Neutral Citation Number: [2022] EAT 43

Case No: EA-2020-001012-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 September 2021

Before :

GAVIN MANSFIELD QC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR JOHN CRAIG	**Appellant**
- and -	
ABELLIO LIMITED	**Respondent**

- -
- -

Ms R Vince (Free Representation Unit) for the **Appellant**
Mr A Lord (instructed by Backhouse Jones Solicitors) for the **Respondent**

Hearing date: 10 September 2021

- -

JUDGMENT

SUMMARY

CONTRACT OF EMPLOYMENT, UNFAIR DISMISSAL

The Employment Tribunal had dismissed the Claimant's claim for constructive dismissal because it found that the Respondent had not acted in repudiatory breach of contract. The Claimant alleged that he had experienced a series of problems with his hours and pay and that when he was on sickness absence the Respondent paid the incorrect level of sick pay and failed to address his complaints. The Respondent initially rejected the Claimant's grievance about his sick pay, but the decision was reversed on appeal. The conclusion of the appeal was that the Respondent would pay over £6,000 in back pay by a specified date. It failed to make the payment by the promised date and the Claimant resigned claiming that this was "the last straw" in a pattern of treatment of him. The Employment Tribunal found that the Respondent had redressed the Claimant's pay dispute in the grievance appeal outcome and that the failure to pay by the promised date was simply a mistake. It held that the delay in payment was not a repudiatory breach itself; nor did it amount to a last straw in a history of events that together amounted to a repudiatory breach.

Held, allowing the appeal: The Employment Tribunal failed to direct itself as to the legal principles applicable to a "last straw" constructive dismissal and failed to engage with the Claimant's factual case on "last straw". It regarded the history of payment problems and complaints simply as something that had been remedied by the grievance. The Tribunal failed to make findings on a number of complaints raised by the Claimant, and where it did make factual findings it failed to explain how the facts fitted into its very brief conclusion on the "last straw" case. The claim of constructive unfair dismissal would be remitted to be reheard by a new Employment Tribunal.

GAVIN MANSFIELD QC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This is an appeal from the Employment Tribunal sitting at London South, Employment Judge Fowell (sitting alone). A one-day hearing, reduced from an original listing of two days, was heard on 26 October 2020.The decision subject of this appeal was a reserved decision sent to the parties on 6 November 2020. The Tribunal dismissed a claim of constructive unfair dismissal brought by the claimant and he appeals to the EAT. There were various other claims in the proceedings below which are not subject of appeal and I have no need to address them.

2. The appellant was the claimant below and I will refer in this judgment to the parties as they were below: as claimant and respondent. The claimant appeared in person in the Employment Tribunal and today he has had the very considerable benefit of representation by Ms Vince on behalf of the Free Representation Unit. Before going further, I would like to record my thanks to Ms Vince for the assistance that she has given to the appellant; and indeed my thanks to FRU for the great assistance that it gives to those otherwise unable to obtain representation. The respondent is represented today as below by Mr Lord of counsel, and I am grateful to him for his assistance to the EAT today.

The Claim

3. The claimant was a bus driver working for the respondent's Battersea Depot from July 2014. For reasons that I will come to later in this judgment, he resigned on 20 July 2019, having been off work sick for a number of months. When he resigned he complained of constructive dismissal. His resignation letter is dated 20 July 2019. I note from that letter that he describes himself as being "left with no choice but to resign in light of my recent experiences regarding my sick pay dispute which subsequently has become a fundamental breach of contract." He

complains about the outcome of the recently concluded grievance procedure. The result was that he was due a payment of £6,114 on 19 July; but the sum was not paid. He says as a result, this has created a breach of trust and confidence between himself and the respondent. He goes on to say this:

> "This has produced a last straw doctrine, Abellio has subjected me to unfair treatment and acted in breach of contract on numerous occasions previously, and although I waived your breach in the past, I am no longer willing or able to endure this consistent pattern of emotional abuse and calculated deceit."

