Neutral Citation Number: [2023] EAT 137

Case No: EA-2022-000630-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 November 2023

Before:

HIS HONOUR JUDGE JAMES TAYLER
MR NICK AZIZ
MR STEVEN TORRANCE

- -

Between:

Ms Sandra Brooks	**Appellant**
- and -	
Brooks v Leisure Employment Services Ltd.	**Respondent**

- -
- -

Billal Malik (instructed through direct access) for the **Appellant**
James Boyd (instructed through direct access) for the **Respondent**

Hearing date: 9 August 2023

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The Employment Tribunal did not err in law in holding that the respondent was in breach of the implied term of mutual trust and confidence but did err in law in holding that the claimant had affirmed her contract of employment before resigning. The matter was remitted to the same employment tribunal to determine whether the claimant had affirmed her contract of employment before resigning.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. The claimant brought complaints of disability discrimination and unfair constructive dismissal. The claims were heard on 8 and 9 December 2021. The claims failed. The judgment was sent to the parties on 13 May 2022. The claimant does not challenge the dismissal of the claim of disability discrimination. The appeal and cross-appeal are limited to the unfair dismissal claim.

Outline facts

2. We take the outline facts from the reasons of the Employment Tribunal. The respondent operates the Butlin's holiday resorts. The claimant worked for the respondent from 1 January 1990. At the relevant time she worked as a Resort Holiday Sales Advisor at a call centre. Her most recent contract of employment was dated 11 July 2007. The claimant worked flexibly on an "annualised hours working scheme". Her contract provided for remuneration by way of a "flex fund" of £5,816.23 per annum. Most of the claimant's remuneration was commission. Payment was made monthly on the 15th day of the month; two weeks in advance and two weeks in arrears, by BACS transfer. The claimant's normal working hours were 30 per week. Her average monthly gross pay was £1,600.

3. The respondent accepted that the claimant was disabled by reason of having asthma. The claimant was asked to stay at home from early in the Coronavirus pandemic in March 2020. On 18 March 2020, the respondent closed its resorts. A national lockdown was announced on 23 March 2020. The claimant was informed that she should remain off work on full pay.

4. On 24 March 2020, Ms Turnbull, the Team Leader for the Conferencing and Events Team, was instructed to put together a list of 20 people who could work from home to deal with customer issues. The respondent wanted its best and most skilled staff on the new home-working team. Ms Turnbull contacted the claimant because she was considered to be an excellent candidate and had the necessary technology to work from home. A WhatsApp group was formed for those who were going to join the home-working team. The claimant was a member of the group.

5. The claimant was understandably concerned about what she would be paid as a member of the home-working team because her salary had previously been predominantly made up of commission and there would be no sales as the respondent's resorts were closed. The claimant raised her concerns by email and chased when she did not receive a response. The Employment Tribunal concluded that Ms Turnbull did not respond to the claimant because the respondent's management had no answers to her questions. Instead, the claimant was removed from the WhatsApp group without explanation. Subsequently, the claimant was told that she had been removed from the WhatsApp group because there were more candidates than could be recruited. That was not true.

6. The claimant submitted a grievance on 15 April 2020, alleging discrimination and breach of the implied term of mutual trust and confidence. The claimant requested documentation and raised concerns about her "financial security". The claimant asserted that the respondent had "discriminated against her and undermined her position and credibility within the business as a method of forcing her out of the company". Mr Hutton, the resort operations manager was asked to investigate the grievance. Issues arose about whether a grievance meeting could take place in person and the provision of documentation requested by the claimant. Mr Hutton suggested that the grievance would be completed by a senior officer on the papers.

7. During email discussions about documentation on 5 May 2020 the claimant wrote "I reserve all of my rights". This comment was not referred to in the judgment of the Employment Tribunal.

8. On 25 June 2020, the claimant resigned by email with immediate effect asserting a breach of the relationship of trust and confidence.

