Appeal No. UKEAT/0038/20/VP (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 March 2021
Judgment handed down on
1st April 2021

Before

THE HONOURABLE MR JUSTICE CAVANAGH

(SITTING ALONE)

LAUREN DE LACEY — APPELLANT

WECHSELN LIMITED t/a THE ANDREW HILL SALON — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR JONATHAN COOK (of Counsel) Instructed by: Right Approach Employment Law & HR Services Ltd, Right Approach House, Rydon Acres, Kingsteignton, Devon, TQ12 3YN
For the Respondent	MR JULIAN ALLSOP (of Counsel) Instructed by: WBW Solicitors, Church House, Queen Street, Newton Abbott, Devon, TQ12 2QP

SUMMARY

SEX DISCRIMINATION AND MATERNITY RIGHTS AND PARENTAL LEAVE

The Appellant claimed that she had been discriminated against by the Respondent hair salon on the grounds of sex/maternity. She claimed that the Respondent had engaged in a course of discriminatory conduct consisting of various matters from May 2015 until she resigned and claimed constructive dismissal in January 2017. These included two particular matters in 2015 (her treatment in relation to a "trade test" in May 2015, and "cold-shouldering" treatment by the salon's principal in the period from May to October 2015). The Employment Tribunal found that the Appellant had established a prima facie case of sex/maternity discrimination in relation to these two matters, but the Tribunal did not go on to decide whether they were acts of sex discrimination. This was because the Tribunal decided that there was no need to do so as any claim relating to these matters would be out of time: the Tribunal found that there had been no course of discriminatory conduct which had extended into the primary limitation period, and that it was not just and equitable to extend time for a discrimination claim.

The Tribunal also found that the Appellant had been constructively dismissed, for the purposes of a claim of unfair dismissal, by reason of a course of conduct which included the two matters and which culminated in a "last straw" incident in January 2017.

The EAT found that the ET had erred in law in failing to consider whether the constructive dismissal was itself discriminatory. In order to do so, the ET should have decided (1) whether the two matters in 2015 were acts of sex/maternity discrimination and, (2) if so, whether they sufficiently influenced the constructive dismissal to mean that the constructive dismissal itself amounted to sex discrimination. The fact that the last straw was not itself discriminatory did not automatically mean that the constructive dismissal was not discriminatory. If the constructive dismissal was discriminatory, then the claim for discrimination would be in time, even though

the events that rendered the constructive dismissal discriminatory were themselves outside the primary limitation period.

The case was remitted to the same Employment Tribunal to determine whether the constructive dismissal was unlawful sex discrimination.

THE HONOURABLE MR JUSTICE CAVANAGH

Introduction

1. This is an appeal by the Appellant, Ms Lauren de Lacey, against the decision of the Employment Tribunal (EJ Goraj and members, "the ET"), sitting at Exeter, entered in the register and sent to the parties on 8 June 2018, that she had not been unlawfully discriminated against by the Respondent on the grounds of pregnancy and maternity contrary to sections 18 and 39 of the Equality Act 2010.

2. The Appellant was employed as a trainee hair stylist at the Respondent's hair salon in Newton Abbott, Devon. She commenced her employment in September 2012. She discovered that she was pregnant in May 2015 and informed her employer the same month. She went off on maternity leave from 18 October 2015 and returned to work at the end of August/beginning of September 2016. She resigned on 19 January 2017.

3. The Appellant brought claims of pregnancy, maternity and sex discrimination and also made claims of unfair dismissal arising from constructive dismissal. In both sets of claims, the Appellant relied upon the same series of events from May to October 2015 and then from her return after maternity leave until her resignation, which she claimed amounted to a course of discriminatory conduct and also to matters which, taken cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence in her contract of employment. These culminated in a "last straw" on 17 January 2017, when the Appellant had been instructed, in front of other trainees, to clean up dog faeces, and had been laughed at. The ET accepted that some of the Appellant's claims were well-founded but rejected others.

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4. The ET dismissed the Appellant's claims of discrimination, holding that only in respect of two of her complaints had the Appellant established a prima facie case of discrimination. These matters were the Appellant's failure of a practical exercise, known as a "trade test", which tested her hairdressing skills, in May 2015, and the cold way that the principal of the salon, Mr Hill, had behaved towards the Appellant after he became aware of her pregnancy in May 2015. These matters were referred to in the ET's judgment, respectively, as Issue 7 i and Issue 11 v, after their numbering in the Order which had set out the list of issues in the case. The ET held that these allegations were out of time because the Appellant had not established that there was a course of discriminatory conducting extending until January 2017, which would have brought these complaints in time, and further held that it was not just and equitable to extend time.

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5. The Appellant's claim for constructive dismissal was put on two alternative bases. The ET rejected the first basis, which was that the Appellant had been subjected to a discriminatory course of conduct, arising from her pregnancy/maternity, from May 2015 onwards, and culminating in the incident on 17 January 2017. However, the ET accepted that, in certain respects, the Appellant had been treated in ways since May 2015 which, when taken together, amounted to a breach by the Respondent of the implied term of trust and confidence, which the Appellant was entitled to treat as a repudiatory breach of her contract employment. This treatment culminated in the incident on 17 January 2017.

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6. Accordingly, the Appellant's claim of constructive dismissal succeeded on the second basis.

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7. The Appellant relies on three grounds of appeal in the Amended Notice of Appeal.