4. In his claim form, drafted by himself, the claimant sets out in short but some detail at boxes 8.2 and 15, the history of matters about which he complains. He starts box 8.2 by saying:

> "I resigned on 20.07.19 citing loss of trust & confidence in the Company following a long history of unlawful deductions from my wages (specifically sick pay & holiday pay) which, unreasonably, I had to fight through various grievance processes. …"

5. He then sets out reference, first, to various promises that were made of payments which he did not receive. Second, he refers to a demand from the company that he repay an overpayment of £2,000 which was subsequently found to have been incorrectly demanded. He refers to harassment over a sustained period and to a grievance that was not upheld. He says that:

> "… The Company admitted that it had made some unlawful deductions to my pay & after I was forced to hand in my resignation, agreed to repay some of those deductions. …"

6. He then sets out three periods of sickness absence which he says were a direct result of what he considered to be mismanagement and poor treatment from the company. He says:

> "… On a number of occasions I enquired why I was paid sickness & holiday pay as if he [sic] was a part-time worker, despite that I was doing full-time hours (42 hours per week) albeit over a truncated 4 day period. …"

7. There is no doubt that it was live in the claim form and in front of the tribunal that the claimant was complaining of a history, going back to 2018, of mismanagement: of incorrect payment of sums to him, and of mismanagement of the complaints that he raised about those

matters. Those were the matters that came before the employment judge at the hearing on 26 October.

8. As I have already indicated, the case had been listed for a two day hearing but, due to tribunal resources, that was truncated to a one day hearing. The employment judge heard all the evidence and the submissions on the day of the hearing and reserved judgment.

The tribunal's decision

9. The employment judge set out his factual findings in relation to the case at paragraphs 11 to 28. I do not propose to deal with those in detail, but I will highlight some points that the judge found which are pertinent to the appeal. From paragraph 11 onwards, the employment judge sets out the history of the claimant's working hours, of changing in working hours and the fact that from 2017 onwards he was effectively working full time, albeit over four days each week. Subsequent changes in hours led to a significant downturn in the amount of pay that the claimant was receiving, a fact that Ms Vince drew my attention to in the documents in the supplementary bundle this morning.

10. The employment tribunal, having recorded briefly that issue, says this about it at paragraph 13:

> "… The incident is only relevant in that it showed the confusion on the part of the company about what hours Mr Craig was supposed to be working."

11. That confusion, perhaps more properly described as error on the part of the respondent, as to the hours that the claimant was working and the pay that he was entitled to was at the heart of the matters about which he complained. Essentially he complained of a litany of errors in relation to those matters over a period of time.

12. The tribunal then goes on to find the periods of absence that the claimant had from March 2016 onwards that brought into focus, as the employment judge puts it, the appropriate level of sick pay. The employment judge then goes on to summarise the difference between the parties in relation to sick pay. As I understand it, and summarising it briefly, there were three issues between the parties that led the respondent into what in due course were found to be errors about the amount of sick pay. First, the claimant was working a four day extended hours shift pattern, so that he was working more than eight hours per day; the respondent appears to have had a practice of paying sick pay on the basis of an eight hour day, not recognising the actual hours that the claimant was working. Second, there appears to have been some error in whether the claimant was treated as working three days or four days. Third, whether or not the leave year started from 1 April each year or was what was called a rolling leave year, also had a significant impact on the amount paid. I do not need to address those factual findings in any more detail now.

13. Those being differences between the parties in relation to the payment of sick pay, the tribunal goes on to make some findings in relation to the differences in approach to sick pay and the grievance that was raised including the subsequent grievance appeal.

14. The grievance appeal is dealt with at paragraph 25 of the reasons. The employment judge records that the appeal officer found in favour of the claimant, overturning the decision below, whereas the decision of the original grievance had been that on a proper calculation of sick pay the claimant owed the respondent over £2,000. On the appeal, that decision was reversed and in fact it was found that the respondent owed the claimant £6,144.. I should note part of Ms Vince's submissions is that this sum in itself was incorrectly calculated and an under payment.