9. The claimant's grievance was dismissed on 10 August 2020.

The pleaded case

10. The claimant asserted breach of the implied term of mutual trust and confidence. In the Particulars of Claim attached to the ET1 the claimant pleaded the background to the alleged breach of her contract of employment:

> 10. On 24 March 2020, G sent Ms Turnbull a message on WA. The message was to the effect that G wanted clarification about what her level of remuneration would be during the time that she was expected to work from home. Later, on 24 March 2020, Ms Turnbull removed G from the WA group. G was not given any prior notice or explanation whatsoever for this removal. Later, on the same day, Ms Turnbull called G. G missed the call but did not return it because she felt humiliated and demoralised about having been publicly excluded from the WA group, particularly against the background of having previously been told that she would be deemed to be on long term sick leave. On 31 March 2020, there was a WA exchange between G and Ms Turnbull. In that exchange, G complained about her removal from the WA group and sought written clarification.

11. The breach of the implied term of mutual contract was pleaded as follows:

> 14. C contends that, in removing her from the WA working group on 24 March 2020 R "without reasonable or proper cause, conduct[ed] [itself] in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee" per *Woods v WM Car Services (Peterborough) Ltd* [1983] IRLR 413. R could not 'cure' this act by offering subsequently to reinstate C to the WA group (see *Buckland v Bournemouth University* [201 OJ EWCA Civ 121). On 11 May 2020, following receipt of R's interim response to her grievance, C elected to treat R's behaviour of 24 March 2020 as a repudiatory breach of contract. C was therefore constructively dismissed on that date.

12. The pleaded case was that the removal of the claimant from the WhatsApp group on 24 March 2020 constituted the breach of contract, in circumstances in which she was removed from the WhatsApp group without explanation after having raised legitimate concerns about her remuneration if she joined the homeworking group.

13. Rather oddly, even though the claimant resigned by an email dated 25 June 2020, and did not communicate any acceptance of the asserted breach of contract before sending that email, it was asserted that she was constructively dismissed on 11 May 2020. That was given as the date of the termination of her employment on the ET1. We shall return to this later in our analysis of the appeal.

14. The respondent pleaded in the Grounds of Resistance attached to the ET3:

> 31 It is denied that the Claimant's resignation amounted to a dismissal within the meaning of s.95 of the Employment Rights Act 1996.
>
> 32 It is denied that the Respondent was in breach of the Claimant's contract

> of employment as alleged or at all. The decision to remove the Claimant from the WhatsApp group was entirely reasonable in circumstances where the Claimant was not going to be required to work from home and the function of the group was to provide a means of communication for those employees who would be working from home.
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> 33 If, which is denied, the Tribunal finds that there was such a breach, the Respondent contends that the breach was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated with immediate effect.
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> 34 If, which is denied, the Tribunal finds that there was a repudiatory breach, the Respondent contends that the Claimant by her conduct **waived such breach** and was not entitled to terminate the contract without notice.
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> 35 In any event, the Respondent contends that the Claimant's resignation was not in response to the alleged breach. [emphasis added]

The issues identified by the Employment Tribunal

15. The issues relevant to this appeal were identified by the Employment Tribunal:

> 2. Constructive unfair dismissal
>
> 2.1 The claimant claims that the respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breach was as follows;
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> 2.1.1 Removing the claimant from the respondent's WhatsApp Group on 24 March 2020.
>
> 2.2 The Tribunal will need to decide:
>
> 2.2.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
>
> 2.2.2 Whether it had reasonable and proper cause for doing so.
>
> 2.3 Did the claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.
>
> 2.4 **Did the claimant delay before resigning and affirm the contract**? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
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> 2.5 If there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act? [emphasis added]

The decision of the Employment Tribunal

16. The Employment Tribunal concluded that the respondent had breached the implied term of mutual trust and confidence:

> 5.63. The question is whether she resigned because of a fundamental breach of contract
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> 5.64. She did not resign because of a breach of contract related to the change in terms and conditions or the uncertainty about pay.
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> 5.65. She decided that the role had come to an end on 24 March. That is her evidence.
>
> 5.66. The reason she gave for that was her belief that she had been removed because of her disability. I have not found that to be true or a reasonable or well-founded belief. There simply is no foundation for it. It is inconsistent with contacting her to invite her to apply for the group and including her in it in the first place, as with offering her later opportunities to join.
>
> 5.67. Her further reason was the way that it was done, without explanation or consultation.
>
> 5.68. I accept that is in itself in the context of the loss of earnings, and great uncertainty, a fundamental breach. That is the relevant breach: the withdrawal without notice or consultation of a valuable opportunity to keep on working.

