Appeal No. UKEAT/0097/20/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On Tuesday, 12 January 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS S FLATMAN — APPELLANT

ESSEX COUNTY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR A OHRINGER (of Counsel) Instructed by: Pattinson and Brewer Solicitors Mermaid House 2 Puddle Dock London EC4V 3DB
For the Respondent	MS J SMEATON (of Counsel) Instructed by: Essex Legal Services Seax House Victoria Road South Chelmsford Essex CM1 1QH

SUMMARY

UNFAIR DISMISSAL – Constructive Dismissal

The Claimant worked in the Respondent's school as a Learning Support Assistant. Her duties included giving physical support and assistance to pupils. In particular, from September 2017, she was required to give support to a disabled pupil, which involved her in daily weight-bearing and lifting work. Over a period of months she repeatedly requested, but was not provided with, manual handling training, despite assurances that steps would be taken to arrange this. From around Christmas time she also began to develop back pain, of which she began to inform the Respondent in January 2018. At the beginning of May the Claimant was signed off for three weeks with back pain. In communications on 21 and 22 May, the head teacher informed the Claimant that she would, upon her return, not be required to lift the particular pupil concerned, that she would be looking at moving the Claimant to another class in the next school year, and that training was being organised for her and other staff in the following few weeks.

The Claimant subsequently resigned and claimed unfair constructive dismissal.

The Tribunal found that the Respondent was in breach of the **Manual Handling Operations Regulations 1992**. But it found that the Respondent was not in fundamental breach of its implied duty to take reasonable care for the Claimant's health and safety. In so concluding, the Tribunal took account of the communications between the Claimant and the head teacher on 21 and 22 May 2018, which, it found, demonstrated that the Respondent had genuine concern for the Claimant's health and safety, and had taken steps to ensure that she would not in future be exposed to danger. The Tribunal concluded that the Claimant was not constructively dismissed, and so dismissed her complaint of unfair dismissal.

The Claimant appealed.

Held: the complaint was that the Respondent had breached the implied duty to provide a safe work environment, by failing, despite requests, to provide manual handling training, over the whole period of many months during which the Claimant was required to carry out such tasks,

and repeatedly requested it. It was accepted that, in order fairly to adjudicate that complaint, the Tribunal needed to consider whether the breach was, or became, fundamental *at any point* during the course of the period from September 2017 onwards. In considering that, the Tribunal could properly take account of the overall picture, including such actions as the Respondent had taken, short of actually providing the training, up to any given point. But, if the breach had become fundamental by a certain point, actions taken by the Respondent later in point of time could not make any difference to that: **Bournemouth University v Buckland** [2010] ICR 908.

The Tribunal had erred by only looking at the overall picture at the point of resignation, including taking account of the communications of 21 and 22 May 2018. It had failed to consider, and determine, whether the point of fundamental breach had been reached at some earlier stage of the unfolding events, consideration of which could not have included those later communications. The appeal was allowed. This was a case where, on the facts found, and taking the proper approach in law, the Tribunal would be bound to have found that the breach became so serious as to be fundamental, at some point between January 2018, when the Claimant first reported back trouble, and the start of May, when she went off sick with back trouble, at the very latest; and that such breach had not been affirmed. As it was also not disputed in this case that, if the Claimant was constructively dismissed, she was also unfairly dismissed, a finding of unfair dismissal would be substituted.

HIS HONOUR JUDGE AUERBACH

1. The Claimant in the Employment Tribunal worked for some years at a school maintained by the Respondent. Following her resignation, she claimed that she had been unfairly constructively dismissed. Her claim was heard by Employment Judge Lewis, Ms Jane Harper and Mrs B K Saund over three days. The parties were respectively represented by Mr Ohringer and Ms Smeaton of counsel. Both of them also appeared before me at the hearing of this appeal today. The Tribunal gave an oral decision in which it found that the Claimant was not constructively dismissed, and it therefore dismissed her claim of unfair dismissal. Written reasons were subsequently provided. The Claimant appeals against that decision.

The Facts and the Employment Tribunal's Decision

2. At paragraph [2] of its decision, the Employment Tribunal referred to the agreed list of issues which included the following:

> **"2: An agreed list of issues was in the Tribunals' bundle [pages 46 to 47], the constructive unfair dismissal claim was identified in the following way:**
>
> **1: Did the Respondent commit a fundamental breach of the Claimant's contract? The Claimant maintains the Respondent breached its obligations under manual handling operations regulations 1992, and/or the implied obligation to provide a safe place of work by:**
>
> **1.1. failing to conduct a risk assessment of the Claimant's role to establish exactly what training is required and to identify possible areas of concern in her existing work practices and**
> **1.2. failing, despite requests, to provide manual handling training during the course of the Claimant's employment in respect of her duties to assist people who required lifting into and out of a wheelchair.**
>
> **2. If so, did the Claimant resign in response to the breach?**
>
> **3. Did the Claimant delay, so as to waive any breach/affirm the contract.**

3. The Tribunal noted that it was referred by Mr Ohringer to a bundle containing seven authorities and a copy of the **Manual Handling Operations Regulations 1992**, and that Ms Smeaton handed up a copy of the EAT's decision in **Assamoi v Spirit Pub Company (Services) Limited** UKEAT/0050/11/LA.

4. The Tribunal found that the Claimant was employed as a Learning Support Assistant. Her duties extended to the provision of physical support and assistance to students. In the class to which she was assigned in the school year that began in the autumn of 2017 there was a disabled student, referred to as AB, who used a wheelchair and other specialist equipment. The Claimant had, at regular intervals during the day, to help AB move from one piece of equipment to another and/or to get to her feet. That involved the Claimant in carrying out weight-bearing and lifting manoeuvres. Although others sometimes helped with AB, this task mainly fell to the Claimant.

5. Although occupational therapists and physiotherapists visited the school and attended to AB's needs, they told the Claimant that they could not give her manual handling training, which needed to be separately arranged for her. Over a period from around September 2017 to March 2018, the Claimant on a number of occasions requested manual handling training from the SENCO, Ms Hearn, including occasions on which she reported that she was having difficulties in respect of AB. Ms Hearn told the Claimant during this period that she was looking into it and that it was at the top of her list, but no training was actually provided. At one point in March 2018, Ms Hearn spoke to a colleague, Ms Lambert, about finding a trainer; but Ms Hearn did not then follow up with Ms Lambert.

