Neutral Citation Number: [2025] EAT 100

Case No: EA-2024-SCO-000060-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 9 July 2025

Before :

THE HONOURABLE LADY HALDANE

- -

Between :

MR JAMES MARSHALL **Appellant**

- and –

MCPHERSON LIMITED **Respondent**

- -
- -

Mr Laurence Cunningham (instructed by DJP Solicitors)**,** for the **Appellant**
Mr Kenneth McGuire (instructed by Thorntons Law LLP), for the **Respondent**

Hearing date: 19 June 2025

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JUDGMENT

SUMMARY

Unfair Dismissal; Proper approach to the question of the 'last straw' . Proper application of the principles in **Malik v BCCI SA 5** [1997] 3 All ER, **London Borough of Waltham Forrest v Omilaju** [2005] IRLR 35, and **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978; [2019] ICR 1

Did the ET, despite properly setting out the applicable legal principles fail to apply those to the facts it found established? Is its finding so far as the existence of a final straw unsound as a result?

Disposal; sufficient grounds to remit to a fresh tribunal or not. **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, EAT. **Jafri v Lincoln College** [2014] ICR 920, CA, **Dobie v Burns** [1984] IRLR 329 and **Willow Oak Developments v Silverwood** [2006] IRLR 607 considered.

The Honourable Lady Haldane:

Introduction

1. The claimant is Mr James Marshall. The respondent is McPherson Limited. The claimant brought a claim for constructive unfair dismissal in terms of § 95(1)(c) of the **Employment Rights Act 1996** ('**ERA**') against the respondent. By its Judgment dated 25th June 2024 the Employment Tribunal ('ET') dismissed that claim.

2. The claimant appealed that decision. There were four grounds of appeal, firstly that the ET had misdirected itself in its application of the law on constructive dismissal; secondly, and flowing from the first ground, that the ET had erred in holding that the respondent was not in repudiatory breach of contract and thus erred in dismissing the claim (a perversity challenge); thirdly that the ET had taken into account irrelevant matters and left out of account relevant matters (also a perversity challenge); and fourth that the ET had erred in failing to give adequate reasons (in other words that the judgment was not '**Meek**' complaint).

3. The matter came before a Judge for consideration under Rule 3(7). The Judge considered that grounds 1-3 were all arguable. The sift decision is silent in relation to the fourth ground. At the hearing parties were content to proceed on the basis that grounds 1-3 only had been given permission to proceed, and no arguments were advanced in support of the fourth ground.

Background

4. Although there was criticism made of the findings of the ET so far as pertinent to the grounds of appeal, there was no challenge to the broader findings in fact and so I draw upon those to provide context for the arguments advanced.

5. The respondent company is a large haulage company based in Aberlour. Much of their work is with local whisky distillers in Speyside. One of their tasks was to remove draff (spent grain) from the distilleries following the distilling process. This draff has traditionally been used as cattle feed

and more recently it has been turned into biomethane in bio plants such as the plant at Grissan Riverside in Dufftown at which the claimant was contracted to work.

6. The claimant is an experienced HGV driver. He has worked for the respondent company for 3 separate periods of time. He joined them as an HGV driver and since 5th May 2017 he worked under a Contract of Employment. He worked 48 hours per week. On average he would receive £850 gross per week with a normal take home pay of £640. 67.

7. The Grissan Riverside Mill was supplied with draff by the respondent's drivers who would take it from surrounding nearby distilleries and unload (tip) it. They assigned a driver to the plant during the day (John Strachan) and one overnight (the claimant). The driver's tasks were to take the draff from distilleries, take it to the plant and to tip it into the intake hopper of the plant. It had to be filled to allow draff to be continuously fed into the plant which ran on a 24-hour process. In addition other drivers would deliver trailers (boxes) full of the material for the plant driver on duty to tip in to the hopper. This occurred throughout the day and night. The drivers assigned to the plant were expected to unload the boxes delivered during their shift and have the empty boxes ready for use by other drivers.

8. When the claimant first began work at the plant there were 2 intakes each with their own hopper. It was possible to fill up one of the hoppers and then tend to other duties such as driving to a distillery to collect a load of draff or take a break as it would take approximately 20 minutes for the largest hopper to empty before needing refilled. The hopper operated 24 hours a day.