17. The Employment Tribunal went on to summarise the breach of contract, but concluded that claimant had affirmed her contract before she resigned:

> 5.72. So on 25 June, she resigned, having decided that the job came to an end on 24 March, and that the grievance procedure was not worth relying on by 11 May.
>
> 5.73. Her resignation was on 25 June. She had continued to be paid while at home. It is true that she was paid without having to work, but that arose from the unique circumstances of lockdown. At some point, she had to elect between termination and continuing with the contract and in my judgment, that time had certainly come by two to three months after the incident relied on, throughout which by her conduct and evidence, she knew she intended not to return.
>
> 5.74. In my judgment, **the reason for her resignation was her removal from the WhatsApp group and home working team in March 2020; the breach of contract was the manner in which it happened**. **S**he had however affirmed the breach by continuing to accept payment without resigning for three months. [emphasis added]

Outline of the appeal and cross-appeal

18. In the cross-appeal it is asserted that based on the pleaded case no breach of contract could properly have been found to have occurred. In the appeal it is asserted that the Employment Tribunal erred in law in finding that the claimant had affirmed her contract of employment before resigning. We consider it is logical to start with the cross-appeal

The cross appeal

19. There is one ground of cross-appeal:

> The Judge's conclusion that the Respondent acted in repudiatory breach of the Appellant's contract of employment at paragraph 5.51 of the Reasons was perverse and it ran contrary to other findings within the Reasons and the Appellant's evidence.
>
> The Respondent relies upon the finding at paragraph 5.53 of the Reasons. In doing so, it emphasises the primacy of the Appellant's pleaded case. As the Judge correctly notes in that paragraph "**the pleaded claim is not a breach of contract related to pay, uncertainty about pay or a change in terms and conditions. It is about being removed from the WhatsApp group**" (The Respondent's emphasis).
>
> Equally, paragraph 5.53 notes that "she was not removed [from the WhatsApp group] for asking about pay, but for asking a question that they [the Respondent] could not answer, so that they could not be sure of her commitment". However, the other findings at paragraphs 5.48 to 5.51 of the Reasons appear to be inconsistent with that later clear finding.
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> For the avoidance of doubt, it was not the Appellant's case that being removed from the home working team amounted to the repudiatory breach – that was something the Judge concluded separately (see paragraphs 5.74 and 5.9) and contrary to the primary evidence/pleadings before the Tribunal.
>
> The Respondent contends that the Appellant being removed from the WhatsApp group alone, in the wider contextual circumstances found by the Judge, could not amount to a repudiatory breach of contract, and no Judge could have reasonably concluded that it was.

The Law relevant to the cross-appeal

20. The respondent relies on the decision of Langstaff J in **Chandhok and another v Tirkey (Equality and Human Rights Commission intervening)** [2015] I.C.R. 527 as establishing the importance of the pleaded case:

> 17. I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

21. We consider that at heart the ground of appeal asserted is one of perversity. It hardly need be stated again that the threshold for establishing perversity is set high; Mummery LJ in **Crofton v Yeboah** [2002] I.R.L.R. 634 at paragraph 92:

> Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable

> tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care': *British Telecommunications plc v Sheridan* [1990] IRLR 27 at paragraph 34.

Conclusion on the cross appeal

22. We have concluded that the Employment Tribunal did carefully consider the pleaded case. EJ Street clearly understood that the asserted breach was the claimant's removal from the WhatsApp group on 24 March 2020, but considered that the removal from the WhatsApp group had to be set in the context of this being done after the claimant had raised genuine and serious concerns about her remuneration if she joined the homeworking team and she was removed from the WhatsApp group without any consultation or explanation. EJ Street was entitled to take this context into account in deciding whether the breach was established. We do not consider that she erred in law in her analysis of the claimant's pleaded case. The determination that, seen in context, the treatment afforded to the claimant breached the implied term of mutual trust and confidence was open to the Employment Tribunal. We do not consider that the respondent has surpassed the high threshold of establishing perversity.