6. From January 2018 the Claimant had also begun complaining to the Respondent of back pain, which she had started to experience before Christmas. She mentioned it to Ms Hearn in January, March and April. In April, she saw her GP about her back, which had by then become

very painful. By 20 April, when she spoke to Ms Hearn again, she was, "fed up with having been asking about training so many times with nothing having been provided to her." The Claimant also spoke to Ms Lambert, who, in turn, emailed the head teacher, Ms Hunt, and Ms Hearn. The Claimant herself emailed Ms Hunt on 26 April, who replied that they were looking to arrange training from an independent physio quickly.

7. On 1 May 2018 the Claimant was signed off work with back pain until 21 May. On 21 May, she spoke to Ms Hunt and then they exchanged texts. In light of her doctor's advice, the Claimant wanted to know if she could return on restricted duties, specifically, no lifting. Ms Hunt replied that that would be "okay in the short term". Her text continued:

> **"We probably need to have a discussion about moving you to another class group so to avoid situations where you may be required to move and assist and to protect other members of staff to difficulties with the remaining members of staff by narrowing down the number of staff who are able to assist."**

8. I will set out the next few paragraphs of the Tribunal's findings of fact in full:

> **"20. The Claimant returned to work on 22 May and went to see the headteacher in her office. We find that Ms Hunt repeated in substantially similar terms what she said in the text, including in respect of looking at moving the Claimant, and needing to address the needs of other members of staff or the need for there to be other staff in the classroom so there were enough staff who could support AB. The Claimant left that meeting feeling angry and upset that the headteacher had not done anything about supporting her and was now talking about the needs of other staff and she felt that her concerns were being minimised or dismissed. She also informed the headteacher she did not want to move class as she had a relationship with that class. During that conversation Ms Hunt told the Claimant that she wished that she raised the issue with her earlier. The Claimant saw this as a criticism and felt that she was now being blamed for not having raised it with Ms Hunt.**
>
> **21. Ms Hunt told the Claimant that training was being organised in the following few weeks, that other staff who would be dealing with the child in future would also be attending, and that she had decided by that point that the child would move to a different class teacher the following year with a new team LSA's.**

> **22. The Claimant's case was that she did not have reasonable cause to believe what she was being told about training being arranged; she had been told by Ms Hearn for months that something was being done but nothing had happened and the headteacher had not been particularly proactive or helpful. She has been told that something would be done quickly in April yet still on the 22nd May nothing had been arranged and at the time of her resignation letter on 5 June still nothing had been arranged. This was five weeks since she had gone on sick leave due to back pain and she had still not been told the date of any manual handling training.**
>
> **23. The Claimant set out in her resignation letter [p.185] firstly, that it was with great sadness that she offered her resignation, then she went on to state that she had requested suitable training multiple time "as per requirements to safeguard my health and well-being in regards to manual handling". She referred to having continuing back issues which had failed to resolve after three weeks rest and then referred to previous dangerous situations she had been placed in where she had also sustained injuries and stress within her working environment."**

9. It appears that there was some evidence to suggest that, following their communications and at the end of the day on 22 May, the Claimant told Ms Hunt that she was considering resigning and/or going to resign. However, it was not claimed that she did, in fact and law, resign then. Rather, when she returned from half term on 5 June 2018, the Claimant handed in the letter to which the Tribunal referred at [22]. It was this letter that it was claimed, and found, effected her resignation. Although the Tribunal did not specifically refer to this in its decision, I was told that that letter gave notice taking effect on 29 June 2018.

10. The Tribunal's self-direction as to the law was as follows:

> **"26. The Claimant's claim is of a constructive unfair dismissal. The issues set out above identify the legal issues for the Tribunal in respect of that claim. The Claimant specifically relied on the following as a fundamental breach of her employment contract.**
>
> **The Claimant maintains the Respondent breached its obligations under manual handling operations regulations 1992 and/or the implied obligation to provide a safe place of work by:**
>
> **1.1 failing to conduct a risk assessment of the Claimant's role to establish exactly what training is required to identify possible areas of concern in her existing work practices and**
> **1.2 failing, despite requests, to provide manual handling training during the course of the Claimant's employment in respect of her duties to assist people who required lifting into and out of a wheelchair.**

> **27. We were provided with written submissions by both Counsel which were amplified in oral submissions. We took into account the parties' respective submissions and the authorities provided to us. There was no real dispute between the parties as to the law and the legal principles were helpfully set out at paragraph 26 of Mr Ohringer's written submissions. The dispute was as to where the legal principles should lead us on the facts before us."**

11. Paragraph 26 of Mr Ohringer's written submission to the Tribunal, to which it there made reference, read as follows:

> **"26. Following the approach of the Court of Appeal *Bournemouth University Higher Education Corpn v Buckland* [2010] ICR 908 to cases of constructive dismissal generally, it is submitted that the Tribunal should consider the following questions:**
>
> **a. Has the Respondent fundamentally breached the implied term that it takes reasonable care to operate a safe system of work? (*Keys v Shoefayre Ltd* [1978] IRLR 476, para 16). In answering this, the Tribunal should apply the principles that:**
>
> **i. There may be a fundamental breach of contract where an employer fails to promptly and sensibly examine a bona fide health and safety complaint. (*British Aircraft Corporation Ltd v Austin* [1978] IRLR 332)**
>
> **ii. Health and safety legislation sets out the duties for employers but not every breach will be a fundamental breach of contract (*Graham Oxley Took Steels v Firth* [1980] IRLR 135; *Lindsay v Dunlop Ltd* [1980] IRLR 93).**
>
> **iii. The Manual Handling Operations Regulations 1992 in respect of work where manual handling cannot be avoided, requires employers to (a) undertake an assessment; and (b) take appropriate steps to reduce the risk of injury.**
>
> **iv. The employer's treatment of the employee is to judged objectively, (*Buckland*)**
>
> **v. A fundamental breach of contract cannot be remedied. (*Buckland*)**
>
> **b. Did the alleged repudiatory breach play a material part in the Claimant's decision to resign? (*Wright v North Ayshire Council* [2014] ICR 77, para 18)**
>
> **c. Did the Claimant affirm the contract following the alleged repudiatory breach and before resigning? A useful summary of the law on affirmation can be found in the Judgment of HHJ *Eady QC in Ashgar &Co Solicitors v Habib* (UKEAT/0332/16), paras 20-22.**
>
> **d. If yes, was the reason for this a potentially fair reason under section 98 (2) of the Employment Rights Act 1996?**
>
> **e. If yes, were the Respondent's actions within the band of reasonable responses? *(Sainsbury plc v Hitt* [2003] ICR 111)."**