9. In about May 2023, the Mill introduced a single intake system to replace the old system. The capacity of the Mill doubled to 500 tons of draff per day. The new system took less time to deplete the hopper than under the old system. If the hopper became empty, the process would come to a halt. The Claimant felt under pressure. The pressure of work coupled with breakdowns and stoppages at the Mill caused a build-up of untipped draff. The claimant found it difficult to take breaks and complete his duties. He resorted to manipulating the tachograph in his lorry to make it seem as though he had, in fact, taken scheduled breaks. In any event he often had difficulty completing all of the

tipping expected of him because of pressure of work. The claimant told his line manager he was having difficulty taking breaks during his night shift but was told to do what he could and 'crack on'. The matter was not recorded as an issue for managers.

10. On the night of 6th and 7th November 2023 the claimant was working a night shift. The respondent instructed another driver to accompany the claimant during the shift, check if the draff was being tipped properly, and report back. The claimant was given no forewarning of this. He was annoyed. He was experienced and had done this work for many years without criticism of his abilities. At the end of that shift, the claimant had had enough. He decided he wanted to leave his position. Following communication with the respondent's Operations Manager, the claimant was asked to attend a meeting on 13th November 2023 to discuss matters.

11. On 9th November, the Claimant emailed Mr Cooper raising issues set out in the email and stating, among other things, that he felt unable to return to work until the issues raised in the email were addressed. On 10th November, Mr Cooper replied and invited the Claimant to a meeting. The Claimant met with Mr Cooper and Ms Braidwood (HR) on 13 November. Among the matters discussed were two incidents that had occurred in 2017 and the current difficulties working at the Mill, including difficulties taking breaks. After the meeting on 13th November, Mr Cooper emailed the Claimant. He stated that he had allocated the Claimant to a local driving role and asked him to report the following day.

12. On 14th November, the Claimant emailed Mr Cooper and stated, among other things, that he declined the transfer for the moment and that he felt that his complaints (both past and present) continued to be ignored. Mr Cooper responded stating, among other things, that as the Claimant was refusing the temporary move, he would remain unpaid. The Claimant responded and requested, among other things, details of the investigations that the Respondent was carrying out with regard to his concerns and absences. He also referred to a caustic exposure incident reported on 15th May 2017. He expressed his concern for his safety and wellbeing at his workplace.

13. The Claimant contacted ACAS on 29th November to commence early conciliation. Early

conciliation concluded on 29th November 2023. The Claimant began temporary work as an agency driver on 4th December 2023. The Claimant was still in that job at the date of the Tribunal hearing in June 2024.

14. Unbeknownst to the Claimant, following the last correspondence between him and Mr Cooper, the latter had instigated investigations into the 2017 incidents. The two managers mentioned by the Claimant had left the company. Mr Cooper checked the logs for the Claimant. No issue had been put on record by the Controllers in relation to the Claimant's concerns.

15. Mr Cooper met Mr Strachan, the day driver, and asked about difficulties taking breaks. Mr Strachan explained that he could get assistance from another driver who would tip the load for him. This allowed Mr Strachan time for a break. The night shift driver did not have that flexibility in getting other drivers to tip the loads. On 20th December 2023, the Claimant emailed Mr Cooper and resigned, saying that he considered this as constructive dismissal.

16. The incidents from 2017 referred to and relied upon by the claimant were, firstly, an unintentional exposure to caustic steam when the claimant was tipping pot ale at Glenlossie Distillery on 15th May 2017, and secondly a 'near miss' involving overhead power lines when the claimant was tipping at a property with which he was unfamiliar, during the hours of darkness. He reported the incident and pointed out the lack of risk assessment for this sort of activity but ultimately the respondent took the matter no further.

The relevant law

17. Section 95(1)(c) of the **Employment Rights Act 1996** ('**ERA**'), so far as pertinent to this matter, is in the following terms:

> "**Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . .. , only if) –
>
> (a) ……..

(b) ……..