The appeal

23. The appeal challenges the conclusion that the claimant affirmed her contract of employment before resigning.

The law on affirmation of contract

24. Affirmation and waiver are subtly different concepts that are often treated as if they were coextensive. As the Editors of Harvey put it:

> [522.01] Before going on to consider these points in detail, one matter of terminology might be mentioned. Although it is common to speak of waiver of the breach by the employee, in pure contract law all that is necessary in order to lose the ability to claim constructive dismissal is that the employee has affirmed the contract in some way. At common law there is a significant difference between the two concepts—if the employee only affirms the contract, they retain the right to sue the employer for damages for the breach of contract; if they go further and actually waive the breach, then that right to damages is lost (on which basis presumably a court would need strong

> evidence to show such an actual waiver). While that distinction could be vital in a common law action for damages, it is suggested that it is of little consequence in this statutory context of constructive dismissal because either affirmation or waiver will negate this statutory right.

25. In the ET3 the respondent asserted that the claimant had waived the breach, although the matter was analysed as an assertion of affirmation in the issues identified by the Employment Tribunal and the judgment.

26. Two interrelated issues often arise when considering whether an employee has affirmed their contract of employment before resigning; the extent to which delay in resigning may establish affirmation and whether using contractual grievance or appeal procedures after an asserted breach results in affirmation. The issue of delay was considered in **W E Cox Toner (International) Ltd v Crook** [1981] ICR 823:

> It is accepted by both sides, and we think rightly, that the general principles of the law of contract apply to this case, subject to such modifications as are appropriate to take account of the factors which distinguish contracts of employment from other contracts. Although we were not referred to cases outside the field of employment law, our own researches have led us to the view that the general principles applicable to a repudiation of contract are as follows. If one party ("the guilty party") commits a repudiatory breach of the contract, the other party ("the innocent party") can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. **But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation**: *Allen v. Robles* [1969] 1 W.L.R. 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. **However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to**

> **accept the repudiation**: *Farnworth Finance Facilities Ltd. v. Attryde* [1970] 1 W.L.R. 1053 .
>
> It is against this background that one has to read the short summary of the law given by Lord Denning M.R. in the Western Excavating case [1978] I.C.R. 221 . The passage, at p. 226: "Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged." is not, and was not intended to be, a comprehensive statement of the whole law. As it seems to us, Lord Denning M.R. was referring to an obvious difference between a contract of employment and most other contracts. An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will himself be doing an act which, in one sense, is only consistent with the continued existence of the contract, i.e. he might be said to be affirming the contract. Certainly, when he accepts his next pay packet (i.e., further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great: see *Saunders v. Paladin Coachworks Ltd*. (1967) 3 I.T.R. 51. Therefore, if the ordinary principles of contract law were to apply to a contract of employment, delay might be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties. It is not the delay which may be fatal but what happens during the period of the delay: see *Bashir v. Brillo Manufacturing Co*. [1979] I.R.L.R. 295.
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> Although we were not referred to the case, we think the remarks of Lord Denning M.R. in the Western Excavating case are a reflection of the earlier decision of the Court of Appeal in *Marriott v. Oxford and District Co-operative Society Ltd*. (No. 2) [1970] 1 Q.B. 186. In that case, the employer repudiated the contract by seeking to change the status of the employee and to reduce his wages. The employee protested at this conduct but continued to work and receive payment at the reduced rate of pay for a further month, during which he was looking for other employment. The Court of Appeal (of which Lord Denning M.R. was a member) held that he had not thereby lost his right to claim that he was dismissed. In the Western Excavating case Lord Denning M.R. explains, at p. 227, that the case would now be treated as one of constructive dismissal. **This decision to our mind establishes that, provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time**, even if his purpose is merely to enable him to find another job. [emphasis added]

27. **W E Cox Toner** has repeatedly been referred to with approval, see for example **Henry v London General Transport Services Ltd** [2002] IRLR 472.

28. In the commercial context it was put this way in **Yukong Line Ltd of Korea v Rendsberg**

Investments Corp of Liberia [1996] 2 Lloyd's Rep. 604, 608

> … the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation.