12. As to the reason for resignation, the Tribunal found that the Claimant was aware that the Respondent had a duty to carry out a risk assessment, and that, had one been carried out, it should have identified the need for her to receive manual handling training. But the Tribunal continued:

> **"However, we find that it was not the failure to provide the risk assessment itself that was in the Claimant's mind when she resigned. We find that the issue identified at 1.2 in the list of issues was central in her mind and we find that was the reason for her resignation."**

13. I will set out the next few paragraphs of the Employment Tribunal's reasons in full.

> **"30. By this time the Claimant had suffered continuous back pain, she had requested training in regard to manual handling to safeguard her health and well-being. She also refers in her resignation letter to having followed all the protocols, taken this up with her line manager since the beginning of the school year, but had no resolution, she felt she was unable to continue in the current situation.**
>
> **31. We accept that there was a breach of the obligation to provide manual handling training and that was ongoing. We also find the Claimant had not waived that breach. There had not been manual handling training provided specific to the task the Claimant was required to do, although she did accept she had prior manual handling training in 2008 in respect of another pupil who required hoisting. At the date she resigned she still hadn't been provided with the manual handling training or a date for that training. She had objected to the failure to provide that training and repeated her request for it throughout the period up to her resignation.**
>
> **32. The more difficult question for the Tribunal was whether that breach was a fundamental breach. It is not every breach of contract which will justify an employee resigning and claiming they have been dismissed. We also had to look at the response from the Respondent, before the Claimant resigned, what they did in the circumstances, and the effect of the breach that we have found on the employment contract as a whole, that is whether the breach we found went to the root of the contract or indicated that the Respondent was no longer indicating a willingness to be bound by a fundamental term.**
>
> **33. The Respondent relies on the fact that they had provided training, although it was not specific manual handling training, in the form of sessions with the occupational and physiotherapists. They were of the view that that input was specific to the needs of AB and that the OT and PT demonstrated the transfers and the equipment that AB used. The Respondent's evidence was that the OTPT sessions was better than the manual handling training that had been provided the previous year.**
>
> **34. Having found the failure to provide manual handling training was a breach we considered what the Respondent had done by the time the Claimant came to resign or reached the decision to resign, whether that is 22 May or 5 June.**

35. On 21 May the Respondent had agreed to restricted duties for the Claimant to protect her from lifting in the short term and had suggested the move to a different classroom as a longer-term solution. We accept that the headteacher had said that she needed to have a discussion about that with the Claimant, but we find that was what she foresaw doing. We are satisfied that this was to protect the health and welfare of the Claimant.

36. Mrs Smeaton in her submissions identified three steps which she said mitigated the effect of the breach in respect of manual handling training, including making arrangements for the training to take effect at the future date. We accept that two of those steps, the restriction on lifting, i.e. restricted duties, and the decision to move the Claimant to a new class had taken place, and the Claimant had been told about them, before the point at which she resigned. We find that those were in place before the resignation – rather than being attempts to remedy a fundamental breach after it had taken place.

37. We accept Ms Smeaton's submissions. We are satisfied that the Respondent, by those actions, demonstrated that it did have concern for the Claimant's safety; it had taken steps to address the Claimant's concerns and to ensure that she would not be exposed to the danger of lifting and to damage to her back and that they were taking her concerns seriously.

38. At the point that the Claimant resigned those measures have been put in place to protect her. We are satisfied that in the context of the employment contract over all that the despite the ongoing failure to provide manual handling training therefore was not a fundamental breach and did not go to the root of the contract.

39. The Claimant's claim for constructive dismissal therefore fails and is dismissed."

The Law

14. It is necessary to a claim of unfair dismissal that the employee was, in fact and law, dismissed. But section 95(1)(c) **Employment Rights Act 1996** provides that the circumstances in which an employee is treated as dismissed include the following:

> **"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."**

15. It is long-established that for these purposes there must, by the time of the resignation, have been a fundamental or repudiatory breach of contract by the employer. The employee must

not have affirmed the contract thereafter, and the breach must have materially influenced the decision to resign.

16. The breach relied upon may be of an express term of the contract or an implied term, or more than one term. All employment contracts contain certain well-established implied terms. In many cases, the employee relies on the so-called implied duty of trust and confidence. In the well-known formulation, this is the term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It is well-established that the nature of that particular implied term is such that, if there is a breach of it, then that will necessarily be a fundamental breach (see **Morrow v Safeway Stores plc** [2002] IRLR 9). Another implied term is the duty to take reasonable care for the employee's health and safety.

17. In the present case, the Claimant asserted that there was a breach of the **Manual Handling Operations Regulations 1992** and/or of the implied duty to provide a safe system of work. It seems to me that the correct analysis is that, for the purposes of this particular claim, the fundamental breach alleged was of the implied health and safety obligation; and this, in turn, was said to have been brought about in this case by an ongoing breach of the **1992 Regulations** by the Respondent failing, despite requests, to provide the Claimant with the required manual handling training, and continuing to require her to carry out such duties in respect of AB.

18. It was not controversial before the Employment Tribunal or the EAT that paragraph 26 of Mr Ohringer's submission to the Tribunal, which it adopted in its decision, is a fair and correct summary of the further principles emerging from the authorities to which it refers. I agree. Two of those principles are of particular significance to the arguments on this appeal.

19. Firstly, not every breach of the health and safety implied term and, in particular, not every breach of it based upon a breach of health and safety legislation, will be a fundamental breach. Secondly, once a fundamental breach of contract – of any sort – has occurred, the employer cannot then cause that breach to cease to be a fundamental breach, by taking further steps to remedy or ameliorate its effects or otherwise to make amends. The authority for that proposition is **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908. Although that authority makes other important points as well, I will refer to this particular proposition as the **Buckland** principle. The right to rely upon a fundamental breach and resign and claim constructive dismissal may, as has been noted, be lost by subsequent affirmation, but that is a different matter.

