can be no discrimination on that basis either as discrimination arising from disability or disability harassment."**

23. Ground one contends that, even if the Tribunal did not err in finding that the refusal to let Mrs Sydenham speak to the Claimant could contribute nothing to a breach of the implied duty of trust and confidence (a conclusion which is itself challenged by later grounds), it was wrong to conclude that, for that reason, the claim of constructive dismissal could not be made out.

24. The Tribunal, in this regard, had cited to it, but did not refer in its Decision to, the decision of the Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1. Adopting the nomenclature used by Underhill LJ in that case, I will refer to the implied duty of trust and confidence as the **Malik** term; and to conduct which individually or cumulatively establishes a breach of that term, as conduct which crosses the **Malik** threshold.

25. I will consider first the point of law and then turn to what the Tribunal actually decided in this case. As to the law Mr Sugarman's argument, in summary, is as follows. If, in a given case, the last conduct, in point of time, relied upon as having contributed, together with earlier conduct, to a breach of the **Malik** term, is properly found by the Tribunal to have been innocuous, then that would be fatal to a claim of constructive dismissal if either (a) the earlier conduct relied upon crossed the **Malik** threshold, but was followed by the employee affirming the contract, or (b) the earlier conduct was not, by itself, sufficient to cross the **Malik** threshold. However, argued Mr Sugarman, if in the given case the earlier conduct (a) was sufficient to cross the **Malik** threshold, (b) was not followed by affirmation and (c) also at least materially contributed to the decision to resign, then constructive dismissal will be made out. This will not be affected by the fact that the most recent conduct, in point of time, which also contributed to the decision to resign, added nothing to the breach.

26. Ms Wynn Morgan contended that if, in a given case, the last straw relied upon by the employee, being the most recent conduct in point of time which actually tipped him into making the decision to resign, was correctly found to be innocuous, and therefore could not be relied upon as contributing to a breach, then, because the claimed last straw could not be relied upon, the claim of constructive dismissal must fail. There would be no need, in such a case, she said, for the Tribunal to examine the earlier acts complained of. She submitted that that would be the position, even if there had been prior conduct amounting to a breach of the **Malik** term which had not been affirmed.

27. Both counsel relied upon paragraph 21 of the Court of Appeal's decision in **Omilaju v Waltham Forest London Borough Council** [2005] ICR 481 in support of their respective analyses of the law.

28. I agree with Mr Sugarman's analysis and I will explain why. The starting point is that there will be a constructive dismissal, that is to say a dismissal within the meaning of Section 95(1)(c) of the **Employment Rights Act 1996** where (a) there has been a fundamental breach of contract by the employer, (b) which the employee is entitled to treat as terminating the contract of employment and (c) which has materially contributed to the employee's decision to resign.

29. As to the first element, the fundamental breach may be a breach of the **Malik** term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the **Malik** threshold. As to the third element, the conduct amounting to a repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced, the decision to resign.

Some authorities use different language to express the same idea, such as whether the employee resigned at least partly in response to the breach, but the underlying point is the same. These two points are long established in the authorities and generally, I think, well understood.

30. As to the second element, in recent years, the following question has been explored in the authorities. If there has been conduct which crosses the **Malik** threshold, followed by affirmation, but there is then further conduct which does not, *by itself*, cross that threshold, but would be capable of *contributing* to a breach of the **Malik** term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?

31. That question appeared to have received different answers from the EAT, but was tackled head on by the Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust**. Their decision confirms that the answer is "yes". In **Kaur**, Underhill LJ, which whose speech Singh LJ concurred, gave the following guidance:

> **"I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:**
>
> **(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?**
>
> **None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy".**

32. This helpful guidance assists Tribunals to navigate through one particular possible permutation of the branchings of the decision tree. Some other possible permutations are

relatively straightforward. If the answer to Underhill's LJ question two is "yes", then the claim of constructive dismissal must fail. If the answer to question three is "yes" then the Tribunal should proceed to question five.

33. As I understand it the parenthetical "if it was" following question four, conveys that it is an affirmative answer to that question that will also take the Tribunal to question five. However, what if the answer to question four is "no"? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the most recent conduct was not capable of contributing something to a breach of the **Malik** term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the **Malik** term, has not since been affirmed, and contributed to the decision to resign.

34. In my judgment this is the correct analysis as a matter of principle, and indeed is in line with what has been said by the Court of Appeal in previous authorities. It is the correct answer in principle because, so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost, and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent, conduct has also contributed to the decision to resign. It would be true in such a case that *in point of time*, it will be the later conduct that has "tipped" the employee into resigning; but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign.