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

Relevant case law

18. The authoritative interpretation of what is meant by dismissal in such circumstances predates the **ERA**, but nevertheless holds good. In **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27 Denning MR (as he then was) said at paragraph 15:

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

19. In such cases, the question of breach of the implied terms of trust and confidence may also arise. The most frequently cited authority on that question is **Malik v BCCI SA 5** [1997] 3 All ER. That case held that a contract of employment contains the implied term that the employer:

> "would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

20. How to approach that question in a practical sense was helpfully discussed in **Buckland v Bournemouth University** [2010] OJ EWCA Civ 121. The following principles were set out: -

> "(1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Mahmud (Malik) test should be applied.
>
> (2) If, applying the Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed.
>
> (3) It is open to the employer to show that such dismissal was for a potentially fair reason
>
> (4) If he does so, it will then be for the Employment Tribunal to decide whether dismissal for that reason, both substantively and procedurally (see Sainsbury v Hitt

[2003] IRLR 23), fell within the range of reasonable responses and was fair."

21. In establishing whether constructive dismissal has been established, the ET will require to consider what, if at all, constituted the 'last straw' leading to the employee's resignation. That analysis of course is very fact specific. Guidance as to the relevant considerations is to be found in **London Borough of Waltham Forrest v Omilaju** [2005] IRLR 35. Lord Justice Prophet stated: -

> "I see no need to characterise the final straw as ·unreasonable· or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence."

22. Finally, under this chapter, in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978; [2019] ICR 1 in considering a claim for constructive dismissal Underhill LJ, at paragraph 55, summarised the proper approach as a five-stage test in the following way:

> "55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) 8 breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

23. As to the role of an appellate tribunal, I bear in mind the following: under section 21 of the **Employment Tribunals Act 1996** an appeal to the Employment Appeal Tribunal lies only on a

question of law. Useful guidance as to the proper approach is found in the judgment of the Court of Appeal in **R (Iran) v SSHD** [2005] EWCA Civ 982 at [9], where examples of errors of law are given and include: i) making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters"); ii) failing to give reasons or any adequate reasons for findings on material matters; iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters; iv) giving weight to immaterial matters; and, v) making a material misdirection of law on any material matter.

24. I also bear in mind recent guidance from Eady J (then President of the EAT) in **Seyi Omooba v Michael Garrett Associates Ltd (T/A Global Artists)** and another [2024] EAT 30 where she summarised the proper approach thus:

> "118. In considering the reasoning of the ET, I remind myself of the guidance provided by Popplewell LJ in DPP Law Ltd v Greenberg [2021] EWCA Civ 672, [2021 IRLR 1016 at paragraphs 57-58, as follows (I summarise): (1) the decision is to be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical (an ET is not sitting an examination; see per Singh LJ paragraph 42 Sullivan v Bury Street Capital Ltd [2021] EWCA Civ 1694, [2021] IRLR 159); (2) the ET is not required to identify all the evidence relied on in reaching its conclusions of fact, nor express every step of its reasoning in any greater degree of detail than that necessary to be Meek-compliant (Meek v Birmingham City Council [1987] EWCA Civ 7, [1987] IRLR 250); (3) it should not be inferred that a failure to refer to evidence means that it did not exist, or was not taken into account: what is out of sight in the language of the decision is not to be presumed to be out of mind; (4) when an ET has correctly stated the legal principles, an appellate court should be slow to conclude that it has not applied those principles, and should generally only do so when it is clear from the language used that a different principle has been applied to the facts found – a presumption that ought to be all the stronger where the decision is that of an experienced, specialist tribunal, applying very familiar principles whose application forms a significant part of its day-to-day judicial workload".

Key findings of the ET

25. There was no suggestion that the ET had not identified and set out the key legal principles applicable to the questions before it for determination, as set out above. Rather, the alleged errors arose in how it purported to apply those legal principles to the facts it found established.

26. So far as the question of whether there had been any 'last straw' was concerned, the ET

analysed the various events that might be considered to be a 'last straw' and then self-directed as follows: -

> '55. As has been noted the breach of the 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, although each individual incident may not do so. In particular in such a case the last act 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 (see Woods v. WM Car Services (Peterborough) Ltd 1981 ICR 666. This being reference to the classic "last straw" situation).'