The Grounds of Appeal and the Arguments

20. The four Grounds of Appeal, set out in the Notice of Appeal, are as follows:

> **"Ground 1**
>
> **8. The ET failed to determine whether the breach of contract, which it had identified, was a fundamental breach at any time before its effects had been 'mitigated' on 21 and 22 May 2018.**
>
> **9. Had the ET correctly directed itself, it would have asked itself whether there had been a fundamental breach at any time prior to termination, including before 22 May. If there had been then, absent affirmation by the Claimant, there would have been a constructive dismissal.**
>
> **Ground 2**
>
> **10. Further or in the alternative, the Tribunal misdirected itself considering whether the breach of the implied term to provide a safe place of work was repudiatory after looking at the 'the effect of the breach...on the contract as a whole'. (paras. 32 and 33).**
>
> **11. Although the implied term of trust and confidence may be viewed in light of the contract as a whole, that is not true of the implied term to provide a safe place of work. A serious breach of the implied term to provide a safe place of work is fundamental regardless of the 'context of the employment contract over all'.**
>
> **Ground 3**

> **12. Further or in the alternative, it appears from paragraphs 34, 36 and 38 of the ET's Reasons that it considered that the question of whether there had been a fundamental breach of contract should be assessed taking into account all the relevant facts up to the date of termination.**
>
> **13. This suggests that the ET considered it possible for a fundamental breach to be remedied in contrast to the correct position set out in *Bournemouth University Higher Education Corpn v Buckland* [2010] ICR 908.**
>
> **14. Indeed, the last sentence of paragraph 36 suggests the ET misunderstood the effect of principle of *Buckland,* which was cited to it, and thought that a breach can be remedied before but not after resignation.**
>
> **Ground 4**
>
> **15. In the alternative, if the ET did correctly direct itself, its conclusion that there was not a fundamental breach of the implied term to provide a safe place of work, was perverse. The ET's primary findings were that the Respondent was required to provide manual handling training, but it failed to do so despite advice and repeated requests from the Claimant, even after she started suffering back pain. This all supported an inevitable conclusion that the Respondent having fundamentally breached the contract of employment."**

21. An authority which was the subject of contention in argument before me is **Assamoi**. The EAT's own summary of its decision in that case ends with the following proposition:

> **"There is a distinction between preventing matters escalating into a breach of the implied term of mutual trust and confidence and trying to cure a breach which has already taken place."**

22. Ms Smeaton, both before the Employment Tribunal and in arguing this appeal, relied upon that as a sound proposition. She submitted that this was a proper distinction to draw, and not at odds with the **Buckland** principle but consistent with it. It was, in substance, her submission that what the Tribunal in the present case had concluded, in particular at [36], was that, in effect, the present case was an **Assamoi** type of case rather than a **Buckland** type of case. The Tribunal, she said, was entitled to so find, and the EAT could not and should not interfere.

A

23. Mr Ohringer submitted that **Assamoi** conflicted with **Morrow** and **Buckland** and, for that reason, should not be followed. Alternatively, he submitted that **Assamoi** only applies to a case concerned with the implied duty of trust and confidence, as it is only in relation to a claim of breach of that implied duty, that the employer's actions could be looked at in the round. That argument went to Ground 2.

B

C

24. Mr Ohringer submitted that, in any event, the Tribunal had failed to determine the question of whether there was a fundamental breach at any time during the course of employment *before* the effects of any such breach had been, in the Tribunal's word, "mitigated" by what happened on 21 and 22 May 2018. That was Ground 1. The Tribunal had only considered the position *as at* the point in time when the Claimant resigned or decided to resign. It had not considered whether the breach had become fundamental at an *earlier* stage. If so, what happened later, on 21 and 22 May, was necessarily to be regarded as irrelevant. There was, said Mr Ohringer, no finding as to when, or *by when*, the breach to which the Tribunal referred at [31] had occurred. The discussion at [32] onwards, in particular at [32], [34], [36] and [38], simply looked at the overall position *as at* the date of resignation and taking into account the events of 21 and 22 May.

D

E

F

25. Further or alternatively (this was Ground 2) the Tribunal had taken the wrong approach, by looking at the impact of the breach upon the contract as a whole. That is a permissible approach in relation to the implied duty of trust and confidence, he said, but not in relation to the implied duty to provide a safe working environment; a sufficiently serious breach of the implied health and safety term would be a fundamental breach, in and of itself, regardless of considerations about the wider context of the contract as a whole.

G

H

26. Mr Ohringer, in particular, took me to the formulation of this implied term in **Johnstone v Bloomsbury Health Authority** [1991] ICR 269. Although the claim in that case was not of constructive dismissal, it was of a breach of the implied contractual (and tortious) duty of the employer "to take all reasonable care for [the employee's] health and safety", which is no different to "the duty to provide a safe system of working" (*per* Stuart-Smith LJ at 273H and 277D). He referred me also to Sir Nicolas Browne-Wilkinson V-C's formulation of it (at 284E) as an implied duty on the health authority, when exercising their own rights under the contract "to take reasonable care not to injure their employee's health". Mr Ohringer said that in relation to *this* implied term, what matters is the impact of the employer's conduct or inaction on the employee's health and safety, and/or the risk thereby posed to the employee's health and safety, not the employer's intentions, promises or reassurance, good or otherwise.

27. To that extent, whilst agreeing with the discussion in **Leeds Dental Team Limited v Rose** [2014] ICR 94, to the effect that, when considering the intentions of the employer, the Tribunal should take an objective rather than a subjective approach, Mr Ohringer said that was applicable to claims of breach of the implied trust and confidence term, but not the health and safety term. Mr Ohringer suggested that an analogy was offered by Sedley LJ in **Buckland** at [28], to the effect that a failure to pay wages is fundamental, regardless of whether there might be particular circumstances that make it a reasonable action on the part of the employer.

28. However, said Mr Ohringer, in this case the Tribunal had impermissibly taken into account broader questions about the attitude or intentions of the Respondent. This could be seen from what it said at [32] and the conclusions that it reached at [37]. It failed there to focus on the health and safety impact of the Respondent's conduct in this case. Wider considerations might have been appropriate had there been a claim of breach of the trust and confidence implied term, but that was not the basis of the claim in this case.

29. Further or alternatively – this was Ground 3 – it appeared from [34], [36] and [38], in particular, that the Tribunal considered, wrongly, that whether there was a fundamental breach by conduct at a certain point during employment, should be considered in light of all the relevant circumstances *up to the date of resignation*. Indeed, said Mr Ohringer, the final words in [36] suggested that the Tribunal had misunderstood **Buckland**, as it apparently thought that a fundamental breach that has taken place can be rectified by the subsequent conduct of the employer, as long as that conduct occurs before, but not after, the resignation.