15. The outcome of the appeal was that a sum (£6,144) was payable to the claimant and that

it would be paid in the next payroll - on 19 July. However, that payment was not made on 19 July, as the tribunal records at paragraph 26. The tribunal found that this was due to a decision taken within the payroll department of the respondent to query the matter; that led to the payment being, as the employment judge puts it, "spiked" on that day. Having not received payment on 19 July, the claimant resigned on the 20th in terms to which I have already referred in this judgment. The resignation letter is referred to at paragraph 27 of the reasons. Those were the findings of fact.

16. The tribunal then turned to its conclusions and the section dealing with the constructive dismissal claim runs for some four paragraphs (around about a page) from paragraph 29 to paragraph 33. The Tribunal directs itself as to section 95 of the **Employment Rights Act 1996** and as to what it describes as the leading case of **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 CA quoting the well-known passage from the judgment of Lord Denning MR in relation to the requirements for constructive dismissal.

17. The employment judge then comes to the key paragraphs of the judgment, paragraphs 31 to 33, in which he sets out his conclusions in relation to the questions of constructive dismissal. Those are the key focus of this appeal. I will need to return to some passages in those paragraphs in due course in considering the grounds of appeal, but for the moment I say this in summarising them. First, the employment tribunal asked itself the question of whether or not, in failing to pay the arrears of sick pay on 19 July, Abellio was guilty of conduct which went to the root of the contract or showed it no longer intended to abide by the essential terms of the contract. It finds, as the employment judge puts it without much further elaboration, it did not. Essentially, he found that through the grievance process the employer was trying to operate the contractual mechanism for dealing with complaints. It had found in his favour; and the failure to pay on time was simply a mistake. He goes on to say that at the time of his resignation, the claimant had a

letter from the director specifying the sum due to him and had a payslip which had been made out in his favour. He says this:

> "31. … Realistically, there cannot have been any doubt that the money would be paid, even if there was a last-minute hitch of some sort."

18. I should note at this stage that it was recorded in the judge's factual findings that shortly after 20 July the money was in fact paid.

19. At paragraph 32 the employment judge finds that the question was whether or not, judged objectively, the company was indicating to the claimant that it was no longer prepared to stick to the contract and he says it "does not appear to me a remotely fair reading of the situation". So essentially, in those two paragraphs (31 and 32), the judge finds that the failure to pay arrears of pay on 19 July did not amount to a fundamental breach of contract so as to ground a claim for constructive dismissal.

20. Paragraph 33 is really the paragraph which is at the heart of the appeal, and I am going to read it in full for the purpose of this judgment:

> "Mr Craig attempted to broaden his argument, so that he was not simply relying on the lateness of the payment but on more general complaints about his treatment, arguing that his resignation letter did not set out all the reasons for his resignation; but that does not change the fundamental position. His resignation letter made clear that it was not this single failure that he relied on – this was just the last straw – but on the history of the way he had been treated. But that history is essentially the history of his sickness absences and the grievance process, which again found in his favour. No real mention was made at this hearing about the other grievance about the manager at iBus, and as already noted that process was still not complete at the time of his resignation. So whether focussing on the late payment as a breach in itself or as the final straw, the outcome is the same. However regarded, the company was not guilty of any fundamental breach of contract towards him, and the complaint of constructive dismissal must be dismissed."

Grounds of Appeal

21. It is against that decision that the claimant now appeals, and I turn to the grounds of appeal. The notice of appeal was drafted by the claimant himself, but in her skeleton argument

Ms Vince puts his grounds of appeal as turning on three points essentially. They are at paragraph 1 of the skeleton, 1.1 through to 1.3. First, an incorrect application of the last straw doctrine by a failure on the part of the tribunal to consider the full course of conduct. Second, an application of an incorrect test for a repudiatory breach. It is alleged that the tribunal fell into error in considering the subjective intention of the respondents rather than the objective effect of their conduct. Third, an incorrect assumption that the use of grievance procedures to resolve a contractual dispute prevented there from being a fundamental breach.