On the application of the law to the facts it found established the ET concluded

> '70. We accept that there is no need for there to be "proximity in time or nature" between a last straw and earlier repudiatory acts. The final straw need not be unreasonable or blameworthy conduct. If however it is not repudiatory in nature it will not revive earlier acts (Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1,CA). The employer's action in checking up on the claimant was not itself a repudiatory act. It was not capable of reviving the Allanbuie incident which occurred in 2017.
>
> 71. We considered an alternative which was that the delay in concluding the investigation could be regarded as a final straw. This is certainly the prompt for the claimant to lodge his letter of resignation. We concluded that despite the relatively long time it was taking to conclude the investigation that this was justified in the circumstances as the claimant wanted the 2017 incident re-examined. Had we held that this was the true final straw that too was unable to revive the earlier incident as it was not repudiatory in character.'

Submissions for the claimant– Ground 1

27. It is convenient to address each ground of appeal separately. Mr Cunningham began by addressing the principal ground of appeal, ground 1. The findings set out above were key to the first and indeed the second grounds of appeal. In particular, the conclusion in paragraph 70 that if a 'last straw' is 'not repudiatory in nature it will not revive earlier acts' was a misdirection and thus an error in law. Having thus misdirected itself, the ET proceeded to apply that misdirection to the facts it found established which led to the conclusion that '*The employer's action in checking up on the claimant was not itself a repudiatory act. It was not capable of reviving the Allanbuie incident which occurred in 2017.*'

28. Having misdirected itself in this way, the ET repeated the same error in paragraph 71 when it concluded that '*Had we held that this was the true final straw that too was unable to revive the earlier incident as it was not repudiatory in character*.' This was not a proper characterisation of the test and was found repeated twice at a crucial part of the ET's decision-making process. The proper approach had been set out earlier in the judgment of the ET at paragraph 55. It had then gone on partially to state the correct test, which it had completed erroneously and compounded matters by applying the erroneous statement of the law to the facts in paragraphs 70 and 71. This error was described by Mr Cunningham as 'fundamental.' The ET had correctly identified that the issue of any possible 'last straw' was central to the claimant's case but had misdirected itself when coming to its' conclusions on the point that the case was all about. A consideration of the key passages in **Omilaju** and **Kaur** confirmed that the ET had erred in this respect. There were no findings in fact or legal analysis to demonstrate that the ET had in mind the relevant tests set out in those authorities when reaching its decision.

29. As a consequence of that misdirection, the ET had failed to consider whether all of the incidents founded upon cumulatively constituted a fundamental breach of the implied term of trust and confidence as described in **Malik**. Nor had the ET made an express finding that the claimant had affirmed the contract, so that could not be taken to be part of its' reasoning.

Response for the respondent – Ground 1

30. Mr Maguire, for the respondent, invited me to conclude that the first ground of appeal had no merit. That said, he candidly accepted that the apparent reference in paragraphs 70 and 71 to the principles enunciated in **Kaur**, were a misstatement of the effect of that judgment. However his position was that notwithstanding those misstatements, there was no material error of law that would justify the decision overall not being upheld.

31. In essence, Mr Maguire submitted that the case turned to a large extent on the question of a 'last straw'; what was the last straw as advanced by the claimant, and whether or not that last straw

contributed in some way to the alleged repudiatory breach of the implied term of trust and confidence. It was significant, Mr Maguire contended, that the ET had concluded that there was no real 'last straw', although he accepted that **Omilaju** does make clear that one was looking at a series of events to consider their cumulative effect. Nevertheless Mr Maguire continued, if there was no 'last straw' then that was an end of the matter. If the scenario was one where there were a series of incidents, none of which in themselves are repudiatory, or perhaps some are, but the employee soldiers on, there still required to be a 'last straw' which contributes in some way to the breach.

32. Mr Maguire pointed to a number of passages in the Judgment that he submitted made it clear that the ET understood that the focus required to be on the actions of the employer, not those of the employee. There was for example a statement at paragraph 57, under reference to **Omilaju**, that made clear that the ET understood that a final straw did not have to be blameworthy but that it did have to be something that contributes to the breach of implied terms.

33. The ET's analysis of the incidents complained of by the claimant made clear that the ET had the correct approach in mind. Mr Maguire pointed to the analysis found between paragraphs 58 and 65 of the incidents in 2017 that had been spoken of by the claimant. The conclusion at paragraph 65 in relation to the 'Allanbuie' incident was '*We concluded that this was a blameworthy incident and one which could possibly alone or with others breach the implied duty of trust and confidence*.' He suggested that the ET did not require to state in terms that the claimant had affirmed any breach, but given that it recorded that the claimant had continued to work after the 2017 incidents and be paid his salary, there was no other reasonable conclusion to draw but that the ET considered the contract had been affirmed.