30. Further, or alternatively – this was Ground 4 – given the findings that the Respondent was obliged to provide manual handling training and had failed to do so over many months, despite repeated requests from the Claimant, and that she had then developed back pain, the decision that there was no fundamental breach was perverse. The Tribunal should have inevitably, had it applied the correct weight to the facts found, concluded that there was a fundamental breach. The employer's stated intentions were not relevant, and the ongoing situation whereby the Claimant continued over many months to be required to carry out weight-bearing and lifting work, coupled with the continuing failure to provide training, even after she complained of back trouble, made the breach, as time went on, progressively worse. The Tribunal should have concluded that, as of January 2018, or at any rate certainly before May, a fundamental breach had occurred, because the impact of the breach had, at some point during that window, become so very serious.

31. Ms Smeaton submitted that the EAT could not interfere with a Tribunal's finding about whether there was a breach and, if so, whether that breach was fundamental, where there was evidence which would support the Tribunal's decision on those questions (see **Woods v WM Car Services (Peterborough) Ltd** [1982] IRLR 413, 415). In this case, the Tribunal had asked itself the right questions and answered them permissibly. It had found, at [31], a breach of the **1992 Regulations** by not providing training; but it had rightly also asked whether there was a

fundamental breach of contract. It had not at any point found that there was a fundamental breach of this implied term. It permissibly concluded at [38] that the ongoing failure to provide training was not a fundamental breach.

32. Ms Smeaton accepted that the pleaded case covered the whole period from September onwards, and that the Tribunal therefore *did* have to consider whether there was a fundamental breach *at any point* over the course of the months from that time onwards. But, she submitted, the Tribunal had indeed done that. The EAT should not adopt an overly pernickety critique of its decision (**ASLEF v Brady** [2006] IRLR 576, at [55]; **Brent London Borough Council v Fuller** [2011] IRLR 414, at [31]). The EAT should not assume that the Tribunal had not considered a particular point, simply because it was not expressly mentioned. (**Retarded Children's Aid Society v Day** [1978] IRLR 128, at [19]). Reading the Tribunal's decision as a whole fairly, it must be read as having concluded that there was no fundamental breach *at any time* during the course of employment; and Ground 1 should therefore fail.

33. As to Ground 2, because not every breach of this implied term is a fundamental breach, the Tribunal was entitled to look at the overall circumstances of the contract to decide whether this particular breach was sufficiently serious to be fundamental (**Graham Oxley Tool Steels Ltd v Firth** [1980] IRLR 135 at [17]). Mr Ohringer's rigid distinction between words and deeds was not warranted by the authorities. Ms Smeaton agreed that the intentions or attitudes displayed by the employer are more likely to be arguably relevant to a claim of breach of the implied trust and confidence term than to a claim based on the health and safety term. But she did not accept that such considerations were wholly irrelevant to whether a breach of the latter term should be viewed as fundamental.

34. In this case, she submitted, the Tribunal properly considered the steps that the Respondent had taken, in particular through the headteacher's actions, to demonstrate that it took the Claimant's concerns seriously, and to ensure that she would not be further exposed to any danger. In any case, the Tribunal had found that the headteacher did take immediate action on the Claimant's return in May, to ensure that she would not be exposed to any further danger through having to lift AB. She did so by, in the short term, indicating that the Claimant would not immediately be required to go on doing so, and by indicating that, in the long term, from the start of the next school year, she would be moved to a different class. The wages example given in **Buckland** at [28] was simply an illustration of the fact that the test was an objective one.

35. Turning to Ground 3, Ms Smeaton submitted that there was nothing wrong with the principle which she extracted from the EAT's decision in **Assamoi**. It drew a valid distinction and was consistent with the Court of Appeal's decision in **Buckland**. It was clear that this Tribunal, which had the relevant authorities, including **Buckland** and **Assamoi**, cited to it, appreciated the **Buckland** principle, and hence it identified a difference between a case where an employer attempts to put right a fundamental breach that has already occurred, and one in which matters never get to that point. That, she said, was clearly the approach the Tribunal properly took, in particular at [36].

36. It was not a fair reading to infer that the Tribunal was labouring under the error that a fundamental breach could be remedied after the breach had taken place, so long as this was done before resignation. It did not find that there was a fundamental breach at all in this case; and the decision should not be overturned because of some minor infelicity of expression. The Tribunal had directed itself correctly as to the law, and the EAT should not infer that it had not applied the law correctly, unless its language elsewhere in its decision admitted of no other conclusion (see

Elmbridge Housing Trust v O'Donoghue [2004] EWCA Civ 939, at [44] and **Jones v Mid-Glamorgan County Council** [1997] IRLR 685, at [30]).

37. Finally, the Tribunal's conclusion that there was no fundamental breach was one that it was entitled to reach on the facts found and was not perverse. Having regard to all the facts found, not limited to those found about the Respondent's actions on 21 and 22 May, the Tribunal was entitled to find that the breach was not fundamental, and there was no basis for the EAT to interfere.

38. Ms Smeaton, however, accepted that it would be sufficient for this appeal to succeed if any one of the four Grounds succeeded. I should only dismiss the appeal if I accepted her case that all four Grounds should fail.

Discussion and Conclusions

39. **Buckland**, a decision of the Court of Appeal, by which both Employment Tribunals and the EAT are bound, is clear and unqualified on the point at issue in this appeal. If there has been a fundamental breach of contract by the employer, then this cannot in law be undone by any further action or conduct of the employer occurring at a point in time thereafter. Sedley LJ, in particular, wrestled with the potential tension between this legal doctrine and the industrial reality of how dynamic employment relationships may ebb and flow over time. But he, and the whole Court of Appeal, came to the conclusion that contract law did not, in this regard, admit any exception or variation, in the context of employment relationships, to this general principle.

40. Of course, there may be cases where the employer, having done something amounting to a fundamental breach, then takes some further action which in fact persuades the employee to

decide to remain in employment and not to resign, even though they would, in law, be entitled to do so, and, thereby, to *affirm* the contract (see the observations of Sedley LJ in **Buckland** at [40] and Jacob LJ at [52] and [56]). But affirmation, as I have noted, is a different concept.

41. It is not disputed that the authorities establish that a breach of the implied duty to take care for the employee's health and safety and, in particular, a breach of that duty said to have been caused by a breach of the **1992 Regulations**, may or may not be fundamental. That must depend on the circumstances of the case.