35. In **Kaur** Underhill LJ observed that the last straw metaphor may, in some instances, mislead, but we are, he concludes, probably stuck with it. See paragraphs 45 and 46. In particular he pointed out there, that the label may be applied both to cases where the last

conduct in point of time was not innocuous, and the previous conduct was not enough by itself to cross the **Malik** threshold, and in cases where the most recent conduct in point of time was not innocuous, and the previous conduct *was* enough to cross that threshold, but was affirmed.

36. The expression "soldiers on" indeed, borrowed from Dyson LJ's speech in **Omilaju**, conveys the notion of affirmation. In many such cases, indeed, the employee will, after the previous conduct of the employer, be taken by some conduct on the employee's own part, to have affirmed the initial breach. In *those* cases, the further conduct of the employer will only put the employee in a position to treat the employment as terminated by the employer's conduct if that further conduct could, itself, contribute something to such a breach. However, it will not be in all such cases that the employee, even though they did not, prior to the further conduct of the employer, resign, will be treated as having affirmed the prior breach. It is always a fact-sensitive question as to whether the employee's conduct, whether by act or omission or some combination thereof, amounts to affirmation.

37. In cases where there has been previous conduct in breach, which has not been affirmed, and then a further innocuous act which tips the employee into resignation, the employee may still, *colloquially*, think of the most recent conduct as the "last straw", because it is the most temporally proximate element of the overall conduct which contributed to the resignation and in fact tipped them into taking that step. However, I venture, it is not a last straw in the legal sense at all.

38. This analysis is also, I consider, not in conflict with the prior authorities. In particular, in paragraph 21 of **Omilaju**, cited by the ET at paragraph 75 of its Decision, and relied upon by Ms Wynn Morgan in her submissions, Dyson LJ referred to a situation in which the employee

"soldiers on *and affirms* the contract" (my emphasis). It is in that situation – where the employee has not only not yet resigned, but has affirmed following the prior conduct – that he is dependent on the later act at least being more than entirely innocuous, in order to be in a position to treat the contract as terminated by the employer's overall conduct. However, that analysis does not apply in a case where he has *not* previously affirmed the contract; and **Omilaju** does not say that it does.

39. The analysis in **Kaur**, as Underhill LJ explained, involves no departure from the analysis in **Omilaju**. As I have explained, the general guidance given by Underhill LJ focusses on the type of scenario at hand in that case, which Tribunals might perhaps most typically encounter; but it does not purport to cover all the possible paths through the decision tree.

40. I turn then to this case and this ET's actual Decision. First, I note that the Claimant clearly was claiming that he resigned in response to what he regarded as a course of mistreatment over an extended period, and not just to the refusal to allow Mrs Sydenham to contact him. This was made very clear in particular in paragraph 19 of his particulars of claim. Since Ms Wynn Morgan accepts this point, I do not need to set that paragraph out. Secondly the Tribunal clearly understood that to be the Claimant's case. Again, Ms Wynn Morgan accepts that, but I note that in paragraph 4.1.1 they wrote that he relied in claiming constructive dismissal "on his treatment in general over a significant period ending on 16 June 2016", before referring to what they understood he argued was the last straw in relation to Mrs Sydenham.

41. Thirdly, in its self-direction as to the law, the Tribunal interpolated some observations as to how it saw its task in this case. At the start of paragraph 75 it said: "In this case we must also pay mind to the fact that the Claimant needs to establish his decision to resign on the last

straw principle in that he argues that the whole of the Respondent's approach caused him to resign". In the last sentence of paragraph 76 it said:

> **"Thereafter we are required to examine whether the Claimant resigned in response to that conduct and that conduct must include a final event which contributes to earlier actions so as to make the entirety of the conduct taken together sufficiently serious so as to damage the relationship of confidence and trust between employer and employee".**

42. The Tribunal here, it seems to me, assumed that the last event *in point of time* relied upon as tipping the employee into resignation, was the last straw, in the sense that it needed to be considered as supplying the thing relied upon, and needed, in order to make good any cumulative breach at all. However, what the Tribunal erroneously left out of consideration here, was the possibility of the alternative analysis, which Mr Sugarman submitted needed to be considered in this case, namely that the earlier conduct itself established a fundamental breach, which had not been affirmed, and which *also* subsequently contributed to the decision to resign, when it came.

43. Ground two argues that the Tribunal then made a further error of law in paragraph 96.1 in the approach that it took to the facts of this case. I agree. It appears to me that in paragraph 96.1 the Tribunal proceeded erroneously on the footing that, if the conduct in relation to Mrs Sydenham was innocuous, that was then fatal to the claim of constructive unfair dismissal. For reasons I have explained, that was an error of law.