34. Against that background, whilst accepting that the language of paragraph 70 was 'clumsy', properly understood the ET could not have meant what it said because firstly it had made a correct statement of the law earlier and secondly because it said that the conduct need not be blameworthy. Mr Maguire accepted that the language in paragraph 70 was wrong but that all the ET were really saying was that there was no final straw. One way to test that proposition, submitted Mr Maguire,

was to test the approach of the ET against the 5-stage test in **Kaur**. If the act complained of was unobjectionable, that was an end to matters. Whilst accepting that the language used by the ET in the present case might have been clearer, it did not amount to an error of law because there was no materiality in the effect of what it had done. It had in found in paragraph 69 that what had been done by the respondent in checking up on the claimant was unobjectionable. If that were so then it could not be said to have contributed in any way to a breach of the implied terms of trust and confidence.

35. The same analysis submitted Mr Maguire could be applied to paragraph 71, with the same result – that the claimant had not identified a repudiatory breach of contract. No matter how the matter was analysed the ET was saying that there was no last straw that had contributed to a repudiatory breach of contract.

Analysis and Decision – Ground 1

36. As the authorities make clear, where an ET has correctly stated a legal principle, an appellate Tribunal should be slow to conclude that it has not applied that principle or principles, unless it is clear from the language used that it has indeed done otherwise. Here, as parties were agreed, the ET has engaged in an impeccable exercise in self –direction on the leading authorities on the question of repudiatory breach of contract. It has, in particular, set out in terms the relevant passages from **Omilaju** and **Kaur** that, cumulatively, enunciate the proper approach to the question of the 'last straw' in particular. However, it is also clear in paragraphs 70 and 71, from the language used, that the ET has, at a key stage in its decision making, employed language suggestive of the application of a different legal test to the one it has set out earlier in its Judgment. Mr Maguire properly concedes as much.

37. As Mr Maguire also rightly says however, the question becomes whether that erroneous language is material or not, when the decision is viewed properly and as a whole. I have concluded that the approach of the ET in paragraphs 70 and 71 in particular does go beyond a *de minimis* 'clumsy' use of language, and goes instead to the heart of the decision, provoking a permissible

conclusion that the ET has misdirected itself on the proper approach. Evidence for that conclusion comes not only from the express language used, which is contrary to the approach set out in **Omilaju**, but also from the lack of actual or inferential application of the 5-stage approach desiderated in **Kaur**. In particular, I have in mind the fourth and fifth stages which state that, having considered whether or not the act complained of was a repudiatory breach of contract, the ET should then consider:

> '(4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?'

38. Whilst it might be argued that the ET can be seen, explicitly or impliedly, to have gone through the first three **Kaur** stages, it cannot be said with confidence that the rest of the exercise has been completed. Indeed, concluding that the ET has expressly or impliedly considered the question of whether or not the claimant did anything to affirm the contract, cannot be assumed with confidence. However, more significantly, since the decision on the question of there being no final straw meant that the ET did not look at the question as a cumulative one, this error is properly described as a fundamental one.

39. It follows that, although not a conclusion that should lightly be drawn, and despite the earlier impeccable self-direction on the law, the ET has fallen into error in its application of the law to the facts it found established. That error further undermines confidence in the factual conclusions underpinning the decision on this question, that is to say: to what extent has the legal error in the approach to the question of the 'final straw' affected the conclusion that there was none in the present case? As **Omilaju** makes clear, the bar is a relatively low one in that respect.

40. An illustration of the uncertainty around this question can be found when one considers the conclusion in paragraph 65 that the Allanbuie incident was capable of contributing, either alone or with others, as contributing to a breach of the implied term. If that is so, then it casts doubt on the apparent certainty with which the ET has also concluded that there was no final straw in the present

case, having earlier, to an extent, expressed the view, correctly, that all of the events complained of can cumulatively potentially amount to a repudiatory breach.

41. For all those reasons, the first ground of appeal succeeds. That is enough to dispose of the appeal but, for completeness, I will touch lightly on the other two grounds.