42. I also agree with Mr Ohringer that, where this particular implied term is relied upon, the Tribunal's focus should be on the harm, or risk of harm, in fact caused, or posed, to the employee's health and safety by the employer's actions or inactions, in light of all the facts found, as to the situation thereby created. Ms Smeaton rightly conceded that this is where the emphasis should lie, in such a case, and that, when considering whether a breach of this particular implied term is fundamental, statements of intention or attitude on the part of the employer will generally have less significance than they might where the claim is of breach of the implied duty of trust and confidence.

43. However, I do not go as far as Mr Ohringer invites me to do: I do not say that such considerations are necessarily in law, in every case which relies upon a breach of the health and safety implied term, wholly irrelevant. In particular, it seems to me that the theoretical bright distinction between an employer's actions on the one hand, and its statements or intentions, on the other, may, in some cases, in practice, be grey or difficult to draw. If, for example, an employer says they have booked and arranged a training course to take place next week, that could be characterised as merely a statement. But making the booking is itself an action of sorts;

and I would not hold that in every case conduct of that sort would necessarily be wholly irrelevant to whether there had been a fundamental breach of the health and safety duty.

44. A separate point, however, is that where, in a case such as the present, the conduct complained of is said to have factually come about by the employee being required over a period of time to continue taking manual handling actions, and also, over that sustained period of time, despite requests, not being given the necessary training, then it may be said that over time the breach becomes more serious, and so at a certain point crosses the line and becomes fundamental. In other words, exposing the employee to risk, whether because of lack of training or otherwise, on one occasion or for a short time, might in a given case not cross the line to being a fundamental breach; but repeatedly doing so, or doing so over an extended period, might be found to do so because of the increased and continuing risk and/or actual harm caused. Such a claim is, in effect, one of breach of this term becoming fundamental by cumulative and persisting conduct over time.

45. I turn to consider **Assamoi**. In that case, the conduct of a manager, Mr Cooper, towards the employee, by accusing him of misconduct, led to the employee raising a grievance. Other managers who then looked into the dispute accepted the employee's account of events, and took steps to put matters right. The Tribunal found that Mr Cooper's conduct was "likely to damage the relationship of trust and confidence". But it went on to find that the actions of the other managers "prevented Mr Cooper's conduct from constituting a breach of the implied term of trust and confidence". It was argued that this analysis was contrary to the **Buckland** principle.

46. The EAT, however, construed the words of the Tribunal, in the first passage that I have just cited, as falling short of a finding that Mr Cooper's conduct *was* a breach of the implied term, because the Tribunal had not there found that his conduct was likely to "seriously" damage the relationship. The Tribunal's further conclusions about the later actions of the managers were,

said the EAT, on a fair reading, not a finding that their actions had changed the nature of Mr Cooper's prior conduct; rather, the Tribunal had found that their actions prevented the matter from escalating into a breach of the implied term. There was, said the EAT, a distinction between that, and trying to cure a fundamental breach which has already taken place. While **Buckland** holds that the latter is not legally possible, it does not preclude the former.

47. I can see the argument that the EAT's reading, in **Assamoi**, of the Employment Tribunal's decision in that case, might perhaps be said to have been a generous one. I note that the EAT observed that the Court of Appeal's decision in **Buckland** (which had been given earlier in the same year), was not cited to the Tribunal in that case. But, given the conclusion that the EAT in **Assamoi** came to, about what the Tribunal in that case had or had not actually decided, I do not think that its analysis of *the law* conflicts with **Buckland**. If an Employment Tribunal finds that, at, or by, a certain point in time, the conduct of the employer, whether by a single act or omission, or cumulative conduct up to that point, amounts to a fundamental breach, it cannot in law go on to find that conduct of the employer subsequent to that point in time has altered that conclusion in relation to the earlier conduct. Nor can it arrive at the same outcome by reasoning that, viewed overall, the entire course of conduct up to the point of resignation does not, after all, amount to a fundamental breach. But on examination, in terms of the proposition of *law* that it advances, **Assamoi** does not say either of those things.

48. Leaving aside the EAT's particular analysis in **Assamoi**, of the Employment Tribunal's decision in that case, I agree, of course, with the various general propositions about the approach that the EAT should take, to the construction and reading of Employment Tribunals' decisions and reasoning, which are expounded in the authorities to which Ms Smeaton took me. But, in cases of this sort, it is important, in light of **Buckland**, that Tribunals do carry out the analysis with care, and can be seen from the content of their reasons to have done so. In particular, what

the **Buckland** principle means is that, in considering whether there has been a fundamental breach of the health and safety implied term up to, or at, any given point in a story which unfolds and develops over time, the Tribunal must take care only to take account of relevant conduct of the employer, and its impact, up to that given point.

49. I turn back then, to the present Tribunal's decision. This Tribunal was, of course, referred to **Buckland** and other relevant authorities; and it referred, albeit by the route of incorporating part of Mr Ohringer's submissions by reference, to the **Buckland** principle. But did it apply the law correctly to the facts found? The starting point in any given case is to consider with care what conduct is said to have amounted to a fundamental breach. In this case, the Tribunal identified that two matters were relied upon by the Claimant as amounting to a fundamental breach. The first – the failure to carry out a risk assessment – was found not as such to have influenced her decision to resign, and there is no appeal in that regard. The second, as identified in the list of issues and referred to at the start of the Tribunal's decision, and again in its statement of the law, was the failure to provide manual handling training despite repeated requests.

50. It is important to note that the complaint was of failing to provide that training, of failing to do so despite requests, and of failing to do so during the course of the employment over a period of months. It is clear that the Claimant was complaining of what had happened (and/or not happened) in this regard, over the whole period from the start of the autumn term in 2017. The clear basis of her complaint of fundamental breach was that she had continued to be required to carry out these physical duties and, during the same period, asked for, and continued to ask for, training, at least roughly once a month from September 2017 onwards, and that throughout that period it was nevertheless not in fact provided.

51. I agree with Mr Ohringer, therefore, that the Tribunal had to consider, and decide, whether *at any point* during that period, a stage was reached whereby the Respondent's conduct up to that point in time amounted to a fundamental breach. Ms Smeaton, as I have noted, confirmed during the course of argument that she did not dispute this, as such; but her case was that, on a fair reading, the Tribunal had considered this, and had found that there was no fundamental breach at any point during that period.

52. As to this, the factual scenario postulated in the claim, and captured in the list of issues, was that the state of affairs complained of had first come about in the autumn of 2017 and then continued thereafter to be the case, month on month. The Tribunal found that this was factually correct. The Claimant was required throughout this period to continue to support AB. She made repeated requests for training throughout this period. The training was not provided throughout this period. It was clearly the Claimant's case that, the longer this went on, and particularly with the added ingredient of her in due course complaining of back pain, the more serious the situation got. The Tribunal, therefore, indeed had to decide, in light of those found facts, whether at any point during that period things had reached the point where the Respondent was now in fundamental breach of this implied term. Ms Smeaton argued that, on a fair reading, it had considered that question and answered it in the negative. I do not agree. My reasons follow.