44. In his skeleton argument Mr Sugarman addressed the contention that the Tribunal's decision should be read as conveying that, notwithstanding how the Claimant advanced his case, the Tribunal, for its part, found that the only thing that *in fact* caused the Claimant to resign was the decision in relation to Mrs Sydenham. Mr Sugarman submits, however, first that

A the Tribunal's decision should not be read in that way, and, alternatively, that if that is what the Tribunal did find, then such a finding was perverse.

B 45. Ms Wynn Morgan submitted that there is no finding in this Tribunal's Decision, that the Claimant was influenced in his decision to resign by the prior conduct, merely a finding that he had it in mind when he resigned, which, she said, falls short of that. Nor, she submitted, would it have been perverse to find otherwise, given that the Claimant did not in fact resign until after he learned of the Mrs Sydenham decision, and indeed given that he wrote in his letter of resignation that he had hitherto *resisted* resigning.

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D 46. My conclusion on this aspect is as follows. Firstly, the finding in paragraph 49, that the Claimant had in mind the previous treatment is, it appears to me, a finding of fact that his view of this earlier treatment *influenced* his decision to resign. That is, I think, clear, from the whole of that paragraph, including the citation from the resignation letter that it contains. What the Tribunal is saying here, it seems to me, is that it accepts that the earlier conduct influenced his decision, but it finds that the trigger, in the sense of the thing that tipped him into acutally taking the step of resigning, coming on top of that earlier conduct, was the discovery of the Mrs Sydenham decision.

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G 47. Later on, in paragraph 96.1, the Tribunal refers to the Claimant's complaint relying on the Mrs Sydenham-related conduct as the last straw. It does *not* go on to say there that it nevertheless found that this conduct was in fact the *only* reason why he resigned. Nor, it may be noted, was that the case advanced by the Respondent before the Tribunal, even in the alternative. Rather, as appears from its grounds of resistance, its case was that the Claimant did

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not resign in response to *any* alleged conduct said to contribute to a breach, but that he did so in order to avoid facing a disciplinary process. Clearly, the Tribunal did not agree with that.

48. Although, in paragraph 96.1.5, the Tribunal refers to there having been much in the Respondent's previous actions that the Claimant could have relied upon "However he relied upon this action", the Tribunal is there, it seems to me, again acting on its erroneous assumption as to the law, that, because the conduct in relation to Mrs Sydenham was the last thing in point of time that tipped the Claimant into resignation, his claim of constructive dismissal could only succeed if that conduct could contribute something to a breach of the implied term. It is in this sense that the Tribunal refers to him relying upon it, namely as the, on its reading of the law, critical last straw. I do not think that paragraph 96.1.5 was meant to bespeak a finding that, in fact, and contrary to the Claimant's case, it was the *only* thing that influenced his decision.

49. For good order I should add that, had the Tribunal so found, I would have indeed considered such a finding to be perverse. That is for the following reasons.

50. Although it did not refer to it directly in its Decision, the Tribunal had before it, the letter of 13 June 2016. The immediate background was that, his grievance and grievance appeal having failed, and with the impending resumption of the disciplinary process, the Claimant had again asked to be given the names of the pupil and his accuser, but the reply had not provided these. The Claimant, in that letter, complained of this and various aspects of his treatment up to that point, and asserted, in terms that "I have lost all faith in my employer treating me properly". Then, on 14 June, he learned via his solicitor that Mrs Sydenham had not been permitted to contact him. His resignation letter of 16 June then opened with the words cited by the Tribunal in paragraph 49 of its Reasons. It went on to refer to what he had written

"only two days ago" and then to his now learning of "another example" of what he considered to be sabotage of his right to defend himself. Further on he wrote "enough is enough".

51. The EAT has to be careful not to trespass on the territory of the ET. However, it also has to take a robust and realistic view about what is reasonably arguable and what is not. I do not agree with Ms Wynn Morgan, that the reference in the resignation letter to the Claimant having resisted resigning hitherto could have supported a conclusion that the earlier conduct did not influence his decision. His meaning in that letter was surely to the opposite effect: that he had resisted being influenced by it hitherto, but now could resist its influence no longer. Of course, in some cases the reasons given in a resignation letter may not be accepted by the Tribunal as in fact true. However, in this case the evidence of this correspondence was clear. The only other matter which Ms Wynn Morgan submitted would have supported a finding that the earlier conduct had *not* influenced his decision, was the fact that he had not resigned on 13 June. However, given that he *did* resign on 16 June, just three days later, and what he wrote in those two letters, and that there was no suggestion of any other significant intervening event, other than his learning on 14 June of the Mrs Sydenham decision, being realistic about it, I do not see how that fact alone could properly have supported such a finding.