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8. Ground 1 is that the ET failed to deal properly with the Appellant's claim that her constructive dismissal amounted to unlawful pregnancy, maternity and sex discrimination. The Appellant submits that the two matters referred to in issues 7 i and 11 v were a material part of the repudiatory breach. In those circumstances, the Appellant submits that, having found these matters to be prima facie discriminatory, the ET should have gone on to determine whether the Respondent had satisfied the reverse burden of proof in the Equality Act 2010 ("EA 2010"), section 136. If the Respondent had not been able to do so, then, the Appellant submits, this means that the constructive dismissal was itself discriminatory. If so, the discrimination claim will have been in time, because time runs in such cases from the termination of employment, not from the date of any of the events that made up the repudiatory breach.

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9. The Appellant submits that the ET had fallen into error by proceeding on the basis that, in order for the discriminatory constructive dismissal claim to succeed, the Appellant was required to establish "conduct extending over a period" for the purposes of the time limit in the EA 2010, section 123(3)(a), or alternatively that it was necessary for the ET to extend time on just and equitable grounds in respect of the two allegations where the ET found that the Appellant had proved a prima facie case of direct discrimination. In other words, the Appellant submits that the ET erred in law in directing itself that the claim of unlawful constructive dismissal on pregnancy grounds, under the EA 2010, could not succeed unless the particular matters in question were in time for the purposes of free-standing discrimination claims either because they were part of a course of conduct extending over a period, or because it was just and equitable to extend time.

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10. Grounds 2 and 3 are concerned with whether the free-standing complaints relating to issues 7 i and 11 v were in time. The Appellant submits that the ET erred in law in placing the

A burden on the Appellant to explain why these claims were in time, and to give a good reason for the delay, and that the ET failed to take into account the merits of the Appellant's claims as a material factor relevant to the exercise of its discretion.

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11. The Appellant submits that the ET's decision that time should not be extended in respect of issues 7 i and 11 v was therefore tainted both by a material misdirection and by a failure to take factors relevant to the exercise of its discretion into account.

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12. The Appellant has been represented by Mr Jonathan Cook of counsel and the Respondent by Mr Julian Allsop of counsel. Neither appeared at the hearing before the ET. I am grateful to

D both counsel for their helpful submissions, both orally and in writing.

13. I will first set out the relevant statutory provisions. I will then set out the key findings and reasoning of the ET before addressing the three grounds in turn.

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The relevant statutory provisions

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Pregnancy and maternity discrimination

14. Section 13(1) of the EA 2010 provides:

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> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

H 15. Sex is a protected characteristic: section 4.

16. Section 18 deals specifically with pregnancy and maternity discrimination during the "protected period". Section 18 provides:

> **"*Pregnancy and maternity discrimination: work cases***
>
> **(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —**
>
> **(a) because of the pregnancy, or**
>
> **(b) because of illness suffered by her as a result of it.**
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> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**
>
> **(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).**
>
> **(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—**
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> **(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;**
>
> **(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.**
>
> **(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—**
>
> **(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or**
>
> **(b) it is for a reason mentioned in subsection (3) or (4)."**

17. Section 39(2) of the EA 2010 provides as follows:

> **"(2) An employer (A) must not discriminate against an employee of A's (B)—**
>
> **(a) as to B's terms of employment;**

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

18. The time limits for discrimination claims are set out in section 123. This provides in relevant part:

"(1)… proceedings on a complaint [of discrimination] may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…..

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;…"

19. The "reverse" burden of proof is set out in section 136, which provides, in relevant part:

"Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Constructive dismissal and unfair dismissal

20. "Dismissal" for the purposes of claims of unfair dismissal includes constructive dismissal. This is made clear by section 95(1)(c) of the Employment Rights Act 1996, which states:

> **"Circumstances in which an employee is dismissed.**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer 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."**

The key findings and reasoning of the ET

21. It is necessary, for the purposes of this appeal, to set out the findings and reasoning of the ET in considerable detail.

22. The Appellant relied on a number of events which she said, when looked at individually or collectively amounted to pregnancy discrimination and/or treatment which, taken together, amounted to repudiatory breaches of her contract of employment which led to her constructive dismissal on 19 January 2017.

23. The Respondent, which runs a large and very successful hair salon, operates its own internal training school for stylists. It is the Respondent's practice to require its trainees/apprentices to undertake a trade test which was designed to ensure that trainees were fully competent to undertake a range of activities such as cuts, blow drying and colouring hair to a high standard within a commercially viable time frame. Trainees are invited to take a trade test when they are regarded as competent enough to pass. When they pass, they start work as graduate stylists, though occasionally apprentices were made redundant after their trade test because there was no room for any more graduate stylists.

24. The Tribunal found that the Appellant and another apprentice, Ms Waldron, undertook their trade test on 11 and 12 May 2015. They were not immediately told the results of the tests, but the Appellant received feedback informing her that she had done really well and should be really proud of herself. The Tribunal found that Mr Hill and the Respondent discovered that the Appellant was pregnant on 20 May 2015. On 27 May 2015, the Appellant and Ms Waldron were told that they had failed their trade tests and would have to re-take them.

25. As I have said, this was issue 7 i.

26. On 18 June 2015, the Appellant's father, Mr De Lacey, a specialist employment solicitor, had a meeting with the Respondent's management and it was agreed that the Appellant's re-take test would be deferred until after her return from maternity leave. The Tribunal did not accept a suggestion that Mr De Lacey had alleged at this meeting that the Respondent had failed the Appellant's trade test because she was pregnant.

27. The Appellant alleged that she was given a disproportionate amount of mundane cleaning tasks in the period between 20 May 2015 and her departure on maternity leave on 17 October 2015, but the ET rejected this allegation.