22. The notice of appeal also on the face of it, at paragraph 3, appears to appeal against the tribunal's findings in relation to unlawful deduction from wages and failure to provide an itemised pay statement, but there is no reference to that either in the grounds nor in Ms Vince's skeleton. At the beginning of this hearing, she clarified on instruction from the claimant that those matters are not pursued. So, the only appeal relates to the points in relation to constructive dismissal.

Legal principles

23. The legal principles relating to constructive dismissal are well established, although it is fair to say they are often easier to state than to apply in practice. Further, the principles of constructive dismissal are not materially in dispute between the parties, although there are some points that I will need to address as I go through the grounds. Rather than this case turning on the application of the principles in **Western Excavating v Sharp** itself, the relevant legal principle raised by the grounds of appeal is the application of the so called "last straw" doctrine, which is dealt with by the Court of Appeal in its decision in **Omilaju v Waltham Forest London Borough Council** [2005] ICR 481. I will read from the judgment of Dyson LJ in paragraphs 14 to 16:

> "14. The following basic propositions of law can be derived from the authorities:
>
> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment …

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 …

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract … The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Mahmud* at page 610H, the conduct relied on as constituting the breach must

> 'impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in *Harvey on Industrial Relations and Employment Law*:

> 'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.'"

"15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> '(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? … This is the "last straw" situation.'

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application."

25. The next case of relevance relied on by the parties is the case of **Kaur v Leeds Teaching**

Hospitals NHS Trust [2019] ICR 1, a decision of the Court of Appeal. The leading judgment was given by Underhill LJ. The relevant passages for today's purposes are at paragraphs 41 to 46 in which Underhill LJ refers to the case of **Omilaju.** For current purposes, I need only refer to paragraphs 45 and 46 of Underhill LJ's judgment::

> "45. … even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the 'last straw' label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. …
>
> 46. Fourthly, the 'last straw' image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in *Omilaju*, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)."

26. I note in this case there are potentially two different types of breach in issue. A breach of the implied term of trust and confidence, and second a breach of an express term in relation to the payment of sick pay. It is worth bearing in mind when considering the claim for constructive dismissal that different types of breach of contract may arise.

27. The claimant also referred me to the decision of the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908, a decision of the Court of Appeal. At paragraph 28 Sedley LJ said this:

> "It is nevertheless arguable, I would accept, that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement. Take the simplest and commonest of fundamental

> breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part."

28. The claimant relies upon that passage in support of two propositions:(1) the obligation to pay wages is a fundamental part of a contract of employment, and if that term is breached by a failure to pay what is due, reasonableness is not a consideration as to whether there is a breach of contract or not. (2) A general proposition that this aspect of employment law is a matter of the general law of contract to which normal rules apply. I accept that.

29. Certain other authorities have been cited to me during the course of arguments, some of which I will return to when I deal with the grounds of appeal.

Grounds of appeal

30. The first point is the failure to apply the last straw doctrine. The claimant's submissions, both in the skeleton argument and orally this morning, can be summarised broadly as follows. The employment tribunal failed to engage with the allegations of persistent and substantial failures on the part of the respondent. The employment tribunal's reasons, whilst they make findings in relation to some aspects of the history, either do not address the gravamen of the claimant's complaints, or do not address the complaints in the claim form at all. The employment tribunal deals with those facts only as background, the relevance of which was that it shows confusion on the part of the company.

31. The claimant points out that on his case those background matters amount to considerably more than confusion, given, for example, that the change in his working hours led to a drop in income for him of a little less than £10,000 per annum. It is a fundamental part of the contract, submits the claimant, that an employee should be paid what they are entitled to for the work that

they have done. A failure to pay not only has financial consequences but can be extremely stressful for an employee who is naturally dependent on their employment for pay. It was stressful for the claimant in this case: he had time off for a stress related absence on a number of occasions as the result of the difficulties in relation to his working hours and pay. The claimant says that the employment tribunal needed to engage with the whole of the factual narrative to make findings and consider the cumulative effect of incidents rather than just looking at the final event.