52. For those reasons, I conclude that a finding to the effect that the only thing that influenced the Claimant's decision to resign was the conduct relating to Mrs Sydenham would have been perverse, and not open to the Tribunal, having regard to the evidence before it.

53. Ground one and ground two therefore succeed, which means that the Decision that the Claimant was not constructively dismissed and, for that reason, not unfairly dismissed, therefore cannot stand. However, I turn, in any event, to say something about ground three.

54. Ground three is to the effect that the finding that the refusal to permit Mrs Sydenham to contact the Claimant was innocuous (meaning that it could have contributed nothing to a breach of the **Malik** term), was reached in error of law and/or was perverse and/or the Tribunal's Reasons for it were not **Meek** compliant.

55. In summary the error of law was said to be that the Tribunal considered that *because* the Respondent's conduct in this regard was, as it found, not unreasonable, it was *therefore* innocuous. It appears to me, reading the chain of argument in the subparagraphs at paragraph 96.1, that the Tribunal did reason in that way and that was indeed an error of law. I am mindful here that, particularly in very long decisions, or those which may call upon the Tribunal to apply the same legal test on multiple occasions, a Tribunal may, at points, use terminology to refer to a legal test which is not precisely accurate. This may be through a desire to avoid tiresome prolixity, a stylistic aversion to repetitiousness, or inadvertence. Often the EAT can be confident in such cases, reading the Decision as a whole, that the Tribunal has nevertheless understood and applied the correct legal test and the Decision is safe.

56. However, in this case the difference in language is important. In **Omilaju** the Court of Appeal said, at paragraph 16, that the final straw may be relatively insignificant but must not be utterly trivial. In paragraph 18 it repeated that it must contribute something to the breach, although what it adds may be relatively insignificant. The Court made it clear that the only issue for the Tribunal is whether the conduct relied upon as contributing something to the breach, objectively viewed, did contribute something, however slightly. There is no requirement that it be adjudged in itself to be unreasonable or even blameworthy. I might add that this is the threshold test for any conduct relied upon as contributing to a claimed cumulative breach of the **Malik** term, not just the so-called last straw. That must, I think,

logically be the case. Further, in **Omilaju** at paragraph 15 Dyson LJ cited the observation of Neill LJ in **Lewis v Motorworld Garages Ltd** [1986] ICR 157 that the repudiatory conduct may, in such a case, consist of a series of acts or incidents "some of them perhaps quite trivial".

57. While the present Tribunal did cite paragraph 21 of **Omilaju** in which Dyson LJ used the term "innocuous", it did not cite from paragraphs 16, 19 and 20 in which he explained the underlying test. Then, it does appear to me, in paragraph 96.1 it reasoned that, because the conduct was not unreasonable, it was therefore innocuous. Ms Wynn Morgan submitted that this was not a correct reading because, along the way, the Tribunal had found that the Claimant understood the reason given for refusing Mrs Sydenham contact, as he acknowledged in his resignation letter. However, it is clear from the contents of that letter that he did not accept that as a genuine or valid reason. In any case this was an objective question for the ET to decide. The Tribunal evidently did think it was reasonable conduct, and perhaps thought that the Claimant ought to have accepted the explanation given for it. However, either way it seems to me that the Tribunal moved from its conclusion that it was reasonable conduct directly to its finding that the conduct was innocuous. That was, as such, an error.

58. Ms Wynn Morgan in the course of oral submissions pointed out that the communication from the employer was to Mrs Sydenham and not, as such, to the Claimant, who had only found out about it because she told his solicitor, who in turn told him. I do not rule out that, where a communication has not been direct between the employer and the employee, the Tribunal may need to consider whether that is relevant to whether the employer's conduct was either calculated or likely to seriously damage or undermine the relationship of trust or confidence. That might include, for example, consideration of how likely it was that the employee would find out. However, in any event, this is not, as it were, a knockout point for the Respondent.

59. I did also raise with both counsel, at the very end of submissions, that, for there to be a breach of the **Malik** term, not only must the conduct must be calculated or likely to destroy or seriously damage the relationship of trust, but the employer must also not have acted with reasonable and proper cause. I raised the question of how *that* reasonableness test was to be reconciled with the **Omilaju** test. Ms Wynn Morgan submitted that this suggested that conduct that was found to be reasonable could not contribute to a breach. Mr Sugarman submitted that the question of reasonable and proper cause has to be considered looking at the overall conduct, if or when the other elements of the **Malik** test are established, and that otherwise the clearly established test set out by the Court of Appeal in **Omilaju** would be rendered pointless.