28. The Appellant also alleged that Mr Hill behaved in a cold way towards her after he became aware of her pregnancy. He no longer invited her from time to time to stand with him and assist him whilst he was looking after clients – as he generally did with trainees, and he did not speak to her or enquire after her pregnancy. The ET found, on the balance of probabilities, that Mr Hill cooled his relationship with the Appellant after becoming aware that she was pregnant. Although she still stood beside him from time to time, he no longer made any personal requests for her to provide him with any additional assistance, and he did

not sign her leaving card or make any attempt to speak to her before her departure on maternity leave. The Tribunal was also satisfied that he had behaved in a similar way towards another pregnant trainee.

29. This was issue 11 v.

30. As I have said, the Appellant returned to work from maternity leave at the end of August 2016. She returned part-time, and the Respondent agreed to increase her hours so that she could receive sufficient training time.

31. The Appellant alleged that the Respondent had promoted two other apprentices, Bethany Yeowell and Gemma Shillabeer, to graduate stylist whilst she was away, without requiring them to take a trade test, in order to thwart the Appellant's promotion to graduate stylist. The ET rejected this allegation on the facts, finding that Ms Yeowell and Ms Shillabeer had passed the trade test and were not promoted to block the Appellant.

32. The Appellant alleged that, from her return after maternity leave onwards, she had been subject to unfair criticism and demeaning treatment at work and that this was done because of her pregnancy, maternity or sex.

33. There were four specific allegations. The first was that the Appellant was allocated inappropriate amounts of menial work. The ET found that this had not been the case. The second was that Mr Hill continued to behave in an offhand manner towards the Appellant and barely spoke to her. The tribunal found that, whilst there was little contact between Mr Hill and the Appellant, there was no evidence that he behaved in an offhand manner towards her

during this period. The third allegation is that the Appellant was inappropriately criticised by the Respondent's senior staff for her clothing and the way in which she wore her hair. The Respondent accepted that she was spoken to from time to time, but the criticisms were justified because sometimes the Appellant's hair and clothing was not in accordance with the Respondent's dress code. The Tribunal found that there was nothing untoward in these conversations and that the Appellant was not alone in being spoken to in this manner. Fourth, the Appellant alleged that Mr Hill had humiliated her in a daily briefing session in December 2016, attended by all of the trainees, because he thought her hair looked like that of the TV character Vicki Pollard. The ET accepted the Appellant's evidence on this issue.

34. On 16 January 2017, the Respondent's managers met with the Appellant and with another trainee, Ebony Brine, to discuss their trade tests, which were scheduled for April 2017. There was potential problem because there were already three graduate stylists working on the floor at the time and the salon had never had more than three graduate stylists. The managers said that if the trainees passed then they would either become graduate stylists or they would have to be made redundant if there was no space for them on the floor. If they failed, they would carry on as trainees until they took a further test. The tribunal accepted that the discussions took place in this way because there were already three graduate stylists, and not for any other reason, and that Mr Hill played no part in the decision to speak in this way to the two trainees.

35. The Appellant contended that she was humiliated at the trainees' briefing meeting on 17 January 2017, which was the final straw that led her to resign from the employment of the Respondent. She said that a manager, Ms Delaney, had told her clean up outside the salon, including removing dog faeces by flicking it into a street with a broom. This had led to the other trainees laughing at her. She said that another manager said to her, "you clean up baby

poo, and this is no different". The ET accepted that it was the Appellant's job to clean outside that day, a job that was done regularly in turn by all the trainees, and Ms Delaney had told her to get rid of a soft ball of material that may or may not have been dog faeces. The other trainees found the request amusing. The ET also found that another manager, Ms Arnold, had said that the Appellant was used to picking up poo because she picked up baby poo, and the others who were present found this remark amusing. The ET accepted that the Appellant found the events distressing and humiliating and left the salon shortly afterwards.

36. Mr Hill was not present at, or involved in, the events on 17 January 2017.

37. Later that day, Mr De Lacey had a meeting with management and alleged that there had been a persistent campaign of maternity discrimination since the Appellant had returned to work.

38. The Appellant subsequently resigned her employment by letter dated 19 January 2017. She referred to the allegations that I have already described and referred to the events of 17 January 2017 as the final straw. Her letter made clear that she considered herself to have been constructively dismissed.

Pregnancy/maternity discrimination

39. The conclusions section of the ET judgment dealt first with the claims of pregnancy/maternity discrimination. The Appellant's case was pursued on the basis that there had been an ongoing conspiracy from the time that her pregnancy became known in May 2015, culminating in the incident on 17 January 2017, with a view to pressurising her out of the business because of her pregnancy. Most of the allegations were prima facie out of time and so if the Appellant was to be able to rely upon them she had to show either (1) that there was a continuing course

of discriminatory conduct extending over a period which continued into the primary limitation period for the purposes of section 123(3) of the EA 2010, as interpreted in light of the CA ruling in **Hendricks v Commissioner of Police for the Metropolis** [2003] ICR 630, or that it was just and equitable to extend time under section 123(1)(b) of the EA 2010. Events would only be within the primary limitation period if they took place on or after 7 January 2017.

40. The ET examined the allegations with a view to determining whether the Appellant had established a prima facie case that her pregnancy was an effective cause of the treatment complained of.

41. The ET found that it was satisfied on the evidence that the Appellant had established such a prima facie case in relation to allegation 7 i, the allegation of discrimination in relation to the failure of the trade test in May 2015, and allegation 11 v, the allegation that Mr Hill behaved in a cold way towards her after her pregnancy was announced in May 2015, up until her departure on maternity leave in October 2015.