32. The respondent's submission broadly across all three grounds, but dealing first with this one, is that the employment tribunal reached a conclusion that it was entitled to reach. It properly considered whether the claimant's complaints, judged individually or cumulatively, were breaches of the implied term of trust and confidence. The respondent submits that the job of the employment tribunal was not to comb through the documents to consider whether or not there were matters that might amount to a breach or might have contributed to a last straw cumulative breach, but to determine the case in the way that it was put by the claimant. The respondent says the sick pay policy was unclear and there was a genuine dispute as to its interpretation. Although the respondent's interpretation was in due course found to be incorrect, it was seeking to apply the terms of the contract, not to breach them.

33. In relation to the last straw doctrine, the respondent's submission is that when one looks at paragraph 33 two points arise. First, although the tribunal did not cite the relevant legal principles that I have referred to, it must have had them in mind from the structure of its decision. Second, when one ties back paragraph 33 to the factual findings, the employment tribunal reached a conclusion on the basis of its factual findings that it was entitled to reach.

34. The respondent characterises the earlier events as simply a genuine dispute about the terms of the sick pay which was in due course resolved in the claimant's favour at the grievance

appeal. The claimant's case, however, was that there were a litany of errors going back to 2018. In my judgment, this is a case not just about a difference of interpretation, a genuine disagreement about the effect of the policy. The complaint was considerably wider than that. The complaint was about repeated failures in relation to payment and about failures in how the dispute was handled. That is how it is explained in the claimant's skeleton before the appeal. More significantly, that is the way in which the claim was put in the claim form.

35. The question is whether the tribunal properly directed itself as to the principles and applied the principles to the facts? In my judgment, it did not. I make the following points. First, there is no reference to the legal principles relating to the last straw doctrine. Although the employment judge refers to the expression "the last straw" at paragraph 33, I cannot be confident that he had in mind the relevant legal principles from **Omilaju** and **Kaur** in particular. Nor can I be confident that he applied them. Despite Mr Lord's best efforts, I am not persuaded that it is apparent that he must have had the right principles in mind from the way in which he expressed his reasons.

36. Second, although the tribunal did, at paragraphs 11 to 28, make findings of fact the whole of the conclusion on the last straw point is contained in paragraph 33. With respect to Mr Lord, paragraph 33 will not bear the weight he places on it: as showing both that the tribunal identified and applied the correct legal principles and reached conclusions on the factual findings in an appropriate way. Paragraph 33 of the employment tribunal's reasons, in my judgment, appears to miss or mischaracterise the gravamen of the claimant's case and the effect of the findings that had earlier been made.

37. The claimant's case was of a litany of errors in relation to his pay and hours and the failure to engage with him when he raised complaints and queries. He relied on a failure to communicate;

on promises of payment of money that was then not paid. All of these earlier complaints are of a kind with one way of looking at the events of 19 July: i.e. the claimant had been told that he was going to be paid a certain sum by a certain date and that did not happen. The claimant may well have been entitled to form the view that he was being mistreated again by the respondent. In my judgment the tribunal ought to have considered whether or not the events of 19 July, seen objectively by someone in the claimant's shoes, form part of a pattern of mistreatment.

38. The employment judge in paragraph 33 did make a finding about the history of the matter, as Mr Lord points me to. He says this:

> "… His resignation letter made clear that it was not this single failure [19 July failure] that he relied on – this was just the last straw – but on the history of the way he had been treated. …"

Then the employment judge says this:

> "… But that history is essentially the history of his sickness absences and the grievance process, which again found in his favour. …"

39. He goes on to say:

> "… whether focussing on the late payment as a breach in itself or as the final straw, the outcome is the same. …"

40. So the effect of the employment tribunal's reasoning at paragraph 33 is that, having found that 19 July was not a repudiatory breach itself, a consideration the history made no difference to that outcome. With respect to the learned employment judge, I find that extremely difficult to understand. The employment judge does not appear to have either understood or had regard to the fact that the claimant's complaint, as I have just characterised it a few moments ago, was that 19 July was another incident in a long history of deficiencies in the way he had been treated by the respondent. Were that right, and the employment judge did not make detailed factual findings in relation to that, it is difficult to see how an employment tribunal could have reached the conclusion that the history of the matter made no difference to how the events of 19 July were

seen. Certainly, the employment judge does not explain it in paragraph 33. In my judgment, this is not just a reasons failure, the inadequacy of the reasoning in paragraph 33 suggests, as Ms Vince argues, that there was a wholesale failure to engage with the last straw doctrine - its principles and their application to the facts.