60. I observe that this Tribunal does not, in any event seem to have been addressing that limb of the definition in paragraph 96.1. Or at any rate its Decision in this respect is not sufficiently clear. Bearing this in mind, and that the point was not fully argued before me, and that the outcome of this appeal does not turn on it, I prefer not to express a concluded view.

61. Further, given the trenchancy of some of the Tribunal's other findings in the course of this Decision, including, as I have noted, that Mrs Matchett was, at a number of points, motivated by a desire to keep control of the process, and indeed that the Claimant was not always told the true reasons for some decisions that were taken, I think that in this case the Tribunal needed to say more to explain why, in respect of *this* matter, it accepted that the reason given by the Respondent for its conduct was not merely one on which, in the Tribunal's view, it was entitled to rely, but was actually the true and genuine reason.

62. Even had I not allowed this appeal on grounds one and two, I would therefore have allowed it on ground three on the basis of error of law and/or lack of **Meek** compliance. I will therefore comment only very briefly on the third strand of this ground, to the effect that this finding was perverse. I am not sure that it necessarily would be perverse, in any and every case, for a Tribunal to find that an employer did not act in a way that could contribute to a breach of the **Malik** term, by directing individuals whose disciplinary processes were in some way connected, not to talk to one another until the decisions in both matters had been issued. However, I do not, in the event, need to explore whether that would have been a conclusion open to the Tribunal on the particular evidence before it and facts found in this case.

63. Having found that grounds one and two have succeeded, I need to consider whether, or to what extent, I need to direct remission to the ET in respect of the unfair constructive dismissal claim. I have already heard some argument about that this morning against the contingency that I might find as I now have.

64. Mr Sugarman submitted that if grounds one and two succeeded, there was no need to remit the case for any further consideration of the claim of unfair dismissal. He said that was in particular because the Tribunal had found that the Claimant was influenced in his decision to resign by the prior conduct, as well as by learning of the decision in relation to Mrs Sydenham, and it had found, in paragraph 96.1.5, that this prior conduct, or at least some of it, amounted to a prior fundamental breach. In addition, there was no finding by the Tribunal that such conduct had been affirmed. Nor, he said, could there tenably have been such a finding.

65. Ms Wynn Morgan submitted that I must, in the event of upholding these grounds, remit the unfair constructive dismissal claim to the Tribunal for further consideration on all of these

points. Further, if the Tribunal found, on remission, that the Claimant was constructively dismissed, or if, contrary to her argument, I substituted a decision that he was, the Tribunal would still need to give further consideration to whether any constructive dismissal was for a fair reason, and if so whether it was fair for the purposes of section 98(4) of the **1996 Act**.

66. I have already indicated that I agree with Mr Sugarman that the ET has already found that the prior conduct influenced the Claimant's decision to resign along with the conduct in relation to Mrs Sydenham. I also agree with Mr Sugarman that when the Tribunal says in paragraph 96.5 "There is much in the actions of the Respondent prior to this that the Claimant could have relied upon, individually or cumulatively to found a breach of the implied term", it is making a finding that there was a breach of that term by such conduct, not merely observing that this was something that the Claimant could have argued, or that might have succeeded.

67. It is, I have to say, hardly surprising that the Tribunal took that view, given the litany of criticisms that it had to make of the Respondent's conduct throughout this process, and the strength of the language in which it expressed those criticisms. It is also the natural and realistic reading of this paragraph, in the context of the Decision as a whole, that the Tribunal rejected the proposition that the Claimant was constructively dismissed only because (in error of law), it considered that the fact that he had not resigned on 13 June or at any rate before he got the news of the conduct in relation to Mrs Sydenham, but was only tipped into resigning when he did get that news, meant that the claim must fail. The natural, and correct, reading of the Decision is that, had the Tribunal correctly applied the law, his claim of constructive dismissal would have succeeded on the basis that there was a fundamental breach as of 13 June on which, he was, subject only to the affirmation point, entitled to rely.

68. What of the question of affirmation? It is true that the Tribunal did not make any specific finding as to whether such prior conduct either was or was not affirmed, although it has been shown to me that this was addressed in argument on behalf of the Claimant, and certainly the argument of the Claimant on this point was not rejected. It seems to me that the Tribunal did not, in terms, consider this point, because, having wrongly understood the law on the last straw point, it thought that it did not need to do so.

69. However, again whilst taking care not to trespass on the ET's territory, realistically I cannot see any basis on which it could properly have found that the prior conduct had been affirmed, given the contents of the letter of 13 June and the resignation letter written three days later, and that there was no suggestion that there was any conduct of the Claimant in those three days from which affirmation might be inferred. I will therefore substitute a finding that the Claimant was constructively dismissed. However, I will hear further submissions about whether I need to remit this matter to the Tribunal to consider whether he was dismissed for a fair reason, and if so whether the dismissal was fair in all the circumstances of the case.