53. First, at [31], the Tribunal found that there was a breach of obligation by the Respondent to provide training, but it did not there refer to any particular point in time or stage of matters. Rather, it described there the overall picture up to, and as at, the date when the Claimant resigned. Then, at [32], the Tribunal referred to the need to decide whether such breach was a fundamental breach. But this language again does not suggest that it was considering there, the possibility of whether at a certain stage or point over the months from September 2017 it *became* a fundamental breach; and, if so, when. Nor did any examination of that particular question follow this passage

in the Tribunal's decision. Rather, the Tribunal immediately moved on to refer to the need to look at the response from the Respondent "before the Claimant resigned", and what the Respondent did and the effect on the contract as a whole.

54. At [33] the Tribunal referred to one aspect of the Respondent's conduct at an earlier stage in the chronology, upon which it relied, being the sessions with the occupational therapists and physiotherapists. But at [34] it then referred again to considering what the Respondent had done "by the time the Claimant came to resign or reach the decision to resign whether that is 22 May or from June". Then, at [35], the Tribunal considered specifically what the Respondent did on 21 May, and the significance that it attached to that. At [36] and [37] it continued to refer to what was said or done on 21 and 22 May. Then, at [38], it referred to the measures that were in place "at the point that the Claimant resigned".

55. What is missing, therefore, is any consideration by the Tribunal, by going back over its earlier findings about how matters unfolded over the months, of whether the point of fundamental breach was reached at any stage in the period from September 2017 onwards, and prior to 21 May, taking account, stage by stage, of the context of what the Respondent did or did not do up to the given point. I do not agree with Ms Smeaton that this is an unfair or pedantic reading of the decision, or that it involves an incorrect inference that the Tribunal overlooked this issue. It is, in my judgment, a fair and natural reading of what the Tribunal positively said. Further, the omission to consider this aspect is not an omission of a minor point, but of a crucial part of what the Tribunal needed to consider in order to dispose of this claim fairly and properly.

56. The concluding words of [38], in terms, suggest that the Tribunal has simply looked at the overall picture as it stood at the date of resignation, including what it described there as the measures that had been put in place at that point – a clear reference to 21 and 22 May. It has not

gone back over its findings of fact to consider the specific question of whether the point of a fundamental breach was reached at any earlier stage in the chronology. This finding, at [38], as to how matters stood at the point of resignation, is the finding – and the only one – that there was no fundamental breach; and this then directly provides the basis for dismissing the claim at [39].

57. I therefore conclude that Ground 1 succeeds. The Tribunal erred because it failed to consider and determine whether there was a fundamental breach at any point in time prior to 21 and 22 May 2018. It was essential to do so, in order for the Tribunal to properly and fairly adjudicate this claim, given the way that it was advanced, and in light of its findings of fact. So, it follows that, for this reason alone, this appeal must be allowed. Given that it was all fully argued, I will, however, say something also about the remaining Grounds.

58. As to Ground 2, as I have said, it would not have been wrong, as such, for the Tribunal to look at all the relevant actions of the Respondent up to any given point, in deciding whether there was a fundamental breach of the health and safety implied term up to, or as at, that given point. But the staged approach required it only to take account of what the Respondent had relevantly done at each stage up to the point in question. This Ground, however, makes a different criticism, being that the Tribunal cast its net too wide, by taking account of displays of intention and attitude, such as would have legitimately formed part of the consideration of breach of the implied trust and confidence term, but not of the health and safety term. Mr Ohringer relied, in particular, on what the Tribunal said at [32], when it referred to looking at the effect of the breach on the employment contract as a whole, and whether it went to the root of the contract or indicated that the Respondent was no longer indicating a willingness to be bound by a fundamental term.

59. The Tribunal was here in potentially dangerous territory, because, on one reading, it might be said that this expression of what the Tribunal had to do is too widely generalised for the context

of the health and safety term. However, no hard findings were made in this paragraph, and the Tribunal was clearly referring, I think, in the final words, to the time-honoured formulation of what it means for a breach to be fundamental. However, Mr Ohringer submitted that the error was demonstrated, in particular, by what the Tribunal said in the later paragraphs. In particular, at [36] and [37] it cast its net wider than it should have in the context of this implied term, by looking at statements of intention and future plans, rather than looking at whether there were concrete actions that affected the harm, or risk of harm, to the Claimant's health and safety.

60. I am just persuaded by Ms Smeaton's careful submissions that the Tribunal probably did not fall into that particular error here. Reading [35] to [38], the Tribunal appears to have taken on board a distinction between what was done in terms of immediate action upon the Claimant's return and what was stated as to future plans. In particular it found that the Claimant was told with immediate effect that she would no longer be required to work with AB; and that taking her off those duties in that class was the short-term way of giving effect to that, and moving her to a different class in the next school year was the long-term way of giving effect to that. The Tribunal has, it seems to me, drawn a distinction between that and the promise of future training. I am persuaded that the Tribunal did observe that distinction.

61. It might, yet, be said that this was not a complete answer to the question of whether the Claimant would be unduly exposed to risk, pending the eventual receipt of training, because of her responsibilities more generally, as opposed to specifically in relation to AB. But that is not something I have to decide. If the compass of this claim had solely been confined to this narrow time window, and if the sole Ground of appeal had been Ground 2, I am not sure, therefore, that I would have upheld it. But, in any event, this point cannot assist the Respondent, because the Claimant has succeeded on Ground 1.

62. As to Ground 3, the second part of the last sentence of [36] does rather look like a reference, at least in part, to the **Buckland** principle, although the Tribunal would have done better to set out a fuller express summary of the law, including that principle, in its decision, or perhaps to have reproduced in an annex the extract from counsel's submission to which it referred. Nevertheless, I note that the principle was specifically cited in Mr Ohringer's submission to which the Tribunal referred by incorporation; and this part of this sentence appears to echo its language.