41. There are two types of failure. First, to the extent that the employment tribunal made findings of fact which showed that there was poor treatment of the claimant, there is a failure to explain or consider why those were not material to the last straw doctrine. Second, a number of aspects of the claim advanced in the claim form as to the persistency of errors and failure in the handling of complaints were simply not addressed. It is clear from the claim form that there are a number of matters that were not addressed by the tribunal that, in my judgment, ought properly to have been.

42. Seen in the light of the history as the claimant advanced it in the claim, it is quite possible that the 19 July delay in payment was, or could have been, the last straw. The claimant was not aware of the circumstances that meant that the failure of payment on the 19th was simply an administrative mistake. He would know that he was not paid a sum which should have been paid some time before. In paragraph 32, the employment judge addresses this in part. He records that the claimant had a letter from a director saying he was due a payment and a payslip. However, he does not make a clear finding that, objectively assessed, a reasonable person in the claimant's shoes would have known that it was simply a mistake or that he would be paid shortly thereafter. In any event, while knowledge that it was a mistake not to make a payment on 19 July, may (and I emphasise "may") be enough for a finding that the failure on the 19th was not a breach in itself, it would still be necessary to consider whether that failure on the 19th could constitute a last straw in the light of all of the earlier circumstances. As is clear from the passage of Underhill LJ in the judgment in **Kaur**, it is not necessary for the last straw itself to be a breach or a particularly

weighty matter.

43. The claimant's position is that he had been receiving no pay for some considerable period of time and was found to be owed a large sum by way of back pay. He was told that it was going to be paid. It then was not paid. Significantly in my judgment, no explanation was given or warning that it was not being paid at the specified time. That could form part of the last straw; but the employment tribunal did not assess it in that context.

44. The next point that I address is that the respondent argues that the employment tribunal was entitled to reach the conclusion it did because this was a case of genuine disagreement as to the interpretation of the sickness absence policy. The respondent argues that, although it was wrong in the application of that policy, it was a genuine dispute as to contractual terms that was resolved through the grievance. Once the grievance was resolved, there was an agreement to pay. That leads the respondent to the submission that there is nothing in that behaviour that damaged the implied term of trust and confidence or evinced an intention not to be bound by the contract. Indeed the contrary, it sought to operate the contract.

45. There are two points in relation to that, the first of which, in my judgment, is sufficient to determine the point in the claimant's favour. The first point is this. The characterisation of the facts is wrong. It is not simply the case that there was a disagreement as to the interpretation of the terms. As I have indicated, the claimant's case was of a long history of various errors and mishandling of his complaints. It may well be, and I do not need to determine this for today's purposes, that a genuine disagreement of terms may be treated in one way. This is well beyond that on the facts.

46. The second point is this. I accept in principle that a genuine dispute, and a willingness to

resolve a dispute through a grievance, may be relevant to the assessment of whether an employer's behaviour amounts to a breach of trust and confidence. However, there is a separate question as to whether there is a failure to comply with an express term as to payment. The failure to pay that which, on a proper construction of the contract, is due is a breach of the contract regardless of whether the contract breaker behaved reasonably in doing so.