42. The ET was not satisfied on the evidence that the Appellant had established a prima facie case that her pregnancy was an effective cause of the other allegations that she had made, namely:

(1) The proposal to reschedule the trade test to August 2015;

(2) Advancing Ms Yeowell and Ms Shillabeer to graduate stylist status in order to frustrate the Appellant's ambitions of making the same step;

(3) Criticising her from time to time for her hair and clothing;

(4) The occasion on which Mr Hill had compared her to Vicki Pollard;

(5) The warning on 16 January 2017 that the Appellant and Ms Brine might be made redundant if they passed their trade tests in April 2017;

(6) The decision on 17 January 2017 to allocate to the Appellant the job of clearing up outside mess which might or might not have been dog faeces.

43. The ET was also not satisfied that the Appellant had established the factual basis of other parts of her claim, namely, (7) giving her a disproportionate amount of cleaning duties between 20 May and 15 October 2015, and (8) Mr Hill behaving in an offhand way towards her when she returned from maternity leave.

44. The ET then went on to deal with the time limit issue for the sex discrimination complaint.

45. The events in allegations 7 i and 11 v were outside the primary time limit in section 123 of the EA 2010, which, as I have said, applies to events that took place on or after 7 January 2017. The ET therefore went on to consider whether the Appellant had established a course of discriminatory conduct extending over a period which continued into the primary limitation period for the purposes of section 123(3) of the EA 2010.

46. The ET held that there was no such course of conduct, because there was no evidence of any conspiracy orchestrated by the Respondent's management and the last of the acts for which there was a prima facie case of discrimination was before the Appellant's departure on maternity leave, in September 2015, long before the start of the primary limitation period.

47. The ET next considered whether it would be just and equitable to extend time. The Tribunal was not satisfied that it was just and equitable in this case to extend time in order to allow the Appellant's allegations at 7 i and 11 v to proceed.

48. It followed that the allegations in respect of which the Appellant had established a prima facie case of pregnancy/maternity discrimination were out of time, and the ET had found the Appellant did not even have a prima facie case in relation to the allegations that were in time, namely those relating to 16 and 17 January 2017.

49. In those circumstances, the ET did not need to examine allegations 7 i and 11 v any further to establish whether the allegations of pregnancy maternity discrimination in relation to those matters were actually proved, and the ET did not do so. All the ET said was that there was a prima facie case that the Appellant's pregnancy was an effective cause of the treatment complained of.

The constructive dismissal claim

50. The ET then went on to deal with the constructive dismissal claim.

51. The Appellant's primary contention was set out at paragraph 153 of the ET's judgment. This was that (a) there had been a discriminatory course of conduct on the ground of her pregnancy/maternity and/or sex culminating in the "final straw" incident on 17 January 2017, (b) such course of conduct amounted to a repudiatory breach of contract (amounting either singly or collectively to a breach of the implied term of trust and confidence) and (c) the Appellant terminated her employment in response to such breach/breaches as she was entitled to do, pursuant to section 95(1)(c) of the Employment Rights Act 1996.

52. In the alternative, the Appellant contended that even if the matters that she relied upon did not amount to unlawful pregnancy/maternity discrimination, she was subjected to continuous unfair criticism and demeaning treatment at work which culminated in the final straw incident on 17 January 2017 and such treatment was singly or cumulatively a repudiatory breach of her contract of employment which she was entitled to accept and thereby put an end to her employment.

53. The ET directed itself on the law relating to constructive dismissal. The ET said that there could be constructive dismissal if an employee was subjected to a series of incidents which, taken together, amounted to breaches of the implied term of trust and confidence that was implied into the employee's contract of employment, and therefore to a repudiatory breach of that contract. This can be put on the basis that there had been a course of conduct which could cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive unfair dismissal following a last straw incident. That last straw need not itself amount to a breach of contract, but it must contribute to the breach. The Tribunal directed itself by reference, inter alia, to **Malik v BCCI** [1998] AC 20 (HL), **Lewis v Motorworld Garages Ltd** [1986] ICR 157 (CA) and **Nottinghamshire City Council v Meikle** [2004] EWCA Civ 859; [2005] ICR 1.

54. As for the first way in which the constructive dismissal claim was put, the ET said, at paragraph 156:

> **"For the reasons already explained in respect of the Claimant's pregnancy, maternity and/or sex discrimination claims the Tribunal is not satisfied that the Claimant has established a discriminatory course of conduct between May 2015 and culminating in the incident on 17 January 2017."**

55. The ET found, however, at paragraphs 157-159 of the judgment, that, whilst the Appellant had failed to establish her case that there was a conspiracy led by Mr Hill to drive her out of the business, and had not established all of the allegations in her claim form, the Appellant had established that there was a series of events, culminating in the final straw events of 17 January 2017 which taken together amounted to a breach by the Respondent of the implied term of trust and confidence not to act in a way which was likely or calculated to destroy or seriously damage the relationship between the parties.

56. The events which cumulatively gave rise to the repudiatory breach of the Appellant's contract of employment were found by the Tribunal at paragraph 157 to be the following:

(1) The trade test incident in 2015. The Appellant had been highly regarded by the Respondent before her trade test. She was led to believe by the Respondent, immediately following her trade test, that she had done well. The respondent then failed to give the Appellant any proper feedback in May 2015 as to why she had failed her trade test. This is issue 7 i (though it was not described in quite the same terms as it was in the section of the judgment which dealt with discrimination);

(2) Mr Hill's change of attitude between the announcement of the Appellant's pregnancy in May 2015 and her departure on maternity leave in October 2015, in that he no longer requested the Appellant to stand with him and did not engage with her or speak to her prior to her departure on maternity leave. This is issue 11 v;

(3) Mr Hill demeaned and embarrassed the Appellant by comparing her to Vicki Pollard at a trainee briefing in December 2016; and

(4) The last straw incident on 17 January 2017, when the Appellant was told to clean up dog faeces and was laughed at by her managers, even though she was visibly upset.