29. The Editors of Harvey have considered an apparent conflict in the authorities as to whether the use of contractual procedures results in affirmation:

> [523.01] Even where there is a breach, the employee may choose to give the employer the opportunity to remedy it. The employee will not then be prejudiced if they delay resigning until the employer's response is known. This occurred in *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443, [1981] ICR 823 (which was referred to in *Mari (Colmar) v Reuters Ltd* UKEAT/0539/13 (30 January 2015, unreported) as the case that 'has been for thirty years, and remains, the leading case on the doctrine of affirmation'). Relations between the employee and his fellow directors became strained and at the end of July 1980 he was censured by them for taking leave without previously advising them. Subsequently he demanded through his solicitors that the censure letter should be withdrawn. He was informed on 6 February 1981 that his fellow directors would not withdraw it. He then left four weeks later on 3 March. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract. However, the tribunal accepted, without finally deciding the point, that he was not necessarily affirming the contract up to the point when the directors refused to withdraw the letter. His conduct until then was an attempt to remedy the grievance in accordance with the contract. It follows that the employee will not by his conduct be treated as having affirmed the contract where the employer has indicated that he is prepared to give the employee time to decide whether he wishes to leave or not (see *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308 at 315, CA).
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> [523.02] The above paragraph concerned an opportunity to remedy generally, but a more important question in practice then arises, where the employee is faced with repudiatory behaviour but would prefer that it was remedied and they retained their job, rather than walking straight out and claiming constructive dismissal – if they use the employer's own internal procedures (grievance or disciplinary), do they affirm the contract and lose the right of action? From a strictly logical point of view, it can be argued that this shows a desire to continue in the employment, not to leave and sue, so that affirmation would be the logical result. However, from a policy point of view (to preserve the employee's rights at a particularly difficult time for them) this would be harsh and undesirable – why should the employee not try first to resolve the issue internally, while keeping open the protection of constructive

dismissal if that procedure does not resolve the conflict? On a wider scale of policy, the law generally tries to encourage the use of procedures in so many ways that too ready a finding of affirmation through their use could be seen as inimical here too. From this point of view, it is to be hoped that the judgment of Lord Summers in the EAT in *Gordon v J & D Pierce (Contracts) Ltd* [2021] IRLR 266 will be taken as resolving the issue (hitherto subject to differing judicial opinions) in favour of the use of internal procedures not normally constituting affirmation.

[523.03] In Gordon, the claimant in a case of constructive dismissal alleged breaches of the T & C term by the ex-employer, but failed to establish these sufficiently before either the ET or the EAT and so the claim overall failed. However, the legal interest in the case is that the ET gave as a second ground that even if there had been the necessary breaches, the claimant would have failed, because he had first used the employer's grievance procedure to challenge them and had therefore affirmed the contract. The EAT allowed the appeal on this point. The reasoning was complicated by contradictory dicta in three then recent cases, which tended to address different issues (though raising the question of affirmation indirectly). In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, [2018] IRLR 833, [2019] ICR 1 (concerning the 'last straw' doctrine in constructive dismissal, see paras [481.01], [541]), Underhill LJ said at [63]:

> "… exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as an unequivocal affirmation of the contract."

That seemed straightforward enough, but in the subsequent case of equal authority of *Patel v Folkestone Nursing Home Ltd* [2018] EWCA Civ 1689, [2018] IRLR 924, [2019] ICR 273 (concerning the effect of successfully using an internal disciplinary appeal procedure in the case of a dismissal by the employer) Sales LJ said:

> "… if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not."

This was then used to like effect by Soole J in *Phoenix Academy Trust v Kilroy* UKEAT/0264/19 (8 February 2020, unreported) (again concerning the last straw doctrine, see para [541.01]).

> [523.04] Considering this conflict, the EAT declined to resolve it by trying to distinguish the cases; instead the bull was taken by the horns, the inconsistency acknowledged and, on grounds of policy and pragmatism, a direct choice made in favour of Underhill LJ's opinion in Kaur. At [23] and [24] the judge states:
>
> > "It appears to me that where an employee intimates that he considers the contract has come to an end, he is not to be taken to affirm that the contract has come to an end for all purposes. In particular I do not consider that the parties can be presumed to intend that a clause designed to procure the resolution of differences should be regarded as being evacuated because one party asserts that the implied obligation of trust and confidence has been breached.
> >
> > Although pragmatic considerations are not always a sure guide, it would be unsatisfactory if an employee was unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure."
>
> As suggested above, it is to be hoped that this settles the matter in favour of no affirmation simply by the use of procedures in a constructive dismissal claim. If that is so, the result seems to be that *Kaur* is right on this point, *Phoenix Academy* is wrong on this point and Patel in fact concerns a different and separate point altogether, namely that in a case of ordinary dismissal, if the employee freely decides to maintain an internal appeal, they are deemed to accept its outcome, especially if it is successful (so that they cannot then pick and choose as to whether to still leave and sue), see para [375] ff.