The claimant's submissions – Ground 2

42. Mr Cunningham addressed this ground succinctly, submitting that it was parasitic on ground 1. He acknowledged the high bar in a perversity appeal (**Yeboah v Crofton** [2002] IRLR 634 at para 93) namely that an appeal ought only to be granted on such grounds "*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*."

43. Mr Cunningham submitted that, having erred in directing itself as to the law in last straw cases, it cannot be said that the Tribunal reached a decision on a proper appreciation of the evidence and the law. In those circumstances, the finding that there was no repudiatory breach of contract cannot stand.

The Respondents' submissions – Ground 2

44. Mr Maguire in essence addressed this ground in the course of his submissions in relation to ground 1 – put short, that the claimant had not established that the ET had misdirected itself in law, and to the contrary, the ET had properly directed itself, with the exception of the misstatements in paragraphs 70 and 71, had made sufficient findings of fact and applied the law to the factual situation.

Analysis and Decision – ground 2

45. Whilst is it correct to say that ground 2 is parasitic on ground 1, that does not necessarily mean that if ground 1 succeeds, so must ground 2. The allegation in ground 2 is that no reasonable tribunal could have dismissed the claimant's claim and thus the decision to do so was perverse. Whilst, for

the reasons given above, I concur that the ET has fallen into error in its application of the law to the question of a final straw and whether or not a repudiatory breach of contract has been established, It goes too far to suggest that no reasonable Tribunal could have dismissed the claimant's claim and thus the overall disposal is 'perverse' as that term is properly understood. Put another way, it cannot be asserted that, the requisite 'overwhelming' case has been made that that the ET reached a decision that no reasonable Tribunal could have reached, on a proper appreciation of the law and facts. What the claimant has succeeded in establishing under ground 1, is that the ET's approach to the application of the law to the facts is unsound and cannot stand. For those reasons, it follows that had this ground stood alone, it would not have succeeded.

The claimant's submissions - Ground 3

46. This ground was originally presented as a standalone, perversity challenge. Mr Cunningham identified various findings which he said either took into account irrelevant matters, or left out of account relevant matters. However, as his submissions developed, it became clear that the inconsistencies identified went more to supporting the main thrust of ground 1, that is to say that they supported the contention that the ET had not been addressing its' mind to the correct legal approach to the question before it. Thus, for example, Mr Cunningham pointed to findings at paragraphs 64 and 75 that the claimant had not raised a grievance or made a complaint to the HSE in relation to his concerns, which was not relevant to the question of the employer's conduct, which is where the proper legal focus should be. In similar vein there were no findings in relation to the respondent's grievance process, or even whether there was one. Thus there were no findings that the 'checking up' on the claimant was part of a process properly followed, which might be relevant to the question of repudiatory breach.

The respondents' submissions – Ground 3

47. Mr Maguire submitted that there was no merit in this ground of appeal, either as a standalone

ground or as a support for ground 1. Apart from the issues identified in relation to paragraphs 70 and 71 the ET had impeccably self-directed on the law and the findings complained of by the claimant were ones that were permissibly open to the ET and did not undermine its' overall conclusions.

Analysis and decision – Ground 3

48. I concur with Mr Maguire that, in isolation, this ground would not have merit as a standalone perversity challenge. However, taken together with Ground 1, it does heighten the suspicion that despite the undoubted earlier impeccable self-direction on the law, the ET may not have been following through on that direction in all respects and at all times. For the reasons already given, the appeal succeeds on Ground 1, taken along with the submissions made on the passages identified by Mr Cunningham as supporting the overall proposition that the ET has fallen into error in its' application of the law to the facts it found established.

Conclusion and disposal

49. For all those reasons, the appeal succeeds. Parties were not at one in terms of disposal in the event that the claimant was successful. Mr Cunningham submitted that the errors identified were so fundamental that the matter required to be remitted back to a fresh Tribunal. Mr Maguire submitted that this was a case where the EAT could make its own decision in light of the facts established which were unchallenged. In any event a re-hearing would be disproportionate and if the matter did require to be remitted it could be considered by the same Tribunal with directions and no further evidence.