57. At paragraph 160, the ET said:

> **"The claimant has not established her case that there was a conspiracy led by Mr Hill to drive out of the business/a number of other allegations contained in the List of Issues. The Tribunal is however satisfied that the Claimant has established that the matters identified at paragraphs 157-159 above were, viewed overall, an effective cause of her decision to terminate her employment."**

58. The Respondent accepted that if, as the ET found, the Appellant was constructively dismissed, she was also unfairly dismissed.

Ground 1

59. The central thrust of Ground 1 of the grounds of appeal is that the ET failed to deal with one of the pleaded allegations. The ET dealt with the allegation that the specific incidents of treatment relied upon were separately acts of unlawful discrimination. The ET found that most were not even prima facie discriminatory. Two of them were prima facie discriminatory but each was out of time and the ET declined to extend time. The ET also considered whether the treatment of the Appellant, whilst she was at work, on either side of her maternity leave, amounted to a course of discriminatory conduct, and found that it was not. The ET then considered whether the Appellant had been constructively dismissed for the purposes of her unfair dismissal claim and decided that she had been. On behalf of the Appellant, Mr Cook submitted that the ET failed to deal with a further pleaded allegation, which had not been

closed off by the ET's findings of facts and conclusions on other matters. This was that the constructive dismissal itself was unlawful sex discrimination.

60. The ET found that the Appellant had been constructively dismissed as a result of the cumulative effect of four matters, set out at paragraph 56, above. The first two of those matters, issues 7 i and 11 v, had been found by the ET to be prima facie discriminatory. Mr Cook submitted that this gives rise to at least the possibility that the constructive dismissal itself was discriminatory. He submits that if two of the material elements of the employer's conduct amounting to constructive dismissal were discriminatory, then the ET should have found that the dismissal itself was discriminatory. Accordingly, he submits that the ET erred in law in failing to go on to consider whether, applying the burden of proof for discrimination cases set out in EA 2010, section 136, the treatment set out in issues 7 i and 11 v was not just prima facie discriminatory but was proved to be discriminatory. In other words, having found that there were facts from which the ET could decide, in the absence of any other explanation, that the Respondent had discriminated in respect of issues 7 i and 11 v (section 136(2)), the ET should have gone on to decide whether the Respondent had discharged the burden of showing that the treatment was not, in fact, discriminatory (section 136(3)). If the Respondent had failed to discharge that burden, then the ET should have found that the constructive dismissal was discriminatory.

61. Mr Cook submitted that the fact that the ET found that the "last straw" was not discriminatory did not mean that the constructive dismissal as a whole was not discriminatory. There were two ways in which this could potentially be the case. The first would be if the ET found that issues 7 i) and 11 v) on their own amounted to a repudiatory breach of contract, which had not been affirmed by January 2017. The second would be if issues 7 i and 11 v amounted to

unlawful discrimination and were a sufficiently substantial and material part of the course of conduct amounting to constructive dismissal so as to taint the dismissal as being discriminatory.

62. Finally, Mr Cook submitted that, if the ET had found that the constructive dismissal was discriminatory, the time limit difficulty for his client would have fallen away. This is because, in a discriminatory constructive dismissal claim, time runs from the date of dismissal, not from the date of the acts which give rise to the constructive dismissal.

Discussion on Ground 1

63. At the heart of Mr Cook's submissions on behalf of the Appellant is the contention that the ET erred in stopping half-way in its consideration of whether the matters set out in allegations 7 i and 11 v were acts of sex discrimination. The ET found that these were prima facie acts of sex discrimination but did not go on to apply the reverse burden of proof in EA 2010, section 136, to decide whether they were in fact acts of unlawful sex discrimination. The reason why the ET did not do this was because the ET found that the acts were out of time, for sex discrimination purposes, and so took the view that it was not necessary to make any further findings about them. Mr Cook submitted that the ET failed to deal with the possibility that if these were acts of sex discrimination, then, as contributory factors to the constructive dismissal, they might have meant that the Appellant's constructive dismissal was itself unlawful sex discrimination. If so, then the time limit problems would have fallen away, because time runs for a discrimination claim arising from constructive dismissal from the date of the dismissal, rather than from the date of the individual events in the sequence of events that, taken together, amounted to the constructive dismissal.

64. As I have said, Mr Cook submitted that there were two ways in which the matters set out in allegations 7 i and 11 v could have meant that the constructive dismissal was unlawful sex discrimination.

65. The first was on the basis that, the matters in allegations 7 i and 11 v were, taken alone, sufficient to amount to constructive dismissal. Even though they happened well over a year before the Appellant resigned, it was not too late for the Appellant to accept the repudiatory breach and to resign in response to it, thereby triggering a right to claim constructive dismissal.

66. I do not accept this argument. In my judgment it is clear, on the basis of the findings of the ET, and on the basis of the reasoning of the ET, that the Appellant had affirmed her contract of employment in the period between the events in May to October 2015 and her eventual resignation on 19 January 2017. In the intervening period, she had gone on maternity leave and had then returned to work some three and a half months before her resignation. Moreover, the way that the case was put on behalf of the Appellant before the ET was that this was a "last straw" constructive dismissal. This means that the conditions that entitled her to resign and to claim constructive dismissal did not crystallise until the last straw event, which was the dog poo incident on 19 January 2017. It follows in turn that the events in allegations 7 i and 11 v did not, in isolation, amount to acts which entitled the Appellant to resign and claim constructive dismissal.