30. We agree that **Kaur** is authority for the proposition that the exercise of a contractual grievance or appeal procedure in an attempt to give an employer an opportunity to resolve the issues that give rise to the breach of contract is not likely to be treated as an unequivocal affirmation of the contract. Use of a contractual grievance procedure will generally be no more than “continuing to work and draw pay for a limited period of time” as referred to in **W E Cox Toner** while giving the employer an opportunity to put matters right, so generally will not amount to affirmation. We also agree with the Editors of Harvey that **Patel** is not a case about affirmation of contract but about the consequences of succeeding in an appeal, and so is not in conflict with **Kaur**.

The date of dismissal

31. The claimant pleaded in the particulars attached to her ET1 "[o]n 11 May 2020, following receipt of R's interim response to her grievance, C elected to treat R's behaviour of 24 March 2020 as a repudiatory breach of contract". At section 5 of the ET1 form the claimant gave 11 May 2020 as the date of the termination of her employment. In the first paragraph of the findings of fact the ET stated "3.1. The claimant has been employed by the respondent from 1/01/90 to 11/05/20, most recently as Resort Holiday Sales Advisor." The claimant contends that the Employment Tribunal therefore made a finding of fact that the claimant resigned on 11 May 2020. We consider it is entirely clear when reading the full findings of fact that the Employment Tribunal found that the claimant did not resign until 25 June 2020. It is clear that the reference to 11 May 2020 at paragraph 3.1 is a slip, probably from reading across the dates of employment set out in section 5 of the ET1. Even if the claimant did decide to accept the respondent's repudiatory breach of contract on 11 May 2020, she did nothing to communicate that acceptance to the respondent. We reject the assertion in the grounds of appeal that the claimant's employment terminated on 11 May 2023.

Affirmation

32. The Employment Tribunal dealt with affirmation briefly in terms that bear repeating here:

> 5.73. Her resignation was on 25 June. She had continued to be paid while at home. It is true that she was paid without having to work, but that arose from the unique circumstances of lockdown. **At some point, she had to elect between termination and continuing with the contract and in my judgment, that time had certainly come by two to three months after the incident relied on**, throughout which by her conduct and evidence, she knew she intended not to return.
>
> 5.74. In my judgment, the reason for her resignation was her removal from the WhatsApp group and home working team in March 2020; the breach of contract was the manner in which it happened. **She had however affirmed the breach by continuing to accept payment without resigning for three months**. [emphasis added]

33. The Employment Tribunal did not consider the fact that the claimant had written on 5 May 2020, in an email exchange about the provision of documentation in the grievance, that "I reserve all

of my rights". The parties were not able to state categorically whether this point was specifically raised with the Employment Tribunal.

34. More significantly, the Employment Tribunal focussed entirely on receipt of payment during a period of delay between the breach and resignation. We put to one side the rather pedantic point that the Employment Tribunal stated that the time had come by two to three months after the breach when the claimant should make up her mind, which suggests that, as the claimant resigned three months after the breach, she did make up her mind within the timeframe the Employment Tribunal considered appropriate. We consider that the key point in the appeal is that the Employment Tribunal did not take into account the fact that the claimant had raised a grievance that had not been completed at the date of her resignation. We consider that it was vital that the Employment Tribunal take this matter into account when considering affirmation.

35. Mr Malik submitted that if we reached this conclusion that the consequence should be remission to the Employment Tribunal to consider this issue. Accordingly, we allow the appeal and remit the case for rehearing on the affirmation issue to the same Employment Tribunal. The Employment Tribunal made findings that have been upheld, it is proportionate to remit to the same Employment Tribunal to minimise further expense and we can rely on the professionalism of the Employment Tribunal to consider the matter afresh.

36. The Employment Tribunal will have to consider on remission the effect, if any, of the claimant seeking to reserve her rights in her email of 5 May 2020. The Employment Tribunal will also have to expressly consider whether the claimant can be taken to have affirmed her contract in circumstances where she remained in employment in receipt of salary for a period in which she was progressing a grievance. The respondent will have to set out clearly what it is asserted demonstrated affirmation that went beyond mere delay in resigning.