47. There was considerable debate about this during hearing and I was taken to a number of cases. Given that I have already identified as error of law in the tribunal's approach, I do not need to deal with this in any detail. I certainly do not intend to deal with in a way that will be seen to be making findings of general principles outside the scope of this case. There are three cases to which I was taken on this point. The first is **Brigden v Lancashire County Council** [1987] IRLR 58 CA, the leading judgment given by Sir John Donaldson, MR. In paragraph 16, Sir John Donaldson says this:

> "… The mere fact that a party to a contract takes a view of its construction which is ultimately shown to be wrong, does not of itself constitute repudiatory conduct. It has to be shown that he did not intend to be bound by the contract as properly construed. There is no finding by the industrial tribunal that this was the case here. Furthermore, it is reasonably clear on the facts found by the industrial tribunal that Mrs Brigden never did resign or leave because of the contract. …"

48. As I remarked in argument, on the facts of that case, the outcome turned on a different point. The claimant had alleged that there was a breach of contract in relation to the interpretation of some collective terms which entitled her to a pay rise. The employment tribunal held (and the Court of Appeal subsequently upheld) that she was wrong and that, on a proper construction of the terms, she was not entitled in the way that she claimed. Therefore there had been no breach of contract. I paraphrase the decision broadly, but the essence of the decision is that this was a case where the claimant had failed to establish, as a matter of construction, the term on which she wanted to rely. So the question of a genuine misunderstanding of the effect of the terms on the respondent's part did not seem to arise. Nonetheless, it is dicta of longstanding from the

Master of the Rolls.

49. There are two cases to which I was taken which deal with related points. The first is a slightly earlier case (**Financial Techniques (Planning Services) Ltd v Hughes** [1981] IRLR 32). In that case Templeman LJ (as he then was) says this at paragraphs 26 and 27:

> "26. I agree that the appeal should be allowed. On the true construction of the contract, £3200 was payable by the employers on 30 September, representing bonus for the period April till June. The employers genuinely thought they had a discretion to withhold part or the whole of that sum, if sufficient work was not done by Mr Hughes during the period July to September. The net result was there was no actual breach until the contract was ended, because the contract was ending and due to end on 30 September. It is important to observe that the employers made no threat to deprive Mr Hughes either of his salary or any bonus which he might earn during the period between July and September, so that the only conflict was whether Mr Hughes was entitled as of right to the payment of 30 September of the whole of the sum of £3200. By genuinely arguing that he was not so entitled and reserving the right to reduce that sum the employers to my mind did not commit an anticipatory breach which went to the root of the contract.
> 27. I desire to guard myself against the implication which might otherwise be read and which I think has been argued, that if any party to a contract has a plausible but mistaken view of his rights under that contract he may insist on that view, and his insistence cannot amount to repudiation. For example, supposing that there had been a dispute between the employer and employee as to whether the employee was entitled to £50 per week or to £50 plus a bonus of £25 per week, payable either weekly or at the end of the year, it seems to me that if the employer mistakenly insisted that he was only liable to pay £50 per week the employee would be entitled to regard that as a fundamental breach enabling him to treat the contract as at an end. He cannot be expected to work and accept less than his entitlement until litigation justified his view of the contract."

50. That passage subsequently cited with approval in the more recent case of **Roberts Governing Body of Whitecross School** UKEAT/0070/12, a decision of Slade J on 19 June 2012. At paragraph 17 she quotes those paragraphs from Templeman LJ and goes on to say this:

> "Whilst adopting a view of a contractual obligation without more is unlikely to be an actual and/or anticipatory fundamental breach of contract, to act on that belief is likely to constitute such a breach. It will not avail a defendant in civil litigation facing a claim of fundamental breach of contract to show that he believed his view of the contract was right. …"

51. In my view, the position outlined by Templeman LJ at paragraph 27 and referred to by Slade J in her judgment, is more apposite to this case. The respondent may have been genuinely

trying to resolve an interpretation of the contract, but nonetheless in the meantime not paying what in due course turned out to be due would appear to be a breach of contract. The non-payment may be one of the factors relevant to the last straw doctrine as well.

52. This is no place for any general statement as to the circumstances when a dispute about terms may or may not give rise to a fundamental breach. For reasons already stated, I have found that the employment judge erred and I intend to allow the appeal, so it is not necessary to develop this point any further as a matter of general principle.