67. The second way in which Mr Cook submitted that the matters in allegations 7 i and 11 v, if discriminatory, would mean that the constructive dismissal was also discriminatory was on the basis that if some of the incidents which make up the sequence of events which eventually result in a "last straw" constructive dismissal are acts of discrimination, then the dismissal itself may be discriminatory.

68. I agree with Mr Cook that, in principle, a "last straw" constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination. There is very limited authority on this point. However, in **Williams v Governing Body of Alderman Davies Church in Wales Primary School** [2020] IRLR 589, at paragraph 89, HHJ Auerbach said that a constructive dismissal should be held to be discriminatory "if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach." At paragraph 90, HHJ Auerbach said that the question was whether "the discrimination thus far found **sufficiently influenced** the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory." (my emphasis)

69. I respectfully agree with the test as it is set out in paragraph 90 of the **Williams** judgment. Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the

dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue.

70. I should add two further points.

71. First, I do not accept the submission, made by Mr Allsop on behalf of the Respondent, that a "last straw" constructive dismissal can only be unlawful discrimination if the last straw itself was an act of discrimination. In the present case, the ET found that the last straw, the dog poo incident, was not an act of discrimination. In my judgment there can be cases in which the constructive dismissal is, overall, discriminatory, even though the last straw was not. The very essence of the "last straw" doctrine is that the last straw need not be something of major significance in itself. It need not even amount to a breach of contract, when looked at on its own. It need not have the same character as the other incidents that preceded it: see **Omilaju v Waltham Forest London Borough Council** [2004] EWCA Civ 1493; [2005] ICR 481, at paragraphs 15-16. Rather, the significance of the last straw is that it tips things over the edge so that the entirety of the treatment suffered by the employee amounts to a repudiatory breach of contract. It follows by parity of reasoning, in my view, that a constructive dismissal may be unlawful discrimination even if the incident which tipped things over the edge was not itself discriminatory. Another metaphor that is sometimes used for a "last straw" constructive dismissal is the "death of a thousand cuts". If some of the deepest cuts were acts of discrimination, it should not matter that the final glancing blow, though painful, was not itself discriminatory.

72. Second, in my judgment, it is clear that, in a discriminatory constructive dismissal, time runs for the claim from the date of the acceptance of the repudiatory breach, not from the date or

dates of the discriminatory events, if earlier. See **Meikle,** at paragraphs 49-53. It follows that a discrimination claim arising out of a constructive dismissal may be in time even if the discriminatory events that render the dismissal discriminatory are themselves out of time. It follows in turn that the fact that the incidents in allegations 7 i and 11 v were out of time for the purposes of a free-standing discrimination claim, or for a "discriminatory course of conduct" claim, does not mean that they should be disregarded for the purposes of a discriminatory constructive dismissal claim.

73. Against that legal background, the next question is whether the ET has erred in law in this case in its approach to the discriminatory constructive dismissal claim. The starting point is that it is clear, in my judgment, that the Appellant pleaded that there had been a discriminatory constructive dismissal and relied on this argument before the ET. Though the allegation is not perhaps spelt out as clearly as it might have been in the particulars of claim attached to the claim form, it is pleaded at paragraphs 35 and 28 of the particulars. Moreover, at paragraph 12 of the judgment, the ET recorded the list of issues in the case, and said, at paragraph 12.2:

> **"The Claimant relied [for her claim of direct discrimination] on an alleged course of discriminatory and/or unfair treatment culminating in the Respondent's alleged conduct on 17 January 2017, which the Claimant contended was the final straw."**

74. In my view, this is broad enough to encompass both a claim of a discriminatory course of conduct and also a claim that the series of events and incidents, taken together, resulted in a discriminatory constructive dismissal. The two claims are not the same. A claimant may make an allegation of a discriminatory course of conduct (which is potentially relevant for bringing earlier events in time), whilst not making an allegation that the discrimination resulted in constructive dismissal.

75. The central issue in relation to this ground of appeal, in my view, is whether the ET's judgment, expressly or by necessary implication, addressed and dismissed the discriminatory constructive dismissal claim. The Tribunal's judgment does not, specifically and in terms, dismiss the discriminatory constructive dismissal claim. Moreover, it is clear from the ET judgment that the ET did not apply its mind to the question whether the matters set out in paragraph 157 of the judgment (summarised at paragraph 56, above), which gave rise to the constructive dismissal, were sufficiently influenced by sex discrimination so as to render the constructive dismissal itself an act of sex discrimination. In order to deal with this question, the Tribunal had to ask itself two subsidiary questions:

(1) Were any of the matters set out in paragraph 157 of the judgment themselves tainted by sex discrimination; and

(2) In light of the answer to (1), did the discriminatory matters sufficiently influence the overall repudiatory breach so as to render the constructive dismissal discriminatory?

76. There were four matters which, in paragraphs 157 and 159 of the judgment, the Tribunal found to have contributed to the repudiatory breach of contract which led to the constructive dismissal. In relation to two of them, the Tribunal made a specific finding, earlier in its judgment, to the effect that the Appellant had failed to establish any prima facie evidence of sex discrimination. In relation to the Vicki Pollard incident, the ET made such a finding at paragraph 129 of the judgment, and in relation to the last straw, dog poo, incident, the ET made such a finding at paragraph 138. However, in relation to the other two incidents, the trade test in May 2015, and Mr Hill's cold-shouldering of the Appellant in May-October 2015, the Tribunal made no finding, one way or the other, as to whether there had been sex discrimination. The Tribunal did, however, leave over the possibility that there might have

been, as it found that the Appellant had established a prima facie case of sex discrimination in relation to these matters.