70. The success of grounds one and two means that ground eight, which rests on the same substantive challenges to the finding of constructive dismissal, must also succeed, and the Tribunal's conclusion that there was not a *discriminatory* constructive dismissal also cannot stand. Although it was not specifically cited by the ET, that is because the same concept of constructive dismissal used for the purposes of unfair dismissal claims is also found in section 39 of the **Equality Act**. I will, however, hear further argument as to whether I need to remit the matter to the Tribunal to give further consideration to whether, in light of the findings that it made, about those claims brought under the **Equality Act** of pre-resignation treatment, that did

succeed, this constructive dismissal was also discriminatory; or whether I can, and should, properly substitute a decision of my own on that point.

71. I turn to ground six. The complaint of failure to comply with the duty of reasonable adjustment to which this ground relates, was described by the Tribunal in the following way:

> **"4.1.2.8 The next part of the schedule also refers to 13 April 2015 running to 30 September 2016. The substance of the complaint is that the claimant was not provided with the name of the student alleged to be involved in the allegation of abuse involving the claimant.**
>
> **4.1.2.9 It is argued that this is a failure to make reasonable adjustments. The PCP relied upon is that names of alleged victims and witnesses to alleged child abuse conduct will not be disclosed to the accused person. It is indicated that the claimant suffered a substantial disadvantage in this regard because of his impaired memory and concentration and susceptibility to stress-related illness. This is argued to mean that the claimant cannot construct a defence as readily as someone without his disability.**
>
> **4.1.2.10 The respondent's defence is that it was obligated under child protection procedures not to disclose the names. It relies on lack of knowledge of the claimant's disability and says that the adjustment sought would not be reasonable in any event."**

72. I have already set out the Tribunal's findings about this matter in paragraph 52 of its Decision. Its conclusions on this particular complaint appear at paragraph 96.6:

> **"96.6. The complaint from 13 April 2015 to 30 September 2016 is that the claimant was not provided with the name of the child in the child protection allegation.**
>
> **96.6.1 The Welsh Government's disciplinary policy guidance indicates that a person accused should be given as much information as it is safe to do.**
>
> **96.6.2 We accept that not providing the name of the child was reasonable whilst the social services investigation was underway. The All Wales Child Protection Procedure would lead to such a conclusion; the protection of the child is paramount until certain investigations are undertaken. Similarly, while the school's internal investigation is underway it would be reasonable to keep the child's name confidential until evidence is gathered from witnesses.**
>
> **96.6.3 After the conclusion of the internal investigation there was no specific reason shown for keeping the name of the child confidential. This is particularly the case as the claimant would need to know the name of the child in order to, for instance, provide a defence of reasonable restraint to protect another child or the child in question or to say that the child identified was not present in the classroom. The identity of the child would be crucial to the presentation of any defence that might exist.**
>
> **96.6.4 Given the fact that the claimant was not prevented from returning to the school and the risk assessments, if properly dealt with, could produce adequate control measures it would not be reasonable to withhold that information.**
>
> **96.6.5 Until the conclusion of the investigation we consider that the respondent was acting proportional in refusing to disclose the name of the child and with the legitimate aims of protecting the child and securing evidence the respondent took this as a reasonably necessary step.**
>
> **96.6.6 Thereafter the school should have disclosed the name of the child. On our findings Mrs Matchett was the cause of the school failing to make this disclosure. Her**

reason, we found, was to maintain control over the process. We cannot say that this is the approach she would take with all processes of this nature. Therefore we are concerned that this decision does not amount to a provision criterion or practice that names of the alleged victims of and witnesses to alleged child abuse conduct will not be disclosed to the accused person. Therefore the claimant cannot show that there was a failure to make reasonable adjustments and this complaint is not well founded.

96.6.7 If we are wrong about that we would find that this was a substantial disadvantage to the claimant for similar reasons to those set out above the provision of information. Further in our judgment providing the information would alleviate this disadvantage. As we have also indicated the defence of justification is not available after the close of the investigation."

73. Ground six contends that the Tribunal erred in law, because it wrongly considered that there could not be a PCP as alleged because it could not say that the approach taken by Mrs Matchett in this case was "the approach she would take with all processes of this nature". It is clear, in particular from paragraph 96.6.7, that this complaint would otherwise have succeeded.