63. The reference, in the first part of the sentence, to the moment of resignation, does sit somewhat uneasily with this, but I do not go so far as to say that this signifies that the Tribunal wrongly thought, contrary to the **Buckland** principle, that once a fundamental breach has occurred it could be repaired by action taken after the breach but prior to the resignation. I am inclined to think that this was a rather inelegant attempt by the Tribunal to allude to what might be called the **Assamoi** distinction. Be that as it may, as I have already said, what this language *does* point to here, as well as in other parts of this section of the decision, is the Ground 1 error of failing to consider whether there has been a fundamental breach, at any point over the history, stage by stage, taking account only of the Respondent's relevant conduct up to the given point.

64. Given that my conclusion in relation to Ground 1 means that this appeal must be allowed, the Ground 4 perversity question, as such, falls away. But in its place, I now have to consider whether the matter must be remitted, or whether I should substitute a decision upholding the claim that the Claimant was constructively dismissed. I can only take the latter course if all the necessary facts have already been found by the Tribunal, and either: (a) more than one outcome is still possible, but the parties consent to me re-taking the decision on the basis of those facts; or (b) I conclude that, applying the law correctly to those facts, only one outcome is possible.

65. In the course of argument earlier this morning, Ms Smeaton indicated that, were I to uphold the appeal, as I now have done, the Respondent would not consent to route (a) and she would be inviting me to remit. Mr Ohringer, however, submitted that there is only one outcome that could properly be reached, applying the law to the facts found by the Tribunal. What they both agreed about is that the overall outcome does turn in this case on whether the Claimant was *constructively* dismissed, because Ms Smeaton confirmed that the Respondent did not, at the end of the day, maintain before the Tribunal that, if this was a constructive dismissal, it was nevertheless fair. She accepted that, in this case, a finding of constructive dismissal would lead to one of unfair dismissal. But before I decide whether I should remit and, if so, on what basis, I will allow counsel the opportunity to make some further submissions to me about that now.

Disposal

66. I have now heard further argument as to whether, in light of the decision I have given allowing this appeal, this is a case where I can and should substitute my decision for that of the Employment Tribunal, or whether I must remit the matter to the Tribunal, and, if so, whether to the same or a differently-constituted Tribunal. I have been reminded of the guidance in **Jafri v Lincoln College** [2014] ICR 920 and **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935 on the first point and, of course, of the **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 principles on the second point.

67. I have come to the conclusion that this is a case where I can and should take a robust approach and I do not need to remit to the Employment Tribunal. That is because, applying the law correctly to the facts as found by this Tribunal, only one conclusion is possible. That is, that, prior to what happened on 21 and 22 May 2018, the point had comfortably been passed by which the Respondent was in fundamental breach of contract. That was also a breach which was not

affirmed, and in response to which the Claimant resigned. Therefore, I should substitute a finding that this was a constructive dismissal; and it has been conceded that, in this case, it follows also that this was an unfair dismissal.

68. I have kept very firmly in mind, and it was one reason why I wanted to give counsel the opportunity to make further submissions to me about this, the limited role of the EAT, and the need to approach with due restraint what is said in **Jafri** at [47] and in **Micheldever** at [20] about there being cases in which the EAT can and should take a robust view. This is, however, such a case. I say that for the following reasons, all of them rooted in the findings of fact made by this Employment Tribunal.

69. Firstly, it really is very striking that this Employment Tribunal found that this situation, of the Claimant being required to carry out the duties in question, without receiving the proper training, obtained over a period, not of days, or weeks, but of months, starting in September 2017 all the way through until April and then into May the following year. Secondly, again a striking feature of the found facts is that it was identified early on by the Claimant herself, and the therapists who, it appears, visited in around October 2017, that there was a need for such training, and this was repeatedly raised. I do not have the precise dates from the Tribunal's decision but it is apparent from its findings that it was raised by her pretty much once a month.

70. Thirdly, again it is a striking feature of the findings of fact, that the Claimant began to experience back trouble before Christmas, and specifically raised this with the Respondent in January and then again in February, and in April. So she made them aware of that, and yet the training was still not provided.

71. Putting all of that together, it seems to me that Mr Ohringer is right that, realistically, no Tribunal, taking those findings of fact and properly putting to one side what happened later on in May, could have come to the conclusion that, as late as early May, this breach of the health and safety duty had still not crossed the line of being fundamental. Any Tribunal, properly directing itself, would surely come to the conclusion that the situation got steadily more serious week by week, month by month, and particularly in the new year once the Claimant was reporting back problems and then, indeed, was signed off for three weeks with back problems by her GP in early May. I have concluded that any Tribunal realistically would have to find that, by the time she was signed off, if not sooner, the line had been crossed and the breach was now fundamental.

72. Another reason why I invited further submissions from counsel before coming to a decision on this point is because it crossed my mind that there might be an issue as to whether my conclusion on the substantive appeal, might have some knock-on implication for the question of affirmation, as the Tribunal had found that there was no affirmation, but only on the basis of its deficient analysis, which did not take the stage by stage approach that, in upholding Ground 1, I have indicated was required.

73. However, once again I believe this is a case where I can take a robust view that, properly directing itself as to the law on the facts that have already been found by this Employment Tribunal, affirmation could not properly be found to have occurred in this case. That is in view, in particular, of the Tribunal's findings that the Claimant, persistently and repeatedly throughout the entire period, complained that she was not getting the training and still being required to carry out the duties. That is a contradiction of affirmation.

74. The best that could be argued for the Respondent was that she nevertheless did not resign sooner than she did. But this Tribunal found that, over this period, the Claimant complained, was

given assurances, the assurances were then not fulfilled, and she then complained again. Further, it found that, as the situation worsened, she escalated her complaints in March 2018. Any Tribunal would, in light of those findings, be bound to conclude that this was not a case of an employee who had decided to live with the situation, but of an employee who had, hitherto, soldiered on for a time, because she had hoped that the promised action would occur; but instead the breach was prolonged and exacerbated. I have therefore come to the conclusion that, realistically, on the facts found, the Tribunal could not infer or find that affirmation had occurred.

75. In summary, the Tribunal made a clear finding as to what the reason for the resignation was, and that the breach materially influenced the decision to resign. It could only properly have concluded, in light of its findings of fact, that that breach had, over time, grown worse and become a fundamental breach, at the latest by the time the Claimant was signed off in early May 2018, and it could only properly have concluded that that breach was not affirmed at any point before the Claimant resigned. I therefore conclude that, on a correct application of the law to the facts found, the only proper conclusion is that the Claimant was constructively dismissed. It is accepted that, accordingly, in this case, the claim of unfair dismissal must succeed. I will therefore substitute a finding that the Claimant was unfairly dismissed.