77. It is true that, for the purposes of the free-standing claims of sex discrimination in relation to those incidents, and for the purposes of the claim of a discriminatory course of conduct, the Tribunal had rightly directed itself that it did not need to go on to decide if the treatment was actually sex discrimination, as it was out of time in any event. However, in my judgment, Mr Cook is right that the Tribunal erred in law in failing to reach a concluded view on whether these incidents were sex discrimination for the purposes of the discriminatory constructive dismissal claim, and, if so, whether this meant that the constructive dismissal itself was unlawful sex discrimination.

78. Accordingly, in my judgment, the ET erred in law in failing to deal with this issue. The ET fell into the trap of regarding the fact that there was no discriminatory course of conduct as being determinative of the discriminatory constructive dismissal claim. In his submissions, Mr Allsop submitted that this ground of appeal represents an unduly nit-picking criticism of the judgment. He submitted that, read as a whole, it is plain that the ET rejected the claim for discriminatory constructive dismissal. I do not accept this submission. This ground of appeal goes beyond an arid criticism of the way in which the ET described its reasoning process. In my view it is clear that the ET overlooked and failed to deal with one of the allegations relied upon by the Appellant. I have considerable sympathy for the ET. This was a case in which a number of complex arguments were advanced on behalf of the Appellant and, to an extent, it may be understandable that one fell through the cracks. Nonetheless, in my judgment the Appellant is right that the ET failed to deal with one of the pleaded issues and therefore this ground of appeal must succeed.

79. I will deal with disposal at the end of this judgment.

Grounds 2 and 3

80. I will take Grounds 2 and 3 together, as Mr Cook did in his submissions. These Grounds are concerned with whether the free-standing complaints relating to issues 7 i and 11 v were in time, and, in particular, whether the ET erred in its approach to the just and equitable discretion.

The ET's reasoning on the "just and equitable" issue

81. The ET dealt with its "just and equitable" discretion at paragraphs 142-149 of its judgment.

82. The ET noted that the Appellant's case was pursued on the basis that there was an ongoing conspiracy to drive her out of the business because of her pregnancy, which had started in May 2015 and culminated in the incident on 17 January 2017. If this submission had been accepted, the entirety of the claim would have been in time (see **Hendricks**), and so there would have been no need for the Appellant to rely on the "just and equitable" discretion. Perhaps for that reason, as the ET recorded at paragraph 145 of the judgment, the Appellant did not advance much by way of explanation in her evidence as to why it would be just and equitable to extend time, and only very limited reference was made to this issue in the closing submissions of her father, who represented her at the Tribunal. The only arguments that were advanced in favour of the Appellant were that she was only 19 at the time of the events in question, and it would have been very difficult for her to bring a claim whilst she remained employed by the Respondent.

83. The Tribunal directed itself that it was necessary for a claimant who seeks to rely on the just and equitable extension to give an explanation of why the claim was not submitted in time, and why therefore an extension should be granted. The ET gave its reasons for declining to grant a just and equitable extension at paragraph 148 of the judgment. The ET decided not to extend time on this basis in light of the Appellant's failure to provide any explanation for the delay in pursuing the allegations earlier. The ET also decided that such explanation as she gave was not satisfactory because (a) she had access throughout to the advice of her father, an expert employment lawyer, (b) she was well aware at all times of the relevant facts; and (c) the Appellant and her father both gave evidence that they had formed a belief in May/June 2015 that she had been subjected to a discriminatory course of conduct, orchestrated by Mr Hill. The ET also considered that the prejudice of allowing the allegations to proceed would be greater to the Respondent than to the Appellant, especially given the length of time that has elapsed, the very limited contemporaneous documentary evidence and the extent to which this case depended on oral evidence. The ET took the view that the cogency of the evidence was likely to be affected by the effluxion of time, and also bore in mind that the Appellant had the relevant knowledge and resources to pursue her claim in 2015, but elected not to do so.

Discussion on Grounds 2 and 3

84. In my judgment, there was no error of law in the ET's approach to the just and equitable discretion, and the conclusion that the ET reached was not wrong in law. The ET was fully entitled to take into account the factors which are set out in paragraph 148 of the judgment, and these were plainly the most important factors in the exercise of the ET's discretion. The Appellant was aware of all relevant facts in 2015 and, indeed, already believed at that stage that she had been discriminated against. Unlike most 19 year olds, she had the benefit of

A expert advice from her father. The fact that she was still employed by the Respondent in 2015 did not mean it was just and equitable to extend time. She had the protection of the law relating to victimisation. The ET was also entitled to take the view that the cogency of the evidence was likely to be adversely affected by the lapse of time.

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85. Mr Cook made three main points in support of these grounds of appeal.

C 86. The first was that the ET had been wrong to refuse to extend time because the Appellant did not give a good reason for the delay. He relied on the following passage from the judgment of Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640; [2018] ICR 1194, a case that was decided a few weeks before the hearing before the ET in the present case, at paragraph 25:

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> **"… the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard."**

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F 87. Mr Cook submitted that, perhaps because the **Morgan** case does not appear to have been cited to it, the ET proceeded on the mistaken basis that it was necessary for the Appellant to give a satisfactory explanation for the delay in presenting her claim before the ET could exercise its discretion to extend time.