74. Mr Sugarman argued that the concept of a PCP should not be construed narrowly, having regard to the underlying purpose of the statute. He cited in this regard **Carreras v United First Partners Research** [2018] EWCA Civ 223 and **Lamb v Business Academy Bexley** UKEAT/0226/15. He also referred to paragraph 4.5 of the **EHRC Employment Code 2010**, which a Tribunal must take into account in relation to any issue to which it is relevant, and which states that a PCP may include a "one-off or discretionary" decision. He sought to distinguish **Nottinghamshire City Transport Limited v Harvey** UKEAT/0032/12, on the basis that it held that a one-off failing in respect of a disciplinary process in that case could not constitute a practice, whereas the present case, he said, concerned an ongoing provision which was deliberately decided upon. A one-off failing was also different from something that had an element of repetition about it, as occurred, he said, in the **Lamb** case, where it was found that a repeated approach taken in relation to the employee's grievance process amounted to a PCP.

75. In this case, submitted Mr Sugarman, although the Tribunal found that the refusal to divulge names would have been justifiable up to a certain point, this conduct persisted beyond that point. Further it was done because Mrs Matchett was "simply trying to keep control of the process". The Tribunal made similar findings about several aspects of what happened in this case, and a more general finding in paragraph 18 that she attempted to exercise a strict control over the school. Given those findings it was an error, he said, to conclude that a PCP was not applied on the facts of this case.

76. Ms Wynn Morgan in oral argument accepted and agreed with Mr Sugarman's analysis of the test emerging from the authorities. In particular she conceded that, whilst the authorities establish that a practice has to have an element of repetition about it, in a given case that element of repetition could be found within the four walls of the handling of the complainant's individual case. For that reason, I can deal with the law fairly briefly, because I think that concession as such, was rightly made.

77. In the case of **Harvey**, considering the words of the predecessor provision of the **Disability Discrimination Act**, which were materially the same, the EAT said at paragraph 18:

> **"In this case it is common ground that there was no provision that the employer made nor criterion which the employer applied that could be called into question; the issue was the practice of the employer. Although the Act does not define "provision, criterion or practice" and the Disability Rights Commission's Code of Practice: *Employment and Occupation 2004* deals with the meaning of provisions, criteria and practices by saying not what they consist of but what they include (see paragraph 5.8), and although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned".**

78. I drew counsels' attention to **Carphone Warehouse v Martin** UKEAT/0371/12 in which the EAT held that a lack of competence in preparing a wage slip, resulting in an employee not being repaid deductions he was owed, could not amount to a practice or indeed a provision or criterion. The **Lamb** case concerned the **Equality Act** provisions. Paragraph 18 of what the EAT said in **Harvey** was specifically cited by the EAT in **Lamb**, Simler P and members, at paragraph 26. They observed in that case, at paragraph 29, that the practice relied upon by the employee was an asserted practice that was in fact repeated, being in that case repeated delays in progressing grievance processes. The EAT held that that was capable of being a PCP.

79. I conclude, first, that, for there to be a practice, no actual non-disabled comparator need be found. It is sufficient if the putative practice would put the employee bringing the claim at a disadvantage because of their disability, compared with an employee who did not have such a disability, were it to be applied to them. Further, whilst, to amount to a practice, there must be some element of repetition or persistence about what the employer has done, rather than it being a one-off occurrence, that element of persistence or repetition may be found within the four walls of how the employer is found to have treated the individual complainant.

80. Ms Wynn Morgan however argued that the Tribunal did not err in law and was entitled to conclude that there was no practice in this case. I consider that the Tribunal did err in law, because its reason for finding that there was no practice, was because it could not say that this was the approach that Mrs Matchett would take with *all* processes of this nature, which set the bar too high, I think. A general or habitual approach could suffice, even if not universally followed. For this reason, this ground also succeeds. However, I then need to consider whether to remit.

81. Mr Sugarman said that I do not need to do so, because what the Tribunal had found in this case amounted to a finding that there had been a practice applied over a long period of time, of withholding these names, and as a deliberate approach. That, he said, could only properly lead to the conclusion that there was a practice for the purposes of the failure of reasonable adjustment claim. The fact, he said, that the Tribunal found that, for a certain period and up to a certain point, this practice was justified, made no difference to that. Ms Wynn Morgan disagreed. She said that there was a distinction to be drawn between the approach taken during the period in which the stance was justified, and then the approach taken during the period in which the stance was no longer justified.

82. I have come to the conclusion that I cannot substitute my decision for that of the Tribunal on this point. I do not think, as a matter of law, it would be impossible for the Tribunal to find that there was a single practice that was justified for a period of time but then, because of the change in circumstances, became no longer justified. However, in this case the Tribunal, in paragraphs 52 and 96.6, has focussed on what Mrs Matchett did in the period July to September 2016, being after the involvement of the Local Authority had fallen away. But it has not made clear findings as to whether the decision initially not to permit the Claimant to know these names, was genuinely taken because of concerns about the integrity of the process. There is also a reference in the Tribunal's Decision to an email from Mrs Matchett that I have not seen, which may potentially affect the Tribunal's view of whether there was a practice at all, applying the correct legal test. These are not matters on which I can make the necessary further findings of fact. Therefore on ground six, at least, there will need to be remission.