53. Further, an important point, there is nothing in the reasons to suggest that the employment judge considered this point or considered the fact that the respondent was in a separate breach of contract by failing to pay, which it then compounded by its failure to comply with its own deadline to make good the back pay.

54. In the light of my findings on the failure to deal with the last straw doctrine, I can deal with the other points raised by Ms Vince considerably more briefly.

55. The second limb of her argument is that the employment tribunal erred in the application of the principles by considering that the respondent's mental intention or purpose was decisive as to whether they were in repudiatory breach; instead it was necessary to consider the respondent's conduct objectively. There is no doubt as a matter of legal principles that a tribunal would err if it had regarded the subjective intentions of a party to the contract as being decisive. There is no dispute between the parties that the test is an objective one. However, I am not at all persuaded that the employment tribunal did make this error. The citation from **Western Excavating v Sharp** at paragraph 30 was an appropriate one and at paragraph 32 the employment judge expressly directed himself that the question was whether, judged objectively, the company

was indicating to him it was no longer prepared to stick to the contract. I have indicated already that the tribunal erred in its failure to engage with the last straw doctrine and with the factual case advanced by the claimant. I am not satisfied that the judge erred by applying a subjective test to the matters that it did consider.

56. The final ground advanced by Ms Vince is that the employment tribunal incorrectly concluded that as the grievance procedure deciding largely in the claimant's favour there had not been a fundamental breach of contract by the respondent. The claimant submits that the tribunal had so held, but that the use of a grievance procedure does not negate a breach which has already occurred. Where there has been a breach, the respondent's subsequent actions cannot cure a breach; it is a matter for the claimant's option whether or not to affirm the contract. There can be a repudiatory breach even if there is a genuine dispute as to the contract.

57. The respondent accepts that an employer cannot cure an earlier breach as a matter of legal principle but submits that that is not what the employment tribunal held. The employment tribunal, the respondent submits, did not find that the grievance procedure acted to cure a repudiatory breach. At paragraph 32, the employment tribunal is dealing with 19 July and holds that the 19 July failure of payment is not in itself a breach. The grievance shows, the respondent submits, that the respondent was dealing with the complaints and operating the contract in the way that it should be.

58. I do not propose to deal with this point in any detail because I am not persuaded that the point advances matters in this particular case. The central point is that the employment tribunal had failed to address the claimant's case as to earlier breaches, either taken on their own terms or cumulatively, so the tribunal was not addressing the question of whether or not the grievance cured an earlier breach because it had made no finding of an earlier breach. That indeed is part

of the tribunal's failing.

Conclusion and Disposal

59. In conclusion, I allow the appeal on the basis of the tribunal's error of law, in my judgment, in failing to engage with the legal principles of the last straw doctrine to make appropriate factual findings and apply those principles to the facts.

60. That leads me to the question of disposal. I am not at all persuaded that this is a case where there is only one possible outcome and that the Employment Appeal Tribunal can take the decision as to that outcome itself. The core of the appeal, as I have indicated, is a failure of the tribunal to engage with the factual allegations and issues. Those need to be engaged with and need to be engaged with by the tribunal, so the case will have to be remitted to be reheard in the tribunal.

61. That leaves the question of whether or not I should remit to the same tribunal or to a separately constituted tribunal. Although neither party has directed me to it, I have considered the relevant principles on remission to the same or different tribunal in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The claimant's submission is that the case should be remitted to a newly constituted tribunal. In the course of his oral submissions, the respondent said were the matter to be remitted, it should be remitted to a new tribunal; although when I queried that point it seems Mr Lord's position is that the respondent does not have a firm view one way or the other whether it goes to the same or to a new tribunal.

62. In my judgment, given that the parties are not in disagreement about this and given, perhaps significantly, the fundamental nature of the failure identified, it would be appropriate to remit this to a newly constituted tribunal. I have no doubt that the employment judge would do

his best to reconsider and rehear the matter in the light of this judgment but given the fundamental restart that is needed in determining the constructive dismissal element of this case, it would be more appropriate to remit to a newly constituted tribunal.