50. The considerations relevant to whether a case should be remitted to the same or to a fresh Tribunal have helpfully been set out in the well-known authority of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, EAT. There, Burton J set out 6 considerations, namely Proportionality, Passage of Time, Bias or Partiality, Totally Flawed Decision, Second Bite at the Cherry, and Tribunal Professionalism as factors to be weighed in the balance when determining whether or not to remit a case for reconsideration. In similar vein, in **Jafri v Lincoln College** [2014] ICR 920, CA the Court

of Appeal explored the relevant considerations applicable to whether a case requires to be remitted at all. In **Jafri** the Court quoted from Lord Donaldson MR in **Dobie v Burns** [1984] IRLR 329 where he said

> "Once [the EAT] detects that there has been a misdirection, and particularly that there has been an express misdirection of law, the next question to be asked is not whether the conclusion of [the ET] is plainly wrong, but whether it is plainly and unarguably right notwithstanding the misdirection. It is only if it is plainly and unarguably right notwithstanding the misdirection that the decision can stand. If the conclusion was wrong or might have been wrong, then it is for the appellate tribunal to remit the case to the only tribunal which is charged with making findings of fact."

51. Those considerations were elaborated by Buxton LJ in **Willow Oak Developments v Silverwood** [2006] IRLR 607 at paragraph 31 where he said

> ‘I must confess with great respect to some difficulty with the "plainly and unarguably right" test elaborated in Dobie. It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal.
>
> ……
>
> This view of the learning simply reflects the different roles of the ET and the EAT: industrial jury and legal supervisor. It sits also with the approach of the High Court in other statutory appeals on law only, and in judicial review, to the question what relief should be granted when it finds that a subordinate decision is flawed by error of law. I venture to think that Lord Donaldson in Dobie, despite his use of the phrase "plainly and unarguably right" (which has certainly been applied in some of the other cases, including Sud), had situation (a) in mind. Moreover his judgment in O'Kelly v Trust House Forte plc [1984] QB 90, 126A-B, articulates the conventional position as regards the relief to be granted in an appeal on law only:
>
> "The [EAT] can correct errors of law and substitute its own decision in so far as the [ET] must, but for the error of law, have reached such a decision. But if it is an open question how the [ET] would have decided the matter if it had directed itself correctly, the [EAT] can only remit the case for further consideration."

52. Drawing those strands together, standing the conclusion reached in relation to Ground 1, the present case is one where the conclusion of the ET, based as it is on a material misdirection as to the

law is wrong or at least might be wrong. Or, adopting the language of Buxton LJ, I consider it is an open question as to how the ET would have decided the matter if it had directed itself correctly. Specifically, as discussed above, the error emerges at a point when the ET is considering whether or not there was a last straw at all, never mind whether such an event contributed overall to a repudiatory breach of contract as per **Omilaju**. It follows that this is not a case where the conclusion is so self-evident that the EAT can make its own finding. The matter will therefore require to be remitted.

53. A more nuanced question is whether that remit ought to be to the same Tribunal, with directions, or whether the remit ought to be to a freshly constituted Tribunal. There was, quite rightly, no suggestion of bias or a totally flawed decision (meaning that it was properly accepted that appropriate findings in fact were made, and that the initial self-direction on the law was appropriate). Legitimate concerns on the question of proportionality and a concern perhaps of there being a second bite at the cherry were also raised. Balancing all these factors as best I can, and with some hesitation, I have concluded that the remit ought to be to a freshly constituted Tribunal. The original hearing was a relatively short one, and there is no reason why another should not be similarly short in scope. Careful case management, such as the use of witness statements in lieu of evidence in chief, might focus matters even further. The principal factor favouring a remit to a fresh Tribunal is the question mark over whether the findings in relation to the last straw will or should survive a reconsideration of the underlying facts and the correct application of the applicable law. It would be challenging for even the most professional Tribunal (as described in **Sinclair Roche and Temperley**) to disentangle its previous findings on that matter and start afresh. Put another way, this remit will involve considerations beyond simply applying the correct legal approach to findings that are undisputed. Rather the whole question of whether or not there was a final straw, applying the considerations to that question set out in **Omilaju** and **Kaur** will require to be reconsidered. In so saying, and for the record, I come to that view although there is no question whatsoever that the ET in the present case entirely meets the definition of Professional Tribunal as set out in **Sinclair Roche and Temperley**.

54. For all the foregoing reasons, the appeal succeeds, and the matter will be remitted to a fresh

Tribunal for rehearing.