83. Having given my decision allowing grounds one, two and eight, and substituting a finding that the Claimant was constructively dismissed, and allowing ground six, which I have remitted, I have heard further argument as to whether I should remit in respect of further issues consequential on grounds one, two and/or eight.

84. I remind myself of the guidance in **Jafri v Lincoln College** [2014] EWCA Civ 449. I must remit unless I am satisfied that there is only one conclusion that the Tribunal could properly reach, if it directs itself correctly as to the law, as this is not a case in which counsel have agreed that the EAT should exercise the Tribunal's jurisdiction. I bear in mind however, as observed by Underhill LJ at paragraph 47 of **Jafri**, that consideration needs to be given, robustly and realistically, to whether the case is indeed one where more than one answer to the given question is reasonably possible.

85. In relation to a claim of unfair dismissal, the next question, after a finding of constructive dismissal, is whether the employer has shown a fair reason for dismissal. In the response form in this case the Respondent asserts that there was a fair reason in this case, namely conduct and/or some other substantial reason. Were that to be shown, the Tribunal would then consider fairness in accordance with section 98(4) of the **1996 Act**. The Respondent asserts that this was a fair dismissal for those purposes.

86. Mr Sugarman submits that, given this Tribunal's findings of fact, there cannot be any proper basis on which the Tribunal could conclude that this dismissal was for the sole or main reason of the Claimant's conduct and/or some other substantial fair reason. That is leaving aside the question of whether, if so found, this could also be found to be a fair dismissal under

section 98(4). Ms Wynn Morgan maintains that this is a matter that now requires to be considered by the Tribunal, having regard to all of the evidence before it and all of its findings. She did not advance any more detailed argument as to the basis on which the Tribunal could find that this dismissal was for the fair reason of conduct or some other substantial reason.

87. I agree with Mr Sugarman. Having regard to the findings of fact that the Tribunal has already made: about Mrs Matchett's attempts to exercise control, about the governing body's lack of understanding of its role, about Mrs Matchett approaching matters as one of performance management rather than by way of consideration of the Claimant's health, or indeed the health and safety of the child said to be involved; having regard to the Tribunal's reasons for its criticisms of the decision to suspend, of the hiatus in proceedings during the summer holidays, of the strange decision (the Tribunal's words) to split the grievance in two, its expression of concerns at Mrs Matchett's motives for exploring the Claimant's paperwork, its findings about the shortcomings of the grievance procedure which it found were not remedied by the grievance appeal, and so forth, I cannot see any realistic basis on which the Tribunal could properly find that the sole, or even principal reason for this dismissal was the Claimant's own conduct or any other substantial fair reason.

88. I therefore decline to remit any further aspect of the unfair dismissal claim and will substitute what is, in my view, the only decision that could realistically and properly be reached in this case, being that the Respondent has not shown a fair reason for dismissal, as claimed, and therefore the Claimant was unfairly dismissed.

89. I take a different view, however, in relation to the claim of *discriminatory* constructive dismissal. Mr Sugarman is right as such, to say that the law – by virtue of a combination of

Berriman v Delabole Slate [1985] ICR 546, and the principle established in **Nottinghamshire County Council v Meikle** [2004] IRLR 703 – is that this dismissal should be held to be discriminatory if it is found that discriminatory conduct materially influenced the conduct that amounted to a fundamental breach.

90. However, the Tribunal's findings thus far, on such conduct pre-resignation, are limited to the following. Firstly, there is a finding that there was discrimination in relation to withholding information about the conduct of which the Claimant was accused. However, the Tribunal did find that the Claimant was at least, prior to his resignation, given the information that he was accused of manhandling a child. Secondly, there was the withholding of the information about the identity of his accuser and thirdly the withholding of access to witnesses and documents. The fourth matter Mr Sugarman seeks to rely on, namely the withholding of the name of the child, is a matter in respect of which I have concluded remission is necessary to determine whether that was an act of discrimination or not. I have concluded that it would go beyond what I can do at this point, to make a finding that the discrimination thus far found sufficiently influenced the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory. That is a finding that it may be open to the Tribunal to make. I do not rule it out, but the Tribunal will have to decide that for itself on remission.

91. Both counsel agreed, as do I, that it is desirable for the outstanding matters to be remitted to the same Tribunal if, or to the extent that its three members are, available. There is every good reason to do so, and none not to. They can be trusted to reach a decision professionally guided by my decision on this appeal.