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88. I do not accept this submission. It is true that, in paragraph 147, the ET said that it was necessary for a claimant who sought to rely on the just and equitable extension to explain why the claim was not submitted on time. The ET did not reject the Appellant's argument on the just and equitable extension because the Appellant had not provided any explanation at

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all for the delay. She did provide an explanation, namely that she was only 19 and she was still employed by the Respondent. Nor did the Tribunal reject the Appellant's argument solely because the Tribunal did not accept that the Appellant's explanation was sufficient. The ET also took account of the impact of the delay on the cogency of the evidence, especially in a case such as this which was not document-heavy. In **Morgan,** Leggatt LJ made clear that ETs are entitled, and, indeed, obliged, to have regard to the explanation, if any, for the delay.

89. Second, Mr Cook submitted that the ET erred in law in that it failed to take into account the merits of the Appellant's claims as a material factor relevant to the exercise of its discretion. Mr Cook relied on a passage in **Bahous v Pizza Express Restaurant Ltd** UKEAT/0029/11, at paragraphs 19-20, in which the EAT (HHJ Peter Clark), said that, in that case, the ET erred in law in its approach to the just and equitable extension because it had not taken into account that the claimant's discrimination claim was established before the Tribunal on its merits.

90. I do not accept this submission either. Unlike **Bahous,** this is not a case in which the ET had made a clear finding of discrimination in relation to the matters which were the subject of the application to extend time. **Bahous** is not authority for the proposition that, in every case in which the just and equitable extension issue arises, the ET must hear the case in full and then make findings of fact on discrimination before going on to decide whether to extend time. If this were so, it would never be possible to deal with the extension of time as a preliminary issue. In the circumstances of the present case, I am satisfied that the ET took account of the key considerations when coming to its conclusions on the just and equitable issue.

91. Mr Cook's third submission was that, because of the error set out in Ground 1 in respect of the discriminatory constructive dismissal claim, the ET failed to appreciate that, irrespective of whether issues 7 i and 11 v were in time as standalone allegations of unfavourable

A treatment, it was necessary to reach a concluded judgment about whether those matters were in fact discriminatory.

92. In my judgment, this ground, too, must be rejected. Ground 1 is concerned with whether the B ET erred in law in failing to decide whether, in light of issues 7 i and 11 v, the Appellant has a good claim for discriminatory constructive dismissal. If she did, then time for such a claim ran from 19 January 2017, the date when she accepted the Respondent's repudiatory breach. C It is true that, for the reasons I gave when dealing with Ground 1, the ET should have reached a concluded judgment about whether these matters were in fact discriminatory. However, it does not follow that the ET erred in law in the decision that it reached on the just and equitable extension on these issues as standalone issues. As I have already said, the ET took account D of the right key considerations when coming to its conclusions on the just and equitable issue. In my view it is inconceivable that the ET's decision on the just and equitable extension would have been any different if the ET had found that the allegations in 7 i and 11 v were well- E founded. Even in that event, it would still have been the position that the cogency of the evidence had been adversely affected by the delay, and that the Appellant did not have a good excuse for the delay, especially as she had ready access to expert advice in 2015.

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93. For these reasons, I dismiss the Appellant's appeal on Grounds 2 and 3.

Disposal

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94. This is not a case in which the EAT can proceed itself to decide the issue in respect of which the appeal has succeeded. The question of whether there has been discriminatory constructive dismissal is not an issue upon which I can be satisfied that there is only one H conclusion that the ET could properly reach (see **Jafri v Lincoln College** [2014] EWCA Civ

449; [2014] IRLR 544). Mr Cook did not seek to persuade me otherwise. Both parties accepted that if the appeal succeeds on Ground 1 it will have to be remitted to the ET. Mr Cook submitted that I should remit the case to a differently constituted ET, whilst Mr Allsop submitted that I should remit the case to the same ET.

95. In my judgment, in all of the circumstances of this case, the case should be remitted to the same Tribunal. I bear in mind the well-known guidance of the EAT on remission which is to be found in the EAT's judgment in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, at paragraph 46, as approved by the Court of Appeal in **Barke v SEETEC Business Technology Centre Ltd** [2005] EWCA Civ 578; [2005] IRLR 633. The main reasons why I take the view that this case should be remitted to the same ET are:

(1) This is not a case in which the ET judgment was fatally flawed. Rather, it was a thorough, clear, and impressive judgment, in which the ET made careful and comprehensive findings of fact. The error of law was only in relation to one issue which does not appear to have been the main focus of the Appellant's arguments or submissions. There is no reason to doubt the ET's professionalism or ability to deal objectively with the remaining issues;

(2) The original ET will be able to deal with the remaining issues in a proportionate manner, with the benefit of its recollection of the evidence at the original hearing. It can refresh its memory by reviewing the detailed findings that it made in its judgment; and

(3) It would be disproportionate, excessively costly, and contrary to the interests of justice and the overriding objective to remit the case to a new Tribunal. The original Tribunal heard from 16 witnesses. Many of these witnesses would have to give evidence again at a remitted hearing. The events in 2015 took place nearly six years ago and, even in 2018

when the original hearing took place, the ET was concerned about the effect on the evidence of the lapse of time.

Conclusion

96. For the reasons set out in this judgment, the Appellant's appeal is allowed, on Ground 1 only. The case is remitted to the same ET to determine the following issues:

(1) Whether the Appellant suffered direct sex discrimination in relation to the allegations set out in issues 7 i and 11 v; and

(2) In light of the Tribunal's finding on (1), whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory?

97. It will be for the ET to decide whether it can decide these matters without further evidence, or whether it wishes to admit fresh evidence.